

“Indigenous sovereignty” and right to self-determination in international law: a critical appraisal

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Abstract

It is worth recalling that the struggle of indigenous peoples to be recognised as “peoples” in true sense was at the forefront of their journey from an object to subject of international law. One of the most pressing concerns in their struggle was crafting their own sovereign space. The article aims to embrace and comprehend the concept of “indigenous sovereignty.” It argues that indigenous sovereignty may not have fixed contour, but it essentially confronts the idea of “empire of uniformity.” It is a source from which right to self-determination stems out and challenges the political and moral authority of States controlling indigenous population within their territory.

Keywords

Indigenous peoples, Indigenous sovereignty, self-determination, remedial secession, international law

Introduction

“Sovereignty,” one of the foundational principles of international law, has deep significance both from the vantage point of indigenous peoples “struggle for recognition” and its direct bearing on the science of international law. As a matter of academic study, advocacy, governance and sustenance of civilisation, sovereignty matters in consequential way to comprehend the political plans, policies and cultural outlook of indigenous peoples. Unfortunately, the scope of sovereign authority under traditional international law was purposefully restricted to “civilised” States (Shrinkhal, 2019; Singh, 2008). Indigenous peoples remained merely an object of international law and their struggle for sovereign autonomy is *raison d’être* of indigenous politics (Barker, 2005).

Sovereignty appears as a prized term within indigenous discourse to denote an agglomeration of legal, social, economic, political and cultural rights. “Indigenous Sovereignty” has varied meanings, ranging from formulation of rights to reverse continuing experiences of colonialism as well as to carry local efforts at the redemption of ancestral lands, resources, self-governance and preservation of cultural knowledge and practices (Barker, 2005). The present article aims to narrate and dissect the concept and scope of “indigenous sovereignty”. It also tends to explore the ontological status of indigenous peoples right to self-determination in international law. The author shows that the right to self-determination for indigenous peoples is still a derivative right within the State (geographical) sovereignty. Furthermore, the article dwells on the possibility of remedial secession for indigenous peoples in international law.

This article is further divided into six sections. The second section briefly displays how the concept of sovereignty has changed dramatically over the period of time. The third section tends to focus on the question of the utility of “sovereignty” as indigenous peoples struggle for distinct identity based rights. The fourth section explicates the scope and meaning of “indigenous sovereignty”. The fifth section critically analyses the scope and status of indigenous peoples’ right to self-determination. It is argued that indigenous peoples were categorically denied the collective right to self-determination by not considering them as “peoples” in international law. In addition, an overview is given of possible conditions under which indigenous peoples may seek remedial right to secession. The sixth section contains brief final remarks.

Sovereignty in a dynamic mode

The idea of “sovereignty” is multi-layered and difficult to define. The difficulty lies in its abstract formulation. However, no other concept in international law and politics has such strong influence in shaping the structure of the world. In general understanding, the term implies “[t]he

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supreme power from which all specific political powers are derived” (Kickingbird et al., 1999, p. 2). Sovereignty is an idea of authority, which originated in the controversies and wars, religious and political, of 16th and 17th century of Europe (R. Jackson, 2007). It existed without pause and expanded across the world since that time, and is still under the process of continuous evolution.

Review of various literatures suggests that there are four different meaning of the term “sovereignty” and frequently used as: (a) domestic sovereignty, referring to the institutions of public authority within the State and to the intensity of operative control employed by those keeping the authority; (b) interdependence sovereignty, referring to the ability of public authority to control movements extending across border; (c) international legal sovereignty, referring to the construction of statehood in international law; and (d) Westphalian sovereignty, referring to the prohibition of foreign actors intervention within domestic authority arrangement of a State (Krasner, 1999, 2001; Bodin, 1945; Fowler & Bunck, 1995; McIlwain, 1933; Verellen, 2011). Generally, the notion of traditional sovereignty is developed around the structure of State, control and authority being the reinforcement material, and is, therefore referred as traditional sovereignty; classical sovereignty or State sovereignty.

In addition to above-mentioned, one striking characteristic of the traditional sovereignty is that it is indivisible and therefore within the State, there cannot exist two or more centres of authorities. To put in the words of Deridda (2002), “Sovereignty is undivided, unshared or it is not. The division of the indivisible, the sharing of what cannot be shared: that is the possibility of the impossible” (pp. XIX–XX). The traditional notion of sovereignty, however, has been received enthusiastically by the discipline of international law, yet it is under constant challenge within the academic discourse. Suggestions to desert the classical notion of sovereignty have gained force, rendering of modern time understanding that traditional concept of sovereignty is an archaic concept, which might not be apt in new era of globalisation (Kingsbury, 1998).

Sovereignty is much more liquid and ductile concept than its usual portrayal as sacrosanct, indivisible and inalienable in international affairs. State has lost its monopoly over sovereignty, now it is fractured and shared among the States and non-State actors in multi-level governance structure. This dilution in the notion of sovereignty is a result of ascending global market economy, which constantly challenges the State’s capacity for holding ultimate source of authority. It is natural for market economy to expand globally crossing the limits of defined territories of States. As a result, there is a dent in primary characteristics of State sovereignty and State loses grip over its exclusive right to create and implement laws, power to defend territory, and to structure and administer economy. Evidently, there is a rise of supranational organisation and powerful sub-national actors such as cities and regions (Bartelson, 2006; Ilgen, 2003). A noticeable illustration is the General Agreement on Tariff and Trade (GATT), and now the World Trade Organization (WTO), wherein a

custom territory has complete autonomy in the execution of its external mercantile relations. Furthermore, in the era of globalisation and liberalisation there are numerous instances in which powerful nations (both in terms of economic and military capacity) shape and influence the domestic policies of other nations. For instance, the North Atlantic Treaty Organization (NATO) used human rights violations as a ground for intervention in Balkans, but in reality, it was more strategic than anything else (Posner, 2014; Jahren, 2013; Pae, 2006). Writing from Third World perspective, Professor Chimni argues, that international institutions have emerged in every sphere of international relations—economic, social, and political. He alleges that international institutions, especially financial institutions, sets out universal norms and ensure that Third World nations frame their domestic policies based upon those norms their by impairing the decision making authority of States (Chimni, 2004).

Presumably, for the above-mentioned reasons, some scholars have rescripted the concept of sovereignty in the modern context and one can find an extreme view in the likes of Louis Henkin who asserts, “for legal purpose, at least, we might do well to relegate the term sovereignty to the self of history of relic from an earlier era . . . to this end it is necessary to analyse, ‘decompose’ the concept . . .” (Henkin, 1995, p. 10). However, such an extreme position would not be judicious to opt, as there is a lack of an alternative concept in international law. In spite sovereignty is strained by practice and problematized by theory, still it is indispensable in international law (Kingsbury, 1998).

So, an obvious question is, which follows the debate, how one can reinvent the concept of sovereignty? Can there be a shift away from the idea of “sovereignty for the benefit of the nation-State” towards the idea of “sovereignty of the people”, thereby giving way to the idea of ‘indigenous sovereignty’?

If minutely observed, sovereignty entails quotas of power sharing in decision-making and in the era of democratic governance model, State can’t govern in perpetuity by coercion. Good governance demands proactive citizens and civil society that can participate and contribute to the decision-making process. In modern times, supposedly a totalitarian leader also seeks validation from common public to secure high degree of authority (Franck, 1992; J. H. Jackson, 2003). This gave the way to the concept of “popular sovereignty”, which usher government to act as an agent of people (Huhn, 2010).

Does sovereignty matter to Indigenous peoples?

Besides rendering just order and peace, sovereignty has something more to furnish. It produces an epistemological system that legalises authoritative entitlements. If one agrees with Hobbes, even those who disagree cannot deny the fact that; the world is methodically divided into sovereign and non-sovereign. Those subscribing to the tutelage of sovereignty find a place in the world, an organised conception, a locus from where humanity can

progress and one has to act within it, which is “inside”. All others (indigenous peoples) are on the “outside”, falling within the domain of war and distress due to multifaceted magnitude of violence or insufficient amount of security to develop and proceed along the path of knowledge and peaceful life (Shaw, 2008).

“Recognition” of sovereign space for indigenous peoples as a precondition for the political ascendancy is quite debatable. Interestingly, an eminent indigenous scholar Taiaiake Alfred (1999) refutes sovereignty as necessary condition for indigenous people’s *carte blanche*. He argues that, “sovereignty is an exclusionary concept rooted in an adversarial and coercive nation of power” (p. 59) and applying it to generalise indigenous histories, governance and epistemologies is not only obscure but also inadequate. For him, if sovereignty remains the ultimate goal of indigenous politics, there is likely chance that indigenous peoples shall be relegated to secondary status within State due to its unparalleled coercive power (Alfred, 1999). He further entrusts the task upon Native leaders to expose and debunk the imperial self-deception underpinning the dogma of State sovereignty and white people supremacy over indigenous communities and their land. Alfred (1999) continues to argue that, any proposal of establishing State legitimacy is derived from rule of law, which is both hypocritical and anti-historic. To his judgement, “there is no moral justification for State sovereignty” (p. 59).

Dale Turner (2001), also an indigenous activist, interprets the Western European discourse of rights and sovereignty as an ideological toxin that has impaired Aboriginal way of thinking by creating “[western] discourse on property, ethics, political sovereignty, and justice” (p. 325). The rationale for such an extreme position is derived from an understanding that any endeavour in pursuit of justice by way of indigenous “claims” against the State essentially within the domestic jurisdiction of State is aimed at maintaining supremacy of State sovereignty. Indigenous peoples being original inhabitant of the land never consented or ratified European ownership of territory or sovereignty over them and there is no historical document to support European claim. In the words of Taiaiake Alfred (1999):

Why are indigenous efforts to achieve these facts framed as “claims”? The mythology of State is hegemonic, and the struggle for justice would be better served by undermining the myth of the State sovereignty than by carving out a small and dependent space for indigenous peoples within it. (p. 58)

The argument seems to have stemmed from a highly emotional mind-set. Premise and inference might appear to proceed as if, “X” property is misappropriated or “X” is forcibly deprived of possession. “X” will not claim the ownership, as “X” never legally transferred it. The inference deemed to be convincing in an ideal conditions. However, when confronted with a mighty opponent who seized “X” land. “X” has two options: First, “X” may choose not to litigate for ownership as it was always his property and feel comfortable with denial of reality. Second, “X” may decide to “reclaim” otherwise his deprivation will be unbroken and endless.

Moreover it is inconceivable, in pragmatic sense, to overshadow the relevance of the “State.” First, an extreme form of indigenous movement may usher to the emergence of “indigenous State” or “indigenous nation” having the elements of power and authority. Second, Indigenous peoples is also not altogether a homogeneous construct. It is a set of variety of heterogeneous indigenous population. These groups may display common and universal virtue of living in peace with each other, environment and “other” (non-indigenous) world. However, can we authoritatively argue that indigenous communities don’t carry any strains of ethnocentrism? They were not entirely uncontaminated when scholars produced anthropological research on violence and war (Dawson, 1996; Keeley, 1997; Otterbein, 2004). Indigenous communities displayed territorial behaviour and apart from few aberrations this is a general practice of humans. The idea of “State” had always been there, may be in the crude form, since the evolution of humans. Finally, humans are humans, be it “indigenous” or be it “non-indigenous,” let the unique identity be preserved but let us not put the human world on opposite axis. To bring indigenous peoples at the centre of political realm, it is desirable to reconstruct the notion of traditional sovereignty.

Indigenous sovereignty: meaning and scope

In addition to symbolising the emergence of modern nation-state system founded on the reciprocal regard of sovereignty, the Treaty of Westphalia delayed in dealing with issues spawned from cultural difference (Inayatullah & Blaney, 2004; Keal, 2008). Westphalia treaty may have secured forbearance between States, but within them it hatched a cultural separateness exposed to political and social actors, discourteous or brazenly xenophobic of diversity (Keal, 2008). Consequently, a cardinal legal phenomenon was absorbed in the form of “Empire of Uniformity” (Tully, 1995, 2000). It implies that, modern constitutions are drafted in a manner to undermine cultural diversity through exclusion or assimilation. To break the silence caused by uniformity of rules, indigenous peoples need to raise their voice. The question, however, remains that what shall entail indigenous peoples to speak? (Spivak, 1988). The answer to the question is embedded in the idea of indigenous sovereignty. “Indigenous sovereignty” challenges the political and moral authority of States with the purpose to secure respect and recognition for “difference and diversity” across different level of governance (Keal, 2008).

The review of academic literature reveals that “Indigenous sovereignty” does not have fixed contours. Different scholars have attributed different meaning to the concept of “indigenous sovereignty.” Siegfried Wiessner (2008), refers to the idea of “authentic indigenous sovereignty,” by which he means the power to create a “safe space” for indigenous peoples; enabling them to live a life with the difference; ensuring their right of free, prior, informed consent; the right to have self-governance; the right to enter into treaties and other agreement; and casting a legal duty on the State to respect, protect and promote

indigenous languages and culture. Subsequently, along with Lorie Graham and Wiessner (2011), he argues that indigenous sovereignty should be solely equated in terms of Western notion of “original power over territory”.

Social activist and lawyer, Frank Brennan (1995) SJ maintained that aboriginal sovereignty is about recognising and respecting that there is “sovereign people within the nation” (p. 127). Brennan (1995) contends that for practical purpose, sovereignty is valuable only in relation to a nation that has “its own land base, economic resources and social structure” (p. 319) which is clearly not enjoyed by indigenous peoples across the globe. Therefore, the goal and objective of indigenous struggle, he argues, should be self-determination (Brennan, 1995).

For Professor Stefano Varese, indigenous sovereignty implies “the recognition that there is no external supreme” and “absolute power over the indigenous community” does not lie somewhere else but “within the community, in the collective body.” And, these issues can’t be resolved unless “indigenous territorial possession and full jurisdiction are in place” (Varese, 2006, p. 270). He further explains the meaning of indigenous jurisdiction in terms of rights and authority to interpret and apply law created by indigenous peoples within the limits of territory controlled by the indigenous communities (Varese, 2006).

Federico Lenzerini traces the roots of indigenous sovereignty in customary international law. For him, indigenous sovereignty is inclusive of right to ownership over traditional land, right to preserve identity and culture, participatory rights in decision making process especially in matters related to culture and life, and the right to self-governance through customary laws. He argues that indigenous sovereignty is “parallel” to that of State but praxis of indigenous sovereignty shall in no way traverse the supreme territorial sovereignty of the State (Lenzerini, 2006).

As previously mentioned, there is a school of thought, which vehemently attacks the notion of sovereignty and rejects the idea of “indigenous sovereignty” within the framework of State because they maintain that any such concession is acceptance of indirect colonial rule similar to that of Canadians, Americans, Australians, and New Zealanders subjugation (Alfred, 1999; Tully, 2000). For them, colonial State is based on racism and ignorance. If, indigenous sovereignty fails to challenge the colonial nature of the modern State, it is serving the State to perpetuate its dominance over indigenous communities. Interestingly, they persuade indigenous scholars to struggle for “intellectual sovereignty.” The “intellectual sovereignty” attempts to decolonise the conceptual and methodological outlook adopted to examine and investigate indigenous histories, culture and their interests in present day world as a part of intellectual colonialism. The striking difference between the notion of State sovereignty and “intellectual sovereignty” is that the recognition of former depends upon on other sovereigns. On the other hand, “intellectual sovereignty” presupposes that indigenous peoples world existed even prior to the conception of modern nation-state system. It is therefore inherent and ancient. In the words of Amanda Cobb (2005):

[t]he term is intended to empower Native Scholars to make us [indigenous scholars] consider the possibility that we spend too much time “writing back” to colonizer rather than “writing forward,” charting our own course and not looking from outside approval. (p. 128)

Thus “intellectual sovereignty” is a way in which indigenous scholars produces indigenous scholarships through indigenous epistemologies rather than western research paradigm (Barker, 2005; Fredericks, 2009).

On the other hand, Professor Dianne Otto, anticipating the need of indigenous sovereignty argues that in the absence of a notion like indigenous sovereignty, it will be difficult to clasp recognition for post-colonial identities (Otto, 1995). She also believes that indigenous sovereignty will pave the way for indigenous peoples to acquire international personality, which is otherwise still State centric. Drawing from Mick Dodson, she explains the meaning of indigenous sovereignty as:

the power of indigenous communities to imagine themselves, to be creators of themselves as subjects rather than objects of law and history. It enables the reconceptualization of Aboriginal identities as bearers of rights, obligations and unique nationhood, as agents of their own destiny. (Otto, 1995, p. 83)

In the same context, Larissa Behrendt (2003) tries to clear doubts that indigenous sovereignty necessarily should not be seen as anti-State to the extent of complete annihilation of the concept of State. However, she claims that indigenous sovereignty does question the legitimacy of its authority and blames the State for continued exclusion of indigenous peoples. Indigenous sovereignty seeks for multifarious efforts, which will be responsible for changing the relationship dynamics of indigenous peoples vis-à-vis State.

In nutshell, the notion of “indigenous sovereignty” is considered by some scholar as critical to recognition of definite and independent indigenous identity and rights. Furthermore, there are certain scholars who regard the entire notion of sovereignty as alien to indigenous discourse and even consider that the language of indigenous sovereignty represents the colonial mind-set with assimilation and subjugation as ultimate aim. However, the refutation of “indigenous sovereignty” by such scholars has not led to denial of advocacy for separate power and autonomy to indigenous peoples. Unsurprisingly, “indigenous sovereignty” is an attempt towards claiming autonomy and legitimacy as sovereign authority within the realm of State. It aims to perpetuate notion of cultural and legal pluralism. It is source for indigenous people’s right to self-determination.

Self-determination and Indigenous peoples

It is possible to develop rich theoretical spectrum of self-determination, having universal outreach, in easy words and phrases. In fact, right to self-determination is one of the most aggressively sought after norm of positive international law

(Hannum, 1990). However, complication runs immediately at the time of implementation. The concept eventually becomes complex when enclosed with reservations and caveat (Rupert, 1971).

In other words, the apparent queries related with right to self-determination are ordinarily simple and direct. The questions are not so complex but their ambivalent answers are enigmatic. The set of questions, which fall under the above mentioned categories are: First, what does self-determination mean? Second, what is the status of self-determination in international law? Third, does indigenous peoples, prior to the *United Nations Declaration on Rights of Indigenous Peoples (UNDRIP)*, had the right to self-determination and what is the position post UNDRIP? Fourth, does indigenous peoples right to self-determination includes right to secession? In the ensuing sections, an attempt is made to get down the nitty-gritty of issues related with indigenous peoples right to self-determination.

Defining self-determination

Defining self-determination was never easy neither in past and not even in modern times (Halperin et al., 1992). Within the self-determination conjecture, diverse propositions and conceptualisation of the term exist in the domain of academic discourse.

According to Wehmeyer (2005), self-determination refers to “volitional actions that enable one to act as the primary causal agent in one’s life and to maintain and improve one’s quality of life” (p. 117). He further explains that the conscious choice of action defining self-determination has essentially four characteristics: (a) the action was autonomous; (b) the conduct was self-regulated; (c) the action was preferred as result of some event, in a psychologically empowered manner and (d) the decision maker acted in self-realising manner (Wehmeyer, 2007). Thus, Wehmeyer expository definition of self-determination explains that the process of self-determination involves a free choice making in situation of a problem to achieve certain goal by any person.

Lung-Chen gives special importance to the principle of self-determination with regard to human’s quest and desire for dignity and human rights. For Lung Chen (1976), the central idea of human dignity is the unrelenting desire of individuals to establish groups that can best aid increase his search of “values of both individual and aggregate terms.” Referring it as intricate and compound social phenomena, Phillip Alott (1993) argues that self-determination is a “contest—between constituted and un- or semi-constituted power and among ideas which operate to structure desires, cultural identities and notion of good life” (pp. 177–178).

The historical instances of principle of self-determination, as it is understood in modern times, within the international political discourse have its roots in American and French Revolution. However, it was the American President Wilson concept of self-determination, which gained much weight in international law and politics (Nawaz, 1965). For the first time, Wilson in his prelude to Four Points address of 1918, publicly uttered the phrase “self-determination.” This was

more than mere phrase and he argued that principle of self-determination was crucial principle of action, which statesman can’t afford to ignore except at the loss of their own political legacy. His manifestation of self-determination can be made out from his articulation that “National aspirations must be respected; peoples now may be dominated and governed by their own consent” (Beigbeder, 1994). Thus, notion of self-determination included the idea of self-government of peoples. In its widest sense, the term meant the break-up of colonial dominion that was a critical point in the advancement towards world revolution. Lenin defined the principle of national self-determination as the right of peoples to secede from tyrannical regimes thereby undermining the capitalist-imperialist world order (Manela, 2007).

Self-determination and the United Nations

The bedrock for evolution of legal framework for right to self-determination was the UN Charter. It provided that one of the purposes of the UN is to “develop friendly relations among nations based on respect for the equal rights and self-determination” (the UN Charter, 1945, Article 1, para. 2). Furthermore, the UN shall promote its various goals in a manner to ensure congenial atmosphere of stability necessary for global peace based on respect for the principle of equal rights and self-determination of peoples (the UN Charter, 1945, Article 55).

It is pertinent to note that at that point of time, the right to self-determination under the UN Charter didn’t implied compulsory dismemberment from colonial empires, otherwise countries like Britain and France would not have extended their support to the Charter (Hannum, 1998). In 1960, an important progress was made in the context of right to self-determination with the adoption of General Assembly Resolution 1514 (XV) of 14 December entitled, “Declaration on Granting of Independence to Colonial Countries.” This step has been heralded as great hope for struggle against colonisation. The decolonisation movement gained strong legal basis in the year 1966 with the enforcement of legally binding instruments upholding the right to self-determination. The common article 1 of the *International Covenants on Civil and Political Rights (ICCPR, United Nations General Assembly, 1966a)* and *International Covenant on Economic, Social and Cultural Rights (ICESCR, United Nations General Assembly, 1966b)* provides:

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development (United Nations General Assembly, 1966a, Article 1, 1966b, Article 1)

Thus, the UN continuously inflated right of all peoples to self-determination without actually meaning it. Right to self-determination of all peoples was an equivalent to right of colonial territories to independence (Hannum, 1998). This is so because even after several decades when the ICCPR and ICESCR came into force, there was no

consensus as to what constitutes “peoples” under international law? One can plausibly argue that it was one of the biggest controversies attached with the principle of self-determination (Jennings, 1956).

Meaning of the term “peoples”

The term “peoples” as used in international legal documents in connection with self-determination stipulates the collective or group perspective within which the rule functions: the composition and operationalization of political order. The term can also be understood as a declaration of the value of community linkages within and among groups (Anaya, 1993, 2004). In its comprehensive outlook, the term “peoples” may enclose ethnic groups such as Basque, Catalans, Romani as well as groups demarcated by statehood boundaries such as Spanish, Nigerian and the Mexicans. The characterisation of self-determination as a right of “peoples” should not be construed in a manner, which refuses individual as a prime beneficiary of the rule. Antonio Cassese (1995) points out the close relation between individual and peoples self-determination, as he observes that

Plainly self-determination is the *summa* or synthesis of individual human rights because a people really enjoy self-determination only when the rights and freedoms of all individual making up that people are fully respected. On a different level, the enjoyment of individual rights presupposes the realization of (external) self-determination because if a people is oppressed by a colonial or occupant Power, individual cannot really be free to exercise their basic rights and freedom. (p. 337)

The right to self-determination thus involves sharing of values, which includes power, well-being, enlightenment, respect, wealth, skill, rectitude and affection. And, “peoples” self-determination cannot be seen in disunion with individual self-determination though they may have different implication but exhibit common manifestation that is, human dignity. However, interpreting “peoples” self-determination, as a “carte blanche” for every individual is not well appreciated among scholars who think that self-determination right of “peoples” should have restricted scope available only to locally defined and mutually exclusive communities (Anaya, 1993). Anaya identifies two dominant variants of this approach and diagnoses each of them with certain limitations.

One alternative, which normally authorises the status quo, argue that a “people” eligible for self-determination is the entire of a population inside the commonly recognised borders of an independent State or a territory of a traditional colonial type. The premise that self-determination is related with the “people” of a State or colonial territory is not odd with the popular interpretation of self-determination, and it elucidates much of international practice including decolonisation. Anaya (1993), argues that such an understanding would completely delegitimise the efforts of several State-groups that are aspiring for statehood in post-colonial world.

The other view has its source in the ethno-nationalist thoughts at the early 20th century, observes Anaya, and is mirrored in scholarly works pushing for self-determination of mutually exclusive communities based on ethnicity and historical linkages with territory (Anaya, 1993; Ofuately-Kodjoe, 1977). Such an understanding has its own limitation as it overemphasises ethnicity and is not capable to explain the decolonisation, which was not based on ethnic solidarity.

Though, the second view has its limitations but it lays down the foundation for right to self-determination to indigenous communities, which were, until recently not considered as “peoples” in international law and yet there is obscurity, whether indigenous peoples have all the rights accorded to “peoples” or more specifically, whether they have a right to external self-determination in international law?

Indigenous communities as “peoples” in international law

The narrative of indigenous population turning into indigenous peoples is reflection of their struggle from being object to subject of international law (Barsh, 1994). Asserting themselves as “peoples” under the UN Charter, indigenous peoples have had been grappling for the emphatic recognition of their unmitigated right to self-determination (Barsh, 1996). Most of the United Nations members were reluctant to explicitly include indigenous peoples within the understanding of “peoples” under UN documents. This approach is pronounced by the terminology attached with the term “indigenous.” For instance, The Convention on the Rights of Child (United Nations General Assembly, 1989), refers to the children of “persons of indigenous origin.” One of the most important piece of work to the explanation of the concept of indigenous peoples is found in the extensive study done by the UN Special Rapporteur J. Martinez Cobo. His report was entitled, “study of the problem of discrimination against indigenous population” (Cobo, 1986). The word “populations” appeared in the title of the Working Group on Indigenous Populations until the Expert Mechanism on the Rights of Indigenous Peoples in 2007, eventually replaced it. There have also been attempt to restrict indigenous peoples to “people” and devoid them with last “s” (Marantz, 1996). As a result, the UN proclaimed 1993 as the “International Year of the World Indigenous People” (not “peoples”) (UNGA Res 47/75, United Nations General Assembly, 1992).

In the year 1992 the Earth Summit, frequently used the term “indigenous people and their communities” (AGENDA 21, Chapter 26, 1992). The UN World Conference on Human Rights (1993), the UN Conference on Population and Development (1994), and the UN World Summit for Social Development (1995) preferred to settle with “people.” The year 1993 was celebrated as International Year of the World’s Indigenous People, which was followed by International Decade dedicated to them in the capacity of “people.” This recurrent of the term “people” instead “peoples” suggest that international community was still

reluctant to accord indigenous population as a group entitled to have right to self-determination. The sentiment is very well reflected in the statement made by Chief Ted Moses on behalf of North American Region:

They have called us populations, communities, groups, societies, persons, ethnic minorities; now they have destined to call us “people” in the singular. In short, they will use any name they can think of, as long as it is not “people” with an “s.” They are willing to turn universality on its head to avoid recognising our right to self-determination. (qtd in Thornberry, 2002, pp. 41–42).

The struggle to establish indigenous communities as “peoples” within the normative structure of international law, resulted into partial victory with the adoption of ILO Convention 169 (Barsh, 1996). Notwithstanding, the term “peoples” was adopted but subject to a qualification atomised in article 1(3), which states that, “the use the term ‘peoples’ in this Convention shall not be construed as having any implication as regards the rights which may attach to the term under international law” (ILO Convention 169, 1989).

Several indigenous scholars and activists did not appreciate this imposing restriction on the interpretation of the term “peoples” (Urrutia, 1996). They believed that indigenous peoples must have unfettered rights over their cultural and economic institutions. The demand was based upon the preamble of the ILO Convention 169. However, ILO considered that the better forum to discuss right to self-determination would be the United Nations (Niezen, 2003).

The long struggle of indigenous communities for their eligibility as “peoples” in international law and right to self-determination became reality with the adoption of the UNDRIP. However, to root out the fear of claim of independence the tone of the right to self-determination was limited to its internal aspect. Thus, indigenous peoples could exercise autonomy or self-governance in their local matters without prejudice to the territorial integrity of its host nation (UNDRIP, 2007, Article 46). In paraphrasing self-determination into domestic context, the UNDRIP provided boarder themes under which States are entrusted for its realisation through action and inaction. These themes includes right to life and liberty; right to preserve distinct identity based on culture, religion, language and spiritual belief; educational rights; self-governance and participatory rights; land resources and management.

Restricting the scope of self-determination within domestic structure of a State had not been appreciated by every indigenous scholars especially those who maintain that right to self-determination is *jus cogens* (Espiehl, 1980) and they argue that self-determination, as mentioned in the *UN Charter*, cannot be limited to colonial context (Barten, 2015). As such, this assertion becomes relevant when it is being realised that legacy of colonialism is continued with the help of neoliberal values and logic that breaks the causal connection between indigenous peoples impoverishment and colonisation. In addition, it devalues indigenous capacity and justifies State coercive authority under the banner of welfare (Strakosch, 2015).

Remedial secession and Indigenous peoples: an inquiry

It is generally observed that an international norm undergoes mutation so that it becomes potentially capable to meet the demands of international community in transition from a coterie of European States to more equal widespread society (Knop, 2002). Apropos to the metamorphoses of the concept of sovereignty, can right to self-determination, from the reference of indigenous peoples, evolve and transgress the “territorial integrity” gulf to ensure a right to remedial secession?

States are strictly rejectionist and often apprehensive on any question of “statehood” by indigenous peoples (Iorns, 1992). As regard to the reasoning for such a standpoint, it appears that their two major contentions are, first, that the indigenous peoples’ societies lack capacity to undertake responsibility of performing legal obligations under international law (Clinebell & Thomson, 1978; Lenzerini, 2006). This type of ascription to indigenous peoples is project of colonial tutelage, which doesn’t consider indigenous peoples’ societies as “authentic” legal entity. The second objection stems from the assertion that indigenous peoples’ statehood aspirations may increase political entropy in global world order (Buchanan, 1997; Radan, 2000). Hence, two cardinal principles of international law, the principle of territorial integrity and doctrine of *uti possidetis* were used to secure stabilisation of global world order.

The principle of “territorial integrity” was used to anchor solidarity and unity within States during post-Second World War international legal order which saw a wave of secessionist movement (Crawford, 1976; Vidmar, 2012). This principle serves a twofold purpose. First, it act as a principle of conduct between States in their international relations and in this sense, a State shall refrain itself from any action which is detrimental to the territorial integrity of any other State (UN Charter, 1945, Article 2[4]; UNGA Res. 2625, United Nations General Assembly, 1970). Second, it places limitation on the scope of right to self-determination of peoples, thereby group aspiring for independent political status and pursuing economic, social and cultural development shall not impair the unity of State of residence. Hence, right to independence was limited to colonial territories rather than “peoples” based on colour, creed, race or ethnicity (Hannum, 1998; UNDRIP, 2007, Article 46).

The principle of *uti possidetis juris* has its roots in Roman law and commonly referred as “*uti possideatis, ita possodeatis*” or “as you possess, so may you possess.” It is identified with an interdict of the *Paretor*, prohibiting any change in the prevailing state of possession of immovable property as between two competing parties (Raič, 2002). Consequently, burden of proof of ownership was incumbent upon the party, which was not in possession. This signified an advantage for the possessor, who had a better chance, even if he was the aggressor and wrongfully acquired the possession (Ratner, 1996).

The doctrine of *uti possidetis* transcended the Roman law structure and later evolved into an important principle

governing decolonisation. As a principle consecrating the administrative contours of ex-colonies, its international application was first seen in 1810 and later to Central America in 1821 (Ratner, 1996). The objectives of the doctrine were chiefly centred on two subjects. First, and primarily, to put a check on any fresh lease to the European colonisation based on the yet another colonial theorisation that some parts of the ex-colonial territories are still *terrae nullius* and therefore subject to *occupatio*, and second, to avoid any sort of boundary disputes between newly emerged States (Colombia v. Hyde, 1947; Venezuela, 1922).

Basically, through the principle of *uti possidetis*, the administrative borderlines in colonial territories were crystallised into international boundaries. In substance, it overwhelmingly negated non-scientific basis of boundaries as in the case of Africa. Boundaries on the African continent were drawn in most cases with little or no consideration for elements such as ethnicity, geography, tribal and indigenous culture or economic convenience (Birmingham, 1995; Libya v. Chad, 1994; Shaw, 1996; Mutua, 1995).

Several States claim the inviolability of the above-mentioned international law principles as a counter to any claims of secession. It is this argument of “basic principles” and its protection, which deprives indigenous peoples from any quest of statehood. There is always a debate among scholars on the issue of legality of right to secession in international law (Buchanan, 1991; Buchheit, 1978; Hannum, 1990; Milanovic, 2017; Oguh, 2018). Majority response on the question of right to secession in international law is dismissive in nature, best exemplified the statement of the then Secretary-General of the United Nations, Mr. U. Thant (1970), “the United Nations has never accepted and does not accept and I do not believe, it will ever accept a principle of secession of a part of a Member State” (p. 36).

On the other hand, there are scholarly writings, which suggest that international law may not provide a positive right to secession but it doesn't completely end the possibility of creation of new States (Oguh, 2018; Orihuela Calatayud, 2018; Pronto, 2016; Slomanson, 2015). It seems there exists a possibility of secession only in exceptional case (Murswiek, 1993). Catherine J Iorns (1992), brings out four possible approaches under positivist framework of international law with respect to indigenous peoples vis-à-vis right to remedial secession. The first one takes an interesting line of thought by arguing that any demand of separate statehood by indigenous peoples should be seen as a part of exercise of self-determination, which is not limited to “salt-water” colonialism. Ian Brownlie, chief protagonist of such viewpoint, argued that Dene and Inuit peoples of the Canadian Northwest Territories are eligible for statehood for because the area concerned was geographically distinct, separate and discernable, making a case for decolonisation paradigm centred on repatriation of indigenous land. In other words, those indigenous peoples who are in pursuit of separate statehood can be considered as “colonised entity” and hence eligible for self-determination under positive international law and don't require any separate claim in

terms of a right of secession (UNGA Res. 1541(XV), United Nations General Assembly, 1960; Iorns, 1992; Brownlie, 1985). This approach, however, does not completely resolve the issue of secession especially in the context of indigenous peoples. First, because of integration, acculturation, assimilation or migration of indigenous population within their State of habitat, they may no longer be a separate territorial group. Therefore, they may not fit into the Brownlie's notion colonialism. Second, because the States in which indigenous peoples live have well recognised international borders and separate indigenous statehood would not be perceived as indigenous peoples' independence but as an act of secession (Iorns, 1992).

The second approach relates to the understanding developed by undersized group of scholars hypothesising an unlimited *jus secedendi* for all groups considered as “peoples” (Murswiek, 1993). They argue that “when the associational right of a group to determine its political existence conflicts with an existing State's right of non-interference, the right of secession is paramount” (Collins, 1980, p. 803). Such a notion has limited support both in terms of scholarly evidences and State practices.

The third approach refers to conceptual framework, which recognises the fact that despite international law denial of positive right of secession, it has not absolutely prohibited future recognition of limited right of secession. Besides that, any recognition of limited right of secession shall not be inconsistent with present day international law (Buchheit, 1978; Crawford, 1979; Iorns, 1992; Nanda, 1997). For Crawford (1979), creation of new States through secession is neither legal nor illegal, but it does cast legal implications. Assuming that secessionist movements may be on the rise in future, Buchheit argues that standardisation of norms for legitimate secession would tend to neutralise the friction resulting from the State action and separatists claims. With the intention to boost order and abridge disorder while dealing with secessionist claims, he suggests, to develop utilitarian arrangement, “whereby the institution of the existing State will be respected, unless to do so would contribute to more international disharmony than would result from legitimating the separation of a component group” (Buchheit, 1978, p. 227). In the same league, Nanda (1997) seek small window of opportunity for secessionist claim based on serious human rights violations.

The fourth approach is an extension of Buchheit's utilitarian approach towards any right to secession. It sets for the development of standards and grounds on which issues of secession can be adjudicated, thereby ascertaining the legality of the claims (Iorns, 1992).

After all the deliberation, it can be deduced that issue of remedial secession does have a bearing on indigenous peoples. There can be a limited opportunity for remedial secession in international under extreme conditions. It is therefore argued that indigenous peoples secessionist measures may be legally justified if all of the following conditions exists. First, *large scale violations of basic*

human rights, the maltreatment and discrimination of indigenous communities leading to real fear and practice of ethnocide and genocide can warrant indigenous peoples to secede from oppressive system as a right to self-defence (Neuberger, 1986). Of late, scholars and activists have argued that forceful grabbing of indigenous peoples land should be construed as genocide (Charles, 2020). For instance, a far right Bolsonaro's government policy to privatise Amazon forest endangers the lives of indigenous peoples and forest dwellers in Brazil (Souza, 2020). Similarly, in the Dakota Access Pipeline case, President Trump of the United States of America paved the way for project undermining the concerns of Standing Rock Sioux tribe (Charles, 2020). However, as a matter of principle, intention to secede should be the last resort when all other legal remedies are exhausted or denied (Kamanu, 1974).

Second, *deprivation of political autonomy in form of self-governance*, in addition to the requirement of large scale human rights violations, the remedial claims should also be evaluated on the basis of indigenous people's chance of self-rule. A genuine demand to secede must demonstrate that the group's existence within the integrated State is threatened because of deprivation of due degree of autonomy to which they are rightful claimant. In this sense also, remedial secession should not be treated as an entitlement but an exceptional derivation to the universal right to self-governance (Orentlicher, 2003).

Self-governance should be seen as part of larger intrastate autonomy for indigenous peoples. This can be justified on the following grounds: First, the formation of intrastate autonomy system for indigenous peoples may be prescribed for the purpose securing rectificatory justice in the interest of reinstating the self-governance of which these peoples were deprived by colonisation. Second, intrastate autonomy can ensure a non-paternalistic system for defending indigenous individuals from sufferings and abuses resulting in infringement of their individual human rights and for offsetting the continuing damaging effects of historical injustice towards them. Third, it may be necessarily required to institutionalise the concept of self-government for indigenous peoples to realise resolution of land disputes aroused due to violation of treaty by the colonisers and their successors. Fourth, rectificatory justice can entail actions to safeguard indigenous peoples from the harmful effect of the discontinuation or non-recognition of the indigenous customary law that shaped and promoted their distinct culture and lifestyle (Buchanan, 2004). A good self-governance model should be judged from the vantage point of indigenous peoples aspirations and their role in design of the internal structure of governance (Evans, 2014). For example, the innovative "Whānau Ora" approach to indigenous health and social services in New Zealand, driven by Māori cultural values, which focuses on holistic well-being of multigenerational family than individual, have shown sign of success.

It is noteworthy to mention that the re-establishment of some form of territorial based autonomy for indigenous communities may grease the wheels for rectificatory

justice, but it also has tendency to defeat the principles of distributive justice within the State and pulverise legitimate expectations of many non-indigenous population. It may be immoderate to extinguish rights of millions of people who were not responsible for destruction of indigenous society (Waldron, 1992). Hence, any grievance redressal mechanism to rectify unfairness towards indigenous peoples must in some way consider the demands of distributive justice concerning the non-indigenous society co-existing with indigenous societies (Waldron, 1992).

Third, *traditional criteria of Statehood*, the parameter for assessing the intrinsic worth of indigenous remedial secessionist claim ought to take in some of the traditional standards for recognising a sustainable State. The traditional standards for statehood not only have a distinct legality accepted under international law, but also have capacity to examine real worthiness of a secessionist conditions. For all practical purposes, any real State must have certain determinable territory and population, and a government apt for maintaining operative control. Necessitating *actual* control over the territory may countenance use of force and violence, therefore as a pre-condition it should be de-emphasised. Preferably, the government should have democratic ethos and non-discriminatory in nature. Support of both indigenous and non-indigenous community would be an ideal situation (Frankel, 1992).

Conclusion

Sovereignty exhibits temporal relativism in terms of its meaning and scope. What it used to symbolise and what it presently stands for depends upon the political subjects who have unfold its ambit and continue to do so in defining relationships with one another; setting their political agendas; and their plans for attaining and sustaining autonomy and social justice. Thus to appreciate how sovereignty matters and for whom, historical and cultural context must be taken into account. In connection with indigenous peoples, traditional notion of sovereignty carries the unpleasant traits of colonialism. Indigenous peoples have seriously put a challenge to this archaic notion and redefined the concept from their own perspective. For them, indigenous sovereignty is linked with identity and right to self-determination. Self-determination should be understood as power of "peoples" to control their own destiny. Therefore for indigenous peoples, right to self-determination is instrumental in the protection of their human rights and struggle for self-governance. However the indigenous peoples' right to self-determination inherently carries a gene of secessionist tendency which should be democratically neutralised to the maximum possible extent by ensuring political and social autonomy to indigenous communities and respecting their human rights.

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