INDIGENOUS GROUPS

AND THE POLITICS

OF RECOGNITION IN ASIA:

CASES FROM JAPAN, TAIWAN, WEST PAPUA, BALI,
THE PEOPLE'S REPUBLIC OF CHINA, AND GILGIT.

INDIGENOUS GROUPS AND THE POLITICS OF RECOGNITION IN ASIA:
CASES FROM JAPAN, TAIWAN, WEST PAPUA, BALI, THE PEOPLE'S REPUBLIC OF CHINA, AND GILGIT

to be published in the International Journal on Minority and Group Rights
Volume 11, Issue 1-2, 2004 (Koninklijke Brill NV, The Netherlands)

Editor in Chief of IJGMR:
Gudmundur Alfredsson, Raoul Wallenberg Institute of Human Rights and Humanitarian Law – University of Lund, Sweden

Guest Editors:
Benedict Kingsbury, Faculty Director of the Institute for International Law and Justice – New York University School of Law, USA

Kirsty Gover, Institute for International Law and Justice Graduate Scholar – New York University School of Law, USA

TABLE OF CONTENTS

Editorial Note

Indigenous Groups and the Politics of Recognition in Asia: Cases from Japan, Taiwan, West Papua, Bali, the People's Republic of China, and Gilgit

This special symposium issue on the International Journal of Minority and Group Rights addresses current questions concerning indigenous peoples in several parts of Asia. Each paper draws on original research, utilizing languages of the region, and makes available material that is difficult to obtain and rarely analyzed in English. The authors are mainly recent graduates of Professor Benedict Kingsbury's course at New York University Law School. For the most part they are newly minted lawyers or doctoral students rather than established scholars, although some have considerable field experience with the groups involved. The papers address controversial subjects - we as editors do not share all of the views the contributors express, and readers will also hold varying opinions about these issues. The papers present carefully researched material and a range of fresh ideas on topics where the existing literature is often sparse. We are pleased to introduce the papers.

If the paradigmatic experiences of indigenous peoples in the Americas and Australasia has been seaborne invasion by settlers and abrupt annexation by the colonizing State, the paradigmatic experience in Asia has been more gradual usurpation of control over distinct groups and their lands, accomplished as much by infiltration and encroachment across unified land masses as by invasion.[1] Contact between an incoming majority and relatively enclosed tribal groups may have proceeded for centuries before institutional dominance was achieved through the apparatus of the State, and the formality of acquisition may not have been so prominent as in organized settler colonialism. These paradigms have a bearing on official attitudes to use of the term 'indigenous peoples', which is generally accepted by government ministries in States shaped by European settlement, but is often resisted in Asian states.[2] Yet these paradigms are by no means exhaustive of the spectrum of cases in each region. There are cases of gradual interaction and mixing in the Americas and in the Nordic region, and many cases of rapid colonization in Asia. Moreover, points of commonality between regions are readily identified by advocates focused on similarities in specific issues such as land title, exploitation of natural resources, relations with multinational corporations, demands for autonomy, or means of political representation in State structures. The global mobilization of the indigenous peoples movement and of NGOs, the transmission of ideas about these

[1] *See for example*, K. Sjoberg, 'Practising Ethnicity in a Hierarchical Culture: The Ainu Case', in R. H. Barnes *et al.* (eds.), *Indigenous Peoples of Asia* (Association for Asian Studies, Ann Arbor, 1995) pp. 378-379.
[2] B. Kingsbury, 'Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy', 92 *American Journal of International Law* (1998) p. 414.

issues by institutions such as the World Bank and the Asian Development Bank, and the borrowing and adaptation of concepts between administrations of different States. have increased the connections between the ideas used in different places by claimants and by national policymakers. Local variations in terminology and concepts continue to matter at the level of national politics, and in the working out of issues at very local levels there may be scant evidence of any global convergence. In this Introduction we use terms such as 'indigenous peoples' or 'ethnic minorities' or 'national minorities' without close regard to local context or to particular political controversies about the terms, our intention being simply to refer in each case to a locus of ideas. In local, national and global contexts such terms do not necessarily carry within them a robust justification that determines questions of meaning: "understanding a general term is nothing more than the practical activity of begin able to use it in various circumstances".[3]

Modalities and Problems of Ethnic Recognition

The central dynamic unifying this set of papers is the interaction between claims made by self-identified non-State indigenous groups on the one hand, and responses to and recognition of these claims and claimants on the other hand. Responses and recognition may be by the territorial State or by other actors such as major corporations, international organizations, local and international NGOs, competing or allied claimants, and social and political groups in the ambient population. A bid for recognition requires the claimant group to demonstrate that it is identifiably distinct from the majority population, and often also to show that its situation is analogous to that of entities already officially recognized. As Duncan Ivison has pointed out: 'Gaining political or legal recognition from the state, or from an international system of states, entails organizing yourself in light of certain regulative norms enforceable by the state. The paradox is that [reducing] the presence of the state in one sphere of social or political life requires that it be increased in others, acting at a distance.'[4] This dynamic has been associated by post-colonial critics with the 'governmentalization' of minority rights.[5] In some places 'governmentalization' is a fair characterization: the State or the inter-State system dominates the contemporary environment, and historical local groups are constrained now to react in the State's official history rather than espouse their own. But the situations canvassed in these papers demonstrate that the dynamics are often much more complex, with numerous public and private actors exercising agency to different degrees, and divergent histories flourishing.

Saeko Kawashima addresses some current claims of the Ainu people, and the responses so far made to these claims in Japanese state law and policy. While the Japanese government has recognized the Ainu as an ethnic minority, and the Sapporo District Court in the *Nibutani Dam* case recognized the Ainu as indigenous in

[1] J. Tully, *Strange Multiplicity* (Cambridge University Press, Cambridge, 1995) p. 106.
[4] D. Ivison, *Postcolonial Liberalism* (Cambridge University Press, Cambridge, 2002) p. 43.
[5] *Ibid.*

Hokkaido, governmental acceptance of current Ainu claims has not extended from cultural matters into spheres such as political representation. She draws attention to the unsatisfactory denouement of legal proceedings alleging mismanagement by State bureaucracies of trust funds set aside for Ainu under the 1899 Hokkaido Former Aborigines Protection Act, and includes as an appendix her unofficial English translation of this decision. This translation will be of particular use to scholars studying the comparative law of indigenous peoples' trust funds, including the USD 137 billion class action of some 280,000 Native Americans against the Bureau of Indian Affairs and the US Department of the Interior for mismanagement of Indian assets and failure to account to beneficiaries.[6] Her paper illustrates an extreme case of a puzzle of positive political theory raised by indigenous peoples in many countries; how to explain the national political salience in a country of 125 million people of the claims made on behalf of perhaps 25,000 people with limited mobilization and little direct political influence? Her own argument, consciously made as a non-Ainu member of the majority in Japan, indicates part of the answer. Kawashima seems to share the premise, increasingly prevalent in other democracies consolidated through colonizing territorial expansion, that indigenous peoples were excluded from participating in nation-building processes and that the legitimacy of current governance arrangements is to some extent in question until their clear consent is secured. This implicit acknowledgement underpins governmental initiatives to affirm the legitimacy of the State through symbolic action, including apologies and the use in some public institutions of indigenous cultural insignia and terminology. These practices, like Kawashima's paper, can be interpreted as indications of the government's and the majority's willingness to engage with indigenous peoples, albeit within carefully limited parameters.

Ming-Hsi Sung's paper, addressing the rapidly evolving dynamic of recognition of indigenous peoples' status and claims in Taiwan, suggests some further explanations for the rise of recognition in the special circumstances of Taiwan. He traces shifts in approaches by the dominant political classes through the periods of imperial Chinese rule, increasing Western commentary on aboriginal peoples in Taiwan in the second half of the nineteenth century, Japanese colonial administration of Taiwan, KMT rule after 1945, and recent democratization. Against this background, he explores the official willingness conscientiously to recognize the special status of indigenous groups, and defends administrative adherence to Japanese colonial-era objective census criteria rather than self-identification as the basis for doing so. He suggests that Taiwan's global political concerns provide part of the explanation for the government's development of this pluralistic policy, noting the drive to define a Taiwanese nation and to distinguish it from mainland China culturally (in terms of ethnic identities and diversity) and politically (in terms of policies on ethnic minorities). In his view, this strategy both provides a basis for Taiwanese to resist the unificatory implications of the 'we are all one people' argument used in support of the PRC's one-China policy, and represents part of a commitment in Taiwan to economic and political models associated with capitalism and democracy. Having established this framework, the paper focuses on one of its greatest

---

[6] The ongoing proceedings in *Cobell* v. *Norton, see for example* 240 F.3d 1081.

4

current challenges, the claims to recognition by members of a self-identified Ping-pu group. Whereas the government has hitherto been willing to recognize very small groups as indigenous peoples, the category of Ping-pu could include over 3 million people whose present culture and lifestyles are often not easily distinguishable from the ambient majority population. The vast majority of this potentially very large Ping-pu group are thought not to be able to prove their descent from individuals identified as indigenous by the Japanese colonial government. The relatively small number of self-identifying Ping-pu individuals who can show genealogical indigeneity by descent from such individuals are generally already categorized as belonging to recognized indigenous groups, and many seek their reassignment to what they believe should be a recognized Ping-pu collective. The Ping-pu movement for recognition is apparently couched simply as a demand for acknowledgement, since its leaders at present seem content not to make claims to the special privileges accorded to indigenous peoples in Taiwan in such matters as school and university admissions – claims which, if made generally by Ping-pu, would have a dramatic effect in Taiwanese politics. This forbearance is offered as an express *quid pro quo* for recognition, but how robustly it will endure in the future is an issue that clouds the recognition debate. Sung argues that the ideas of recognition and entitlement should be separated: some groups may justly seek recognition, but not be deserving of the types of targeted assistance that at present are entitlements accompanying indigenous status. Entitlements based on indigenous status, without discretion as to how and what type of benefit will be conferred, could lead to the dilution of the claims of those groups who have a particular moral and political claim to special assistance from the State. These 'priority claimants' might include those whose cultural and geographical isolation constrains the processes by which they engage in the mainstream affairs of the State, or whose small population makes it exceptionally difficult to secure adequate representation for their views in democratic fora. In addition, those groups who maintain a close attachment to lands may be able to demonstrate more immediately the contemporary impacts of historical injustice, as in the loss of territory for the maintenance of an agrarian lifestyle. Sung notes that the indigenous/non-indigenous categorization adopted by colonial authorities was a crude but efficiency-enhancing reductionism that remains broadly accepted as legitimate, despite its arbitrariness, because social understandings have evolved to track these categories. He notes that this binary approach promoted convergence within the category of 'indigenous peoples', and hardened the external borders of this category. The claims made on behalf of Ping-pu reflect the shedding over time of internal divisions, so that the idea of 'Ping-pu', which was once relative and internally complex, has transformed into the idea of a tribal, ethnically coherent group, because the recognition framework admits no other sort of group. He defends the census-based approach adopted by the Japanese administration as a sensible solution to the issue of competing conceptions of authenticity. It accepts the unsolvable indeterminacy of questions of ethnicity and adopts an approach which recognizes that the categorization process must be based on political considerations.[7] In

---

[7] Compare to Benedict Anderson's account of the use of in colonial south-east Asian of census

this approach, officially-recognized individual identity forms the starting point for composing the group, rather than official recognition of the group providing the opportunity for assertion of individual affiliation. The policy aim was to limit costs by imposing an upper limit on the number of those qualified, while allowing reorganization where needed within finite numerical limits. Sung's policy argument is that the same goal can now be pursued by conferring recognition without entitlement. He asserts that the government has the discretion to establish a new collective known as the Ping-pu even if those people claiming to be Ping-pu have historically missed out on the assignment of individual status as indigenous.

Aderito Soares' paper on relations between the US-based Freeport McMoRan corporation and local communities around Freeport's Grasberg mine in West Papua introduces the policy of a locally-dominant multinational corporation as a further element shaping indigenous claims and ethnic recognition. Faced with local indigenous resistance, external pressure led by NGOs, the need to maintain symbiotic relations with the Indonesian security forces and with the Jakarta government, and the changes in Indonesia's political environment towards democracy and decentralization after the fall of President Suharto in 1998, Freeport's strategy in West Papua has shifted toward a greater willingness to make deals with local community groups and provide benefits to them. Soares draws attention to the divisive impacts on local indigenous organizations of these corporate and governmental initiatives. The availability of funds encourages a proliferation of new organizations whose *raison d'etre* is to bring claims and apply for grants. Recognition by the corporation and by government officials of some groups rather than others operates as an additional incentive reshaping local community organization and leadership, or reinforcing existing power imbalances and longstanding rivalries between groups. Soares suggests that in West Papua, key administrative and representational roles were increasingly allocated to those groups affected most palpably by mining operations, while secondary roles and less authoritative status were granted to other groups in the region. Others have argued that the Amungme accumulated a disproportionate share of power relative to the Kamoro and other regional groups, in part because Amungme in the highlands mine area were more isolated and so more cohesive, whereas the Kamoro in the tailings-deposition and lowland and coastal areas had long suffered incursions of slave-traders, colonists and neighboring groups, and were left with a more diffuse organizational structure that was relatively pliant to Freeport's policies.[8]

---

classifications identifying minorities in need of special political representation, in which minority groups were named and collected by colonial powers in order to form viable coalitions against larger sub-State groups with the capacity to make nationalistic bids for power in competition with colonial authorities. B. R. Anderson, 'Introduction' in *Southeast Asian Tribal Groups and Ethnic Minorities* (Cultural Survival, Cambridge, 1987) p. 5.

[8] D. Leith, *The Politics of Power: Freeport in Suharto's Indonesia*, (University of Hawaii Press, Honolulu, 2003), p. 86. By contrast, Tania Li has suggested that frequent conflict may have reinforced the defensive boundaries of affected collectives elsewhere in Indonesia: "Where definite, tribe-like social units were found in the interior, their emergence could often be traced to conditions of warfare and conflict. In the absence of such encounters and confrontations, loosely structured, decentered, often scattered populations did not view themselves as distinct ethnic groups or tribes, and their identities remained

In West Papua, the Indonesian government seems in recent years to have encouraged the establishment and formalization of five additional tribal NGOs to counterbalance Amungme resistance to engagement with Freeport, and it supported the establishment of an alternative Amungme representative group after the main Amungme organization (LEMASA) refused to participate in the design and implementation of Freeport's One Percent Fund.[9] Soares' portrayal of the flux and shuffling of authority among local groups and between public and private actors highlights the challenges of public-private collaborations characterized by extreme power-imbalances. These challenges include the potential for cooption of local leaders into the institutional arrangements of the corporation (which may empower the grouping as a whole or generate a new wealthy elite at the expense of the majority of group members), the creation of local dependency on short-term arrangements, and inequity between the resources available to local indigenous groupings and to groups now resident in the region who migrated in search of work or were moved in fulfillment of government transmigration policies. Problems in these asymmetrical dynamics are easier to identify than they are to adequately remedy. Multinational corporations, much more than the territorial State, have the option of disengaging from relationships with local actors. The implications of closure of the Grasberg mine, especially an early closure, would be enormous. Freeport is reportedly the single largest taxpayer in Indonesia and the largest employer in Papua, although ethnic Papuans make up only about 26 per cent of Freeport employees in West Papua.[10] The terms of exit may also be problematic. It is reported that "[n]either Freeport's 1967 contract nor its 1991 contract detailed a mine closure plan. It was not until 1996, as part of its deal with the US Overseas Private Investment Corporation (which had threatened to revoke the investment insurance policy), that Freeport committed itself to providing a $100 million mine closure fund for the eventual rehabilitation of the mine site."[11] Some of the challenges are exemplified by the case of the Ok Tedi copper mine in the central highlands of neighboring Papua New Guinea. Ok Tedi accounts for approximately ten per cent of Papua New Guinea's GDP and approximately twenty per cent of its exports. The Australian multinational BHP Billiton faced major environmental problems, damaging publicity, and declining profitability at Ok Tedi. BHP was reportedly unable to secure agreement for the

only vaguely specified." T. M. Li, 'Articulating Indigenous Identity in Indonesia: Resource Politics and the Tribal Slot', 42:1 *Comparative Studies in Society and History* (2000) p. 158.

   [9] "Unfortunately, management and distribution of this money has been contentious from the start. Though certain aspects of the fund, particularly health and education programs, have been somewhat successful, struggles over the fund's other uses have resulted in violent – even deadly – conflict on a number of occasions. Freeport has attempted to reform this fund by forming the Voluntary Land Rights Trust Fund, which places significant portions of the One Percent Fund in trust for the Amungme and Kamoro descendants." Council on Foreign Relations, *Indonesian Commission: Peace and Progress in Papua* (Council on Foreign Relations, New York, 2003), p. 53.

   [10] Council on Foreign Relations, *Indonesian Commission: Peace and Progress In Papua* (Council on Foreign Relations, New York, 2003) p. 7.

   [11] D. Leith, *The Politics of Power: Freeport in Suharto's Indonesia*, (University of Hawaii Press, Honolulu, 2003) p. 175.

early closure of the mine from the other shareholders, these being the Papua New Guinea Government with 30 per cent and Inmet Mining Corporation with 18 per cent of the shares. In February 2002, BHP announced it would withdraw from the mine and transfer its 52 per cent equity share to a development fund known as the PNG Sustainable Development Program Limited. The Program is intended to use dividends paid during the mine's remaining operational life (until 2010), to fund development projects in Papua New Guinea, especially in the Western Province, for up to forty years following the mine closure.[12] As a *quid pro quo* for its own withdrawal, BHP sought protection from future liabilities. It claimed to have received informed consent for continued operation of the mine, and for the compensation payments, from 95 per cent of the persons directly affected by the mine's operation, in a consultation led by the Papua New Guinean government and overseen by the Individual and Community Rights Advocacy Forum, a Papua New Guinean NGO.[13]

The paper by John MacDougall and Frederick Rawski on post-Suharto Indonesia highlights a further tension in indigenous group claims to recognition, by focusing on the connections between governmental decentralization, recognition of traditional local governmental units, and pro-local chauvinism. Aspirations of indigenous groups to control their own affairs and locales are often couched as demands for autonomy, and any localizing shift in power and institutional structures can be expected to build up a new class of local political elites as well as to increase the importance of emerging local networks of political patronage. That the post-Suharto shift to regional autonomy has had this result is not surprising, but MacDougall and Rawski point to the immense difficulties in reaching general conclusions about the costs and benefits of such an approach, especially in a polity as diverse and complex as Indonesia. They note variations in the specific local organizations that have been empowered through decentralization, some being modern political formations, others being longstanding units whose legitimacy is fortified by appeals to traditional values. In their case study of Bali, they emphasize the hazards to intra-Indonesia migrants of institutions and political rhetoric that are premised on the primacy of indigeneity.

Shuping Wang's paper on policy approaches in the People's Republic of China further explores the problems for State institutions of choosing among different theoretical bases for deciding which groups and group claims to recognize. She chronicles the development and application of an ethnic minorities policy in China, with its focus on regional autonomy under firm central control.[14] This framework may

[12] *BHP Billiton Withdraws from Ok Tedi Copper Mine and Establishes Development Fund for Benefit of Papua New Guinea People*, 8 February 2002, News Release, BHP Billiton. <www.bhpbilliton.com/bb/newsCentre/newsReleaseDetail.jsp?id=News/2002/NR_NewsRelease_080202.html>, visited on 25 February 2004.

[13] Ok Tedi Mining Limited, *Update on Ok Tedi*, 10 March, 2001. <www.oktedi.com/reports/news/8/NEWS_Update_10_3_2001.pdf >, visited on 3 May 2004.

[14] The Law on Regional Ethnic Autonomy was adopted in 1984 at the Second Session of the Sixth NPC as the basic law specifically guaranteeing that the constitutionally decreed regional ethnic autonomy system is carried out. According to the popular website of the Chinese Internet Information Center:

have contributed to a sense of unity among the designated Han people, a category encompassing some 94 per cent of China's population.[15] Wang points to problems this framework has not solved for particular minority communities, including problems relating to land, natural resources, environmental degradation, and control over development priorities. She evaluates alternative conceptual frameworks used abroad, including human rights, minority rights, self-determination, and indigenous peoples' rights, and concludes that simply importing any one of these concepts into Chinese policymaking is unlikely to be fruitful. Rather than adopting a concept of 'indigenous peoples' based largely on Western categories, she recommends that the Chinese government draw on existing cultural and political understandings within China to extend the ethnic minorities policy to encompass policy approaches based on collective human rights, minority rights, and core specific features of the international law of indigenous peoples' rights.

Anita Raman addresses the situation of people in what at the end of British rule was the Gilgit Agency, now administered by the Federal Government of Pakistan as the 'Northern Areas'. Bounded to the south by the Western Himalayas, to the west by the Hinduraj mountains, to the north by the Hindukush and Karakoram mountains, and to the east by the valleys and ranges in the vicinity of the India-Pakistan ceasefire line, the peoples in this area have historically been distinctive, although they were within the domain of the Dogra rulers of Kashmir for a century prior to 1947. The area is formally claimed by India, with seats set aside in the Indian Lok Sabha (the lower house of Parliament) awaiting the arrival of representatives from the area. Although administered by Pakistan, at present the area is not formally claimed as part of Pakistan nor mentioned expressly in the current Pakistani Constitution adopted in the early 1970s. Rule by Pakistan federal authorities lacks the representative decision-making bodies, judicial institutions, and mechanisms for governmental accountability that operate elsewhere in Pakistan when the country is not under martial law. For these reasons, exacerbated by the effects of the proclamation of martial law in 1999, the political preferences of the inhabitants can not readily be assessed from the outside. Some (often Sunni, and especially in

---

"Now apart from five autonomous regions (the Inner Mongolia, Xinjiang Uygur, Guangxi Zhuang, Ningxia Hui, and Tibet autonomous regions), China currently has 30 autonomous prefectures and 120 autonomous counties (known, in some cases, as "banners"), in addition to more than 1,300 ethnic townships. The organs of self-government in ethnic autonomous areas are the people's congresses and people's governments of autonomous regions, autonomous prefectures and autonomous counties (banners). The chairperson or vice-chairpersons of the standing committee of the people's congress and the head of an autonomous region, autonomous prefecture or autonomous county (banner) shall be citizens of the ethnic group(s) exercising regional autonomy in the area concerned." *Regional Ethnic Autonomy* <www.china.org.cn/english/features/38106.htm>, visited on 25 February 2004.

[15] Dru Gladney notes the long history of projects under which "[t]he Han were seen to stand in opposition to the Others on their borders, the Manchu, Tibetan, Mongol and Hui, as well as the Western Imperialist . . . By drawing together under the collective imagination of one Han people, the Nationalists thought they could prevent the total dismemberment of the Chinese state." D. C. Gladney, *Muslim Chinese: Ethnic Nationalism in the People's Republic* (Council on East Asian Studies, Cambridge, 1991), pp. 85–87.

the Diamer District) seek formal incorporation into the autonomous entity of Azad
Jammu and Kashmir (the Pakistan-controlled portion of the disputed Kashmir ter-
ritory, called 'Azad' as an indication of freedom from India, which is not formally
claimed as part of Pakistan). The High Court of Azad Jammu and Kashmir in 1993
upheld arguments for incorporation of the Northern Areas into this autonomous
entity[16] but this created difficulties for both the Government of Pakistan and the
Government of Azad Jammu and Kashmir, and the decision was overturned by the
Supreme Court of Pakistan in 1995, on the basis that it involved a non-justiciable
political question. Other inhabitants (often Shia) seek constitutional reform within
Pakistan, perhaps to make the Northern Areas into the fifth province of Pakistan,
comparable to Sindh or Baluchistan. The Supreme Court of Pakistan gave support
to demands for constitutional reform in 1999,[17] but major reform has not occurred.
Other inhabitants favor local self-rule (including some Baltistan people who seek
separation from Gilgit) or independence. Moves in any of these directions have
implications for the international politics and demography of the Kashmir question.
They could also implicate Pakistan's relations with China, with regard both to bound-
ary questions and transit on the connecting highways, and might raise concern about
control and allocation of water in the major rivers of the area. Anita Raman argues
in favor of a plebiscite in the Northern Areas, urges that independent statehood be
one of the options offered, and advocates a restrictive franchise which would exclude
migrants (mainly Punjabi and Pukhtun, and predominantly Sunni) who remain full
citizens of Pakistan. All of these positions are controversial. For the time being the
wider politics make major reform initiatives unlikely, but the difficulty and con-
tentiousness of the issues should not be allowed to obscure their importance to the
lives of the people involved, whose voices have been little heard.

Developmentalism, Pluralism, and Order

The articles highlight the significance of government policy and law in the shaping
of ethnic identity, particularly where the State is strong relative to other social forces.
With regard to such States, the papers explore the tension between two partially
competing national goals: stability and unity on one hand and inclusiveness and
plurality on the other.
   Historically, the formation of a State from a collection of relatively enclosed sep-
arate groupings may have required strategies to construct a majority and place it in
opposition to other groupings inside or out of the proposed national unit, while
simultaneously reassuring smaller collectives that their interests would be served
through participation in the new coalition. In most of the cases discussed by the

---

[16] *Malik Muhammad Miskeen* v. *Government of Pakistan*, Writ Petition No. 61 of 1990 (High Court
of Judicature, Azad Jammu and Kashmir, 8 March 1993) republished in Kashmir Human Rights Forum,
High Court of Judicature, Azad Jammu and Kashmir: Verdict on Gilgit and Baltistan (Northern Area)
(hereinafter Writ Petition), p. 71 (1991).
[17] *Al-Jehad Trust* v. *Federation of Pakistan*, 1999 S.C.M.R. 1379.

contributors, however, the particular groups involved were not important enough in size or strategic position to be built into core bargains early in modern State formation, and their consent remained in question after the establishment of the territorial state infrastructure.

Benedict Anderson has analyzed late colonial policy of European rulers in South-East Asia as the construction of ethnic identity and oppositions in order to build a majority coalition able to legitimate the otherwise unappealing fact of minority rule by the colonial authorities and their local collaborators. In Dutch rule in Indonesia, for example: "The last designated ethnicities recruited for colonialism's majority game were those that had merely symbolic, quasi-juridical importance. Collectively, we can think of them as hill tribes, slash-and-burn swidden agriculturalists, 'stone-age populations' and so on. Typically these were groups, real or census, that were numerically small, geographically remote and without valuable economic resources."[18] In modern State building enterprises also, distinctive groups of this sort may become important to the legitimation of the national polity or of its specific constitutional arrangements. States may manipulate the symbolic meanings of minority groups and their worldviews to further governmental goals, in ways which may or may not correspond with the groups' own interests. In recent years the construction of a concept of 'indigeneity' has been pursued as a further refinement of longstanding notions of ethnicity, particularly as regards community connections to land and to related distinctive custom. Tania Li has illustrated this in the Indonesian context, in a study of the characterization of the Lindu group's attachment to their territory in spiritual terms, a new strategy enabling the group to argue that a dam project in their region should not proceed because unlike other regional residents, the Lindu could never be adequately compensated by the provision of equivalent territory elsewhere.[19]

What might State governments gain from this promotion of, or acquiescence in, symbolic politics that magnifies the significance of otherwise marginal groups? In a time when economic liberalization has been part of the international *zeitgeist*, government development policies and international relations stances may press into national service the distinctive histories and cultures of such groups. Competition between States for visibility and influence in international markets, and related efforts to create a strong 'brand' for the country, can militate in favor of State openness, pluralism, and responsive institutional capability, which may have implications for the government's policies in relation to vulnerable and bounded groups within its territory. In this respect, concepts of liberalism and pluralism may be considered to run in parallel, as outward and inward manifestations of the same 'open' national stance. States concerned with advertising their legitimacy to international publics may seek to emphasize the consent given by marginal groupings to government policy and regulatory frameworks. Traces of such attitudes can be discerned in the policies of many of the governmental authorities referred to in these papers. But international economic liberalism does not on its own seem to be a major driver for intra-State pluralism in most of these cases.

---

[18] Anderson, *supra*, note 7, p. 5.
[19] Li, *supra* note 8, pp. 163–168.

Liberalization is only one element of the current international *zeitgeist*. Many State governments place a high premium on other elements: stability, order, national coherence, and anti-insurgency and anti-terrorist capabilities. One evolutionary pattern is noted in Aderito Soares' paper. Amidst considerable uncertainty as to the status and future of West Papua, one of the first acts of President Suharto's military government after 1965 was to assert legislative control over the province by enacting the Foreign Investment Act and concluding an agreement with Freeport permitting the company to begin its operations in Timika. In addition to providing a massive source of revenue for the New Order regime, the presence of Freeport in West Papua demonstrated to the international community and to potential foreign investors that the government exerted effective control over the province and was capable of guaranteeing the political stability required for long-term investment operations. The move also provided an incentive for capital-exporting States to recognize the legitimacy of the Suharto regime and its control over marginal territories in the Indonesian archipelago. Indonesian responses to West Papuan independence movements have evolved alongside broader changes in the administration of the State, in which a highly centralized and militarized government, and developmentalist doctrine focused on a unitary Indonesian State, for a time gave way to policies in which local and administrative control is vested in lower tiers of government. Whether and how such devolution works in the interests of local and isolated groups is a contentious matter, especially given the long history of Dutch colonial manipulation of traditional infrastructures in support of conservative elites, carried through in the Suharto era by locally embedded military outposts. Whether devolution will endure is also contentious, especially as the Indonesian military has begun to reassert control in other areas, such as Aceh.

Establishing local autonomy for bounded groups has been one State strategy to address risks of secessionism and inter-group conflict, particularly in polities where nationalism dominates ethnic politics. In such polities, governmental authority may be allocated to groups at the outer margins of the central government's control to ensure their continuing participation in the national polity. Donald Horowitz expands on this idea, arguing that; "[e]arly, generous devolution, coupled with abundant opportunities for a regionally concentrated group outside its own region, is generally a considerable disincentive to secession, since departure from the undivided state would forfeit those opportunities or leave a large fraction of the group's extraregional population outside any new state".[20] The colonial administration under Dutch rule in Indonesia pursued such a strategy of 'traditionalization' of frontier communities, delimiting and co-opting traditional groupings as bounded entities, in part through systematizing and codifying *adat* customary law. This strategy aimed to reduce the fiscal cost of colonial rule. "They used the notion of traditional quite deliberately to legitimate colonial policies of indirect rule, and to help consolidate the authority of the Dutch-appointed 'traditional' leaders through whom this rule

---

[20] D. Horowitz, 'Self-Determination: Politics, Philosophy, and Law', in I. Shapiro and W. Kymlicka (eds.), *Ethnicity and Group Rights* (New York University Press, New York, 1997) p. 452.

would be expressed."[21] In areas of little commercial interest to Dutch administrators, such as interior hill regions, more diffuse identities were permitted to persist and much less official effort was invested in codification of *adat*.

In establishing boundaries for more or less autonomous units, the State may aim to enclose groups and establish a jurisdictional relationship with the new entity as a *quid pro quo* (whether the exchange is achieved by bargain or imposition), in which autonomy is accompanied by denial of access to mainstream State political institutions and citizenship. The regime of the Northern Areas in relation to Pakistan has some such features. The State may seek to promote a minority ethnic group's sense of self-rule in a jurisdictional zone while also curbing potential monopolization by that group, by assigning jurisdictional boundaries that favor the group but do not follow strictly traditional or ethnic lines. In some cases, this may have the effect of breaking up ethnically coherent groups and diffusing the consolidating effects of old ethnically-defined boundaries. Such an approach to jurisdictional and representational dimensions of the decentralization processes may be traced in the reactions to Indonesian President Megawati's 2003 proposal to divide West Papua into three provinces.[22] The government claimed this was required for the effective delivery of services, while many Papuans reportedly viewed this as an attempt to dilute or frustrate Papuan autonomy, in contravention of the Special Autonomy Law, which had never been completely implemented in the region.

Resettlement and Transmigration

Governments of States confronted by extreme disparities in population density and living standards between different areas, and concerned to consolidate nationhood and shared loyalty, have frequently sought to reallocate and expand national resources through resettlement or transmigration. The case for such voluntary resettlement (voluntary from the viewpoint of the new arrivals) is stated buoyantly in the Asian Development Bank's Handbook on Resettlement:

"Voluntary movement of people such as rural-urban migration and transmigration programs organized by governments often stimulates economic growth. The people involved in such movements are likely to be (i) self-selected, young or middle-aged men that are single or (ii) households headed by such men. They are dynamic, and show initiative, and willingness to take risks and pursue new opportunities and challenges. Government-organized successful transmigration programs are often planned with significant attention not only to new home sites, but also to new livelihood opportunities, social services, community organizations and even cultural and religious needs. The planning of such programs is generally elaborate, involving surveys of natural resources including agro-climatic conditions in resettlement areas, and identification of suitable cropping patterns and other viable livelihood opportu-

[21] Li, *supra* note 8, p. 159.

[22] Presidential Instruction No.1/2003. *The Issuance of Presidential Instruction (Inpres) No. 1/2003 To Divide Papua into Three Provinces* <www.kbri-canberra.org.au/s_issues/acch/news/030211sp.htm>. visited on 3 May 2004.

nities. Migrants are assisted to transfer to the new locations, given food and shelter to tide over the transition period, trained and advised on how to establish themselves, and provided support services such as access to credit, markets, and extension services. Often a number of government technical agencies are drawn in to provide the necessary support and services in the transmigration areas."[23]

Critics are far more sanguine, in some cases because of poor outcomes for settlers created or for environmental management, and in many cases because of adverse impacts on existing groups in the resettlement area. Indonesia's transmigration project was partially financed by a World Bank loan from 1976 until 1994, when the Bank terminated its support for the project. The Jakarta government's transmigration program was designed to voluntarily resettle residents of the overpopulated interior islands, particularly Java and Madura, to outlying parts of the archipelago with lower population densities and rich natural resources, especially Kalimantan, West Papua and Lampung. In some cases, tensions between local inhabitants and settlers erupted into episodes of devastating violence. In a 1994 review of five Indonesian transmigration projects, the Bank's Operations Evaluation Department noted the improvement in living standards of transmigrants, but found that "[t]ransmigration had a major and probably irreversible impact on indigenous people."[24]

The tension between these two assessments of resettlement was confronted in China's Western Poverty Reduction Project, which planned the voluntary resettlement of nearly 60,000 residents of Qinghai Province. Settlers are high-altitude farmers in the poverty-stricken Haidon Prefecture, to be resettled in a lowland irrigation project in the Dulan County of the Haixi Tibetan and Mongolian Autonomous Prefecture some 450 kilometers away. The project was initially to be funded by the World Bank, but a request for a World Bank Inspection Panel Investigation was filed by NGOs concerned that Tibetan and Mongolian ethnic groups would suffer potentially irreversible harm from the project. The Bank stressed in its description of the project that the proposed resettlement was taking place *within* the boundaries of the Qinghai Province and so in its opinion did not pose the same threat to ethnic minorities as might have been the result of large-scale Han migration into Qinghai from other parts of China: "Considering Qinghai Province as a whole, the project is ethnically neutral."[25] Following the Report of the Inspection Panel noting, among other issues, that the Bank's Operational Policy on Indigenous Peoples had not been complied with, the Bank decided to withhold funding until the completion and review of several studies dealing with its social and environmental impacts. The Chinese government subsequently announced its intention to bypass the World Bank and fund the Qinghai component of the Poverty Reduction Program itself.

---

[23] Asian Development Bank, Handbook on Resettlement: A Guide to Good Practice (1998) <www.adb.org/Documents/Handbooks/Resettlement/Handbook_on_Resettlement.pdf >, visited on 25 February 2004.

[24] Operations Evaluation Department, The World Bank Group, *Transmigration in Indonesia*, <http://lnweb18.worldbank.org/ocd/ocddoclib.nsf/DocUNIDViewForJavaSearch/4B8B0E01445D8351852567 F5005D87B8?opendocument>, visited on 25 February 2004.

[25] *Summary Paper, China Western Poverty Reduction Project*, 2 June 1999, p. 5. <www.worldbank.org/html/extdr/offrep/cap/projects/china/wprp/sumlite1.pdf>, visited on 25 February 2004.

Dialogue

Calling for more awareness of Ainu issues among the wider public, Saeko Kawashima's article draws on international legal materials in arguing that operationalization of a deepened understanding of participation rights should be pursued and will provide a modest but politically viable basis to go forward. She notes that dialogue between Ainu and the government improves governmental decision-making processes by providing detailed information on the likely impact of proposed policies, reducing the tendency for absolutism in claims-making, broadening the range of possible solutions to shared problems, contesting otherwise unexamined assumptions, and reducing the incidence of unintended adverse discrimination against indigenous peoples.[26] These arguments form the core of the inclusivity thesis of scholars advocating deliberative models for the management of inter-group dynamics in diverse democracies outside Asia. In the remainder or this Introduction, we briefly note current directions in scholarship.

Western proponents of dialogue-based approaches argue that discourse shapes mainstream politics and normalizes the claims of minorities in a way which both improves government decision-making processes by expanding the menu of plausible solutions to national problems, and encouraging mutual transformation. Along with decentralization and devolution, dialogue-based models reflect an emphasis on relationships between agents, and a focus on jurisdictional questions. Duncan Ivison, for example, advocates discursively legitimated forms of inter-group agreement that he describes as "discursive modi vivendi: discursive because they emerge from the constellation of discourses and registers present in the public sphere at any given time, and subject to at least some kind of 'reflexive control' by competent actors; and modi vivendi because they are always provisional, open to contestation and by definition "incompletely theorized".[27] Some Western theorists make the more contentious argument that a dialogue-based constitutional model is a preferable alternative to rights-based arrangements, as it avoids a rights-based tendency towards absolutism and essentialization in the unilateral definition of groups as objects of State protection.

Jeremy Webber signals the need for caution in the adoption of dialogue-based constitutionalism where indigenous groups have been profoundly weakened by chronic marginalization and historical dispossession. In a discussion of the impact

---

[26] "Proponents of the application of a model of deliberative democracy to actual political processes in imperfect democracies with injustices suggest that the more that public life and political decision-making motivate political actors to justify their claims and actions and be accountable to their fellow citizens, the more the arbitrariness of greed, naked power, or the cynical pursuit of self-interest can be exposed and limited. When public debate gets beyond sound bites and manipulated opinion polls, issues often are seen as more complex and less polarized, and thus more open to minority voices. Relatively small or weak social segments have more chance of influencing political outcomes in a process where people are expected to justify their opinion and actions and listen to others than in a competition that aggregates pre-existing preference." I. M. Young, *Inclusion and Democracy* (Oxford University Press, Oxford, 2000), pp. 35–36.

[27] D. Ivison, *Postcolonial Liberalism* (Cambridge University Press, Cambridge, 2002), p. 74.

of Australia's landmark *Mabo* decision,[28] Webber suggests that mutual exchanges between indigenous collectives and the dominant society can be productive only when indigenous groups have the security of basic guarantees of non-interference.

> "In every era there have been individuals and associations who have sought to understand, with some success, those on the other side of the divide. These connections have led to more constructive relationships between peoples. And it is undeniable that the societies have, over time, shaped each other. I do not romanticize this interaction. The influence of non-indigenous on indigenous cultures has often been accomplished by violent and objectionable means. Nor has it been anything like reciprocal. Today indigenous societies may well most need respect for autonomy in order to maintain their cultures and protect their material and spiritual possessions, not demands that they participate in what has long been an unequal cultural exchange."[29]

A period of consolidation through institutionalized pluralism is often a necessary precondition of constructive dialogic engagement. In democratic States, constitutional arrangements assigning special status to indigenous groups require a degree of support or acceptance of the majority in order to be effectively operationalized. State responses to the claims of groups need to take account of shared history and current power imbalances between minority and dominant populations. An emphasis on the dynamism of relationships between sub-State groups is increasingly guiding State responses to indigenous claims, at least in polities where fundamental issues of indigenous categorization and recognition have been resolved and are accepted in principle by the ambient society.

Formalization of the group's interactions with State infrastructure may provide a base guarantee of non-disruption and organizational continuity that encourages the group to adopt flexible rules on membership, exit, and internal reform, since the survival of the group as an entity does not depend solely on the coercive powers of group leaders. Will Kymlicka favors an approach which aims to remedy extreme power-imbalances between groups while respecting the individual agency of group members. He suggests that protective measures may be necessary to ensure the establishment of stable collectives which are able to withstand the flux and plurality of a liberal democracy, but that once an institutional frame is established, individuals may operate within it to engender cultural change:

> "Once the societal cultures of national groups are protected, through language rights and territorial autonomy, then the cultural market-place does have an important role to play in determining the character of the culture. Decisions about which particular aspects of one's culture are worth maintaining and developing should be left to the choice of individual members. For the state to intervene at this point to support particular options or customs within the culture, while penalizing or discouraging others, would run the risk of unfairly subsidizing some people's choices."[30]

---

[28] *Mabo and Others* v. *Queensland* (No. 2) (1992) 175 CLR 1.

[29] J. Webber, 'Beyond Regret: Mabo's Implications for Australian Constitutionalism', in D. Ivison *et al.* (eds.), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, Cambridge, 2000) p. 60.

[30] W. Kymlicka, *Multicultural Citizenship* (Oxford University Press, New York, 1995) p. 113.

Others argue that formalization of group structures may render transparent the internal ordering of a collective to a degree that encourages inappropriate acts of assessment and correction by the State.[31] Similarly, formalization and recognition do not resolve and may in fact exacerbate problems of under-inclusivity in group affairs, such as those that occur in group fragmentation, where the status of exited members is in question. But an approach which regards institutional arrangements as revisable in accordance with the challenges faced by the group in question, and facilitative of ongoing and productive engagement between groups, may be an advance on the strong form of dialogical or group-rights based models. An emphasis on matching institutional responses to changing political realties certainly provides scope for the development of mechanisms which are suited to local circumstances.

These dialogue-based deliberative models highlight a further complexity in the relationship between States and indigenous peoples. The acknowledgement of a distinct group identity and negotiating capacity, and the role of the State as the counterpart in negotiations with the group, means that the State can be seen simply as the representative of one party to the negotiations. At the same time, the State claims to be the representative of all people in the State's official territory, and to provide the forum within which different elements of the national society negotiate. Historical treaties between the colonial State and indigenous peoples which now have contemporary constitutional significance,[32] and modern peace and autonomy agreements, raise this issue very acutely. But such complexities arise in any pluralistic State structure. They involve uncertainty as to what constituency the State represents, or should aspire to represent. They can also involve deep disagreement within a deliberative process as to what reasons are legitimate public reasons for action, and what are unacceptable sectarian reasons. In addition, the civic mindset demanded of individuals in deliberative models, namely the willingness to be persuaded by the reasoning of others and to change one's views accordingly, are not easily transferred to interactions between groups. Persuasion based on conceptions of the public good may have an erosionary impact on the identities of vulnerable minorities, where the expressed opinions of the group are a function of its distinctive culture and often reflect a history of marginalization. Some suggest that part of the answer lies in the provision of effective avenues for the contestation of decisions made in the public interest, allowing groups whose views may typically be drowned out in political fora to table their distinctive view of the public good through non-political review mechanisms.[33] For proponents of deliberation models, these questions are not soluble *a priori*. Answers are contextual, and revisable. They depend on a form of recognition, not in this case only recognition by the State alone, but recognition by indigenous peoples and social groups and other actors who shape evolving conceptions of the State.

---

[31] Ivison, *supra* note 4, also R. Post, 'Democratic Constitutionalism and Cultural Heterogeneity', 25:2 *Australian Journal of Legal Philosophy* (2000) pp. 194–195.

[32] As, for example, in New Zealand. *See* the symposium volume 'Liberal Democracy and Tribal Peoples: Group Rights in Aotearoa/New Zealand', 52 *University of Toronto Law Journal* (2002).

[33] P. Pettit, 'Minority Claims under Two Conceptions of Democracy', in D. Ivison *et al.* (eds.), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press. Cambridge, 2000) p. 199.

The articles in this collection prompt reflection on the degree to which pluralist deliberative models, with their emphasis on dialogue and mutually constitutive recognition, can be said to operate in various Asian contexts. Among the cases covered in these papers, there are signs in some areas of deliberative commitments of the sort embodied in Kawashima's paper. But in most of the cases, while the endurance or revitalization of long-practiced patterns of pluralism has attracted some State recognition of indigenous groups and organizations, many key components of pluralist deliberation are not yet present. The sense of mutually constitutive recognition, commitment to persuasion through public reasons, and willingness to change is not evident. The deliberative commitment that academic writing on indigenous peoples has embraced and advocated in several OECD countries seems remote from many of the cases presented here. Deliberative pluralism may nevertheless come to appear as part of the way forward, in this region as elsewhere.

Kirsty Gover and Benedict Kingsbury