Law and Critique (2024) 35:93–123
https://doi.org/10.1007/s10978-023-09343-8

How to Be Indigenous in India?

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Accepted: 28 February 2023 / Published online: 18 April 2023

Abstract
Although international law grants a distinct juristic personality to indigenous peoples, this subjecthood is premised on a hierarchical reading of ethnicity and indigeneity. Through illustrations of Adivasi experiences in India, this article interrogates the prejudices of the global juridical discourse that are reproduced by the domestic jurisdiction, exposing the voyeuristic performance of legality in constructing indigenousness.

Keywords Indigenous Legal Personality · Adivasi · Indigenous Nationhood · Jose Martinez Cobo · Rights of indigenous peoples · Indigenous People

Colonialism generates varied experiences, but the fact of oppression is its indelible legacy. Over the last fifty years, much has been written about indigenous peoples and what rights they deserve in international law (see for example Manuel and Posluns 1974; Alfredsson 1982; Nettheim 1984; Anaya 1996; Fukurai 2018). Much has been debated in multinational conferences and much has been agreed through treaties and conventions. Yet, to beg the initial question, the legal regime still suffers from a definitional lack. The predominant understanding of indigenous peoples in international law, even today, borrows from the UN Special Rapporteur Jose Martinez Cobo's (1987) *Study of the Problem of Discrimination Against Indigenous Populations*. In 1971, the UN finally admitted that 'indigenous populations often encounter racial prejudice and discrimination' (ECOSOC 1971, *Preamble*). The Sub-Commission on Prevention of Discrimination and Protection of Minorities then authorised Cobo's study with the belief that integration is 'the most appropriate means of eliminating discrimination' (ECOSOC 1971, *Preamble*). Released over a period of twelve years, Cobo's twenty-four-part report broke the organisation's prolonged dormancy

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(Macklem 2008, pp. 198–199) and inaugurated new modalities of 'UN contact with indigenous communities [by] encouraging … NGOs to deepen their networks' (Peterson 2010, p. 197). Today his conceptualisation of nativity and primordiality has become the 'most widely-cited' definition of indigenous peoples, crystallising their legal personality in the resultant doctrinal corpus (UNOHCHR 2013, p. 6). Cobo (1987, para 379) writes:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them.

A number of Secretary Generals, since then, have repented the injustice etched on the Aboriginal consciousness (see for example Fréchette 2012; Annan 2003; Ki-moon 2015). Sadly, the ruing has accomplished little, for as Jeffery Hewitt (2016) laments, healing takes time whereas officious spreadsheets find equity in statistics and speedy out-turns. If compensation for historical wrongs is what frames the juristic personality of indigenous peoples, then surely there is some worth in Arundhati Roy's (2009, p. 59) assertion that the Adivasis[1] of India 'have the right to murder, arson, and wanton destruction'. Restorative justice would demand that. But the creepy neocolonial aesthetics of human rights cares more about discovering victims and savages than practising proportionality. The seductive explosion of rights as a liberal means of mitigating subordinating powers reinstates subjugated groups in the sites of their unyielding suppression. To replicate Wendy Brown's (2007, p. 232) Foucauldian words, having a right as indigenous does not necessarily entail freedom from 'being designated and subordinated' by the militant-managerial state and its corporate sponsors. While legal personality may involve 'some protection from the most immobilizing features of that designation, it reinscribes the designation' itself in seeking to protect the designated people, thus enforcing more regulation through definitional fiat. Try as we may to set more human rights edicts, there seems no end to incessant humanitarian crises (Sircar 2012, p. 182). International law promises freedom in a captivating parlance that dually conspires to curtail dignity (Chimni 2010). For instance, the UN General Assembly's (2007, art 46) exhortation of 'rights, equality, non-discrimination, good governance and good faith' for indigenous communities simultaneously prescribes a ban on any Aboriginal activism that impairs 'the territorial integrity or political unity of sovereign and independent States'. The state's ability to justify restraining action on its unwanted masses via the rule of law—or surplus repression, as Upendra Baxi (1990) terms it—follows a shrewd logic of selective emancipation, and international organisations are replete with this pageantry of reparation on paper without real redistribution. Theatrically and ceremoniously caring for the disenfranchised, only to assuage imperialist guilt without any moral or material

[1] Adivasi, roughly meaning Original Inhabitants, is a collective term for India's tribal populations. As will be clarified later, the purpose of this critique is to question the tools that international law uses to construct the indigenous. The Adivasis are not the object of my critique, nor the only group I seek to learn from. They are instead the people to whom this politico-literary project is dedicated, the stakeholders closest to the theoretical and geographical clime in which this piece and its methods are incubated.

indemnification, undergirds the General Assembly's invocation of territorial sovereignty as a legal obstruction to the very juristic subjecthood that it champions. Even in Third-World decolonial readings, the indigenous are branded saviours of 'traditional values from destruction', while the moneyed and powerful go on to hoard the fruits of development (Chimni 2006, p. 19).

Here, I am not concerned with offering a new, alternative definition of indigenousness. A generic essence anyway is impossible. Through illustrations from the Adivasi sectors of India, I instead wish to reveal the prejudices in the domestic jurisdiction that trickle down from the international legal discourse on the 'Aboriginal' Fourth World (see Manuel and Posluns 1974, pp. 6–12)— 'the Host World' preceding the 'synthetic realities' of First-, Second-, and Third-World polemicists (LaDuke 1983, vii).[2] At its heart, this is a methodological account of how I imagine one can approach these biases, offset by a sacrifice of historical and anthropological depth for illustrative breadth. Indigenous social struggles are adept at combining natural law and positivistic rights to proffer a subjectivity distinguishable from both (Speed 2008, pp. 17–37). There is neither a dearth of provisions, nor a disability in rights. Rather, the structural underpinnings of international law intensify and nurture Aboriginal vulnerability (see Speed 2019),[3] and it is the nationalist, elitist, imperialist, ethno-centric, xenophobic distributaries of this global edifice that perturb the Adivasi (see Tsing 2007).[4]

Methodological Quandaries

We are confounded by the inadequacy of classification here. Xaxa (1999, p. 3589) explains that the signifier indigenous, when used in the Indian context, lacks any determinate meaning. Irrespective of a tacit common-sense that the term indicates Adivasi populations, there is little consensus on a comprehensive anthropological and historical definition of tribal formations (Beteille 1986). Owing to this uncertainty, successive Indian governments have hesitated to link the Scheduled Tribes[5]

[2] The politics of presence has long been used to alienate indigenous groups from their own lands. Even in law, they are forced to articulate their native title in the language of property rights, although that right may completely overlap with them having been present at their lands as long as the legal claim, or from even before. The colonial project, the precursor to their First World, was able to neutralise the presence of the indigenous by arguing that they lacked modern law to have any rightful claim. They were there, but sedentarily, while the colonialists used their labour to render the land fruitful. Thus it is their secondary presence that was supposed to count. Even in the postcolonial Third World where the indigenous cohabit with other groups, their cultural cosmos is posited in a frame of difference, subsuming their originary presence within the simultaneity of cultural hybridity. Although I criticise some of these presumptions here, there is great significance in thinking about the Fourth World not as chronologically or logically the fourth site of global politics but as the space where subsequent worldings occurred, the host of these other worlds.

[3] Speed makes a similar argument in the case of women immigrants and refugees.

[4] I will describe throughout the piece how similar discourses in India use the language of international law.

[5] In India, the Scheduled Tribes are certain socially disadvantaged tribal groups that are constitutionally designated as such for welfare schemes by the central and state governments.

to the growing internationalisation of indigenous peoples as an aspirational and legal construct (Karlsson 2008). But such indecisive signification is a productive incompleteness. It brings forth an open-textured field of subjectification where claims of indigenousness append the Adivasi struggles of India to other political resistances against the disorder and destruction of resource extraction. Once the stiff definitions of international law rigidify this fluidity, any truly inflammatory indigenous resurgence falls prey to what Nancy Fraser (2000, p. 112) would call the external imposition of seemingly 'authentic, self-affirming and self-generated collective identities'.

The Adivasi cannot speak, if I may modify Spivak's (1988) reproval of Western representations of Third-World women, inasmuch as we do not have the correct device to listen to them. Expecting them to have a voice as the monolithic category of indigenous peoples denies them their constitutive heterogeneity; referring to them as 'them' entails constructing the Other of this critique as a pre-discursive object. But what really is the object of my critique—the indigenous, indigenous peoples, the Aboriginal, or the Adivasis? One reason why I use these terms interchangeably, despite their geopolitical particularities, is because between the incomplete self-referentiality of the signifier Adivasi and the official ossification of the Scheduled Tribes, there is a convoluted field of identifiers borrowed from international organisations, human rights workers, and popular culture that are used to denote postcolonial indigeneity. I do not wish to constrict this ambivalence, however anthropologically and legally troublesome it might be, to pitch borders as the subject of this critique for an object—and possibly a future subject—that at present is effusive. For there indeed is a subject writing this, located in a neoliberal law school, perhaps more conversant in the Western theorisation of the Third World than indigenous lifeworlds. It also has a locale, and this is the discourse of international law and its municipal offshoots. In consequence, I end up creating a critique without an object, or for that matter one with many partial objects that I construct and discard if only to clear the opening in international law for us to learn from the indigenous instead of teaching them how to represent themselves better. This is half a critique at best. It desires its own dissolution, speaking for the Adivasis through phrases that might be more apposite in other locations, since this equivocation is the current legal idiom. I speak for the Other today to beseech for a listening device to hear them tomorrow.

This piece is designed as an itinerary for walking through some select places that common law has frequented across the arc of time to finally melt into the terminus of international law. Movement, Olivia Barr (2016) informs us, is crucial for the reproduction of modern legality.[6] Strolling generally through performances of law in India, and observing their resonances elsewhere too, is a serious practice in nonchalance to trace the traverse of indigenous legal personhood. The technical paraphernalia of such movement is jurisdiction itself, the territorial line-drawing function that arrogates the Aboriginal as a material venue to manufacture legal relations. It is to unsettle the self-assuredness of this province of jurisprudence that I frequently refer

[6] Barr's work surely is more materially informed than mine. I selectively borrow her insistence on movement as a jurisdictional practice to trace the journey of the mistaken notions of indigeneity across jurisdictions. That is not to say the patterns of movements adduced here are not material. It is just a minor methodological preference: my way of retelling these stories of movements is more literary than strictly empirical.

to judicial pronouncements from Australia and Latin America though the remit of my analysis is limited to South Asia. In a more provocative token, this is a parallel to the common law habit of adducing cases from across colonial contexts. The comparative patchwork, aloof and haphazard on the first impression, unveils putative themes of indigenousness that scatter from the global arena and are formalised by the citational practices of destined countries. No doubt different regions have undergone demographic purges at the hands of European settlers to different degrees, in different laces of time and space, inducing different connotations of indigeneity in different places. An easy equivalence cannot be stretched between India and elsewhere. Still, the word betokens the commonality of 'unexpected othering' and 'genocidal killing', two recurrent conditions that feature in my bricolage of snapshots of Aboriginality (Baird 2016, p. 504). As such, I ponder the municipal jurisdiction as a 'site or space of enunciation' (Pahuja 2013, p. 65; also see Parker 2020, p. 10) that gatekeeps the aspects of indigenous cultures which can be iterated in the name and language of modern law. When I say India, I definitely engrave a geography, but more importantly the edges of a toponymy, the trigger of border crossings, and the orbit of 'difficult solidarities' (Sircar 2021, p. 237). This is an attempt at 'critical redescription' to reinvestigate via a narrative—not an argument simpliciter, neither a thesis nor a blueprint—the Fourth World we have taken for granted, prompting 'it to be seen differently as a mode of political engagement' (Pahuja 2013, p. 68). My prose might appear to be circuitous, the argumentation broken, and the form obstructive. While there perhaps is a more straightforward way to say what I do say here, I cannot restructure this body of writing if I do not experiment with the form. This is not so much an impossibility as a choice of method that speaks to the other ways of saying similar things. I willingly try to curate a disfigured, amorphous, meandering storyline to notice the equally strenuous action of walking: the locomotion of jurisdiction, the rambling of Aboriginal lives on the course of modern law, the impossible fixedness of semantics, and the material journey of indigenous myths to courtrooms and judgments. In keeping with Anne Orford (2012, p. 609), I shun explanation for description, so I describe what already has been explained.

And indigenous scholars themselves have explained incisively how they experience and intend to shape law. The statist concoction of Aboriginal places has come to be a recurrent insight in their work. Against the nebulous, abstract spatiality of colonial law, indigenous locales materially embody their normativity. 'The Land is the Source of the Law', eliciting 'meaningful engagement with landscape' (Black, McVeigh, and Johnstone 2007, p. 308). Mark McMillan (2014, pp. 109 & 123–124) writes that Aboriginal movements turn towards the international to abjure domestic constraints and profess such a corporeal formulation of collective jurisdiction, in the process carving an interstice where their 'transnationalism' can defy both common law and the global 'nation-state order'. But the legal fixation on land diminishes this liminality by stirring 'intra-Indigenous disputes that most commonly have as their focus disagreements as to who are the individuals or groups with customary rights' (Palmer 2018, p. 186). I wish to look beyond land. The profound association that communities share with their environments can be viewed as rival vocalisations of law, but not the source itself. Space too moves with jurisdiction, vaporising unchanging, originary coordinates. It is to subsist amidst this uncertainty that the Adivasis, as

a flipside to transnationalism, may encompass international tenets within municipal constitutionalism—be it the Chakma's disappointment in the Supreme Court or the innovation of Pathalgadi.

Chris Andersen (2009, p. 94) urges us to expand our enquiry beyond the 'continuity of land, community, self-government and culture'. Along with Martin Nakata (2006) and Andrea Smith (2010), I heed his scholarship to examine the discursive and disciplinary shapers of indigenousness, indicating pathways—if not full-fledged analyses—into the conditions of Aboriginal existence that are spurned in law despite the pervasive use of objectifying terms like 'tribals', 'Scheduled Tribes', and 'indigenous'. The larger drive, quite like Irene Watson's suggestion, is to reclaim the realm of knowledge production that modern law has invaded under the guise of terra nullius (Watson and Venne 2012; Watson 2014). She extensively relies on Cobo's definition (Watson 2014, p. 511), but I show how this can be done against its grain.

The last few decades have witnessed the rise of a politics of recognition contingent on self-determination, which is nothing but a euphemistic perpetuation of coloniality to strengthen a colonial ensemble of power after its formal end (see Merino 2018). In India, lazy judicial reasoning has converted self-determination into a fungible resource for all, or for the resourceful as it happens. The indigenous strive for freedom, and international law paralyses them by assenting to a sedentary politics of recognition under the cloak of autonomy that buttresses the 'colonialist, racist, patriarchal state power' they want to transcend (Coulthard 2014, p. 3; also see Coulthard 2007). Forwarding Aileen Morento-Robinson's (2015) exposure of how whiteness has been normalised as *a priori* in the ascendant perceptions of Aboriginality, I propose that the legal distortion of indigeneity has deviously contorted indigenousness into a pre-given. We now need a jurisprudence of 'feeling the law', listening to its song, 'returning to a "tribal way" of understanding indigenous legal thought' (Black 2016, p. 8). For Christine Black (2009; 2011), this warrants renouncing Western ways of knowing and enlivening indigenous narratives.

But that is not what I try doing. À la Spivak (1999, p. 9), my reading of indigeneity is 'mistaken'. I do not dismiss that there are persuasive ethical and pedagogic grounds to be irritated at my rehearsal of the old postcolonial theory. At times, it is more beneficial to sabotage the obsolescence at our disposal than to 'invent a tool no one will test'. I write this from a caste- and class-sanitised law school that is insulated from the Adivasi hinterlands at the peripheries of our jaded field-sites. My upbringing in Assam, a region splintered by ethnic tensions, has endlessly skirted the tribal divide (see Bhagabati 2021). The postcolonial aftermath is my heftiest resonance with the indigenous, hence I use its theoretical protocols to catch up with the grammar of the First Nation scholars adumbrated above.[7]

[7] The rise of proto-fascist Hindutva in India has inaugurated new modes of assimilating the Adivasis into the national (read Hindu) fold to create an integrated, monolithic conception of nationhood. This has unfurled a new wave of violence on the indigenous. I do not deal with these trajectories for two reasons. First, the paucity of space compels me to primarily underscore the definitional praxes of international law and their proliferation in the municipal jurisdiction, even at the cost of other systems of subordination that might have escaped this text. Second, the question of Hindutva merits greater focus. Its expansion into the Adivasi lifeworld signals the encroachment of a new colonial influence that was earlier, and still is, absent in the global discourse on Aboriginality. This development cannot be traced merely in an

For the panopticon of postcolonial theory is my methodological refusal to think of the indigenous and international law in any other way—not because it is conceptually sufficient, but because I have reached a limit. And this is not a sexy stance, a principle, a historical narrative, or 'an enjoyment in the reveal' (Simpson 2014, p. 107) of a new possibility of sovereignty at the point of refusal, as might be with indigenous anthropologists who reject certain forms of writing or communities that defy certain modes of recognition. Adivasis themselves know what is wrong with the law affecting them. They feel and understand the inequities I mark here, so perhaps I am ethically bound to refuse rewriting that which they are struggling to articulate in their own voice. Mindful of these two limits, I put my familiar tools to work in the hopes of a praxis of international law that notices its biases.

The upcoming parts deconstruct the three prime axes hoisting the ubiquitous legal definition of indigenous peoples. The first two dismantle the *objective* rosters of precolonial continuity and territorial inextricability and the third regrets the hidden mishaps in the euphoria of *subjective* self-identification. After all, Watson's desertion of Eurocentric knowledge steers the Third and the Fourth world in synergy towards an introspective worlding of the South (see Natarajan 2021). That, succinctly, is my cue to wander in the postcolony.

Peopling a Lost Nation: Who Is Indigenous?

The ordering of the phrase 'communities, peoples and nations' in Cobo's working definition aptly constellates the modes of realising indigenous collectivities. For, as Benedict Anderson (1991, p. 188) notes, cultural cohesion begets the imagined political *community* of a *nation* only when 'substantial groups of *people*' see themselves as living lives parallel to others in an ethnos. Becoming a people mediates a community's transformation into nationhood. In a certain sense, the General Assembly does acknowledge the sovereign aspirations inherent in a community's political upsurge. In Article 3 of Resolution 61/295, it affirms indigenous peoples' right to self-determination. At the same time, Article 4 forecloses the liberatory potential of their nationhood by restricting 'the right of autonomy' to internal and local matters only. The 'historic injustices' of 'colonization and dispossession of lands, territories and resources' that the Preamble evocatively castigates do little to free the Fourth World from its imprisonment in the states responsible for enslaving it. This is a curious irony, in that the General Assembly has usually perceived colonisation as a good enough reason for granting 'full independence' (General Assembly 1960) and 'permanent sovereignty' (General Assembly 1962) to those yet to attain a 'full measure of government' (General Assembly 1946). Indigenous groups, however, are only given an assurance of limited self-governance that comes around to entrench the modern state's universal projection.

annexure to the legal conception of indigenous juristic personality. Therefore, I map the logjams until this point and provide apertures that can help us enter the Hindutva question from the current formulations of indigenous rights.

Indigenous nations thrive in excess of the nation-states they are annexed to. The mere recognition that a people might burgeon into a nation suffices to unleash what David Lloyd (1997) calls 'nationalism against the state'. The absorption of variegated anti-colonial nationalisms into a unified state fabric always leaves behind certain residual collectivities that resist the generation of homogenous identities. With the current international law regime enabling nation-states to subsume indigenous consolidations, Aboriginal marginality tends to reclaim the language of law as 'a minimal defense against homogenization' (ibid. p. 192). This is a 'minimal' tactic in the sense that indigenous nationalism, when directed against an existing state, only provisionally borrows the statist vocabulary to oppose bureaucratic irrationality and militant governmentality, instrumentalising the privileged idiom of legal sovereignty to institute a sovereign subjecthood unto itself. The Kol people's travails in the Chota Nagpur Plateau is a telling example of the friction between indigenous nationhood and mainstream civic elitism. The Kol revolted against the British in 1831 and 1857. Although the insurrections were localised mutinies against colonial interferences in their customary landholding patterns without much pan-India linkages (Bhadra 1998), these subaltern rebellions were seamlessly usurped, and then forgotten, by the dominant anti-colonial narrative. What had been an impetus for the national movement before independence subsequently disappeared from the myopic and unitary imaginations of India. One way the Kol have resisted this systemic erasure involves wresting the hegemony over juridical recognition from the state and civil-society gentility to voice parallel legal pronouncements of their political awakening.

Consider how a movement called Pathalgadi has gripped Jharkhand of late, encouraging Adivasi villages to erect gigantic stone tableaus of the Constitution (see Rao 2020, p. 17).[8] These epitaphs, quoting the rights of the Adivasis, are a simulacrum of their figurative (and real) death to the statist plunder of resources. Pathalgadi is more than seeking recognition as the legal and constitutional subjects that the indigenous are. It is about iterating the legality of the Constitution itself—about enunciating from the breakdown of life the constitutionality of the otherwise impermissible Aboriginal selfhood. Indeed, it is an afterlife that comes before a life of discrimination, a utopia cradling dystopias. Stone epitaphs usually commemorate the death of Adivasi ancestors and Pathalgadi uses the same trope. Here the obelisks shame the extant legal protections for conspiring to murder the indigenous and then own up to this death anyway, by effacing hopeless constitutional rights and re-writing them on an Aboriginal surface, to begin from ground zero. They suffuse earthly life with the spirit of Adivasi elders, redeeming the empty promises of international polity with a mythic return of what existed before modern law devoured the uncolonised body. Again, the stone edicts are not figurative of the Constitution. There is no other proper constitution from which Pathalgadi acquires its legality, but the epitaphs themselves are the Constitution—conceived as inherently just, legal, and sovereign. Death symbolically puts together the reality of Pathalgadi, abjuring all trust in the closed, exclusionary circuit of international and municipal systems to establish an Aboriginal state

[8] Rao provides a brilliant analysis of how Lloyd's 'nationalism against the state' explains not just Adivasi resistance but also many other protests in India that borrow the state's guarded language to subvert its privilege.

that will have become intelligible in the future. It already is as mature a state as any other. But we presently do not have the correct looking glasses to decode its composition, so the Adivasi deploy the well-regarded language of constitutional law to make us understand.

The movement deviates from the global schedule of indigenous rights (Davidsdottir 2021, pp. 1113–1115) to enounce an 'experiential, unmediated' broadcast of enfranchisement that is postulated on Adivasi 'awareness' and not the 'belief or speculation' of outsiders (Kapur 2018, p. 118).[9] It surpasses legality to instruct and recoup the legal. For its part, international law has, apart from ambivalent utterances, maintained an unsettling silence on how the *nation*-state might be intrinsically antagonistic to an indigenous *people's* counter-state demands that stem from the *community's* collective memorialisation of its blood-marred past.

Another deficiency in the legalistic iteration of indigenous peoples is the assumption of an originary, unchanging ethnic identity rather than focusing on the social differences that authenticate their liminal subjectivities. To be indigenous does not imply entrapment in timeless nativity, for the element of indigeneity itself is a creation of cultural hybridity. Just as Bhabha (1994, p. 6) argues that the Western metropole must rectify its postcolonial history with an 'indigenous or native narrative', international law too must saturate its geopolitical space with kaleidoscopic 'third-world' identities. Every indigenous identity is inexorably constitutive of its other, while an originary selfhood is forever deferred by subjectivities that have meaning only to the extent of what they are not. Therefore, when the UN High Commissioner for Human Rights (2013, p. 2–3), in line with the UDHR and Cobo's definition, conceptualises an indigenous lineage based on 'historical continuity with pre-invasion and/or pre-colonial societies', they abjectly neglect the ontological ruptures of colonialism and underplay the metropolitan incursion into indigenous worldviews. The misconception of 'historical continuity' ignores how social change in the Adivasi society is kindled by an assemblage of affinities and contests with mainstream actors (Xaxa 1999, p. 1519) and not, as Cobo (1987, para 380) envisages, by the linear assimilation of a common ancestry, language, or culture into the caste hierarchy. Similarly, while the International Labour Organisation (1989, art 1) is on point to advocate self-identification as the 'fundamental criterion' of indigenousness, its insistence on 'customs and traditions' falls short of recognising the temporal shifts in Aboriginal subjectivities. Within the cleavages of modernity, tradition inheres as a cultural vestige moulded here and now, written with the proverb of the past but on the register of the present. Illusions of constancy, blotted with shades of primitivity, overlook the relentless movements of Adivasi bodies.

The politics of belongingness among the Chakma people foregrounds the temporal and spatial instability of indigenous identifications. Their folklore recounts sagas of migration from Magadh in present-day Bihar to Arakan; their identities are generative of their relative autonomy over the Chittagong Hill Tracts, sustained by paying tributes to the Mughal crown, the *faujdar* at Chittagong, and the East India Company at different points in time (Serajuddin and Buller 1984). After the forma-

[9] Kapur, however, uses these words for Tibetan Buddhism, nonetheless pondering how Non-Western, counter-hegemonic epistemologies can transcend the liberal human rights project.

tion of East Pakistan, insurgency, border disputes, and majoritarian incendiaries have turned countless Chakmas into political refugees scrambling for asylum in the Indian states of Arunachal Pradesh, Mizoram, and Tripura (EPW 1998, p. 249). In the politico-legal setup of refugee and asylum laws, the Chakma's indigenous identity becomes inconsequential. Their border crossings retain importance only as jurisdictional changes. For example, in the 1993 case of *The State of Arunachal Pradesh v Khudiram Chakma*,[10] where the Supreme Court was concerned with the refugees' citizenship status and fundamental rights, the taxonomy of foreigner-versus-citizen interpellated the Chakma as 'illegal occupants' without any attention to the cultural politics that had displaced them from their ancestral lands in the first place.

The fifty-six appellant-families in the petition had fled East Pakistan in 1964 and taken shelter at a rehabilitation camp in Assam. In 1966, they shifted to Miao in the erstwhile North East Frontier Agency, which later became the union territory of Arunachal Pradesh in 1972. The government alleged that the Chakma settlers were encroaching on the lands of their neighbouring tribes and must be evicted to protect the region's original inhabitants. The point here is not the veracity of these charges but the Court's understanding of what it means to be a Chakma. The petitioners contended that they were rightful citizens of India under Section 6 A of the Citizenship Act, 1955 since they had entered Assam before January 1966.[11] The two-judge bench refuted this argument: Section 6 A requires a person to be an 'ordinary resident' of Assam and the Chakma refugees had been in the state only for a brief while. Impliedly, not being citizens, they were denied the right enumerated in Article 19(1)(d) 'to move freely throughout the territory of India'. This provision begins with 'all citizens', as opposed to something along the lines of *all persons*. The judgment makes no mention of their indigenous credentials and, on the contrary, reviles them as 'outsiders' whose 'growth of population' foments a threat to the 'local people'.[12] At a moment when the Chakma were endangered by xenophobic ethno-nationalism, the Court summarily disregarded their indigeneity on account of frequent migrations. Instead of appreciating their hybrid selfhoods, it cited the Chakma's social difference from their Singpho neighbours to exclude them from the '26 major tribes' of Arunachal.[13] If 'historical continuity' is a hallmark of indigenousness, then the very definition bars their access to citizenship and legal personhood—that too in a humanitarian regime which constantly professes to be mindful of displaced groups (see Stavropoulou 1994).

In Mizoram, where the Chakma have achieved an autonomous district council, their ethnicity is situated at the brink of divergence from the majority Mizo population. They are Chakma there insofar as they are not Mizo or Buddhist as much as they

[10] 1994 Supp (1) SCC 615.

[11] Sub-Sect. 2 of Section 6 A of the Citizenship Act, 1955 reads: '… all persons of Indian origin who came before the 1st day of January, 1966 to Assam from the specified territory [Bangladesh being one] … and who have been *ordinarily resident* in Assam since the dates of their entry into Assam shall be deemed to be citizens of India as from the 1st day of January, 1966.' Further, Clause d of Subsection 1 defines a person of 'Indian origin' as someone having parental roots in undivided India, including present-day Pakistan and Bangladesh.

[12] The judgment, in paragraph 17, authoritatively borrows these quotes from the report of a nine-person committee headed by the District Commissioner of the region.

[13] *The State of Arunachal v Khudiram Chakma*, para 50.

are not Christian (Chakma 2009). This othering occurs despite both the Chakma and Mizo being indigenous groups. Yet the category of indigenous peoples is constructed in the framework of international law, contrary to the Chakma's persistent exodus, as a homogenous entity founded on originary cultural traits. In contrast, indigeneity is produced by a conflicted arrangement of intermeshed identities that breach the classification's discursive unity.

Finally, the bureaucratisation of indigenous peoples is premised on their diminished access to international, trans-governmental governance mechanisms, even when the system purports to work for their benefit. The principle of Enhanced Direct Access (EDA) under the Green Climate Fund (GCF 2019) is a quintessential demonstration of this bureaucratic disconnect. EDA, a climate-finance channel, aims to put local communities in control of the global funds earmarked for various adaptation and mitigation projects. In a nutshell, while the flow of funds remains top-down from international donors and lenders, the decision-making process operates bottom-up under EDA (Climate & Development Knowledge Network 2013). Every funding proposal needs to be routed through a country intermediary—which, for India, is the National Bank for Agriculture and Rural Development (NABARD). It is red-tapism at the level of the country intermediary that determines who is an endangered indigenous group and which villages are vulnerable enough to merit funding. Out of the three GCF-financed projects in India, only one deals with the adaptation requirements of indigenous communities: a project on ground water recharge and solar micro-irrigation in the 'vulnerable tribal areas' of Odisha (NABARD 2017). One of the targeted districts is Kalahari, where the Kondh people have been peacefully protesting the bauxite mining operations run by Vedanta, in cohorts with the state-owned Orissa Mining Corporation, at Niyamgiri Hills (Beigh 2019). In 2013, the Supreme Court held that the Gram Panchayat's[14] consent was necessary to acquire land for mining.[15] Often mining negotiations prefigure the indigenous as savages or natural men (Desai 2013, p. 226–231). The Kondh endear the hills as the sacred abode of Niyam Raja, and this custom had to be communicated in the pre-legal metaphor of 'natural asset' and 'traditional worship' to gain currency as law.[16] Consequently, the twelve affected Gram Sabhas categorically rejected Vendanta's offer. The state responded by designating the protesters as Maoists (Tripathi 2017), around the same time in 2017 when NABARD and the Department of Water Resources, Government of Odisha were filing the funding proposal with GCF. It is a profoundly disquieting paradox that the state which paternalises the Adivasis as 'vulnerable tribal groups' had no qualms in dehumanising the same people as terrorists. In fact, the proposal shifts the blame onto 'the tribal population's… complex land tenure system and archaic tenancy law' for making the fight against climate change 'extremely tenuous' (NABARD 2017). That the land-and-water troubles of the Adivasis have their genesis in colonial tenancy systems (Mahapatra 1999) and were later debilitated by the postcolonial state's exploitative developmental initiatives (Ambagudia 2010), has been insidiously omit-

[14] Gram Pachayats are local village-level governing bodies, built on the legal recognition of traditional village authorities and championed as an enhancer of grass-root democracy.

[15] *Orissa Mining Corporation v Ministry of Environment & Forest* (2013) 6 SCC 476.

[16] *Orissa Mining Corporation v Ministry of Environment & Forests*, paras 20, 33, 55, 58.

ted from the report. Oddly, this bureaucratic rationality denounces 'as institutional barriers' the same cultural traits that international law considers markers of indigenous identity (see NABARD 2017).

These three illustrations highlight how law creates a spectacle of indigenous rights for the masses to repose their trust in the emancipatory apparition of global governance, while the state continues to masquerade its violent apparatus—both taxonomic and physical—behind formal bureaucratic shadow boxes (see Sircar 2012).[17] The problem is as much with the vague definition of 'people' as with the forged essentialism of indigenousness. This logjam could have been solved by resorting to the voluminous body of covenants and scholarship which contemplates the 'people' as a recipient of rights and subjecthood (see Summers 2007). But that is not to be: for Article 1(3) of the Indigenous and Tribal Peoples Convention, 1989 brazenly declares that 'the term people,' when hyphenated with indigenous, 'shall not be construed as having any implications as regards the rights which may attach to the term under international law'.

The 1989 Convention, however, makes dialogic participation a legally binding obligation on its signatories. For practitioners, this was a high-point in their 'procedural claims of resistance'. Yet resisting groups were not too happy (Tennant 1994, pp. 48–49). The revision process that replaced the 1957 Convention demoted the indigenous to 'indirect and demeaning levels of participation' and hardly included their vantages. The ILO, for all its procedural fairness, wanted Aboriginal bodies as mannequins to 'lend credibility to the process' (Venne 1989, p. 66).

At any rate, Article 6 calls for institutionalising the 'means by which these [indigenous] peoples can freely participate' in any 'legislative or administrative' measure affecting their governance. Perhaps it is the Convention's consultative approach to indigenous self-determination which has landed it in disfavour among sovereign states: till date, only twenty-three countries have ratified it and India is not one of them (see Swartz 2019). A 2014 decision of the Guatemalan Appeals Court reflects the Convention's capacity to mobilise activism in the municipal judiciary through its legal precepts. Aggrieved by the Ministry of Energy and Mine's allocation of mining licenses to the subsidiary of a Canadian company, the Sipakapense People's Council moved the Court to stop the ongoing mega-development projects in their territories.[18] Drawing on the 1989 Convention, the Court vacated the licenses for the want of 'free, prior and informed consent' from the affected communities (NISGUA 2014). Although the refusal to read 'people' as an immanently sovereign entity circumscribes the hope for self-determination within the exploitative, resource-extracting structures of the state, the Convention's stress on participation and consultation

[17] Oishik Sircar terms this phenomenon Spectacles of Emancipation, by which he refers to the ability of the Constitution to enforce a performance of rights that elicits people's trust in the constitution, while the rule of law goes on to inflict unspeakable violence of suspect bodies.

[18] The resemblance that this case bears with *Orissa Mining Corporation* is not limited to the incursion of mining corporations that the indigenous face worldwide. Both the judgments empower the local governing bodies to decide how their lands are to be used. While the Guatemalan case derives this right from the 1989 Convention, the Indian Supreme Court locates it in the Constitution because India has not ratified the Convention.

compels its functionaries to minimally share their decision-making powers with disenfranchised communities.

We must be alert to the perils of both unchecked praise and austere nihilism. No doubt juristic personality, in the classic manner of legal liberalism, is a 'violating enablement' (Spivak 2008, p. 44) one cannot not want. A world where indigenous peoples have cultural entitlements in international law is better than a world where they do not in more ways than otherwise. Although enjoying these rights requires assuming a subordinate role in the global comity, withholding them would relegate the Aboriginal to 'waiting room of history' (Chakrabarty 2000, p. 8)—a border zone that appears pregnant with emancipatory possibilities but the only door out of which opens to an infinite series of other doors. Conversely, apologetic sighs that 'this is the most we can hope for' (see Ignatieff 2001, p. 173)[19] thwart all progressive tenor with a supposedly neutral and apolitical middle-ground that promotes minimalistic recognition as the primary job of law. Complacently accepting that today we have greater safeguards against the maiming and dispossession of the indigenous than ever before, true though it may be, and working onwards from there is not a worthwhile option. This middle-ground is not neutral, since it overtly endorses a liberal layout of power among the state, citizens, and the Other, and nor is it apolitical insofar as it 'displaces, competes with, refuses, or rejects other political projects, including those also aimed at producing justice' (Brown 2004, p. 453).

Critique, hence, is not a resolution of this ideological tussle but an embedment right in its core, a gambit against the antimonies of the structure. The key is to shoulder the responsibility of dissecting why we think the way we do and why laws are arranged in skewed patterns—*why*, *how*, and the contextual and temporal interrogators *where* and *when* as well. Perhaps at this juncture I can more wholeheartedly greet my inability—for that matter, my blatant unwillingness—to chart a legible way forward through the ramified visions of indigenous rights. As important as a manifesto-like blueprint that conforms to the 'best practices' of research methods and policy making is, my inclination is towards an 'anti-manifesto' (see Davies 2002)—a disfigured, fragmented inscription which harnesses the pessimism of the prefix 'anti' to parry teleological mirages.[20] In short, this is a three-fold aesthetic endeavour.[21] First, I am more interested in the tastes and judgments of international law than in the doctrines and precepts it has created; more in the erotics than the hermeneutics, if at

[19] Ignatieff's minimalism is more generally in the context of human rights.

[20] I am inserting these signposts at the middle of the piece and not in the introduction, as conventional wisdom would direct, not the least because—in line with Spivak's preface to Derrida's *Of Grammatology*—prefatory or introductory comments are a lie. They always take shape literarily and mentally after the entire piece has been read, thus written as well. More so, for an effort that wishes to defy the blueprints of form, it would be quite paradoxical to nevertheless add conventional signposts at the beginning—as if to say any problematisation of form is contingent on traditional writing styles, the 'anti' is pointless without the 'manifesto' first. At any rate, these so-called flags here might make more sense because of the preceding material, as opposed to skeletally hinting in the introduction at what I intend to mean here and then illusorily postponing meaning in anticipation of what is to come. Not defining at the beginning my expectations from this piece lets the reader assume a writerly presence that walks at the heels of the narrative to see what it ends up becoming, rather than already gleaning where I, the author, have already forced it via tell-tale signposts.

[21] For more on aesthetic critique and education, see Spivak (1999).

all the two can be separated. Second, I try to ponder how the politics of indigenous personhood is itself practised like an art form. Third, quite reductively, I wish to conceptualise the space where law and myths, the modern and the folk, the coloniser and the colonised meet as a sullied canvas on which are drawn varied images of (in) justice and power(lessness).

(De)Territorialising Indigeneity

The intrusion of property rights into indigenous lands did not just enable the imperialistic ownership of that which was thought to be previously ownerless. At a visceral level, it invested law with the 'desire to own, control, and dominate', and anyone wanting legal personhood now had to face the metaphysical propertied interest in whiteness (Moreton-Robinson 2015, p. 67). If indigenous groups today must be identified by the territories on which they have long been living, then recognising their communal land entitlements implies precipitating a legal possessive that drives law to own them as objects whose fragmented histories it can rewrite.[22] It is one thing to locate Aboriginality via territory, which is what I assail, and another to support the cause of recovering customary lands—a struggle that law conflates with the former, but we need not.

Cobo construes indigenous groups as 'distinct from other sectors of the society' and determinately rooted in their 'ancestral territories'. Such territorial inseparability is also asserted by the World Bank (2005) in its Operational Manual and the OHCHR (2013, p. 22) in its fabrication of an indigenous 'way of life which is closely associated with territory'. While this might be a useful pledge for many dispossessed groups worldwide, the territoriality conceived here is deduced from a community's being at a place and has nothing to do with the 'political technologies' underlying the production of that site (for more on the political geography of space and territoriality, see Delany 2005; Elden 2007; 2009; 2010a; 2010b). The Lisu people (also known as Yobin) from the remote Vijoynagar circle in the Changlang district of Arunachal exemplify the fragile territorial bases of indigeneity. James Scott (2009, p. 235), in his writings about the Lisu living in the South-East Asian highlands, marvels how they refuse 'to pin themselves down to any account of their past'. Denying history to themselves is not a process of de-historicisation but a volitional strategy that 'positions [the Lisu] vis-à-vis their powerful text-based neighbors'. In Arunachal, 'historylessness' had shaped a cosmology tethered to their unperturbed lives in isolated villages, reserving the landscape authoritatively for the community in the shadows of their migration from Myanmar and Yunnan. The tribe's relatively recent arrival in this region was immaterial to their intimacy with the territory, until proprietorship became a contested issue when their lands were enclosed within the boundaries of the Namdapha National Park in 1983. Earlier in 1961, an Assam Rifles expedition had

[22] This is not to undermine indigenous groups struggling for their land entitlements in international law. The paradox lies in the fact that if indigenous peoples, by reinventing the colonial instrument of property, try to internally sabotage the system of juridical rights for their rightful ends, then the system itself precludes its sabotage by using those territories to misconstrue the genealogy of indigenous peoples—at least in India.

stumbled upon some Lisu settlements and renamed the village of Shidi, in patriotic zeal, as Gandhigram. In 1963, their lands were confiscated to forcibly settle hundreds of ex-servicemen of Gorkha descent (Talukdar 2020). Since then, the Assam Rifles[23] and forest officials have appropriated the story of their migration as a rationale for evacuating their villages, pillaging their livestock, and immolating their huts (De and Kochhar 2019, p. 73). The territoriality that was earlier a source of the Lisu's indigenous stock has now been remodelled to suit their subjugation.

The story goes that sometime in the 1960s an arial border patrol detected smoke billowing from the forest canopy below. Later, foot soldiers located some Lisu villages and christened the whole area Vijoynagar after the only son of a major general in the Assam Rifles.[24] Soon Gurkha settlers were flown in to truncate the region's demographic contiguity with Burma and flag India's supremacy via the ex-servicemen's proxy. The new inhabitants gradually started adopting Lisu practices to survive. A wooden pestle called *aje chidu* that runs on the pressure of mountain streams has become a common machine in Gurkha households nowadays. Quite a marvellous mimetic drama unfolds when statist expansion brings into contact the custodians of modern law and the tribal embodiments of primitivity! The Gurkha begin behaving like the Lisu, who in turn are forced to baptise their home with a strange name. State functionaries wishing to eternally sanctify this association by installing satellite phones and flying An-72 sorties must also replan their onward march according to the vicissitudes of climate and the vagaries of the community's cropping cycle. Who really remains indigenous after the roles have been swapped? These are all ploys of taking possession, 'a copy of the primordial act of the Creation of the World' (Eliade 1965, p. 10). The Aboriginal possessed of an unknown name fledges the state's possession of an unknown territory. The Gurkha's possession of their retirement benefits dispossess the Lisu of their shared ethnic space with the Kachin state in Myanmar. Modern law will promptly follow. This imitational ritual is 'pre-creation in an expansionary way' (Fitzpatrick 1992, p. 47), readying the ground for juridical interventions on the altar of state power.

The Lisu's misfortune is just one example out of many. Hostility may not always be between the state and a people but can also occur among communities with counteractive indigenous genealogies. The Bru people in Mizoram face a territorial ascendancy of this kind that threatens to rework their relations with their lands and folklores of displacement (Roluahpuia 2019). Their thrust for separate statehood in the past have been met with chauvinistic pogroms that declined to admit any contaminants in the Mizo's supremacy over Mizoram (Grey 2018). Nonetheless, when Chin refugees started pouring in from the neighbouring provinces of Myanmar after the 2021 coup, the Mizo welcomed them with open hearts (Sparinsanga 2021; Krishnankutty and Taskin 2021). These two ethnic denominations boast of almost 'brotherly' ties (Basavapatna 2012, p. 61), united by reciprocal ripples of migration and trade, shared environmental corridors, and borders that literally run through living rooms. So amiable is their relationship that the Mizo who loathe the Bru have readily received the Chin.

[23] The Assam Rifles is a paramilitary force in India, the oldest active one in the world.

[24] Talukdar (2020).

All is not well in the Aboriginal Arcadia. If anything, truculent positions of indigeneity should help us in the Global South pity another postcolonial clutter like ours—all the more a reason for Third and Fourth World solidarities. Territory is not mute space. It has its biases, and so does it have the morphological malleability to chisel out a body of disparate indigenous organs. North-Eastern Hill University (NEHU) in Shillong, Meghalaya would be a case in point. Founded in 1973, NEHU was envisioned as an educational hub for the Hill Peoples— a synonym for tribal groups strewn across the North-Eastern hinterlands. The Preamble of the NEHU Act 1973, its parent legislation, presumes that the inhabitants of 'hill areas' share a unifiable 'intellectual, academic and cultural background'. The university, therefore, is a standing pedagogy in the politicisation of geography. We can never be sure. If for one moment territory becomes an anchor for educational inclusivity, it can just as easily turn into a war zone over ethnic sparks. Especially in South-East Asia, it is a capricious yardstick of indigenousness: either people move between places, or the territoriality of a location undergoes far-reaching changes.

In the international legal speak, rootedness to a territory is a 'matter of fact and also of law' to ascertain indigeneity (UNOHCHR 2013, p. 6). Customary landholding prerogatives and communitarian imaginaries of ownership must be conveyed as modern legal entitlements to be enforceable. This ostracism of folk-worlds exhibits how the ostensibly objective and universal methods of knowledge production, such as juridico-deductive logic, supress subaltern epistemologies for being 'emotional' and excessively given to stories (s.r. and Jojo 2019, p. 3–4) As the Lisu have learnt, their villages are theirs only if law accords them proprietorship. Territory has thus become a linchpin of indigenous legal personality regardless of how these communities themselves approach their sites of living. The reason why Adivasi and indigenous resurgences centre their activism around land is because mythologies of eternal title are a pragmatic counter to modern law's inequitable apportionment of resources. Rather than a one-to-one relationship with geography, indigenous politics is shaped by varied trajectories of spatially imagining a homeland, including avenues of co-managing resources within multiple indigenous groups or among indigenous and non-indigenous populaces (van Schendel 2011, p. 17–38). Territory is not just an inaccurate evidence of indigenous bloodlines but an obsolete one too. Amidst the climatic and ethical crises plaguing the Anthropocene, the conceptual abstractedness of territory needs to be substituted with the physicality of terrain as an ecological embodiment of rights and obligations (Matthews 2019). The three major communities of Meghalaya—Garo, Khasi, and Jaintia—maintain certain forested areas as sacred groves that personify their sylvan deities. Legally, the management of these groves is vested in the village communities,[25] ensuing in a major success for the state's bio-diversity conservation goals (Tiwari et al. 1998). While the communities see the forests as living entities whose topography is not unlike the vitality of a flesh-and-blood human body, international law cartographically reduces these spots to flat, abstract delineations on a map. Although there is adequate limelight on the cultural practices of the indigenous, the physical features of their symbiotic environments are

[25] See The United Khasi-Jaintia Hills Autonomous District (Management and Control of Forests) Act, 1958; The Garo Hills Autonomous District (Management and Control of Forests) Act, 1961.

absent from this negotiation of rights and duties. The anthropocentric cast of international law does not bode well with the Aboriginal worldviews which experience natural elements as living and holy beings on par with humans.

Even from a humanist perspective, indigenous territoriality, against Cobo's prejudices, may not be drastically different from mainstream societies. We read with Mona Bhan (2008) that the Brokpa[26] people in the Kargil district of Ladakh lend their labour as contractual employees of the Indian Army to participate in the larger national formation, not necessarily as an outward compulsion but through the fusion of their village hierarchies into the class-stratified labour market. But contra what one, including Bhan (2014, p. 31–33) herself, may call disculturation, submitting to the capitalist regimen enables the community to allay their geographical isolation in the Himalayas—and the attendant malaises of unemployment and economic precarity—by enticing metropolitan remittances. Their culture has not attenuated. It has grown into a protean amalgam of neoliberalism and its exotic fetishes. I observed during my own fieldwork there how the folk performance of the Brokpa constantly plays on pop references, exercising both local and global forms of cultural production (Bhagabati 2018, 2021). In summers, the performers move from traditional settings in the village to a makeshift stage maintained by the Army to sing and dance for tourists. The community finds employment in culture itself, fetching a much-needed financial stimulus from patrons ranging from officers posted in the nearby garrison to inquisitive Westerners. The bane of their territorial remoteness changes into a sellable commodity in much the same way as ordinary marketing.

In the tourists' eyes, the jovial Brokpa is an exotic figment of pre-colonial racial alterity. For better or for worse, this is a scheme of survival not without the community's volition. In the outsider's gaze, there is ocular violence and an aperture for livelihood too. At the other end, underneath the façade of static primitivity, is a desiring agent who inhabits what Giddens (1990, p. 99) terms a phantasmagoric locale: a de-territorialised, eclectic location that conceals its distant social and economic ingredients. International law would have us believe that the songs and dances of the Brokpa emanate within a fixed performative space where the subject is always already constructed. However, this de-territorialised spatiality itself is structured by the community's grappling with modernity and globalisation—in a sense, displacing the pre-given position of territory as an identifier of indigenousness.

A constructive outcome of the stress on territory is the growing receptivity of international law to the land entitlements of indigenous peoples. The Indian Supreme Court, on the other hand, has selectively incorporated this doctrinal progress in its constitutional jurisprudence to sanction the neoliberal state's developmental machinations. In *Narmada Bachao Andolan v Union of India*,[27] the Court was dealing with the question of rehabilitating the villages submerged by the Narmada Valley

[26] In Tibetan and other allied languages, the word Brokpa refers to a number of different herding communities. *Brok(g)* signifies highland pastures and p.a. designates the agent. Here, I use the term to denote a specific agro-pastoral people living in Kargil, specifically in the villages of Darchiks, Garkone, Hanu, and Ganoks too in Pakistan. This region has become popular as Aryan Valley of late in the tourism industry since these Brokpa communities share a mythic (Aryan) lineage with a few itinerant soldiers of Alexander's invading army.

[27] (2000) 10 SCC 664.

Project.[28] Quite abrasively, it declared that 'the displacement of the tribals … would not per se result in the violation of their fundamental or other rights'.[29] The three-judge bench was convinced that the new 'living conditions of the oustees [would] be much better than what they had in their tribal hamlets'.[30] The judges vindicated their unwillingness to stall the government's policy decision by citing Article 12 of the ILO's *Indigenous and Tribal Populations Convention 1957*, which allows displacement as an 'exceptional measure' that must be implemented 'in accordance with national law'. That the international atmosphere since the 1960s onwards has been steadily departing from the assimilationist tendencies of this Convention is omitted from the judgment, and so is every other instrument apart from the outdated 1957 document (Anaya 1997). The dislodged families were afforded the constitutional right to life under Article 21 only to ensure effective rehabilitation, not to halt the inundation of their lands and lifestyles. In the end, since the displaced people were being shifted to a new site with modern civic amenities, including a 'children's park' and 'village pond',[31] the Court found that the spoils of globalisation outweighed the vulnerability of Adivasi communities in the Narmada basin (Menon and Nigam 2007, pp. 61–82).

The Court once again relied solely on the 1957 Convention to adjudicate a matter of rehabilitation in *The State of Kerala v People's Union for Civil Liberties*.[32] One of the issues, tersely put, was whether Article 21 provided 'a right of tribals to be rehabilitated in their own habitat'.[33] The two-judge bench refused to specify an inalienable right to ancestral indigenous lands, mostly because decades of inter-community transfers in Kerala had engendered complex landholding configurations between tribal and non-tribal owners. It was held that exclusivity from the mainstream would dictate the restoration of Adivasi lands: 'some of them [tribal communities] are still living in jungle and are dependant [sic] on the products thereof … some of them, on the other hand, have become a part of the mainstream'.[34] What the judgment's predispositions signify is that to claim the territorial rights stipulated in international law, a community must appear primitive enough, live in jungles, and remain sequestered from non-tribal populations. Indigenous peoples can be transformative agents capable of desiring a better, or different, life through their interaction with the mainstream—this much the Court is correct in hinting. However, shedding their traditional lifestyle need not imply an erosion of indigeneity and constitute an excuse for abridging the protections that might otherwise be available to those living in 'jungles'. What one needs to appreciate is the fact that indigenous subjectivities can unfurl in a vortex of modern and traditional, local and global territorialities. Modernity builds indigeneity, so do the indigenous craft modern tools to voice their

[28] The Narmada Valley Project was a mega construction endeavour to build a litany of damns over the Narmada river in the states of Gujarat, Madhya Pradesh, and Maharashtra.

[29] *Narmada Bachao Andolan v Union of India*, para 62.

[30] ibid. para 241.

[31] ibid. para 152.

[32] (2009) 8 SCC 46.

[33] ibid. para 102.

[34] ibid. para 106.

claims (see Harney and Phillips 2018; Scully 2015; Singh 2011). Hence is defied the universal typology of modernity in favour of a situated and contingent production of timely political engagements.

Objectifying Subjectivity: The Perils of Self-Identification and Self-Determination

Squinting at the tribal currents of India through a lens devised mainly for the Americas impoverishes their voice to identify as such. What happens when the restitution of selfhood to the indigenous alienates their prospering vision of rights and commodifies their identity, is the apocalyptic counter-narrative to international law's most cherished covenants.

A notable leap from the narrowness of the 1957 Convention is the overarching ascription of self-identification introduced by ILO 169, the 1989 Convention. Article 1.1 sets forth the objective criteria of identification, namely the dated catalogues of historical continuity and territorial affinity. More peculiarly, it bifurcates tribal communities from indigenous groups, again segregating them from the mainstream as those whose 'social, cultural and economic conditions distinguish them from other sections of the national community'. Static identification and isolation—the objective matrix regurgitates the same stereotypes that have been continuing since Cobo. This forced rift between the indigenous and the tribal, nevertheless, is a helpful distinction since many might identify as indigenous but not tribal due to the prejudices associated with the term or see themselves as tribal despite falling foul on the objective checklist like the Chakma (see Dhir et al. 2020). The capacity to self-identify that follows in the next clause therefore becomes an exercise in subscribing to either of the two reified categories.

Indeed, reified, because though broad and unqualified subjective allowance for self-identification might be, the objective variables fuel identarian, ethnically charged political confrontations in local contexts that repackage the abstract demarcations of indigeneity and tribality themselves as subjects of rights, objectivising the real people struggling for these entitlements into discursive grounds for the auto-poetic reproduction of law.

Let's reread the Supreme Court's verdict in *Shayara Bano v Union of India.*[35] On face value, it has nothing to do with indigenous juristic personality. This ruling criminalises the practice of 'talaq-e-biddat', popularly chastised as triple talaq, which allows Muslim men to divorce their spouses by pronouncing the word 'talaq' thrice. The judgment revolves around the clash between personal laws and constitutional safeguards, but a surreal juncture arrives in the text where the judges begin discussing the 1957 and the 1989 Conventions. The petitioners averred that triple talaq violated India's international humanitarian commitments, so the Court wanted to explore the 'binding nature' of the ILO instruments to gauge how far the state could meddle in the customs of the 'tribes'.[36] Without any antecedents, without any exposition why

[35] 2017 SCC OnLine SC 963.

[36] ibid. para 380.

it might be pertinent to think of Indian Muslims in conjunction with indigenous cultures, the judgment suddenly conjures these covenants in paragraph 380. It reiterates the observation in *State of Kerala v People's Union for Civil Liberties* to proclaim that the 'notion of autonomy contained in the 1989 Convention has been rejected by India', primarily to convey that domestic laws would prevail over international precepts in the event of any contradiction. Then the quote ends, the paragraph too, and the judgment makes no further mention of anything indigenous or tribal.

The ease with which the Court could characterise Hanafi jurisprudence as an indigenous practice evinces the dangers of self-identification. If we go by the diktat of Article 1, then the judgment offers every component to satisfy the objective mandate. Triple talaq had persisted for about 1400 years—historical continuity—and Indian Muslims, notwithstanding their conversion, have been living on this landmass for centuries, millennia for that matter—territorial rootedness. Considering that proponents of the practice would readily embrace this ascription to defend it, the logical limit of this comparison pegs them on the same plane as the Adivasis. If such awkward deductions seem highly improbable, then one merely needs to look at how caste Hindus in Assam call themselves indigenous—not colloquially, but with full legal import—to separate themselves from so-called Bangladeshi immigrants.[37]

The idea is not to illumine the misuses of Article 1 but to portray that self-identification is a false assurance. It is an oxymoron, an impossibility. Law flourishes by classifying the world into the legal and the illegal, the banned and the permissible, the Aboriginal and the non-Aboriginal. The moment we incapacitate this function, the purpose of law becomes moot. In reality, to term oneself indigenous is an epistemic ploy that ultimately depends on the civil society and the state for cogency. As we saw in *Shayara Bano*, the objective criteria did not hinder the avowal of indigeneity. They enabled it. The Court circumvented the tricky Adivasi question to perfunctorily cite the ILO Conventions—as though reifying indigenousness as a subtext, caring little about who might coherently embody it, to discharge a juridical burden. It co-opted the capability of self-identification to make the Muslim proponents of triple talaq indigenous when they did not want to be themselves. This, precisely, is the discontent of self-identification: in the last instance, it never is self-identification. Communities must inevitably accede to a pertinent jurisdiction to affirm their identities.

Two inferences become apparent. The departure initiated by the 1989 Convention in 'the strengthening of indigenous rights at the national, regional and universal level' has mostly been pivotal in Latin America (Yupsanis 2010, p. 433). In South Asia, given its history of routine migrations and changing imperia, indigenous juristic personality remains more or less a comparative political reference (see Errico 2020).[38]

In 2013, when the Karnataka Government permitted mining near the Jambunatheshwara temple in the Bellary District, the Supreme Court ordered that 'the protection of ancient monuments has necessarily to be kept in mind while carrying out development activities'.[39] This ratio, amusingly, was derived from the Niyamgiri

[37] More on this in the coming paragraphs.

[38] See Stefania Errico, 'ILO Convention No. 169 in Asia: Progress and Challenges' (2020) 24 *The International Journal of Human Rights* 156.

[39] *K Guruprasad Rao v State of Karnataka* [2013] 11 SCR 581, para 91.

Hills case and the 1989 Convention. A temple with Brahmin custodians, boasting of 'immense cultural and historic wealth', had to appropriate a ruling meant for Adivasi customs to cull out a general right to the 'political, economic and social structures' of a community and conserve its 'culture, spiritual traditions, histories and philosophies'.[40] Self-identification takes a tragic turn when indigeneity is reduced to a rhetorical amenity, a hollow scaffolding that anyone can occupy. The materiality of Adivasi existence is replaced with an abstract paternalism that is treated as a fungible commodity. Whenever judicial rationality suffers from a lack, courts allot indigenousness to the actors before them as a detour to international covenants. Muslim men sought to preserve their patriarchal privilege of triple talaq and the Supreme Court labelled them Aboriginal to adduce India's non-ratification of the 1989 Convention as an excuse to trump it with personal laws.[41] Jambunatheshwara temple feared the environmental hazard of mining, and the Court nudged its petition towards the juristic entitlements of the indigenous. In the text of the judgments these remain mere inuendoes, but they do not belie their provenance in the expansive ambit of Article 1, ILO 169.

Such patchy application of self-identification might clarify that it is more of a *power*, in a Hohfeldian sense, than a *right* (Hohfeld 1913, p. 16). Article 1 vests the power in those meeting its objective baseline to hail themselves as indigenous and enter into a legal relation with the state and its citizenry that removes the *disabilities* impeding their 'aspirations' to 'control their own institutions, ways of life and economic development' (ILO 1989, *Preamble*). After, and only after, this ability is implemented with legal backing, the state can be held liable to confer the other rights enshrined in the Convention. Self-identification alone is useless. The UN and its allied organs may uphold all elocutions of indigeneity (see Anaya 2014), but it is on the municipal jurisdiction to confirm that qualifier and adjudge which community gets how much of the funds released by global mechanisms, who is marginalised enough for protection, and which group is an obstacle to development. The power to identify oneself as indigenous must be complemented by another vital right that is completely absent from the Convention: the right to self-determination.

During the revision process leading to the adoption of ILO 169, the chair announced that 'no position for or against self-determination was or could be expressed in the Convention, nor could any restrictions be expressed in the context of international law' (ILO, Provisional Record 1989, para 42). For some, this is a 'fatal failure' (Malezer 2020, p. 297) and for others, the apathy necessitates the gleaning of self-determination from some other instrument, preferably the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (Cambou 2019; Dorough 2020). We have already seen before how autonomy in Article 3 does not include the scope for secession, impelling the Adivasi towards arcane responses to co-exist with the state like Pathalgadi. Practically, it is a human-right duty to equip the indigenous for local self-government (Article 4), institutionalised legal and political pursuits

[40] Ibid para 91.

[41] The Court held that triple talaq was immune from constitutional and international safeguards as a matter of personal law. It, however, injuncted the practice based on its extraordinary powers to do 'complete justice' under Article 142 of the Constitution.

(Article 5), physical and mental wellbeing (Article 7), and cultural independence (Article 8). When read with the 1989 Convention, easier said on paper than done, the UNDRIP proves to be an 'extraordinary and positive development' (Dorough 2020, p. 294). But the reluctance to lay out a right to secession is the epitomic perversion of self-determination, because even when Aboriginal groups seek to be accommodated more wholesomely within a nation-state without leaving it—perhaps through a greater devolution of centralised authority, better grassroot governance, or a more pluralistic legal milieu—their demands are perceived as a tangible challenge to sovereignty and accordingly negated.

India is a signatory to the UNDRIP, and its comprehensive coverage has made it an attractive motif in civil society protests. The parliament, in 2019, passed the Citizenship Amendment Act, bestowing fast-tracked citizenship on Hindu refugees from Muslim-majority South Asian countries who had entered India before 2014. In Assam, a state encircled by a porous border with Bangladesh, the Act was reviled as a scam to legitimise illegal immigrants from Bangladesh, some of whom had been living there for decades without documents. Self-proclaimed indigenous organisations instantly rallied behind the symbolism of the UNDRIP to play up their right to self-determination (see for example Eyben 2019; The Assam Tribune 2021).[42] Not superficial clamouring, this was a legally sound position. In 1985, after five years of an anti-immigration mass movement in Assam, the Central Government signed a memorandum of understanding—popularly known as the Assam Accord—with the Agitation's leaders (see Baruah 1999; Pisharoty 2019). The Accord is a constitutional annexure for the cultural, economic, and social upliftment of Assam. If posed as an extension to the UNDRIP, it stipulates a binding obligation on the government to see to its developmental promises. But the Indian state avoided stirring the volatility of the Accord and simply boasted that the CAA was a constitutionally abiding vehicle of human rights for persecuted Hindus. Stifled with the argot of liberal individualism, the collective agency of being a people no more held sway. Each Hindu immigrant had to be individualised as a holder of citizenship for the CAA to work, and against this evoking the UNDRIP moored the corporate endowment of the Assamese.[43] The quasi-legal imagery during the protests was perspicacious. The construal of indigeneity, not quite.

Armed with the aptitude to self-identify that had become common-sense after ILO 169, everyone who was not branded a Bangladeshi immigrant extolled themselves as indigenous. The sole requirement was having Assamese as the native tongue. Tribal populations with their own linguistic traditions, who in fact are indigenous to this region, have long used Assamese as a lingua franca, so they were fine. For a demographic umbrella ranging from caste Hindus to Assamese-speaking Muslims and tribal groups to royal households, indigenousness became a separator from Bengali immigrants and self-determination an apology for xenophobia. The way the protes-

[42] My comments here do not deal with the socio-economic and cultural rights of the Assamese. Neither do they ponder the resolution of the immigration problematic in Assam nor the unintended ramifications of unchecked immigration.

[43] On how the collective entitlements of the UNDRIP are attenuated by the state's liberal conception of rights, see Gover 2015.

tors marshalled the political and legal valence of the UNDRIP is a flawless, albeit depraved, weaponisation of the international doctrine. First self-identify as indigenous, then fight for self-determination. The government, anxious about secessionism even though no one wanted to break away from India, arrested the leaders under draconian preventive detention laws, deriding some of them as terrorists and Maoists (Bharadwaj 2019; Assam Times 2019).

Assam's disenchantments are reminiscent of the stalemate in the present conception of juristic personality in international law. In Latin America, where there already is a prevalent notion of who is indigenous and who is not, where the colonised and the coloniser can be told apart reflexively, self-identification is a shorthand for the extant denotations of Aboriginality. In India, being Adivasi is only the bottom-line. There can be myriad other connotations of indigenousness, creating a conceptual repository of meanings that are imbued with particular experiences of vulnerability in global and migratory contexts. Self-identification and self-determination, in this clutter, harbour a kind of subjective indeterminacy that proliferates nigh objective socio-political inequities. The equivocation lures the state into 'excluding or narrowly defining' the right (Engle 2010, p. 70). This is not to say that they be done away with. These ideals are unprecedented and were long due.[44] But their efficacy depends on the objective criteria. When that standard itself is inapt for South Asia, the subjective locators of indigeneity become a battleground for courts and several tribal and non-tribal actors to exert their power and capital.

Epilogue: The Adivasi Will Dance No More

Mangal Murmu, a Santhal musician, will not dance for the President. In his youth, he and his troupe had toured the length and breadth of the country, but the octogenarian today refuses to perform like a 'toy' controlled by the push of a 'button'. His farmlands have been ravaged, hills mined for coal, rivers dammed for development, sisters raped for humiliation, and children denied their share of education and midday meals. The cheerful days have long gone by and there is nothing left to dance for. But how can the 'foolish' Santhal even think for himself—they wonder. So they grab him, pin him to the ground, and thrash him till he remembers that his Adivasi credentials are acceptable only as long as he puts on a show for them (Shekhar 2015, p. 169–187). This desperate attempt at making Mangal Murmu dance is a part of what Srirupa Roy (2006, p. 200) calls 'the deliberate strategies of nationalization' through which the cultural practices of ethnic minorities are forcefully accentuated to reinforce a sublime imagery of India's diversity.

Murmu's story, though fictional, grimly underlines the cultural expropriation that routinely occurs in the name of discerning indigenousness. Pursuant to the General Assembly Resolution 71/178, the year 2019 was celebrated as the International Year of Indigenous Languages. Although the effort to mobilise indigenous voices is commendable, it speaks volumes about the current international law dispensation that

[44] For more optimistic takes on ILO 169 and UNDRIP, see Swepston 1990; Sargent 1998; Larsen and Gilbert 2020.

this event to 'raise awareness' about 'cultural diversity' morphed into a voyeuristic display of ethnic otherness (The International Year of Indigenous Languages 2019). UNESCO (2019) conducted 'theatrical, musical and artistic performances' to mark the months-long celebrations. Likewise, the General Assembly's (2017, p. 2) drive to conserve indigenous 'histories, languages, oral traditions, and philosophies' finished with a 'cultural performance of indigenous artists' at its high-level meet on the conclusion of the year in New York. These spectacles were not incidental to the main agenda but heightened and choreographed presentations of the occult that set apart Aboriginal bodies even in everyday routines. They were unconscious enactments of the institutional proclivity for culturalism which deposes the indigenous from their sovereign posture and disparages them as yet another minority.[45] This critique is not a cynical disillusionment with the positive milestones adorning the quest for juristic personality. What I have hoped to illuminate are some vignettes that disclose international law's recursive tendency to alienate indigenous peoples from their own historical and social weft in the name of forming legal knowledge.

The international legal climate still revolves around Cobo's views on indigenous attributes—namely, historical continuity and ancestral bonds to land. His document, as the bedrock of subsequent treaties and treatises, rightly propounds a 'subjective' legal definition, capacitating indigenous groups to determine their own identities (Cobo 1987, paras 21 & 364). Yet, this choice is considerably restrained by the high-handed construction of an aestheticised subjecthood that they must either embrace and fight for the concomitant rights or reject and forgo justice outright. We are once again reminded of Barr's (2016) walk alongside jurisdictional movements. If ever evolving and ever transient, and splintered and fragmented, indigenous figures have waded through the sludge of modernity to look for their customary entitlements, international law has walked away in a different direction, dragging them to a place where they are promised a historically and politically unreal spectacle of indigeneity.

Subjective identification also clashes with the archetypes of legality through which one must expound their claims of rights. Time and again we have seen how judicial reasoning spells the death of disadvantaged worldviews. Back in 1971, when the Supreme Court of the Northern Territory in Australia passed its controversial judgment in *Milirrpum v Nabalco*,[46] Baxi (2020) observed in a seminar paper—written back in the 70s but published only recently—how the justice-situation conceived by the Court expunged the Aboriginal master narrative of the Dreamtime altogether.[47] This Dreamtime was redolent of the Yolngu people's title over their land—their

[45] For a critique of culturalism in the treaty mechanism of the UN, see Isabelle Schulte-Tenckhoff (1997, p. 272–286).

[46] (1971) 17 FLR 141. *Milirrpum v Nabalco* was later overruled by the High Court of Australia in *Mabo v Queensland (No 2)*, (1992) 175 CLR 1.

[47] Australian and Indian indigeneity do not fully overlap. Yet *Milirrpum*—or, for that matter, a host of Australian judgments on Aboriginal rights in the 1970s and 80s—shares a great amount of discursive and pedagogic amity with the Adivasi question. Baxi himself recalls that while teaching in Australia around this time, his students were curious about the constitutional entitlements of the Adivasis in India. At that time, he was not fully sure of what to say. When he came back to Delhi to work on tribal rights, the resonances became much clearer to him, allowing him to return to his Australian student with an adage that unifies both the contexts: 'it is much more important in thought and action to be Ab-*original* than *original*'. (pp. 25–26)

being-there before the colonisers came with the fiction of property rights and their fight to *be-there* in spite of property rights. Seeing that no one individually owned the disputed swathes, the government sold a part of the Arnhem Land Reserve to a bauxite mining company. The Yolngu asserted that they had enjoyed a 'communal native right' over the area since time immemorial. Justice Blackburn ruled against them, holding that a common-law right to native title could not exist except through statutory provisions and that in the absence of a well-defined legal system, the Yolngu did not have pre-existing entitlements to property. Notice how the pluralistic iterations of justice were drowned in legalese and rendered incompatible with the Aboriginal Dreamtime.

Across nations, throughout the international doctrine, indigenous legal personalities are hampered by law's misunderstanding of indigenous personalities in the first place. Manderson (2001) notes how in *Kruger v The Commonwealth*,[48] although the Aboriginal petitioners spoke in a jargon familiar to law, the High Court of Australia failed to grasp the intentionality propelling their arguments. In question was the Northern Territory Aboriginals Ordinance 1918, which empowered the government to separate children from their parents and ship them off to missions and orphanages. The petitioners advanced that the Ordinance whitewashed a deplorable genocide, violating Australia's commitment to the *Genocide Convention 1949*. In response, one section of judges ruled in favour of absolute sovereign power, even to purge and persecute, while others doubted if the Ordinance could be extended to the Northern Territory without democratic participation from indigenous stakeholders. Yet, the latter sceptics also found the Ordinance constitutional since its language was too broad to particularly permit a genocide. Two different reasonings, two different preservations of colonial relics. Crude mass-murder disappeared in the sleight of hand of a genocide, staging a genocide of the second order that withheld the faculty to feel its psychological trauma and the amplitude to withstand it through its lexicon. It forbade the 'recognition of First Nations as peoples in international law' (Watson 2015, p. 113).

All these Dreamtimes—the Yolngu's, the Kondh's, the separated families'—are downtrodden critiques of the legal violence unleashed on the Fourth World. Their voices were suppressed before they could be realised in the domain of law. But such subaltern stories of suffering and resilience live on as potent counters to the systemic attempts of expropriating indigenous lands for capitalist development and recasting their bodies for the labour market. From Pathalgadi in Jharkhand to the anti-deforestation protests in the Amazon rainforest, the struggle for personhood is alive—sometimes with the aid of law, and at other times through activism from the margins. With these subversive narratives being far from extinct, indigenous inventiveness nowadays prefers the word Dreaming over Dreamtime,[49] underscoring the continuous, untruncated, and unending nature of Aboriginal lifeworlds. My account from the outside, largely located in a university-sanctuary, is a mere invitation to think why international law cannot succeed without undoing the repression of apocryphal cos-

[48] (1997) 17 ALJR 991.

[49] In a sense, both these words do not entirely encapsulate the full import of the phenomenon that indigenous peoples experience and culturally, religiously articulate as creation stories. For more on this, see Goddard and Wierzbicka (2015); Nicholls (2014); Price-Williams and Gaines (1994).

mologies. Perhaps this is why despite the incentives of rights and citizenship, Mangal Murmu just won't dance.

Declarations

No funds, grants, or other support was received.
The author has no financial or proprietary interests in any material discussed in this article.
There are no other relevant competing interests or ethical disclosures that the author has to make in relation to this article.

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