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I. INTRODUCTION

The main purpose of this research is to enhance ecological sustainability, pursuant to Agenda 21,[1] which was agreed to by much of the international community, and is the plan of action that sets the principles of sustainability in motion. It has been determined that one of the critical issues facing the global community is continuing damage to ecosystems.[2] The absence of a stewardship ethic has been a large proponent of this current crisis. Theologian DeWitt[3] suggests that the way forward is a modern application of the Judeo-Christian stewardship ethic.[4] This requires the identification of 'where we are in the stream of time and [the identification of] the major happenings of the world.'[5] It is submitted that this process has already been undertaken with results finding expression in the Rio instruments,[6] most prolifically Agenda 21.[7]

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[1] U.N. Conference on Environment and Development (UNCED), Agenda 21, U.N. Doc. A/CONF. 151/26/Rev.1 (Vol.), U.N. Sales No. E.93.I.8(1992)

[2] *ibid*

[3] DeWitt is a theologian and Professor of Environmental Science at the University of Wisconsin, Madison, and Founder and President of the Au Sable Institute of Environmental Studies.

[4] 'Stewardship dynamically shapes and reshapes human behavior in the direction of maintaining individual, community, and biospheric sustainability in accord with the way the biosphere works.' DeWitt, C.B., 'Stewardship: Responding Dynamically to the Consequences of Human Action in the World' (2006) http://www.aeseonline.org/aeseonline.org/Cal_DeWitts_Papers_files/Windsor--Stewardship.pdf

[5] DeWitt, C.B., 'Stewardship: Responding Dynamically to the Consequences of Human Action in the World' (2006) http://www.aeseonline.org/aeseonline.org/Cal_DeWitts_Papers_files/Windsor--Stewardship.pdf

[6] UNCED, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev. 1, reprinted in 31 I.L.M. 874 (1992); U.N. Conference on Environment and Development (UNCED), Agenda 21, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I); UNCED Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests, U.N. Doc. A/CONF.151/26 (Vol.III)

[7] U.N. Conference on Environment and Development (UNCED), Agenda 21, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I)

According to DeWitt, behaviour should flow from '*scienta*, *ethics* and *praxis*.'[8] *Scienta* is knowledge and understanding of how the world works through experience, *ethics* refers to the manner in which one ought to live with respect to the biosphere from this knowledge and understanding, and *praxis* refers to putting into practice the understanding of the world and right living.[9]

Whilst Agenda 21 satisfies the *scienta* and *ethics* aspects, *praxis* based on these is yet to be determined. It is unequivocal that the biggest steps will be taken when *praxis* is determined with direct reference to the dominant values of the global North. However, due to the entrenchment of these values, this promises to be a protracted process, thus it is submitted that an effective measure in the short-term would be to determine the *praxis* aspect as regards indigenous people.[10] This allows prompt remedying of an area that has been recognised and accepted as one that necessitates change, namely; the role of indigenous people in the global push for a more ecologically sustainable globe.[11]

Considering the plethora of academic discourse on the subject of ecological sustainability and the rights of indigenous people of the New World, it may at first blush seem difficult to contribute anything useful to the discussion, and superfluous to extend the debate further. However, in the midst of the discussions surrounding each, consideration for the main issue— that increased ecological sustainability and

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[8] DeWitt, C.B., 'Stewardship: Responding Dynamically to the Consequences of Human Action in the World' (2006) http://www.aeseonline.org/aeseonline.org/Cal_DeWitts_Papers_files/Windsor--Stewardship.pdf

[9] ibid

[10] See chapter 1, pp.40-42

[11] UNCED, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev. 1, reprinted in 31 I.L.M. 874 (1992), principle 21; U.N. Conference on Environment and Development (UNCED), Agenda 21, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I) chapter 26

the preservation of the aforementioned indigenous cultures are inextricably linked — has, at times become obscured. For this reason, it is necessary to extend the debate by bringing into sharper focus those elements of indigenous rights, which are perceived to positively impact ecological sustainability. In light of the drive towards ecological sustainability, which has recently been presented as a matter of urgency on the international agenda,[12] the purpose of this thesis is to present a case for change in the manner in which cases pertaining to the land issue and indigenous people, particularly those of what was formerly termed the 'New World,' are decided.

The submission concerning indigenous people is not simply that an injustice, which is part of a bygone era, must be remedied for the sake of justice. The submission is that their pre-colonial ideals and cultural norms, which still bind these communities in this present age,[13] have the potential to radically impact upon the global atmosphere, thus playing a key role in the global move towards prolonging the life of the planet.[14]

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[12] The purpose of the United Nations Conference on the Human Environment, at Stockholm in 1972 was to 'consider the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment.' Declaration of the United Nations Conference on the Human Environment; U.N. Conference on Environment and Development (UNCED), Agenda 21, U.N. Doc. A/CONF. 151/26/Rev.1 (Vol.), U.N. Sales No. E.93.I.8(1992)

[13] Bradford, W.C., 'Beyond Reparations: An American Indian Theory of Justice', at 7. Ideals referred to are those such as their 'sacred responsibility to preserve and transmit Indian land, and with it identity, religion and culture, to successive generations.' Their ethos of sustainability, and inter-, and intra-generational equity and responsibility are central to their culture, religion and land use; Van Every, D., 'Disinherited: The Lost Birthright of the American Indian*'* 239 (1966); Boldt, M. and Long, A. (eds), *The Quest for Justice: Aboriginal People and Aboriginal Rights* (University of Toronto Press 1985)*,* 22-23

[14] Agenda 21, chapter 26; Convention on Biological Diversity, 5 June 1992, UNCED, UN Doc. UNEP/Bio.Div./N7INC.5/4 (1992); Gadgil, M., Berkes, F., and Folke, C., *Indigenous Knowledge for Biodiversity Conservation* Vol. 22, No.2/3, Biodiversity: Ecology, Economics, Policy (May, 1993), pp.151-156; Berkes, F., Colding, J., Folke, C., 'Rediscovery of Traditional Ecological Knowledge As Adaptive Management' Ecological Applications Vol.10, No.5, 1251-11262; Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests (1992), Annex III, A/Conf.151/26 (Vol.III); Krakoff

It is the submission of this thesis that in order for an ecologically sustainable globe to be achieved, a holistic and integrated environmental approach is required. This must involve effectively addressing indigenous land justice and environmental protection in order to maximise the earth's carbon sink.[15] This thesis attempts to resolve the aforementioned issues with specific reference to the legal context.

II. LITERATURE REVIEW

The approach of this thesis in tackling ecological sustainability was motivated by the approach of third wave environmentalism. It suggests that by analysing the human-to-human relationship in tandem with the relationship between humanity and nature,[16] the social injustices perpetuating ecological un-sustainability can be better addressed.[17]

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suggests that the blue-print for a world of zero-emissions can be seen in the traditional ways of indigenous peoples. She asserts that the types of interaction with the natural environment exemplified by these peoples are instructive of the types of behavioural changes that the West will have to embrace. See Krakoff, S., 'American Indians, Climate Change and Ethics for a Warming World', 85 Denver University Law Review 865, 893—894 (2008). See also Tsosie, R., 'Climate Change Sustainability and Globalisation: Charting the Future of Indigenous Environmental Self-determination' Environmental and Energy Law and Policy Journal 189, 248—249 (2009).

[15] See Toledo, confirming '[Indigenous peoples] live in about 75 of the world's 184 countries and are inhabitants of practically each main biome of the earth' Toledo, V.M., 'Indigenous Peoples And Biodiversity' in Levin, S., et al, (eds.) *Encyclopedia of Biodiversity*; Durning, A.T., 'Supporting Indigenous Peoples' in Brown, L. (ed.) *State of the World* (London 1993), 80-100. World Watch Institute (1993); With regards to climate change, which has been highlighted as one of the biggest threats to sustainable progress, land has a crucial role to play as vegetation determines the size of the earth's carbon sink. See generally, Institute for Global Environmental Strategies (IGES), White Paper, 'Climate Change Policies in the Asia-Pacific: Re-uniting Climate Change and Sustainable Development' (2008);Klugman, J., 'The Real Wealth of Nations: Pathways to Human Development' Human Development Report 2010

[16] Taylor, D.E., 'The Rise of the Environmental Justice Paradigm: Injustice Framing and the Social Construction of Environmental Discourses.' (2000), 43 American Behavioral Scientist, 508, at 523

[17] Commoner, B. *Poverty of Power: Energy and the Economic Crisis* (New York 1976) 2. See also, Griffin, R.C., 'A Prairie Perspective on Global Warming and Climate: The Use of Law, Technology, and Economics to Establish Private Sector Markets to Compliment Kyoto', 17 Southeastern Environmental Law Journal 95, at 109; See CIEL, which defines the categories as 'ecological (biological), physical (natural and created by human labor), social, political, aesthetic, and economic conditions.' 'One Species, One Planet: Environmental Justice and Sustainable Development', Centre

The dominant environmental discourse has been instrumental in raising consciousness of the need to consider the environment, and has positively impacted it at a global level.[18] However, it has been insufficient in tackling the issue of ecological sustainability due, in part to the fragmented approach adopted. By examining existing literature this review demonstrates how the third wave environmental framework, as opposed to the antecedents and other competing frameworks, is best placed to deal with the issue of ecological sustainability.

As indicated by Taylor, the first point of distinction between third wave environmentalism and the dominant discourse is that the injustice frame is explicit rather than submerged,[19] and has 'people, rather than fauna and flora, at the centre of a complex web of social, economic, political and environmental relationships.'[20] Rather than simply analysing the relationship between humanity and nature, the human-to-human relationship is also examined.[21] The injustice referred to is the social injustice of these relationships, which occurs from discriminatory environmental practises, hastening environmental degradation.[22] The second point of distinction is that third wave environmentalism recognises that social, ecological, and

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for international Environmental Law, (2002), at 4. Available at http://www.ciel.org/Publications/onespecies_oneplanet_22oct02.html

[18] Taylor, D.E., 'The Rise of the Environmental Justice Paradigm: Injustice Framing and the Social Construction of Environmental Discourses' (2000) 43 American Behavioral Scientist, 508, at 522; see also Marsh, G.P., *Man and Nature: Physical Geography as Modified by Human Hand.* (Harvard University Press 1965); Muir, J., *My First Summer in the Sierra* (Boston 1944); Muir, J., *The Tuolumne Yosemite in Danger Outlook*, vol. 87(9) (Boston 1907) 486-489; Muir, J., *The Story of My Boyhood and Youth*, (Boston 1913); Muir, J., *A Thousand-Mile Walk to the Gulf* (Boston 1916); Pearson, T.G., *Adventures in Bird Protection, an Autobiography*, (New York 1937)

[19] Taylor, D.E., 'The Rise of the Environmental Justice Paradigm: Injustice Framing and the Social Construction of Environmental Discourses' (2000) 43 American Behavioral Scientist 508, 523

[20] McDonald, D.A., *Environmental Justice in South Africa*, (Capetown 2002), 3

[21] Taylor, D.E., 'The Rise of the Environmental Justice Paradigm: Injustice Framing and the Social Construction of Environmental Discourses' (2000) 43 American Behavioral Scientist, 508, 522

[22] Taylor, D.E., 'The Rise of the Environmental Justice Paradigm: Injustice Framing and the Social Construction of Environmental Discourses' (2000) 43 American Behavioral Scientist 508, 522; McDonald, D.A., Environmental Justice in South Africa, (2002) 3

economic issues are 'not a series of separate and distinct crises, but a single crisis brought on by an overall design defect.'[23]

Nordhaus and Shellenberger[24] note that the plethora of legislation emerging during the second wave of environmentalism was symptomatic of what they termed the three-pronged approach to dealing with environmental problems; 'first, define a problem (e.g. global warming) as "environmental." Second, craft a technical remedy (e.g. cap and trade). Third, sell the technical proposal to legislators through a variety of tactics, such as lobbying, third-party allies, research reports, advertising, and public relations.'[25]

This conceptualisation of the environment as a 'thing,' distinct from humanity, has acted as an impediment to the process of enacting more comprehensive legislation due primarily to the conflict in views between economic development and environmental protection.[26] Furthermore, the aforementioned solutions neither leave room for consideration of the socioeconomic nor the cultural impacts. The resulting scenario is, as has been stated earlier, as one problem is solved, others become exacerbated such as the cultural genocide in areas inhabited by indigenous people, which are now recalled for use as carbon-sinks.

Nordhaus and Shellenberger attribute the failure of the aforementioned approach to

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[23] Commoner, B. *Poverty of Power: Energy and the Economic Crisis* (1976) 3
[24] Shellenberger, M., Nordhaus, T., The Death of Environmentalism; Global Warming Politics in a Post-Environmental World, (2004) http://www.thebreakthrough.org/PDF/Death_of_Environmentalism.pdf
[25] ibid, 9
[26] Carlarne, C.P., 'Notes from a Climate Change Pressure-Cooker: Sub-Federal Attempts at Transformation Meet National Resistance in the USA', (2008) 40 Connecticut Law Review 1351, at 1408; Brulle, R.J., Jenkins, J.C., (2006) 'The Rhetorical Reconstruction of Progressive Politics' Organization and Environment 82, 84

the lack of a unifying vision, lack of coherence within a broader narrative and failure to resonate with existing identities.[27] Agenda 21 provides a unifying vision and broader narrative for dealing with the aforementioned elements.

Agenda 21 tackles issues that are critical in the global community; namely, increasing poverty, disappearing and damaged ecosystems, ill health and high levels of illiteracy.[28] Chapter 2 of Agenda 21 deals with lessening the demand on the environment by means of an open multi-lateral trading system. The rationale is that, through a sound environment, Agenda 21 would allow more efficient resource allocation and maintenance of 'ecological and other resources needed to sustain growth and underpin a continuing expansion of trade.' [29]

Chapter 4 focuses on the demand on natural resources caused by unsustainable consumption patterns. Implicit in this chapter is the idea that the concepts of wealth and prosperity must be re-defined in terms of the earth. However, re-defining wealth to reflect an appreciation of the quality of the earth seems an insurmountable task due to conflict with the prevailing paradigm of consumerism, thus will take time.

Chapter 7 deals with promoting sustainable human settlements in rural areas to stem the increased flow of migration from rural areas to cities, as consumption patterns of cities are environmentally prohibitive. Indigenous rural-urban migration is

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[27] Shellenberger, M., Nordhaus, T., (n. 24); Brulle and Jenkins consider the theoretical underpinnings of Death of Environmentalism, tracing it to George Lakoff's work (Lakoff, G., *Don't Think of an Elephant! Know Your Values and Frame the Debate* (Vermont 2004)). Here it is stated '…To be politically effective, progressives need to develop a simple unified frame that resonates with existing identities and unifies various political proposals.' Brulle, R.J., Jenkins, J.C., (March 2006) 'The Rhetorical Reconstruction of Progressive Politics' Organization and Environment 82, 83

[28] Agenda 21, section I, Social and Economic Dimensions, chpt.3

[29] ibid 2.19

precipitated by the destruction of indigenous habitats,[30] thus by protecting indigenous habitats the proposals of this thesis could stem the migration of people from such communities. This would serve two purposes, first it would ease the saturation of cities; secondly, it would increase the earth's biodiversity due to continued cultural diversity.[31]

The World Bank's carbon offset scheme would suggest to a large extent that ecological sustainability is currently still being approached with reference to old frameworks,[32] where the economics dictate the shape of environmental regeneration but to the exclusion of social justice.[33] This scheme often disregards the importance of the role of indigenous people in achieving ecological sustainability. This is symptomatic of the atomised approach to ecological sustainability. Despite the inherent environmental nature of the claims of indigenous people and the strong

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[30]Trujano, C.Y.A., 'Indigenous Roots: A Framework for Understanding' (2008) Indigenous Migration International Organization for Migration

[31] See chapter 2, 2.3. The Value of Indigenous Cultures as Recognised by International Instruments

[32] This is also evident in the trade-oriented approach to the multilateral environmental treaties, which have emerged in response to the need for international co-operation in creating a more ecologically sustainable globe. For example, the Montreal Protocol on Substances that Deplete the Ozone Layer (1987), required the control of national production and consumption of ozone depleting substances; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (2005) requires the minimisation of the generation of environmentally hazardous waste, which includes an 'integrated life-cycle approach', which directly effects products from the manufacturing end; the Convention on International Trade in Endangered Species of Wild Fauna and Flora regulates the international wildlife trade; the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade regulates the international trade of hazardous chemicals and pesticides; the Cartagena Protocol on Biosafety (Montreal, 29 January 2000; (2000) 39 ILM 1027) focuses on the transboundary movement of living modified organisms; Stockholm Convention on Persistent Organic Pollutants, limits trade in persistent organic pollutants; Kyoto Protocol to the UN Framework Convention on Climate Change indirectly affected trade by regulating the carbon output, which affected factory activity. See generally UNEP, Trade Related Measures and Multilateral Environmental Agreements (2007) for a fuller explanation of each of the afore-mentioned agreements. www.unep.ch/etb/areas/pdf/TradeRelated_MeasuresPaper.pdf

[33] See generally, Böhm, S., and Dabhi, S. (eds), Upsetting the Offset: The Political Economy of Carbon Markets (London 2009); Lohmann, L., 'Regulation as Corruption in the Carbon Offset Markets' in Böhm, S., and Dabhi, S. (eds), Upsetting the Offset: The Political Economy of Carbon Markets (2009), 175-191

relationship with ecological sustainability,[34] they are not being framed with reference to broader frameworks. The result of this is that biodiversity is being sacrificed, as indigenous traditional knowledge has not been harnessed, as highlighted by the Sao Jose do Buriti case.[35]

Despite the lapse of almost 10 years since the creation of Agenda 21, very little progress has been made with regards to meeting the agreed objectives. Implicit in chapters 2, 4 and 7 is the reality that the changes required are not simply surface changes; rather the paradigms perpetuating ecological un-sustainability require to be addressed. This thesis seeks to begin addressing this with reference to indigenous people of the New World. It deals with the role of indigenous people in enhancing ecological sustainability, and the paradigms and legal constructs hindering progress.

Laura Westra deals quite comprehensively with the subject of indigenous land rights and the link between the *sui generis* relationship with their territories and the hope for the future of humankind.[36] However, she argues form the perspective of ecological integrity thus this approach is insufficient to drive the type of change required for enhanced ecological sustainability.[37] This is mainly attributable to the fact that ecological integrity neither ties indigenous communities to traditional lands nor does it redress the issue of power relations required to establish the role of indigenous people in the global push for ecological sustainability.

II. METHODOLOGY

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[34] See chapter 4, 4.1. Introduction
[35] See chapter 3, 3.3. Indigenous People of the New World, p.70
[36] See chapter 4, 4.1.1. Self-determination as the Cornerstone of Indigenous Rights, p.82
[37] See chapter 4, 4.1.2. Ecological Integrity as the Cornerstone of Indigenous Rights, p.83

The main research question that the proposed thesis shall seek to address is:

> In pursuit of a sustainable environmental paradigm, is there need for revision of the current legal approach with regards to land justice and environmental protection for indigenous people of the New World?

As consideration was given to the above question, the following research questions emerging from the study were as follows: 1) Are Enlightenment philosophies and ideals, as opposed to Judeo-Christian ethics, the root of unsustainable consumption patterns? 2) What is the connection between land justice and environmental protection for indigenous people of the New World, and enhanced ecological sustainability? 3) To what extent, if any, do entrenched Enlightenment ideals influence the current legal approach to indigenous rights, hindering the pursuit of ecological sustainability?

In researching the main question, the conceptualisation of land justice, arriving at a definition in law, and placing land justice and environmental protection in a legal context, are pivotal. Furthermore, constructs impacting the question significantly such as the Judeo-Christian stewardship ethic and *terra nullius* shall be examined in terms of the aforementioned questions.

The main thesis question shall be addressed by analysing literature, international documents and legal instruments, and case law. The main area of challenge arising in the thesis is substantiating the assertion that placing lands in the hands of indigenous people of the New World, buttressed by environmental protection, would result in the increment in biodiversity that is required for enhanced ecological sustainability. Case studies have been used to demonstrate the importance of environmental

protection to indigenous cultures. Furthermore they demonstrate the failings of the current models, in the absence of land justice. Existing case studies in the field have been used to demonstrate the increase in biodiversity following varying forms of environmental protection partnerships. Since information regarding the level of increased biodiversity is purely anecdotal,[38] this is further substantiated with reference to the many international documents and instruments recognising the link between indigenous cultures and increased biodiversity, and ecological sustainability.[39]

Furthermore, from the case studies it can be seen that where land justice has been acquired in environmentally protected sites, the measurable difference has been the shift in balance of power of negotiation in favour of the indigenous inhabitants.[40] This is positive in terms of ecological sustainability as research and international instruments alike suggest that the contribution of indigenous communities is key[41] but in the absence of land justice, their views and proposals were not being apportioned with weight commensurate with that given to the views of non-indigenous participants.

Although history is replete with examples of arguably unjust land dispossessions, this thesis deals with wider issues than unjust land dispossession, connecting land justice with creating a more ecologically sustainable paradigm. For this reason, the land justice cases that shall be the focus of this thesis are those where the ways of life

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[38] See chapter 2, 2.4.1. Indigenous Protected Areas p.56-60
[39] See chapter 2, 2.3. The Value of Indigenous Cultures as Recognised By International Instruments p.49-54
[40] See chapter 2, 2.4.1. Indigenous Protected Areas p.56-60
[41] See chapter 2, 2.3. The Value of Indigenous Cultures as Recognised By International Instruments p.49-54

of the indigenous people concerned are strongly linked with ecological sustainability. This thesis shall focus on those indigenous people of the New World, living as part of an identifiable community, in adherence with traditional ways of life. The jurisdictions that shall be examined are the U.S.A, Canada, Australia and New Zealand, the purpose of which is threefold; first, these jurisdictions share a common history with regards to legal foundations (all governed by the English common law, applying the same precedents). Secondly, the indigenous people in these jurisdictions exist as a minority population. Thirdly, these countries are developed countries; thus, possessing an advanced infrastructure in terms of land-planning, legal system and law enforcement. This suggests that land justice cases can be resolved in an equitable manner that does not precipitate civil unrest, whereas the situation in developing countries such as Brazil would be vastly different.[42]

It is not suggested that the disparate communities of indigenous people across the jurisdictions or even within, are part of one homogenous culture, it is understood that they are not. Neither does the thesis seek to depict the aforementioned indigenous people as the environmental 'Other';[43] however, international instruments recognise, the positive impact of traditional ways of life, of indigenous people, as regards biodiversity preservation and ecological sustainability.[44] This element is the point of unification, of these different communities, that is recognised by the thesis.[45]

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[42] After the latest, 2011, attack on indigenous people in Brazil who were trying to recover ancestral land, it was stated that 'Brazil's labyrinthine legal system makes the resolution of disputes difficult.' Romero, S., 'Violence Hits Brazil Tribes in Scramble for Land'Americas *The New York Times* (New York, 9 June 2012) http://www.nytimes.com/2012/06/10/world/americas/in-brazil-violence-hits-tribes-in-scramble-for-land.html

[43] Said, E., *Orientalism* (Routledge and Kegan Paul Ltd. London 1978)

[44] 'Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the

IV. CONTRIBUTION TO KNOWLEDGE

Stewardship is an ancient concept, almost lost to the global North, and a key component of achieving a more sustainable globe.[46] As the last workable environmental paradigm, it has been submitted that a modern application of the Judeo-Christian stewardship ethic ought to be reflected once more.[47] It has been submitted that whilst *scienta* and *ethics* of a modern application have been established in the Rio instruments,[48] most prolifically Agenda 21,[49] *praxis* is yet to be established. In order to satisfy the *praxis* element that should flow from Agenda 21, section III, chapter 26,[50] the continuance of indigenous people of the New World's cultures, should be facilitated and protected.[51]

Where indigenous people occupy the land but with a precarious title, it is submitted that the title be made secure in order to allow indigenous people to steward such areas effectively. It is thus submitted that land justice is a requisite with environmental protection also acting as a limitation on the type of development that

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conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;' 'United Nations Convention on Biological Diversity', 5 June 1992, Doc. UNEP/Bio. Div/N7-INC.5/4 (1992), 31 I.L.M. 818, s. 8(j)

[45] See chapter 2

[46] See chapter 1,1.4.1. Principles of the Judeo-Christian Stewardship Ethic p.38

[47] ibid, 38-43

[48] UNCED, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev. 1, reprinted in 31 I.L.M. 874 (1992); U.N. Conference on Environment and Development (UNCED), Agenda 21, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I); UNCED Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests, U.N. Doc. A/CONF.151/26 (Vol.III)

[49] U.N. Conference on Environment and Development (UNCED), Agenda 21, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I)

[50] U.N. Conference on Environment and Development (UNCED), Agenda 21, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I)

[51] See chapter 1, 1.4.1. Principles of the Judeo-Christian Stewardship Ethic p.38-43

could occur on lands.[52] It is further submitted that land justice for indigenous people of the New World is foundational to enhanced global ecological sustainability, as they possess the majority of the earth's key biomes, due to their worldview.[53]

Rather than self-determination, it is submitted that land justice is the cornerstone of indigenous peoples rights.[54] The rationale is that it is a right that is sufficient to cause other rights contended for to unfold. Self-determination, which is currently regarded as the foundational right, does not guarantee the return of ancestral lands. Ancestral lands define indigenous peoples' identity, culture, economic standing and entire way of life, and it is explicit from studying literature that these are the elements for which indigenous people contend the most.[55]

Finally the thesis demonstrates that through a teleological approach to Human Rights, indigenous land justice and environmental protection can be adjudicated within dominant legal frameworks.[56]

V. THESIS STRUCTURE

The thesis is divided into three parts: part 1, establishing the grounds for the thesis, consisting of chapters 1-4; part 2, analysing legal principles and mechanisms underpinning land injustice, and establishing the basis for the legal status of

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[52] See chapter 2, p.64
[53] See chapter 2
[54] See chapter 4
[55] '…very few, if any, indigenous peoples actually had asked for anything approaching a threat to the territorial integrity or political unity of existing states. The goal of "indigenous sovereignty," in particular, was mostly defined in the sense of cultural and spiritual reaffirmations much more than in the Western sense of independent political powers.' Anaya S.J., Weissner, S., 'The UN Declaration on the Rights of Indigenous Peoples: Towards re-empowerment' (2007) 3 JURIST
[56] See chapter 9

indigenous people, consisting of chapters 5-7; and part 3, demonstrating a modified legal approach, consisting of chapters 8-9.

Part one begins by demonstrating that Enlightenment philosophies are one of the major causes of this current ecological crisis. This, it is submitted, is due in part to the thorough entrenchment of Enlightenment ideals advocating the tyrannical reign of man over the natural environment, to the exclusion of a stewardship ethic. It is submitted that as the last operative environmental paradigm, the benefits of the Judeo-Christian stewardship ethic ought to be harnessed as a means of enhancing environmental sustainability. The first chapter discusses the role of Judeo-Christian ethics in this current ecological crisis. It suggests that a modern application of the Judeo-Christian stewardship ethic requires the establishment of *praxis* derived from the *scienta* and *ethics* of present times.

Chapter 2 considers the environmental implications of land justice for indigenous people and environmental protection. It establishes the link between both the survival of traditional knowledge and indigenous habitats, and expounds upon the role of indigenous people of New World as regards ecological sustainability. Subsequently, with particular reference to case studies, the importance of environmental protection as regards habitats of indigenous people and ecological sustainability is discussed. In this chapter the role of land justice emerges as a means of enhancing the viability of reciprocal partnerships between indigenous people and conservation managers. In chapter 3, land justice is conceptualised and defined, further developing the argument of the importance of land justice for indigenous people in achieving enhanced ecological sustainability globally. Chapter 4 shifts the emphasis from the

importance of land justice as regards ecological sustainability, to the role it plays vis-à-vis other rights contended for by indigenous people.

Part 2 of the thesis begins establishing the *praxis* element flowing from the *scienta* and *ethics* established in Agenda 21, chapter 26, by examining the ideological and legal basis determining the status quo of indigenous people of the New World (chapters 5-6). This time the influence of Enlightenment paradigms on the legal position of indigenous people, and the manner in which their cases are adjudicated in courts of law is the focus. Chapter 7 analyses cases where land justice is at issue to determine whether they are being adjudicated in a manner that leads to justice in present times. It takes the form of case analyses, the purpose being to determine if Enlightenment ideals continue to dictate how indigenous land cases are adjudicated in modern times, or if there has been a paradigm shift more conducive to justice. Where a systematic denial of justice is evident, this chapter seeks to discover common reasons to enable a way forward to be determined.

Part 3 proposes modifications to the current legal approach in order to bring indigenous people within dominant legal frameworks, at both domestic and international levels. It demonstrates the manner in which existing legal mechanisms are capable of accommodating indigenous rights, thus enabling land justice and environmental protection; therefore, establishing *praxis* based on the *scienta* and *ethics* of Agenda 21, chapter 26, in accordance with a modern application of the stewardship ethic.

Glossary

Indigenous people Indigenous people of Australia, Canada, New Zealand and the U.S.A., living as part of an identifiable community, in adherence to traditional ways of life as relates to ecological sustainability.

Land justice The doing of justice to a people who have (1) been deprived of their land without their consent and without compensation, (2) lost effective control of their land without their consent and without compensation. Justice mandates that traditional owners receive the inheritance that has been wrongfully taken from them.

PART 1

Chapter 1

Towards a Sustainable Ethic: The Historical Roots of Our Ecological Crisis Revisited

1.1. Introduction

> [S]ince the roots of our trouble are so largely religious, the remedy must also be essentially religious, whether we call it that or not.[1]

It has been widely accepted, in modern times, that religion, namely Christianity, is the root cause of the environmental problems of this era.[2] Whilst this position has

[1] White, L., 'The Historical Roots of Our ecological Crises' (1967) 155 Science 1203, 1207; Thirty-four reputable scientists issued an open letter to the religious community stating the environmental problem was so vast that it would require a partnership of science and religion in order to safe-guard the environment. See Carroll, J.E., and Warner, K., *Ecology and Religion: Scientists Speak* (Franciscan Press, Quincy, IL 1998), ii-iii; Schaeffer, F.A., *Pollution and the Death of Man* (London 1970); Ehrlich, P.R., and Ehrlich, A.H., *Betrayal of Science and Reason: How Anti-environmental Rhetoric Threatens our Future* (New York 1996); 'The transition to a sustainable society must be undergirded by a moral, ethical and spiritual revolution which places these values at the centre of our individual and social societal lives.' Strong, M., The Fourth Kew Environmental Lecture (1993); Hamilton, L.S., *Ethics, Religion and Biodiversity* (Cambridge 1993), at 1; Shrader-Frechette, K.S., *Environmental Ethics* (California 1981); Fisher, A., 'Towards a More Radical Ecopsychology: Therapy for a Dysfunctional Society' (1996) 22(3) Alternatives 20, 20-26

been questioned many times in theological discourse,[3] it has not received much attention in other areas of academic discourse. This is problematic due to the perceived relationship between the remedy and the root; Professor Lynn White's dictum connotes that where the wrong root is identified, the wrong premise is thereby established for arriving at a remedy. It is, therefore, critical that the correct root is identified.

The disassociating factor between religion and secularism is differing value systems; thus, rather than specifically pointing to a religious remedy, the underlying sentiment is that as the current state of degradation was value-driven, so must the remedy be value-driven. Simply put, the *ethics* and *praxis* of a new environmental paradigm must flow from societal values rather than stand in stark contrast. The purpose of this part of the thesis is not to enter into a religion versus secularism debate; rather the purpose is to identify the effect of particular mindsets in relation to the environment, namely, the Enlightenment mindset and the interpretation of the Judeo-Christian stewardship ethic.

This chapter seeks to demonstrate that White erred in asserting that Christianity is the root cause of this current environmental crisis, submitting instead that the values of Enlightenment philosophies, manifesting as Enlightenment theology, is one of the

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[2] Prof. Lynn White's paper has been extremely influential in promoting this view. Lynn White, Jr., 'The Historical Roots of Our Ecological Crisis' (1967) 155 Science 1203, 1203 – 1207. The following are a few of the numerous texts citing and echoing his views; Shaeffer, F.A., *Pollution and the Death of Man* (London 1970); McHarg, I.L., *Design With Nature* (New York 1969); Nicholson, E.M., *The Environmental Revolution* (London 1970); Oelschlaeger, M., *Caring for Creation: An Ecumenical Approach to the Environmental Crisis* (New Haven 1994); Livingstone, D.N., 'Ecology and the Environment' in Ferngran, G.B., Larson, E.J., Amunsden, D.W., Nakhala, A.E. (eds) *The History of Science and Religion in the Western Tradition: An Encyclopedia*, (NY, Garland 2000) 429-434

[3] Sheldon, J.K., 'Twenty-one years after the 'Historical Roots of Our Ecological Crisis': How Much Has the Church Responded?' (1989) 41 Perspectives on Science and Christian Faith, 152, 152-158; Whitney, E., 'Lynn White Ecotheology and History' (1993) 15 Environmental Ethics 151, 151-169

major causes. Further to this, it shall be submitted that the principles underpinning Judeo-Christian ethics can indeed make a valuable contribution to the debate on increasing ecological sustainability. Thus, it is submitted that as the last operative environmental paradigm, these principles ought to be harnessed in birthing a new sustainable environmental paradigm.

In support of the first submission, it shall be suggested that by reinterpreting principles of the dominant order, namely the concept of 'dominion' in the Judeo-Christian cultural mandate,[4] in a manner that would support the new Enlightenment philosophies, religious principles were harnessed as a vehicle to drive the New World-view.[5] This shall be buttressed by demonstrating the congruencies between the Western worldview and the prevailing Western Enlightenment philosophies. Furthermore, it shall be submitted that the stark contrast between applications of Judeo-Christian ethics, in countries beyond the Western world as compared with Western application, suggests Enlightenment philosophies are at the root of this current crises.

In support of the second submission, the concept of 'dominion' in the Judeo-Christian context shall be fully explored, with reference to the cultural mandate and the principles of stewardship. This shall illuminate the disparities between the Enlightenment's concept of dominion and the Judeo-Christian concept, thus

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[4] The cultural mandate is found in the Judeo-Christian foundational text, the Bible, at Genesis c. I v. 20 – II v. 3, and is so named because 'what God has given us is *nature*, whereas what we do with it is *culture*.' Berry, R.J., *The Care of Creation* (Leicester 2000), 8

[5] Locke can be distinguished from other philosophers on the basis that while he suggested 'God who has given the world to man in common, hath also given them reason to make use of it to the best advantage of life and convenience. The earth and all that is therein is given to men for the support and comfort of their being…' He emphasised that nothing was to be spoiled or destroyed. Locke, J., *The Second Treatise of Civil Government* (First published 1690) Chapter V, section 26 http://oregonstate.edu/instruct/phl302/texts/locke/locke2/locke2nd-a.html

demonstrating the link between Judeo-Christian ethics and a more sustainable environmental paradigm.

1.2. Enlightenment Principles

Professor White, in his critique, which decades later, is still being referred to as 'one of the most significant articles to appear in environmental studies in the second half of the 20th century',[6] states that:

> The present increasing disruption of the global environment is the product of a dynamic technology and science, which were originating in the Western medieval world…Their growth, cannot be understood historically apart from distinctive attitudes towards nature, which are deeply grounded in Christian dogma…no new set of basic values has been accepted in our society to displace those of Christianity.[7]

White's explanation for attributing the current environmental ills to the perceived vagaries of Judeo-Christian ethics was his belief that 'no new set of basic values has been accepted in our society to displace those of Christianity'.[8] Contrary to this assertion, recent scholarship has described the Enlightenment as the prevailing worldview, developed in the West,[9] with science and technology as the main tools.[10]

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[6] Minteer, B.A., Manning, R.E., 'An Appraisal of the Critique of Anthropocentrism and Three Lesser Known Themes in Lynn White's "The Historical Roots of our Ecological Crisis"' (2005) 18 Organization Environment 163, 166. Articles which have relied on White's article are, Leiserowitz, A.A., Kates, R.W., Parris, T.M., 'Do Global Attitudes and Behaviors Support Sustainable Development?' (2005) 47(9) Environment 22, 22-38; Cobb, J.B., 'Protestant Theology and Deep Ecology' in Barnhill, D.L., Gottlieb, R.S., (eds) *Deep Ecology and World Religions: New Essays on Sacred Grounds*, (Albany 2001).

[7] White, Jr., L., 'The Historical Roots of Our Ecological Crises' (1967) 155 Science 1203, 1203-1207

[8] *ibid*

[9] Elkana, Y., 'Rethinking – not Unthinking – the Enlightenment' in W. Krull (sd.), *Debates on issues of our common future* Weilerswist: Velbruck Wissenschaft (2000) available at

Indeed, the root of the metaphysical barrier, central to the anthropocentric paradigm governing use of the natural environment, has been traced back to the period of the Enlightenment,[11] and is not evident in the fabric of theistic religions in general.

Central to all theistic religions is the principle that as an act of worship to God, mankind must love all of His creation for both its intrinsic worth and for the sake of God.[12] This dictates man's responsibility to all of creation both human and non-human. Thus,

> While a religious worldview necessarily locates humankind within the context of a greater spiritual scheme, mechanistic worldview individuals, by means of rationality, are seen as masters…of a world that is at their disposal. The conception of a universe in which God is ultimately the controlling power is

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http://www.ceu.hu/yehuda_rethinking_enlightnment.pdf; see also Hall, D.E. et al, 'Conceptualizing "Religion": How Language Shapes and Constrains Knowledge in the Study of Religion and Health Perspectives' (2004) 47(3) Biology and Medicine 386, 390

[10] Habermas, J., 'The Entwinement of Myth and Enlightenment: Re-Reading Dialectic of Enlightenment' (Levin, T.Y., (tr.)) (1982) 26 New German Critique 13; Hall, D.E. et al, 'Conceptualizing "Religion": How Language Shapes and Constrains Knowledge in the Study of Religion and Health Perspectives' (2004) 47(3) Biology and Medicine 386, 386-401

[11] According to Horkenheimer, the objective of the Enlightenment was to institute mankind as sovereign thus freeing him from subordination to greater, perhaps, mythological, powers. Horkenheimer, M., and Adorno, T., *Dialekt der Aufklärung*, (Frankfurt 1988), 9; see also Riebel, A., who, in his review of Dialektik der Aufklärung, states that one of the failures of the Enlightenment was that it created control over nature. Riebel, A., 'Max Horkheimer und Theodor W. Adorno, Dialekt der Aufklärung – Entzauberte Welt' (Jan.2009) Zenit - Die Welt von Rom aus Gesehen

[12] Adams, R.M., 'The Problem of Total Devotion' in Badhwar, N.K. (ed) *Friendship: A Philosophical Reader* (Ithaca: Cornell University Press 1993), 108-133; Wood, A.W., 'Kant on Duties Regarding Nature' Volume LXXII (1998) Proceedings of the Aristotelian Society Supplement; Augustine held only to the view that as part of worship, creation had to be loved for the sake of God, rather than for any intrinsic qualities. This view, whilst in the minority in terms of not attributing to creation any worth of its own, still renders mankind with an obligation towards the natural environment and non-human parts of creation. Augustine, On Christian Doctrine, 1.4.4, available at http://www9.georgetown.edu/faculty/jod/augustine/ddc.html

> replaced by a viewpoint in which technology can enable humankind to control and utilize the world[13]

Hence mankind, on account of his ability to reason, become gods with the ultimate goal of subordinating the universe to himself, using science and technology as the main instruments. The end of such domination is the belief that a person's identity is developed by their ability to control the natural environment.[14] Domination thus became one of the most prominent hallmarks of the Enlightenment; man dominated man, and man dominated nature.[15]

The above principles are reflective of Cartesian dualism, a dominant concept of the Enlightenment.[16] This concept postulated, 'an anthropocentric, mechanistic-materialistic worldview…[propagating] the conception that the ego is a substance that is disconnected from the material world';[17] or simply put, mankind exists as an entity apart from the natural environment. Kant expresses this in the following manner,

> The fact that human beings have the "I" in his representations raises him infinitely above all other living beings on the earth. Because of this he is a

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[13] Kidner, D.W., 'Why Psychology is Mute About the Environmental Crisis' (1994) 16 Environmental Ethics 359, 361

[14] Habermas, J., 'The Entwinement of Myth and Enlightenment: Re-Reading Dialectic of Enlightenment' (Levin, T.Y., (tr.)) (1982) 26 New German Critique, 13, 15; Adorno, T.W., Horkenheimer, M., Dialectic of Enlightenment, trans. by Cumming, J., (New York, 1972) at 54

[15] 'Domination of an objectified external nature and a repressed inner nature are the hallmarks of Enlightenment.' Habermas, J., 'The Entwinement of Myth and Enlightenment: Re-Reading Dialectic of Enlightenment' (Levin, T.Y., (tr.)) (1982) 26 New German Critique 13, 13-30; Hume, D., 'Negroes…Naturally Inferior to Whites' in Eze, I.M. (ed) *Race and the Enlightenment* (Blackwell, 1997) 29-33; Hulme, P., Jordanova, L., The Enlightenment and its Shadows (London: Routlege, 1990); See chapters 5-6 for examples of man dominating man.

[16] Elkana, Y., 'Rethinking – not Unthinking – the Enlightenment' in W. Krull (sd.), *Debates on issues of our common future* Weilerswist: Velbruck Wissenschaft (2000) available at http://www.ceu.hu/yehuda rethinking enlightnment.pdf

[17] Scarfe, A.C., 'Overcoming Anthropocentric Humanism and Radical Anti-Humanism: Contours of the Contructive Postmodernist Environmental Epistemology Process' (2008) 12 Studies Supplement.

person,…through rank and dignity an entirely different being from *things*, such as irrational animals, with which one can do as one likes.[18]

Further to this, Kant suggests that without mankind, the natural world would be 'mere wasteland, gratuitous and without a final purpose'.[19] Since non-rational nature is without the capacity to state its own end, its end is determined in relation to its instrumental value to mankind.[20] The part of nature, which can be ascribed with rights, is the rational part (mankind), which can set an end in itself, rather than simply being a means to an end.[21] The non-rational part of nature is, on account of its inability to reason, without intrinsic worth.[22] The commitment of the Enlightenment to this ideal was such that application was extended to peoples in lands geographically remote from Europe, as a means of dehumanisation.[23]

1.2.1. Re-birth of Religion in an Enlightenment Framework

It has been suggested that while the Enlightenment proper was based on dialectical thinking, the Enlightenment forming the Western worldview, was monolithic.[24] The

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[18] Kant, I., *Anthropology from a Pragmatic Point of View* (Louden, R.B., and Kuehm, M., eds Cambridge University Press 2006) 127; He further mentions that this dignity gives mankind a 'prerogative over all merely natural beings'. Kant, I., *Groundwork for the Metaphysic of Morals*, (1785), Bennett, J., (tr.) (2005), available at http://www.earlymoderntexts.com/kgw.html 35

[19] Kant, I., *Critique of Judgment* (Pluhar, W.S., tr. Indianapolis: Hackett Publishing Co., 1987), 331

[20] 'Beings whose existence depends not on our will but on nature, if they are not rational beings, have only relative value as means, and therefore called "things".' Kant, I., *Groundwork for the Metaphysic of Morals*, (1785), Bennett, J., (tr.) (2005), available at http://www.earlymoderntexts.com/kgw.html 28

[21] Kant, I., (n.20) 33

[22] Kant asserts that since mankind is the only part of nature capable of morality, it is the only part with intrinsic worth. Kant, I., *Groundwork for the Metaphysic of Morals*, (1785), Bennett, J., (tr.) (2005), available at http://www.earlymoderntexts.com/kgw.html 33; Wood, A.W., 'Humanity as an End in Itself' in Robinson, H. (ed) 1(1) *Proceedings of the Eighth International Kant Congress*, (Memphis 1995) 307-310; Kant, I., *Critique of the Power of Judgement* (Guyer, P., and Matthews, E., trs., Cambridge University Press 2000), paras. 64-65

[23] See chapter 5, p. 85

[24] Elkana, Y., 'Rethinking – not Unthinking – the Enlightenment' in W. Krull (sd.), *Debates on issues of our common future* Weilerswist: Velbruck Wissenschaft (2000).

dominating concepts were Cartesian dualism, objectivity, rationality, globalisation and material oriented wealth. These Enlightenment concepts manifested as an over-arching and under-girding general framework, to which all irrational phenomena, such as religion and culture were subjugated. Everything was reinterpreted, in an autopoietic manner, in terms of the dominant Enlightenment philosophies; thus, the Western world, including the nation state, colonialism, and religion, was reborn within the conceptual frameworks of the Enlightenment.[25]

Religion was regarded as a great enemy of the Enlightenment worldview;[26] thus displacing the old world order, which held man in subordination to God and His laws, was paramount. For this reason, it is unsurprising that tenets would be so widely discussed by Enlightenment philosophers, and seemingly form the starting point for many of their works.[27] It is submitted that by reinterpreting the principles of the dominant order (Judeo-Christianity), in a manner that would support the new Enlightenment philosophies, religion was harnessed as a vehicle to ensure a seamless transition from a religious worldview to an Enlightenment worldview.

Kant typifies the aforementioned thus is used as an illustration, due to his work's significance as an historical pivot. Post-Kantian theology was more anthropocentric than pre-Kantian theology yet the biblical references remained constant.[28] Whilst

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[25] ibid. See also Elkana, Y., 'Two-Tier Thinking Social Studies' (1978) 8 Science, 309-326; Hall, D.E. et al, 'Conceptualizing "Religion": How Language Shapes and Constrains Knowledge in the Study of Religion and Health Perspectives' (2004) 47(3) Biology and Medicine 386-401

[26] Elkana, Y., (n. 20) 4; Scott, J.C., *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, New Haven, CT 1998)

[27] For examples see Locke, J., *Two Treatises of Government* (New York: New American Library, 1965); Firestone, C.L., and Palmquist, S.R., *Kant and the New Philosophy of Religion* (Indiana University Press, 2006); Tweyman, S., *Hume on Natural Religion* (Thoemmes Press: England, 1996).

[28] Cobb, J.B., 'Protestant Theology and Deep Ecology' in Barnhill, D.L., Gottlieb, R.S. (eds) *Deep Ecology and World Religions: New Essays on Sacred Grounds*, (Albany State 2001) 215

pre-Kantian theology regarded all creation as being reconciled in God, thus attributing intrinsic worth to nature, habits informed by post-Kantian philosophy disregarded, to a large extent, the general natural environment and ecological systems on which mankind is dependent.[29] Consistent with Enlightenment philosophies man was characterised as a distinct entity, alienated from nature, occupying a position far above nature, empowering him to exploit natural resources to satisfy his own ends and without moral accountability.[30] This is the type of misconstruction of the Judeo-Christian dominion concept,[31] which characterised the new Enlightenment approved religion. This theology continues to inform the manner in which the West relates to the environment.

In non-Western continents evangelised by Christianity and regarded as 'outside of light',[32] having no part in the Enlightenment, the prevailing paradigm continues to be that there needs to be a balance between people and nature.[33] Thus, the Judeo-

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[29] Cobb, J.B., 'Protestant Theology and Deep Ecology' in Barnhill, D.L., Gottlieb, R.S. (eds) *Deep Ecology and World Religions: New Essays on Sacred Grounds* (Albany State 2001), at 220. Cobb also states that the influence of Kant was such that theologians of his era 'fell into the modern philosophical bias of defining issues epistemologically'. 217

[30] Scarfe, A.C., 'Overcoming Anthropocentric Humanism and Radical Anti-Humanism: Contours of the Contructive Postmodernist Environmental Epistemology Process' (2008) 12 Studies Supplement; Descartes' stress on the individual as the basic unit of society also gave the necessary impetus to a philosophy of individualism, which served to disconnect peoples from each other, from communities and from the environment. McCloughry, R.K., 'Theology and Community' in Atkinson, D., and Field, D.H., (eds) *New Dictionary of Christian Ethics and Pastoral Theology*, (Leicester Inter-varsity Press 1985), 111

[31] See section 1.4. Stewardship and the Cultural Mandate

[32] Eze, I.M. (ed) *Race and the Enlightenment* (Blackwell, 1997) 4-5

[33] Sowunmi, A., 'How and Why Creation Disintegrated' (September 1987) 3 Reintegrating God's Creation, Church and Society Documents, 11; South African theologian, Allan Boesak states that the cultural mandate only makes sense in terms of servant-hood and stresses the importance of the covenant between mankind and nature. Forum, Justice, Peace and Integrity of Creation Newsletter, No. 6, May 1989,1; also expressing the same sentiment are, Mugambe, J., 'God, Humanity and Nature in Relation to Justice and Peace,' (September 1987) 2 Church and Society Documents, (ii); Setiloane, G.M., 'Towards a Biocentric Theology and Ethic - Via Africa' in C.W. du toit (ed.), *Faith, Science and African culture: African Cosmology and Africa's Contribution to Science*, (Pretoria UNISA 1998) 73-84; For Asian views reflecting the same sentiments, see Yong Bock, K., *Justice, Peace and the Integrity of Creation* in Carino, F., and Gosling, D. (eds), *Technology from the Underside*, (Manila: NCCP 1986), 48; and also, Death of a Forest*,* Columbian Mission, Manila, n.d.,

Christian God's command to man to rule over, and cultivate the earth, continues to exist in the context of servant-hood.[34] In relation to the natural environment, the dominant interpretation of this it that it connotes stewardship.[35]

1.3. Judeo-Christian Ethics and Sustainability

The submission that Judeo-Christian ethics are not responsible for the state of environmental degradation, can only truly be substantiated with reference to the actual principles, thus it is necessary to revisit the original source. The purposes of this are twofold; first it will help ascertain the precise nature of the principles, and secondly it will determine whether Judeo-Christian ethics can be instructive in solving this current environmental crisis.

Post Enlightenment, the interpretation of the cultural mandate has moved away from the idea that first, the earth has no value apart from its utility to mankind,[36] and secondly, that the gift of land was one of exploitative ownership as per Enlightenment theologies. In accordance with pre-Enlightenment principles, modern theologians have established that at the core of the cultural mandate is, and always has been, stewardship.[37]

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p.2, available in Britain as a slide and audio meditation from CAFOD. As cited in Gosling, D., *A New Earth* (London 1992), 28

[34] Gosling, D., A New Earth (London 1992), 24

[35] DeWitt, C.B., 'Creation's Environmental Challenge to Evangelical Christianity', in Berry, R.J. (ed.) *The Care of Creation* (Leicester, 2000) 60-73. This is the interpretation that shall be adopted by the thesis.

[36] Sider, R.J., 'Biblical Foundations for Creation Care' in Berry, R.J. (ed.) *The Care of Creation* (Leicester, 2000) 43, 47-49; Bauckham, R., 'Stewardship and Relationship' in Berry, R.J. (ed.) *The Care of Creation* (Leicester, 2000) 99, at 102; Evangelical Declaration on the Care of Creation (1994).

[37] Attfield, R., *The Ethics of Environmental Concern* (1991); DeWitt, C.B., 'Creation's Environmental Challenge to Evangelical Christianity', in Berry, R.J. (ed.) *The Care of Creation* (Leicester, 2000) 60-73; McGrath, A.E., 'The Stewardship of the Creation: An Evangelical

1.4. Stewardship and the Cultural Mandate

There are two main principles, which can be derived from the cultural mandate. First, underlying the clause, 'Be fruitful and multiply; fill the earth and subdue it'[38] is an economic statement for development; it is a cultural mandate for humanity to develop and unfold creation.[39] Secondly, underlying the clause, 'have dominion over the fish of the sea…'[40] is the principle of earth keeping.[41]

While the term 'dominion' imports hierarchy and the idea that mankind will enjoy a kingly rank over creation, the apex imported by Judeo-Christian theological constraints is one of leadership and servant-hood rather than exploitation.[42] The concepts of 'kingship' and 'dominion' have been interpreted as carrying both privilege and responsibility,[43] suggesting stewardship. It is further asserted that the Hebrew command, 'to have dominion' is also the apportioning of an on-going task and could be more closely translated to the modern word 'manage.' This assertion is

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Affirmation' in Berry, R.J. (ed.) *The Care of Creation* (Leicester, 2000) 86-89; the Bible Ezekiel c. xxxiv v. 18; Deuteronomy c. xx v.19, c. xxII v. 6

[38] The Bible, Genesis c. I v28; Kearns suggests that the Judeo-Christian stewardship ethic begins here. Kearns, L., 'Saving the Creation: Environmentalism in the United States' (1996) 57(1) *Sociology of Religion* 55, at 58.

[39] See Munroe, M., *Understanding Your Potential* (Destiny Image Publisher 2008); Bishop, S., 'Green Theology and Deep Ecology: New Age or New Creation' (1991) 16 (3) Themelios 8-14 www.theologicalstudies.org.uk/pdf/ecology_bishop.pdf

[40] The Bible, n.38

[41] Bishop, S., 'Green Theology and Deep Ecology: New Age or New Creation' (1991) 16 (3) Themelios 8-14 www.theologicalstudies.org.uk/pdf/ecology_bishop.pdf

[42] Waters, B., 'Christian Theological Resources for Environmental Ethics' (1995) 4 Biodiversity and Conservation, 849 at 854; Bishop, S., 'Green Theology and Deep Ecology: New Age or New Creation' (1991) 16 (3) Themelios 8-14

[43] Hart, I., 'Genesis 1:1-2:3 As A Prologue to the Book of Genesis' (1995) 46.2 Tyndale Bulletin 315, at 322-323; Waters, B., 'Christian Theological Resources for Environmental Ethics' (1995) 4 Biodiversity and Conservation 849, 854; Bishop, S., 'Green Theology and Deep Ecology: New Age or New Creation' (1991) 16 (3) Themelios 8-14. Bishop states that it is a rulership that is accountable. He also indicates that the principles underpinning 'dominion' are also exemplified by Jesus as the shepherd-king (The Bible, Philippians 2).

further buttressed by the Genesis c. II v.15[44] narrative, which uses the Hebrew word '*Shamar,'* which has been translated into English using the phrase 'tend and keep';[45] more specifically, a 'loving, sharing, sustaining keep'.[46] Theologian De Witt expands upon this principle suggesting that the Creator is expected to keep mankind in all of his vitality, energy and beauty, and in connection with all of his vital relationships required to help sustain his life. Furthermore, he imports this principle into the cultural mandate suggesting that mankind is expected to reflect this as he keeps creation. In this context, this does not connote a 'preserved, inactive, uninteresting state', it connotes cultivating the earth and developing culture.[47]

It has been further asserted by commentators, that the Hebrew word in Genesis c. I v. 28, which has been translated into 'subdue' in English also connotes work. 'Subdue' refers to making the soil produce, that is to say, making the earth produce, rather than simply taking what happens to grow naturally, or leaving it in a wilderness.[48] Thus, mankind may partake of the fruits of the earth but within the constraints of the stewardship principles invoked by the use of the word *Shamar*.[49]

1.4.1. Principles of the Judeo-Christian Stewardship Ethic

[44] 'Then the Lord God took the man and put him in the garden of Eden to tend and keep it.'
[45] Sider, R.J., *Biblical Foundations for Creation Care,* in Berry, R.J. (ed.) *The Care of Creation* (Leicester, 2000) 43, at 48. The King James Version uses 'tend and keep,' other translations have adopted different phraseology such as 'work it and take care of it' (New International Version), 'tend and watch over' (New Living Translation).
[46] DeWitt, C.B., 'Ecology and Ethics: Relation of Religious Belief To Ecological Practice in the Biblical Tradition' (1995) 4 Biodiversity and Conservation 838, at 844
[47] Bishop, S., 'Green Theology and Deep Ecology: New Age or New Creation' (1991) 16 (3) Themelios 8-14; De Witt parallels the use of the word *'Shamar'* in Genesis 2v15 with the use of the same word in the Bible, Numbers 6v24 in reference to the Creator keeping Mankind. DeWitt, C.B., 'Ecology and Ethics: Relation of Religious Belief To Ecological Practice in the Biblical Tradition' (1995) 4 Biodiversity and Conservation 838, at 844; See also Bishop, S., 'Green Theology and Deep Ecology: New Age or New Creation' (1991) 16 (3) Themelios 8-14
[48] Hart, I., 'Genesis 1:1-2:3 As A Prologue to the Book of Genesis' (1995) 46.2 Tyndale Bulletin 315, 323; Barr, So J., 'Man and Nature: The Ecological Controversy and the Old Testament' (1972 -73) 55 BJRL, 9-32
[49] See n. 45

Stewardship is an ancient concept and a key component of ecological sustainability.[50] Whilst the Enlightenment served to almost abort this concept, in the Western world, it has been well preserved in many indigenous communities of the New World, still informing their world-views.[51]

In his article, 'God's Love for the World and Creation's Environmental Challenge to Evangelical Christianity',[52] De Witt, provides a list of biblical principles inherent in the type of stewardship advocated by Judeo-Christian ethics. These principles, are broadly similar to those informing the worldview of indigenous people of the New World,[53] and have been distilled into four core principles.[54] These are:

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[50] DeWitt, C.B., (n. 46), 838

[51] McKay, describes indigenous people as an 'Old Testament people' based on their having a spirituality that centres around the relationship to the whole of creation, their ideals regarding stewardship, and their oral tradition. McKay, S., 'An Aboriginal Perspective on the Integrity of Creation' (1994) Ecotheology: Voices from South and North, 212-217

[52] DeWitt, C.B., 'God's Love for the World and Creation's Environmental Challenge to Evangelical Christianity' (1993) 17 Evangelical Review of Theology 134, 140-143; re-appearing in 'Creation's Environmental Challenge to Evangelical Christianity' in Berry, R.J. (ed.) *The Care of Creation* (Leicester, 2000) 60-73. For examples of other writings which reflect this perspective, see Granberg-Michaelson, W., *A Worldly Spirituality: The Call to Redeem Life on Earth* (San-Francisco 1984); Redeeming the Creation: The Rio Earth Summit—Challenges for the Churches (WCC Publications, 1992); Wright, C., 'Biblical Reflections on Land' (1993) 17 Evangelical Review of Theology 153, at 166; Wilkinson, L., *Earthkeeping in the 90's: Stewardship of Creation* (Grand Rapids 1991); Wilkinson, L., 'How Christian is the Green Agenda' (1993) Christianity Today 16, 20

[53] One of the main elements informing indigenous world-views is that 'land is granted and entrusted by one Creator for everyone to harness, cultivate, sustain, and live on.' Guan, J., and Guzman, IPRA, R.B., 'Legalizing Dispossession?' (1999) 42 IBON Special Release; Molintas, J.M., 'The Philippine Indigenous Peoples' Struggle for Land and Life: Challenging Legal Texts' (2004) 21 Arizona of International and Comparative Law 269, 275

[54] DeWitt, C.B., 'Three Biblical Principles for Environmental Stewardship' (2002). Available at http://www.leaderu.com/theology/environment.html The remaining principles are spiritual and provide the ideals which, if adhered to, increase the likelihood of success in maintaining the afore-mentioned principles. The remaining principles are (1) following in Christ's example of servant-hood (This entails following in His footsteps as sustainer and reconciler of creation. The Bible, Colossians 1:19-20), (2) Seeking first the kingdom of God, rather than self-interest (The Bible, Matthew 6:9-10; Matthew 6:33, Zerbe, G., 'The Kingdom of God and Stewardship of Creation' (1991) The Environment and the Christian 73—92, where it is suggested that fulfilment comes from first seeking God's kingdom), (3) Seeking contentment as our great gain (The Bible, Psalm 119:36; Hebrews 13:5; 1 Timothy 6:6-11), (4) Acting upon what we know is right (The Bible, Ezekiel 33:30-32; Luke 6:46-49). These principles are also applied in McGrath, A.E., 'The Stewardship of the Creation: an Evangelical Affirmation' in Berry, R.J. (ed.) *The Care of Creation* (Leicester, 2000) 87

1. The Earth-keeping principle; we must keep creation as the Creator keeps mankind.[55]

2. The Sabbath Principle; creation must be allowed to recover from mankind's use of its resources.[56]

3. The Fruitfulness Principle; mankind may enjoy, but not destroy the grace of God's good creation[57]

4. The Fulfilment and Limits Principle; there are limits set to mankind's role within creation.[58]

Contrary to advocating a reign of tyranny over the environment, the aforementioned principles affirm the responsibility of mankind towards the environment.[59] Judeo-Christian ethics neither advocates the idea that the natural environment is the

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[55] See 'Stewardship and the Cultural Mandate' above.

[56] This principle is found in The Bible, Exodus c. XXIII v. 10-11; Leviticus c. XXV v. 1-7, 11. The importance of observing a fallow year every seven years is enhanced by the corresponding punishment of exile from the land following failure. The Bible, Leviticus c. XXVI v. 33-34. The purpose of the exile is expressed in the following way: 'The land also shall be left empty by them, and shall enjoy its Sabbaths while it lies desolate without them.' See also The Bible, Jeremiah c. XXV v. 11-25; c. XXIX v. 10 where the people were exiled for 70 years, which was equivalent to the number of Sabbath years the land had missed. This principle speaks of sustainability, as it requires regeneration of the land and conservation of food (see Deuteronomy c. XXII v. 6,7 which allows the taking of eggs from a birds nest but forbids the taking of the mother). See also DeWitt, C.B., *Earthwise: A Biblical Response to Environmental Issues* (Grand Rapids 1994) 42.

[57] DeWitt, C.B., (n. 46) 846. Here it is suggested that a paradigmatic application of Old Testament principles would suggest that society operates in a manner that does not cause the degradation or destruction of ecosystems, and where this has occurred, they must be restored. The Bible, Deuteronomy 22:6; Ezekiel 34:18, 'Is it too little for you to have eaten up the good pasture, that you must tread down with your feet the residue of your pasture—and to have drunk clear waters, that you must foul the residue with your feet?'

[58] DeWitt, C.B., (n. 46) 846 where it is asserted that the Exodus 23 and Leviticus 25-26 instructions regarding land regeneration are there as 'buffers' to stop mankind transgressing the limits causing 'crises of species extinctions, starvation, environmental genocide…'

[59] Writers aligning themselves with the utilitarian conservation ethic exist in the minority. See Ball, J., 'The Use of Ecology in the Evangelical Protestant Response to the Ecological Crisis' (1998) 50(1) Perspectives on Science and Christian Faith 32, at 33; Beisner, E.C., *Prospect for Growth: A Biblical View of Population, Resources, and the Future* (Westerchester, IL 1990); Melvin, B.A., 'One Perspective on the Environment' (1990) 49 United Evangelical Action

possession of mankind, nor does it suggest that it has no intrinsic worth.[60] It instead, affirms nature as having intrinsic worth, and man as being responsible for the safekeeping and nurturing of the natural environment. Whilst mankind may partake of the natural environment, exploitation undermines the role of stewardship.[61]

The dualism and rationalism of a post-Enlightenment world are unlikely to be overcome by an integrated spirituality.[62] However, the Judeo-Christian stewardship ethic is conterminous with the stewardship ethic reflected by indigenous people in their care of creation, where nature is regarded for its intrinsic value. One method of harnessing the environmental benefits of the Old Testament application of the stewardship ethic is to safeguard the aforementioned indigenous people's habitats and cultures,[63] which would increase the scope for preservation of traditional knowledge.

However, a modern application of the aforementioned stewardship ethic does not necessitate the return to a religious worldview, for the dominant culture, nor does it involve a narrow application of a particular perspective. The essence of the Judeo-Christian stewardship ethic is to 'shape and reshape human behavior in the direction

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[60] Moltmann, J., 'God's Covenant and Our Responsibility' in Berry, R.J. (ed.) *The Care of Creation* (Leicester, 2000) 107 at 110, quoting the Declaration of World Alliance of Reformed Churches (1990).

[61] Hall, D.J., *Imaging God: Dominion as Stewardship*, (Grand-Rapids 1986); Cobb, J.B., *Sustainability: Economics, Ecology and Justice,* (Albany 1992); Nash, J., *Loving Nature: Ecological Integrity and Christian Responsibility*, (Nashville 1992); Barr, J., 'The Image of God in the Book of Genesis: a Study of Terminology' (1968) 51 Bulletin of the John Rylands Library(1968), 11-26; Preuss, H.D., *Old Testament Theology* (Louisville 1995); Moltmann, J., *God in Creation* (London 1985)

[62] Kearns, L., 'Saving the Creation: Christian Environmentalism in the United States' (1996) 57(1) Sociology of Religion 55, 58

[63] The contribution of the afore-mentioned traditional indigenous cultures to enhanced ecological sustainability is explored in the next chapter.

of maintaining individual, community, and environmental sustainability'.[64] The ensuing theoretical framework for a modern application of the Judeo-Christian stewardship ethic is thus composed of *scienta*, *ethics* and *praxis*. The corresponding questions as regards each are, how does the world work (*scienta*)? What ought to be (*ethics*)? What must we do (*praxis*)?[65] Rather than returning to a bygone age, *scienta* includes the harmonisation of knowledge from natural sciences, social sciences and humanities for coherency as regards the way things are now in terms of the biosphere.[66] The corresponding *ethics* derives from what human behavior ought to be or ought not to be based on the *scienta*.[67]

It is submitted by this thesis that the *scienta* and *ethics* aspects of a modern stewardship ethic have been, for the most part, determined with results finding expression in Rio instruments,[68] most prolifically Agenda 21.[69] The *praxis,* which must be informed by the *scienta* and *ethics,* is the only element that has yet to be determined. Pursuant to establishing *praxis* flowing from Agenda 21, section III, chapter 26, which deals with strengthening the role of indigenous people,[70] it is

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[64] De Witt, C.B., (n. 46) 843
[65] ibid, 844
[66] ibid, 845
[67] ibid
[68] UNCED, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev. 1, reprinted in 31 I.L.M. 874 (1992); U.N. Conference on Environment and Development (UNCED), Agenda 21, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I); UNCED Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests, U.N. Doc. A/CONF.151/26 (Vol.III)
[69] U.N. Conference on Environment and Development (UNCED), Agenda 21, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I)
[70] '26.3. In full partnership with indigenous people and their communities, Governments and, where appropriate, intergovernmental organizations should aim at fulfilling the following objectives:
(a) Establishment of a process to empower indigenous people and their communities through measures that include:
1.Adoption or strengthening of appropriate policies and/or legal instruments at the national level;

submitted, by this thesis, that steps could be taken, to facilitate the continuance of the aforementioned indigenous communities as they adhere to traditional ways of life. Therefore, whilst safeguarding the aforementioned indigenous habitats and cultures would increase the scope for preservation of traditional knowledge,[71] this is not the entire fulfilment of a modern application of the Judeo-Christian stewardship ethic.

If enhanced ecological sustainability is to be sustained, the role of dominant cultures must be addressed; therefore, *praxis* is not simply satisfied in the act of returning title to land, or legally recognised stewardship, to the aforementioned indigenous people, in order to facilitate the continuance of their ways of life. It begins to be satisfied as old ideologies responsible for the status quo of indigenous people are exposed and stripped away. It begins to be satisfied as the role of indigenous cultures as regards enhanced ecological sustainability begins to be understood by those of the dominant

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2.Recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate;
3.Recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development;
…
(b) Establishment, where appropriate, of arrangements to strengthen the active participation of indigenous people and their communities in the national formulation of policies, laws and programmes relating to resource management and other development processes that may affect them, and their initiation of proposals for such policies and programmes;
(c) Involvement of indigenous people and their communities at the national and local levels in resource management and conservation strategies and other relevant programmes established to support and review sustainable development strategies, such as those suggested in other programme areas of Agenda 21.
26.4. Some indigenous people and their communities may require, in accordance with national legislation, greater control over their lands, self-management of their resources, participation in development decisions affecting them, including, where appropriate, participation in the establishment or management of protected areas. The following are some of the specific measures which Governments could take:
(a) Consider the ratification and application of existing international conventions relevant to indigenous people and their communities (where not yet done) and provide support for the adoption by the General Assembly of a declaration on indigenous rights;
(b) Adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices.' Agenda 21 (n.70)

[71] The contribution of the afore-mentioned traditional indigenous cultures to enhanced ecological sustainability is explored in the next chapter.

culture. It begins to be satisfied as the new standards enshrined in the various international instruments as regards this role, and traditional knowledge,[72] is enabled through legal systems and frameworks. It is more satisfied as partnerships between the aforementioned indigenous communities and people of the dominant culture occur in pursuit of enhanced ecological sustainability. It becomes more satisfied by the entire process culminating in bringing indigenous people of such cultures within dominant legal frameworks domestically and internationally.

1.5. Summary

It has been submitted that White erred in asserting that Judeo-Christian ethics are the root cause of this current environmental crisis.[73] Contrary to White's assertion, it has been submitted that the values of Enlightenment philosophies are one of the major causes and that these values were used to re-interpret Judeo-Christian principles. This led to Enlightenment theologies, which were used as a means of supplanting religious values as the dominant worldview, paving the way for Enlightenment philosophies, thus values as the New Worldview.

It has been submitted that while the Enlightenment's view of domination gave man the prerogative to control nature and humanity in a destructive fashion; the idea of dominating the earth, according to Judeo-Christian ethics denotes the antithesis and as such can be instructive in the debate on ecological sustainability. As the last workable environmental paradigm, it has been submitted that the principles inherent

[72] See chapter 2, pp.49-54
[73] White, Jr., L., (n. 7)

in the Judeo-Christian stewardship ethic ought to be harnessed to curb the current ecological crisis.

It is submitted that this does not require the return to a bygone era but requires a paradigmatic application of the Judeo-Christian stewardship ethic. This necessitates the determination of *praxis*, which flows from the *scienta* and *ethics* of this modern age.

The next chapter shall explore the connection between safeguarding indigenous cultures, traditional knowledge, and environmental protection.

Chapter 2

Indigenous People and Environmental Protection

2.1. Introduction

Since the time of the Enlightenment, the *scienta, ethics* and *praxis*,[1] of indigenous people have historically been regarded as fundamentally incommensurable with, and inferior to, that based on Western modes of attainment.[2] The concept of progress as per the Enlightenment required a shift 'from superstition, to magic, to religion to science',[3] hence, from the irrational to the rational. As traditional knowledge was based on the 'irrational', it was regarded as primitive whilst western technologies and science were regarded as the binary opposite. As a result, during colonialism, traditional knowledge systems were usurped and destroyed by western science.[4] The concepts of 'primitive' and 'advanced' were applied to epistemologies and to the human minds that adhered to each;[5] therefore, those adhering to Western science

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[1] See p.41 for an explanation of these terms.

[2] Shiva, V., 'Cultural Diversity and the Politics of Knowledge' in Dei, S., *et al* (eds) *Indigenous Knowledges in Global Contexts: Multiple Readings of Our World* (University of Toronto Press: 2000) vii-x vii; Davis, M., 'Bridging the Gap or Crossing a Bridge? Indigenous Knowledge and the Language of Law and Policy' in (eds) Reid, W.V., *Bridging Scales and Knowledge Systems* (Island Press: 2006) 145, at 146-147; Warren, D. M., 'Linking Scientific and Indigenous Agricultural Systems' in Compton, J., L. (ed), *The Transformation of International Agricultural Research and Development*, 153-70, (Boulder, CO: Lynne Rienner: 1989)

[3] Davis, M., 'Bridging the Gap or Crossing a Bridge? Indigenous Knowledge and the Language of Law and Policy' in Reid, W.V. (eds), *Bridging Scales and Knowledge Systems* (Island Press: 2006), 145, 148

[4] Shiva, V., 'Cultural Diversity and the Politics of Knowledge' in Dei, S., *et al* (eds) *Indigenous Knowledges in Global Contexts: Multiple Readings of Our World* (University of Toronto Press: 2000) vii-x, vii

[5] Goody, J., The Domestication of the Savage Mind, (Cambridge University Press: 1977), at 1; See also chapter 1, p.10

were advanced and those adhering to traditional systems were regarded as primitive human beings.

Owing to the failure of science and technology in maintaining the global environment, the aforementioned position has had to be reconsidered.[6] It has been accepted by scholars that there is more than one 'universal' form of knowledge.[7]

This chapter shall begin by defining traditional knowledge, and establishing the link between both the survival of traditional knowledge, and the survival of indigenous cultures. This shall be buttressed by establishing the value of indigenous cultures pertaining to global ecological sustainability, as accepted by the international community. Case studies of indigenous people in environmental protection areas shall be employed to strengthen the central research argument that land justice and environmental protection together constitute a mechanism for increasing the production and protection of natural habitats. Simply put, recognising title to land, in the Western sense of the concept, and in some cases legally recognised stewardship, for indigenous communities buttressed by environmental protection constitutes a mechanism for the aforementioned. Finally, the legal rights and implications

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[6] See generally Shiva, V., 'Cultural Diversity and the Politics of Knowledge' in Dei, S., *et al* (eds) *Indigenous Knowledges in Global Contexts: Multiple Readings of Our World* (University of Toronto Press: 2000) vii-x; 'Lakoff dismisses the 18th-century Enlightenment idea of science, arguing that because people think in frames, ideas and facts that run counter to these frames will be rejected even if true. Thus, a movement that grounds its claims based on scientific evidence that does not fit prevailing popular frames will be irrelevant...' Brulle, R.J., Jenkins, J.C., 'The Rhetorical Reconstruction of Progressive Politics' (March 2006) Organization and Environment 82, 83

[7] Turnbull, D., Masons, *Tricksters and Cartographers: Comparative Studies in the Sociology of Scientific and Indigenous Knowledge* (Amsterdam: Hardwood Academic, 2000), 1-6; Agrawal, A., 'On Power and Indigenous Knowledge' in Posey, D.A. (ed.), *Cultural and Spiritual Values of Biodiversity* (London: United Nations Environment Programme/Intermediate Technology Publications, 1999) 177, 177; see also Agrawal, A., 'Dismantling the Divide Between Indigenous and Scientific Knowledge' (1995) 26 Development and Change 413

emanating from international instruments pertaining to indigenous communities and ecological sustainability shall be considered.

2.1.2. Traditional Knowledge and Indigenous Worldviews

A key distinction dissociating traditional knowledge from western science is the holistic approach characterising traditional knowledge. Traditional knowledge has been defined as:

> A living system of information management, which has its roots in ancient traditions. It relates to culture and artistic expression and to physical survival and environmental management. It controls individual behavior, as it does community conduct…it is a concept that essentially defies description in Western terms, but which lies at the heart of Indigenous society.[8]

Thus, economic interactions are not divorced from the social and spiritual aspects of life, and the land forms the point of intersection.[9] Furthermore, traditional knowledge operates 'as a complex set of interrelationships among the physical world, the world of humans, the natural world, and the unseen world of ancestors and cosmology'.[10] This is the root of the 'idiom of kinship and belonging'[11] between land and people.

A further key distinction between indigenous people of the New World and other societies is the belief among indigenous people that 'land is granted and entrusted by

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[8] Howden, K., 'Indigenous Traditional Knowledge and Native Title' (2001) 24(1) University of New South Wales Law Journal 60, 60

[9] Strang, V., *Uncommon Ground: Cultural Landscapes and Environmental Values* (Oxford: Berg., 1997), 84

[10] Davis, M., 'Bridging the Gap or Crossing a Bridge? Indigenous Knowledge and the Language of Law and Policy' in Reid, W.V. (eds), *Bridging Scales and Knowledge Systems* (Island Press: 2006), 145, 153

[11] Kirsch, S., 'Lost Worlds: Environmental Disaster, "Culture Loss," and the Law' (2001) 42(2) Current Anthropology 167, 169

one Creator for everyone to harness, cultivate, sustain, and live on.'[12] This connotes a strong stewardship ethic advocating the sustainable use of natural resources underpinned by harmonious living with the environment. These key components inform traditional knowledge, and mandate ecological integrity.

2.2. Indigenous Communities and Environmental Protected Areas

Protected areas have arisen as a result of the international community's commitment to conserve biodiversity.[13] Protected areas have been defined as:

> An area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means.[14]

This also includes the sustainable use of natural resources, maintenance of ecosystems, and consideration for local indigenous cultures.[15]

As a result of the vast biodiversity in indigenous territories, many of the lands belonging to indigenous people are being proclaimed protected areas without the consent of the indigenous people inhabiting the area.[16] This approach of 'colonial

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[12] Guan, J., and Guzman, IPRA, R.B., 'Legalizing Dispossession?' (1999) 42 IBON Special Release; Molintas, J.M., 'The Philippine Indigenous Peoples' Struggle for Land and Life: Challenging Legal Texts' (2004) 21 Arizona of International and Comparative Law 269, 275

[13] Concu, N., May, K., 'Institutional and Ecological Scales of Indigenous Protected Areas in Australia: A Critical Analysis' Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, Australia, (2010) 5

[14] Guidelines for Protected Area Management Categories (IUCN, 1994); Borrini-Feyerabend, G., *et al* 'Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation' World Commission on Protected Areas (IUCN, 2004), 1; Andrew-Essien, E., Bisong, F., 'Conflicts, Conservation and Natural Resource use in Protected Areas Systems: An Analysis of Recurrent Issues' (2009) 25(1) European Journal of Scientific Research 118, 118

[15] Borrini-Feyerabend, G., *et al* 'Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation' World Commission on Protected Areas (IUCN, 2004), 1

[16] This biodiversity is the result of being in the care of indigenous people for tens of thousands of years. Bauman, T., and Smyth, D., Policy Briefing Paper for the Australian Collaboration Outcomes

conservation'[17] has served to further dispossess indigenous communities of land since once an area is designated 'protected,' human occupation is prohibited except in specific areas.[18] This approach has also led to a loss of access to common property such as cultural sites, and has interrupted the social institutions of the indigenous communities in question.[19] This is detrimental to the international move towards creating a more ecologically sustainable globe, because displacement of communities and severe resource extraction restrictions, precipitate cultural erosion.[20] As cultural practises come under pressure, a loss of cultural diversity begins to occur. This is followed by the extinction of language, causing a loss of traditional knowledge. In order for the international community to benefit from this traditional knowledge both indigenous cultures and habitats must be protected.[21]

2.3. The Value of Indigenous Cultures as Recognised by International Instruments

It has been estimated that 85% of all known plant species are situated in areas that are the traditional homelands of indigenous peoples.[22] At the same time, between 50

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of three case studies in Indigenous Partnerships in Protected Area Management, Australian Institute of Aboriginal and Torres Strait Islander Studies, (2007), 3.

[17] State of the World's Indigenous Peoples. United Nations. Dept. of Economic and Social Affairs, Permanent Forum on Indigenous Issues (United Nations), United Nations. Statistical Division United Nations, (2009), 91

[18] Andrew-Essien, E., Bisong, F., 'Conflicts, Conservation and Natural Resource use in Protected Areas Systems: An Analysis of Recurrent Issues' (2009) 25(1) European Journal of Scientific Research, 118, 122

[19] Cernea, M., 'Poverty Risks and National Parks: Policy Issues in Conservation and Resettlement' World Development (2005) vol. 34(10), 1808-1830; State of the World's Indigenous Peoples. United Nations. Dept. of Economic and Social Affairs, Permanent Forum on Indigenous Issues (United Nations), United Nations. Statistical Division United Nations (2009), 93

[20] State of the World's Indigenous Peoples. United Nations. Dept. of Economic and Social Affairs, Permanent Forum on Indigenous Issues (United Nations), United Nations. Statistical Division United Nations (2009), , at 94

[21] See generally O'Connor, T.S., '"We Are Part of Nature: Indigenous Peoples" Rights as a Basis for Environmental Protection in the Amazon Basin' (1994) 5(1) Colo. J. Int'l Envtl. L. and Pol'y, 193

[22] Burger, J., *The Gaia Atlas of First Peoples: A Future for the Indigenous World* (London: Gaia Books Ltd, 1990) 32

and 80% of global species diversity are found in just twelve countries.[23] In addition, tropical rain forests, which account for only 7% of the earth's land surface and provide the habitat for 50 million indigenous peoples, are thought to contain well over half of the species in the entire world biota. [24]

These statistics belie the fact that the world's indigenous people[25] occupy a mere twenty percent of the earth's territory.[26] The link between human cultural diversity and concentrations of biodiversity has been proven both biogeographically and on a country-by-country basis.[27] The seventeen nations, which inhabit two thirds of the earth's biological resources, are also the traditional lands of the majority of the world's indigenous people.[28] Furthermore, of the six thousand cultures in the world,

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[23] Shine, C., and Kohona, P., 'The Convention on Biological Diversity: Bridging the Gap between Conservation and Development' (1992) 1 RECIEL 278

[24] Wilson, E.O., 'The Current State of Biological Diversity' in Wilson (ed) *Biodiversity* (Washington D.C. 1998) 8; UNEP, The State of the World Environment 1991 (1991) Chapter 3; Woodliffe, J., 'Biodiversity and indigenous peoples' in Bowman M., Redgwell C. (eds.) *International law and the conservation of biological diversity* (Boston MA, Kluwer Law International 1996) 257; Getches, D.H., 'Foreword: The Challenge of Rio' (Winter 1993) 4 Colo. J. Int'l Envtl. L. and Policy 1, 13

[25] Whilst there is no universal definition of the term 'indigenous communities, peoples and nations', the commonly accepted understanding is that provided by Jose R. Martinez Cobo in his Study on the Problem of Discrimination against Indigenous Populations (UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1-4.): 'Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system…'

[26] Gray, A. 'Between the spice of life and the melting pot: biodiversity conservation and its impact on indigenous peoples' IWGIA Document No. 70. Copenhagen: IWGIA, (1991) at 8; State of the World's Indigenous Peoples. United Nations. Dept. of Economic and Social Affairs, Permanent Forum on Indigenous Issues (United Nations), United Nations. Statistical Division United Nations, (2009), 84.

[27] Toledo, M.V., 'Indigenous Peoples and Biodiversity' in Levin, S., *et al* (ed.) *Encyclopedia of Biodiversity*, (Academic Press 1991); Maffi, L., *Language, Knowledge and the Environment: the interdependence of cultural and biological diversity* (Oxford University Press 1999).

[28] United Nations High Commissioner for Human Rights, Leaflet No. 10: Indigenous Peoples and the Environment (2001); Amiott, J., 'Investigating the Convention on Biological Diversity's Protections for Traditional Knowledge' (2003) 11 Mo. Envtl. L. and Pol.'y Rev., 3, 6

four to five thousand are indigenous.[29] Additionally, research demonstrates that the loss of culture precipitates a loss of language and subsequently a loss of ecological knowledge; as such knowledge is contained in languages, which are orally transmitted through the generations.[30]

It has further been accepted that land rights, land use and resource management are critical for the maintenance of indigenous cultures due to the inextricable link between indigenous cultures and ancestral lands.[31] In order to better preserve indigenous cultures and in turn traditional knowledge, environmental protection is required.

This is resonated in various international instruments including the Brundtland Report,[32] the Rio Declaration,[33] the Forest Principles,[34] Agenda 21,[35] and the Convention on Biological Diversity (CBD).[36] They have also been affirmed by international environmental organisations including the World Wide Fund for Nature

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[29]State of the World's Indigenous Peoples. United Nations. Dept. of Economic and Social Affairs, Permanent Forum on Indigenous Issues (United Nations), United Nations. Statistical Division United Nations, (2009), at 84

[30] Working Group on Article 8j (2007j), Plan of Action for the Retention of Traditional Knowledge – Section D: Research on and implementation of mechanisms and measures to address the underlying causes of the decline of traditional knowledge, innovations and practices. UN Doc. UNEP/CBD/WG8J/5/3/Add.1 September (2007), para 42; State of the World's Indigenous Peoples. United Nations. Dept. of Economic and Social Affairs, Permanent Forum on Indigenous Issues (United Nations), United Nations. Statistical Division United Nations, (2009), at 94

[31] State of the World's Indigenous Peoples. United Nations. Dept. of Economic and Social Affairs, Permanent Forum on Indigenous Issues (United Nations), United Nations. Statistical Division United Nations, (2009), 94

[32] World Commission on Environment and Development, Our Common Future (Oxford University Press, Oxford 1987)

[33] UNCED, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev. 1, *reprinted in* 31 I.L.M. 874 (1992)

[34] UNCED Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests, U.N. Doc. A/CONF.151/26 (Vol.III) (1992)

[35]U.N. Conference on Environment and Development (UNCED), Agenda 21, U.N. Doc. A/CONF. 151/26/Rev.1 (Vol.), U.N. Sales No. E.93.I.8 (1992)

[36] United Nations Convention on Biological Diversity, Doc. UNEP/Bio. Div/N7-INC.5/4, 31 I.L.M. 818 (1992)

(WWF) and the International Union for the Conservation of Nature (IUCN).[37] Furthermore, the contribution of indigenous people to sustainable development has been recognised by the United Nations Declaration on the Rights of Indigenous Peoples, and the following has been enshrined in the preamble:

> Respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.[38]

The Brundtland Report addresses the issues of environmental degradation and social and economic development. It seeks an integrated approach to tackling these related problems, in a manner that serves the interests of both present and future generations. To this end, it recognises the adverse impact on humanity, of the loss of traditional knowledge as regards ecological systems. It recognises the fact that modern development, at times, displaces and destroys these traditional cultures, causing the disappearance of traditional skills, valuable to modern society, in the sustainable management of complex ecological systems.[39]

Principle 22 of the Rio Declaration emphasises the vital role of indigenous people in environmental management and development, based upon traditional knowledge and practices. Furthermore, Forest Principle 12(d) takes this a step further, stating that traditional knowledge as regards conservation and sustainable development, should

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[37]State of the World's Indigenous Peoples. United Nations. Dept. of Economic and Social Affairs, Permanent Forum on Indigenous Issues (United Nations), United Nations. Statistical Division United Nations, (2009), 85

[38] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007)

[39] World Commission on Environment and Development, Our Common Future (Oxford University Press, Oxford 1987), 115

be 'recognised, respected, recorded, developed, and as appropriate, introduced in the implementation of programmes.'[40]

Agenda 21,[41] deals with issues that are critical to the global community, under four headings, namely, Social and Economic Dimensions; Conservation and Management of Resources for Development; Strengthening the Role of Major Groups; and Means of Implementation. Chapter 26, pertaining to the role of Indigenous people and sustainability, exists under the third heading, specifically dealing with recognising and strengthening the role of indigenous people and their communities. It recognises the link between indigenous people and their land, thus the need for participation regarding decisions affecting their communities. As well as establishing objectives for governments, it provides that

> [I]n view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous peoples, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.[42]

This gives clear recognition to the link between Indigenous peoples' ways of life and sustainable development of the natural environment. Furthermore, it recognises the

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[40] UNCED Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests, U.N. Doc. A/CONF.151/26 (Vol.III) (1992), Article 13(d)

[41] U.N. Conference on Environment and Development (UNCED), Agenda 21, U.N. Doc. A/CONF. 151/26/Rev.1 (Vol.), U.N. Sales No. E.93.I.8 (1992)

[42] U.N. Conference on Environment and Development (UNCED), Agenda 21, U.N. Doc. A/CONF. 151/26/Rev.1 (Vol.), U.N. Sales No. E.93.I.8 (1992), chapter 26.1

need for strengthening the role of indigenous people as regards sustainable development and protecting the environment.

The Convention on Biological Diversity is binding on all signatory States and strives for environmental protection for indigenous people.[43] Paragraph 12 of the preamble acknowledges:

> [T]he close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its component.[44]

Thus, the objectives of the convention are to conserve biological diversity; to sustainably use the components of biological diversity; and the equitable sharing of the benefits of utilisation.[45] Article 8(j) further entrenches the aforementioned, by directing signatories to take measures to protect and preserve indigenous ways of life and traditional knowledge as is 'relevant for the conservation and sustainable use of biological diversity'.[46]

2.4. Environmental Protected Area

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[43] There are a total of 191 parties to the Convention on Biological Diversity. State of the World's Indigenous Peoples. United Nations. Dept. of Economic and Social Affairs, Permanent Forum on Indigenous Issues (United Nations), United Nations. Statistical Division United Nations, (2009), 101.
[44] United Nations Convention on Biological Diversity, Doc. UNEP/Bio. Div/N7-INC.5/4, 31 I.L.M. 818, (1992) Article 1
[45] ibid
[46] ibid

As a means of remedying the clash between indigenous communities and protected areas, the involvement of indigenous communities in management and decision-making is now encouraged as a part of environmental protection.[47] The predominant approaches to the administration of protected areas are the Top-Down and the Mixed Top-Down and Bottom Up management approaches.[48] The former represents the approach whereby a protected area is managed by a governing body, to the exclusion of the surrounding indigenous communities. The latter characterises the approach whereby resource management occurs with the partial involvement of the indigenous communities.[49]

One of the main impediments to the creation of reciprocal partnerships between indigenous communities and conservation managers is the issue of land rights. Where there is no recognised legal title to land, in the Western sense, residing in the indigenous community, these communities are generally excluded from management. Even where they are included, their proposals are given less weight than those of non-indigenous participants, and the favoured approach is that based on science rather than social reality[50] to the detriment of ecosystems. This is despite

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[47] Guidelines for Protected Area Management Categories (IUCN, 1994); Borrini-Feyerabend, G., *et al* 'Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation' World Commission on Protected Areas (IUCN, 2004), 1. This is based upon research indicating that people, cultures and natural resources are inextricably linked. See Wilson, A., 'All Parks are People's Parks' (2003) 12 Policy Matters 71; Philips, A., Management Guidelines for IUCN Category V Protected Areas: Protected Landscapes/Seascapes. Best Practice Protected Area Guidelines Series. (IUCN 2002); see also United Nations Convention on Biological Diversity, Doc. UNEP/Bio. Div/N7-INC.5/4, 31 I.L.M. 818, (1992), Article 8

[48] Andrew-Essien, E., Bisong, F., 'Conflicts, Conservation and Natural Resource use in Protected Areas Systems: An Analysis of Recurrent Issues' (2009) 25(1) European Journal of Scientific Research, 118, 125

[49] ibid

[50] Colchester, M., 'Conservation Policy and Indigenous Peoples' (Mar. 2004) 28(1) Cultural Survival Quarterly; Dowie, M., 'Conservation Refugees—When protecting nature means kicking people out' (Nov./Dec. 2005) Orion; State of the World's Indigenous Peoples. United Nations. Dept. of

research suggesting that indigenous peoples' 'effective participation in biodiversity conservation programs as experts…would result in more comprehensive and cost-effective conservation and management of biodiversity worldwide.'[51]

In Australia, this trend of the marginalisation of indigenous people in the aforementioned cases is being reversed, and this is occurring in tandem with the success of land claims by indigenous communities.[52] As property in land is being transferred to indigenous communities, the potential for creating reciprocal partnerships has increased significantly as the balance of power is transferred with the transfer of title.[53] As a result, those who were ambivalent about meeting with indigenous communities before are now required to meet with them in order to participate in the management of biodiversity.[54] At present, all reciprocal partnerships in Australia are based on some form of claim of title to land or rights in land,[55] thus the vital role of land justice to enhance current models of environmental protection is evident.

2.4.1. Indigenous Protected Areas

Economic and Social Affairs, Permanent Forum on Indigenous Issues (United Nations), United Nations. Statistical Division United Nations, 2009, 92

[51] Sobrevila, C., The Role of Indigenous Peoples in Biodiversity Conservation: The Natural but Often Forgotten Partners (World Bank, May 2008) xii

[52] Adams, M., 'Negotiating Nature: Collaboration and Conflict Between Aboriginal and Conservation Interests in New South Wales, Australia' (2004) 20(1) Australian Journal of Environmental Education 3, 8; Adams, M., 'Foundational Myths: Country and Conservation in Australia' (Feb. 2008) 3(1) Transforming Cultures eJournal, 291, 306-307.

[53] Langton, M., *et al,* 'Community-oriented protected areas for Indigenous peoples and local communities' (2005) Journal of Political Ecology 12, 23

[54] Concu, N., May, K., 'Institutional and Ecological Scales of Indigenous Protected Areas in Australia: A Critical Analysis' Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, Australia, (2010) 24

[55] Bauman, T., and Smyth, D., 'Indigenous Partnerships in Protected Area Management in Australia: Three Cases Studies' AIATSIS, Canberra (2007)

Indigenous Protected Areas are excellent in terms of the level of control vested in the indigenous communities as regards conservation since they ensure that conservation objectives 'conform to the ecological and cultural aspirations of the community',[56] thus ensuring the conservation of native flora and fauna, and indigenous culture.

An Indigenous Protected Area (IPA) is a narrow form of an Environmental Protected Area and exists in the form of conservation agreements between indigenous landholders and the government.[57] Title to land, in the Western sense, is a requisite for declaration of an IPA since the agreement consists of indigenous landowners voluntarily dedicating their lands for the purpose of conservation for which they receive both financial and technical assistance.[58] IPAs have arisen in response to the 'conservation and biological importance of Aboriginal lands and Aboriginal land management practices'.[59] Below are examples of two case studies, which are indicative of enhanced biodiversity where indigenous people play a substantial role in the management of environmental protected areas. Furthermore, these case studies highlight the important role of land justice, and a legal basis for environmental protection if biodiversity is to be further enhanced.

Nantawarrina IPA

Nantawarrina, a South Australian IPA, was declared as such in 1998 and was the first IPA to be declared.[60] The trigger for entering the IPA programme was the need for more effective land management in order to restore land of cultural value, which had

[56] Bauman, T., and Smyth, D., (n. 55), 36
[57] Muller, S., 'Towards Decolonisation of Australia's Protected Area Management: the Nantawarrina Indigenous Protected Area Experience' (2003) 41(1) Australian Geographical Studies, 29, 34
[58] ibid
[59] ibid
[60] ibid 21

been degraded by pastoralism and non-native and destructive animals.[61] Declaration as an IPA would allow resources to this end to become available to the indigenous community. Qualitative research was undertaken by Muller to illustrate the possible achievements for cultural and biological diversity when indigenous communities are empowered in environmental management of environmental protected areas. This research was conducted over the course of three field trips to the IPA, and included interviews with the three tiers of management of the IPA,[62] including members of the indigenous community.[63]

The key themes addressed by the case study are:

1. local control in meeting conservation objectives;
2. improved conservation of cultural and natural values;
3. community representation;
4. formal recognition of land management abilities, and
5. gender biases.[64]

To ensure local control in meeting conservation objectives, direct involvement of the indigenous people was employed throughout the drafting of the IPA plan of management. This was imperative for ensuring that the conservation objectives at the initial stage were in conformance with the ecological and cultural aspirations of the indigenous community.[65] Synchronising conservation objectives with the aforementioned aspirations of the indigenous community ameliorates the need for imposing prohibitive restrictions on the indigenous people's use of land for cultural,

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[61] Muller, S., (n. 57) 35; Concu, N., May, K., (n. 54) 22; Bauman, T., and Smyth, D., (n. 55), 36
[62] The three tiers were comprised of the Aboriginal Land Trust, Environment Australia and members of the Nepabunna community (indigenous community) Muller, S., (n. 57) 35
[63] Muller, S., (n. 57) Appendix 1, 43
[64] ibid 36
[65] ibid

economic and spiritual activities; thus, both can thrive together. In the Nantawarrina IPA it was observed that conservation outcomes were enhanced. This assertion is not based on scientific evaluations but is based on accounts of members of the indigenous community indicating the resurgence of native plants and a reduction in the number of non-native and destructive animals.[66] The Nantawarrina IPA has been deemed exemplary as an IPA, in terms of both management and conservation achievements, receiving an award from the United Nations Environment Program (UNEP).

However, data collected from the results of a questionnaire based on the World Commission for Protected Areas Framework,[67] examining three case studies including the Nantawarrina IPA, suggests that due to the limited scope of the indigenous community's powers,[68] IPAs are not as effective as they ought to be in terms of conservation management and dealing with external threats. This is due to the fact that IPAs are not legally protected. This lack of legal basis means that indigenous communities involved in IPAs, often have no power to militate against threats emanating from outside the IPA boundary.[69]

Deen Maar IPA

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[66] Muller. S., (n. 57) 37; Langton, M., *et al,* 'Community-oriented protected areas for Indigenous peoples and local communities' (2005) 12 Journal of Political Ecology 23, 38

[67] This is an overarching framework assessing the effectiveness of management of protected areas worldwide. Hockings, M., et al, *Assessing Effectiveness—A Framework for Assessing Management Effectiveness for Protected Areas* (2nd edn. IUCN, Switzerland 2006); Concu, N., May, K., 'Institutional and Ecological Scales of Indigenous Protected Areas in Australia: A Critical Analysis' Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, Australia, (2010) 4

[68] Concu, N., May, K., 'Institutional and Ecological Scales of Indigenous Protected Areas in Australia: A Critical Analysis' Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, Australia, (2010) 24, other case studies included were the Dhimurru IPA and the Deen Maar IPA

[69] Concu, N., May, K., (n. 68) 4

A case study on the Deen Maar IPA[70] confirms the results of the aforementioned case study in terms of factors impeding efficacy. The purpose of the Deen Maar IPA was also to restore the ecological and cultural value of the land. The success of this is reflected by the return of 'native grasses and numerous bird species'.[71] Prior to becoming an IPA the land in question had also been used for pastoralism; vegetation had been cleared, unwanted species of plants were a major issue and non-native animals were running rampant. Following declaration as an IPA, non-native and destructive animals, and unwanted species of plants continue to be a problem,[72] thus the survival of the Deen Maar community continues to be threatened. The issue of non-native and destructive animals emanates from the surrounding activity sharing boundaries with the Deen Maar IPA.[73]

These activities continue to be a problem due to the limited scope of the powers of the Deen Maar community, and lack of legal basis of the IPA. This lack of power is based on the fact that IPAs do not enhance the powers inherent in pre-existing indigenous land rights legislation,[74] thus IPAs frequently exist in areas, with boundaries that do not reflect the boundaries of the community's territory. To increase efficacy of this model, environmental protection needs to be a right defensible in law, to redress the scope of powers invested in indigenous

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[70] ibid 20-21
[71] ibid; DEWHA (2010c) 'Deen Maar Indigenous Protected Area' DEWHA, Canberra, http://www.environment.gov.au/indigenous/ipa/declared/deen-maar.html
[72] DEWHA (2010c) (n. 71)
[73] Langton, M., *et al* (n. 53), 21
[74] Concu, N., May, K., 'Institutional and Ecological Scales of Indigenous Protected Areas in Australia: A Critical Analysis' Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, Australia, (2010) 26.

communities. Additionally, as title to land is a requisite for declaration of an IPA[75] land justice must be justiciable.

2.5. Legal Implication of these Internationally Recognised Rights

With the exception of the CBD[76], recognition of the important role of indigenous people in terms of ecological sustainability, and the rights that follow, occur in non-legally binding international reports and declarations. Therefore, despite the recognition of the role of indigenous peoples in the sustainable management of ecological systems, and the correlating need to protect their environments, little has been yielded to this end. Indigenous people are still at the mercy of the State. This assertion is aptly reflected by the legally binding CBD. The limitation to the recognition and preservation of traditional knowledge and cultures, under Article 8(j), are the constraints imposed by national legal systems. This level of discretion has become a major impediment to progress. Only two thirds of the parties to the convention have complied with their duty to report on their efforts to implement Article 8(j).[77] Of those that have reported, even fewer regard the protection of traditional knowledge as 'high priority,' and many parties indicated that they were taking no active measures to comply with Article 8(j).[78]

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[75] ibid 14
[76] n. 56, p.51
[77] Amiott, J., 'Investigating the Convention on Biological Diversity's Protections for Traditional Knowledge' (2003) 11 Mo. Envtl. L. and Pol.'y Rev., 3, 5. This statistic is applicable only to submission of the first report. The second report had even fewer submissions with the number falling to around a third of parties.
[78] Ad Hoc Open-Ended Inter-sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, 'Review of Progress in the Implementation of the Priority Tasks of the Programme of Work on the Article 8(j) and Related Provisions' UNEP/CBD/WG8J/2/3; Amiott, J., 'Investigating the Convention on Biological Diversity's Protections for Traditional Knowledge' (2003) 11 Mo. Envtl. L. and Pol.'y Rev., 3, 5

The Draft Declaration of Principles on Human Rights and the Environment[79] buttresses the enshrined rights by further defining substantive rights including the human right to the protection of the environment.[80] It also includes the right to 'an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.'[81] Furthermore, the declaration provides,

> Indigenous Peoples have the right to control their lands, territories and natural resources and to maintain their traditional way of life. This includes the right to security in the enjoyment of their means of subsistence.[82]

Despite this, not much has been yielded in terms of land justice, land justice being central to the harnessing of traditional knowledge and protection of the ways of life of indigenous people.

It has been observed that indigenous knowledge is disappearing as a result of cultural homogenisation and modernisation under the nation state and international community.[83] It has also been accepted by academics that ex-situ conservation strategies are defective as a means of preserving 'physically demarcable, "natural" entities'[84] and also indigenous knowledge.[85] The land is required to provide the

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[79] UN Doc. E/CN.4/Sub.2/1994/9, 6 July 1994
[80] ibid, principle 6
[81] ibid, principle 4
[82] ibid, principle 14
[83] Agrawal, A., 'Dismantling the Divide Between Indigenous and Scientific Knowledge' (1995) 26 Development and Change, 413, 431
[84] Hamilton, M., 'Ex Situ Conservation of Wild Plant Species: Time to Reassess the Genetic Assumptions and Implications of Seed Banks Conservation' (1994) 8(1) Biology, 39; Wilson, E.O., *The Diversity of Life* (NY: W.W. Norton: 1992); Falk, D., 'The Theory of Integrated Conservation Strategies for Biological Conservation' in Mitchell, R. *et al* (eds) *Ecosystem Management: Rare Species and Significant Habitats, Proceedings of the 15th Natural Areas Conference*, 5-10 (Albany, NY: New York State Museum 1990)

resources essential to life, cultural practises, and the continuation of cultural knowledge for every generation.[86] In order for traditional knowledge to survive and continue to have relevancy, the contexts in which it exists must also be acknowledged and preserved otherwise it will become outmoded with no opportunity for evolution, and finally obsolete.[87] Contextual significance is not an element that is peculiar to indigenous knowledge; indeed science and technology also require certain contexts to remain live.[88]

However, as is implicit in the situation of reciprocal partnerships, the issue of existing power relations needs to be addressed for the viability of in situ conservation. To this end, it has been suggested that '[i]n situ preservation cannot succeed without indigenous populations gaining control over the use of the lands in which they dwell and the resources on which they rely'.[89] Furthermore, it has been submitted on analysis of the case studies that the viability of in situ conservation also requires a legal basis for environmental protection.

2.6. Summary

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[85] Agrawal, A., (n.82), 429

[86] Support can be derived from Stevens' assertion that '[M]any have long lived in ways that have left the natural resources base and biodiversity of their lands relatively intact. These peoples have developed patterns of resources use and resource management that reflect intimate knowledge of local geography and ecosystems and contribute to the conservation of biodiversity through such practices as protecting particular areas and species as sacred, developing land use regulations and customs that limit and disperse the impacts of subsistence resource use…' Stevens, S., *Conservation Through Cultural Survival: Indigenous Peoples and Protected Areas* (Island Press 1997), at 2; Anderson, K., 'Native Californians as Ancient and Contemporary Cultivators' in Blackburn, T.C., and Anderson, K., (eds.) *Before the Wilderness: Environmental Management by Native Californians,* (California 1993) 151, 151-152

[87] ibid

[88] Agrawal asserts 'Within our own lifetimes an immense variety of technical expertise has become obsolete as our culture has changed around us. Divorced in archives from their cultural context, no knowledge can maintain its vitality or vigour.' Agrawal, A., (n.75), 429; see also Feyerabend, P., *Against Method*, (1975; rpt. London: Verso 1993); Kuhn, T., *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press: 1962)

[89] Agrawal, A., (n.82) 432

The supremacy of traditional knowledge over 'western scientific' knowledge is not argued for in this chapter. It is simply submitted that a substantial contribution to global ecological sustainability can be made through land justice and environmental protection for indigenous communities. The rationale is that by this means, traditional knowledge can be preserved as preservation of habitat facilitates the continuance of culture. Support for this submission is derived from the widespread international agreements on the importance to the global community of preserving indigenous cultures. Further support is derived from the results of case studies on the Nantawarrina and Deen Maar IPAs recording increases in biodiversity.

Despite the plethora of international instruments expressing the importance of indigenous cultures to enhanced global ecological sustainability, the bulk of these have not been converted into legal rights. It is submitted that in order for indigenous cultures to be protected, environmental protection must have a strong legal basis as a means of increasing the scope of powers vested in indigenous communities, in terms of protecting their way of life. Furthermore, land justice must be explored as a means of redressing the balance of power during negotiations.

Chapter 3

Land Justice Conceptualised

3.1. Introduction

Land justice is a concept concerning which there is much debate, the world over, despite the lack of theoretical definition.[1] There exist a myriad of contexts, causing variations in the type of land justice framed by each. In order to elucidate the conceptual embodiment of land justice as applied by the thesis, land justice shall be examined in the context of various communities of concern. On examination, the reason for focussing on indigenous people of the New World, to the exclusion of other communities of indigenous people shall receive further clarification. Following this, a theoretical definition shall be arrived at.

3.2. Indigenous Peoples of Post-Colonial Settler Colonies

One of the main issues prevalent in countries with sub-divisions of indigenous people is the tension that derives from a dominant culture versus subservient culture dichotomy, where the subservient culture is struggling for survival. The context of the struggle is the colonial victory of the West over the indigenous people, during the

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[1] Lane, M.B., 'The Role of Planning in Achieving Indigenous Land Justice and Community Goals' (2006) 23 Land Use Policy 385-394; Christopher, A.J., 'Indigenous Land Claims in the Anglophone World' (1994) 11(1) Land Use Policy 31-44; Atkinson, W., 'Not One Iota of Land Justice: Reflections on the Yorta Yorta Native Title Claim 1994-2001' (2001) 5(6) Indigenous Law Bulletin 19

Enlightenment, following which many were forcibly dispossessed of lands both in that era and in the present day.[2] This alienation from land has caused the loss of economic strategies that were associated with the land and resources therein; thus, there was a loss of means of subsistence. Furthermore, due to the loss of connection to place, local traditional knowledge was lost. The loss could be quantified as 'cultural impoverishment economically, politically, socially, spiritually, and experientially'.[3]

Whilst not forming a homogenous group, indigenous peoples of post-colonial settler colonies, where the indigenous people survive as a minority population, have the aforementioned in common.[4] In terms of disassociating factors, a further subdivision can be made allowing two categories: peoples of former colonies whose 'pattern of settlement and cultural and racial legacies fall somewhere between the abstract paradigms of settler colony and colony of occupation',[5] namely, countries such as South Africa, Kenya, Algeria and Mozambique;[6] and on the other hand Canada, U.S.A, New Zealand and Australia.

The former group is predominantly comprised of communities where the indigenous people exist in the majority; however, racism, segregation and subjugation implemented via legal and political mechanisms have operated to deny them land

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[2] Hitchcock, R.K., 'International Human Rights, the Environment, and Indigenous Peoples' (1994) 5 Colo. J. Int'l Envtl. L. and Pol'y 1, 10; Kirsch, S., 'Lost Worlds: Environmental Disaster, "Culture Loss," and the Law' (2001) 42(2) Current Anthropology 167, 167-198; Singel, W.T., and Fletcher, M.L.M, 'Power, Authority, and Tribal Property' (2005-2006) 41 Tulsa L. Rev. 21, 21

[3] Kirsch, S., 'Lost Worlds: Environmental Disaster, "Culture Loss," and the Law' (2001) 42(2) Current Anthropology 167, 178

[4] See Moore, *D.S. Suffering for Territory; Race, Place and Power in Zimbabwe* (Harare Weaver Press 2005); Christopher, A.J., 'Official Land Disposal Policies and European Settlement in Southern Africa 1860 -1960' (1983) 9(4) Journal of Historical Geography 369

[5] Ashcroft, Bill, Gareth Griffin, and Helen Tiffin. (eds), *The Post-Colonial Studies Reader* (London: Routhledge, 1995) 211

[6] ibid

justice, and many other rights, which in the West would, arguably, be categorised as fundamental rights.[7] The latter group represents lands where the colonisation process was much more complete and 'successful.' It is comprised of indigenous people whose cultures and communities were jeopardised by the physical violence visited upon their communities, and also the disease and amalgamation policies.[8] These communities exist as a minority within their lands and are currently fighting for rights, which have arguably been obscured by the 'tide of history'.[9] Not only is the minority indigenous population a defining characteristic of the latter group, this group consists of developed countries. Due to the advanced infrastructure in terms of legal system, law enforcement and land-planning in developed countries, land justice could be resolved in an equitable manner that does not precipitate civil unrest, as compared to what can be achieved in developing countries as typified by Brazil, an emerging economy in the upper spectrum.[10]

3.3. Indigenous People of the New World

With regards to land justice, this section can be further subdivided into (1) cases requiring the return of land, (2) cases requiring title to land already occupied by the indigenous people in question, and (3) cases requiring effective control to reside in

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[7]Johnston, A., Lawson, A., 'Settler Colonies' in Schwarz, H., Sangeeta, R., (eds), *A Companion to Postcolonial Studies*, (Oxford: Blackwell 1999) 362

[8]Theron, L., 'Healing the Past: A comparative Analysis Of the Waitangi Tribunal and the South African Land Claim System' (1998) 28 Victoria U. Wellington L. Rev. 311; Johnston, A., Lawson, A., 'Settler Colonies' in Schwarz, H., Sangeeta, R., (eds), *A Companion to Postcolonial Studies*, (Oxford: Blackwell 1999) 362

[9]*Mabo v Queensland (No.2)* (1992) 175 CLR 1, 59-60, (Brennan, J.)

[10] After the latest, 2011, attack on indigenous people in Brazil who were trying to recover ancestral land, it was stated that 'Brazil's labyrinthine legal system makes the resolution of disputes difficult.' Romero, S., 'Violence Hits Brazil Tribes in Scramble for Land'Americas *The New York Times* (New York, 9 June 2012) http://www.nytimes.com/2012/06/10/world/americas/in-brazil-violence-hits-tribes-in-scramble-for-land.html

the indigenous people, allowing stewardship to be exercised over the land and its resources.

(1) Return of Land

This case-type is illustrated in the series of Sioux nations cases *United States v Sioux Nations.*[11] The Fort Laramie Treaty of 1868 between the U.S. government and Sioux nation stipulates that the Sioux reservation, including the Black Hills, would be 'set apart for the absolute and undisturbed use and occupation'[12] by the Sioux. On the discovery of gold in the Black Hills, in the early 1870's the government reneged on the treaty, with a military invasion of the Black Hills, following which legislation was passed by Congress, opening up the land to occupation by miners and settlers. The Sioux were subsequently expropriated,[13] and stripped of their weapons, rendering them unable to hunt, thus unable to subsist, forcing them to become dependent on state rations.[14] During this period, they were moved onto a reservation prescribed by Congress.[15]

Although a judgement was handed down, this legal battle continues.[16] The effects of the aforementioned actions perpetuate into the present day, acutely affecting the living environment of those dispossessed.[17] As indigenous people of America, the

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[11] 448 U.S. 371 (1980)
[12] Fort Laramie Treaty, 1868, Article II http://www.pbs.org/weta/thewest/resources/archives/four/ftlaram.htm; *United States v Sioux Nation* 448 U.S. 371 (1980)
[13] *United States v Sioux Nation* 448 U.S. 371 (1980), 379; Philbrick, N., *The Last Stand: Cluster, Sitting Bull, and the Battle of the Little Bighorn* (Viking 2010)
[14] *United States v Sioux Nation* 448 U.S. 371 (1980), 379
[15] ibid
[16] *United States v Sioux Nation* 448 U.S. 371 (1980)
[17] See LaDuke, W., *All Our Relations: Native Struggle For Land And Life* (South End Press 1999) 5, where a link is made between the loss of biodiversity, the loss of plant and animal life induced by industrialization of indigenous land, and the material poverty of the indigenous peoples.

Sioux belong to the most marginalised ethnic group in the U.S. having the highest rate of disease, unemployment and poverty, and being in the lowest stratum of every economic category.[18] The cultural impact of dispossessing the Sioux nation of their lands is immense; they are no longer able to hunt or even farm, which has adversely impacted the ability to subsist. Moreover, cultural practices, such as holding ceremonies in places sacred for the purpose,[19] have had to cease. Those who manage to graduate from life on the reserve are forced to give up what is left of their culture to integrate with the urban life.[20] The type of land justice sought by Sioux nation is return of land no longer in their possession; namely, the Black Hills.[21]

(2) Title to Land Already In Possession

This scenario is typified by the case of the Meriam Islanders in *Mabo v Queensland (No.2)*.[22] The land at issue was in Torres Straits, namely the Murray Islands. The land was in possession of the Meriam Islanders; however, following the annexation of these lands by the Colony of Queensland, in 1879, a proclamation was made vesting absolute beneficial title to all lands in the Crown. The Meriam Islanders were permitted to remain in possession of the land until the Crown extinguished their

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[18] The pine Ridge Reservation has few natural resources and no industry. Ninety-seven percent of the residents live below the Federal poverty level, enduring no electricity and fuel at times, with a life expectancy of around 50yrs, and an infant mortality rate, which is five times higher than the national rate. http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml U.S. Census Bureau.

[19] LaDuke, W., *All Our Relations: Native Struggle For Land And Life* (South End Press 1999) 133.

[20] Carlson, P**.** 'In the year of "Dances with Wolves," everybody wanted to be on the Senate Indian Affairs Committee. Nearly a decade later, it can hardly get a quorum' Washington Post Sunday, (February 23, 1997) W06, Sen. Ben Nighthorse Campbell was the one Indian in Congress in 1997. In his interview he spoke of the fact that although he made his living in the city, he returned to the reservation periodically to be an Indian for a few days and re-connect with the remnant of his culture, then at the end of his visit, he would put his suit back on and return to the city.

[21] Woster, K., 'Sioux Leaders Work on Black Hills Lands Proposal for Obama' (27th Sept. 2009) http://ndnnews.com/2009/09/sioux-leaders-work-on-black-hills-lands-proposal-for-obama

[22] (1992) 175 CLR 1

holdings.[23] The indigenous people sought declaration that they were entitled to the land 'as owners; as possessors; as occupiers; or as persons entitled to use and enjoy the said islands'.[24] Thus the type of land justice sought by the Meriam Islanders was legal title to land already in their possession.[25]

(3) Stewardship

The following example brings into sharper focus the crucial role of traditional knowledge as regards ecological sustainability, and also the importance of land justice for such communities.

In order to offset excessive carbon emissions at a plant in Grangemouth in Scotland, BP became involved in the World Bank's carbon off-set scheme.[26] The rationale was to generate carbon-offset by planting trees which would act as a carbon sink causing a net reduction in carbon, rather than directly reducing the level of pollution at the plant in Grangemouth. During this period, a major iron foundry in Brazil was threatening to switch from charcoal as a fuel to the carbon intensive coal, due to a shortage in charcoal. The World Bank sought to remedy this problem by planting eucalyptus trees, which would both offset the emissions in Grangemouth and also provide charcoal for the iron foundry in Brazil.[27]

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[23] (1992) 175 CLR 1, para. 23 (JJ Deane and Gaudron), para. 97 (Brennan, J.)
[24] (1992) 175 CLR 1
[25] This case is more fully discussed in chapter 7, 7.2. Australia, at 120
[26] Cabello, J., 'The Politics of the Clean Development Mechanism: Hiding Capitalism Under he Green Rug' in Böhm, S., and Dabhi, S. (eds), *Upsetting the Offset: The Political Economy of Carbon Markets* (Oxford University Press 2009), 192-202
[27] Checker, M. 'Double Jeopardy: Carbon Off-sets and Human Rights Abuses' Carbon Trade Watch Nov.2010. Available at http://carbontradewatch.org; Lohmann, L., 'Regulation as Corruption in the Carbon Offset Markets' in Böhm, S., and Dabhi, S. (eds), *Upsetting the Offset: The Political Economy of Carbon Markets* (Oxford University Press 2009), 175-191

In order to facilitate this project, the land of Sao Jose do Buriti's indigenous people has been taken into private ownership[28] further compounding the cultural, economic and environmental devastation.[29] The eucalyptus monoculture, along with pesticides and insecticides has destroyed biodiversity;[30] the large roots of the trees have caused severe lowering of the water tables, including drying out entire rivers and lowering of springs,[31] causing the demise of the natural vegetation.

This decimation of biodiversity has caused the cessation of many cultural practises as cultural practises and biodiversity were inextricably linked. Thus, the drying of the river means that there are no fish, thus fishing has had to cease undermining the ability to subsist.[32] As the floor of the forest is no longer capable of supporting the flora, cultural practises contingent upon this flora, such as the use for medicinal purposes, have had to cease. The economic viability of the indigenous people was contingent upon cultural practices of hunting, fishing and making use of resources of

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[28] Barugh, Hannah and Glass, Dan 'Environment, Climate Change and Popular Education' (winter 2010) 1(3) Concept. Available at http://concept.lib.ed.ac.uk/index.php/Concept/article/view/91/101

[29] Andrade, de Oswald 'The Monoculture of Fear' Where the Trees are a Desert; stories from the ground. (Nov.2003), 6-12 http://www.carbontradewatch.org/durban/trees.pdf Case studies show the effect of agrotoxins, and the general devastation caused to the environment of the indigenous people to the extent that indigenous villages are disappearing and individuals are being forced to re-locate to the city. See also Meirelles, D., 'The Embezzlement of Cellulose and Charcoal And the Impacts of Private Property' Where the Trees are a Desert; stories from the ground. (Nov.2003) 12-16

[30] See Granada, P., Carbon Sink Plantations In the Ecuadorian Andes Impacts of the Dutch FACE-PROFAFOR monoculture tree plantations project on indigenous and peasant communities, Accion Ecologica. See also Andrade, de Oswald 'The Monoculture of Fear' Where the Trees are a Desert; stories from the ground (Nov.2003), 6 - 12 http://www.carbontradewatch.org/durban/trees.pdf

[31] Checker, M., 'Double Jeopardy: Carbon Off-sets and Human Rights Abuses' Carbon Trade Watch Nov.2010. Available at http://carbontradewatch.org

[32] Andrade, de Oswald 'The Monoculture of Fear' Where the Trees are a Desert; stories from the ground (Nov.2003), 6 - 12 http://www.carbontradewatch.org/durban/trees.pdf reports of the indigenous people describe how new 'forests' have caused the cessation of the cultural practices of hunting and fishing as the land can no longer support the flora and fauna; Cabello states that 'The transferred large-scale 'clean' technologies, which serve powerful global interests, are undermining the traditional ways for sustaining local and indigenous' peoples livelihoods, which are an invaluable source of ecological sustainable alternatives.' Cabello, J., 'The Politics of the Clean Development Mechanism: Hiding Capitalism Under he Green Rug' in Böhm, S., and Dabhi, S. (eds), *Upsetting the Offset: The Political Economy of Carbon Markets* (Oxford University Press 2009) 200

the ecosystem for food, medicine and craft, thus the decimation of the resources has also adversely impacted their economy.[33] The issue here could be resolved by awarding the indigenous people with legally recognised stewardship similar to the sole stewardship model arising out of the land claims negotiations between the Teme-Augama Anishnabai (TAA) First Nations and the Province of Ontario.

During the land claims negotiations between the TAA and the Province of Ontario, areas of sole stewardship[34] and areas of shared stewardship[35] were established. Areas of sole stewardship were established by transferring title to land to the TAA. The main effect of sole stewardship was that 'no conveyances, new developments, permits, licences', or any other permission regarding the land could be given without written consent of the TAA.[36] In essence, the TAA controlled the use of the land.

This type of stewardship would have put control of the land in the hands of the indigenous people of Sao Jose do Buriti; thus, requiring negotiations to occur

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[33] Meirelles, D., 'The Embezzlement of Cellulose and Charcoal And the Impacts of Private Property' Where the Trees are a Desert; stories from the ground. (Nov.2003) 12-16 http://www.carbontradewatch.org/durban/trees.pdf

[34] Agreement in Principle between Her Majesty the Queen in Right of Ontario, and the Teme-Augama Anishnabai, October 18, 1993 (unsigned). Article 3.1.

[35] The model of shared stewardship was good in theory but failed due to a failure of the Ontario Ministry of Natural Resources to devolve much decision-making power. Beckley, T.M., 'Moving toward consensus-based forest management: A comparison of industrial, co-managed, community and small private forests in Canada' (Sept/Oct. 1998) 74(5) The Forestry Chronicle 736, at 738; For discussions on the Wendaban Stewardship Authority see Black, B., 'Temagami: An Environmentalist's Perspective' in Bray, M., Thomson, A., (eds) *Tegamami: A Debate on Wilderness,* (Dundern Press, Toronto, 1990) 141-147; Bray, M., Thomson, A., Introduction in Bray, M., Thomson, A., (eds.), *Tegamami: A Debate on Wilderness,* (Dundern Press, Toronto, 1990) 9-21; Wolfe-Keddie J., '"First Nations" Sovereignty and Land Claims: Implications for Resource Management' in Mitchell, B., (ed), *Resource and Environmental Management in Canada: Addressing Conflict and Uncertainty* (OUP, Toronto 1995) 55; Dust, T.M., Q.C., The Impact of Aboriginal Land Claims and Self-Government on Canadian Municipalities: The Local Government Perspective, An Intergovernmental Committee on Urban and Regional Research Project, (ICURR PRESS, 1995), 10-18

[36] Dust, T.M., Q.C., The Impact of Aboriginal Land Claims and Self-Government on Canadian Municipalities: The Local Government Perspective, An Intergovernmental Committee on Urban and Regional Research Project, (ICURR PRESS, 1995) 12

between the World Bank and the indigenous people of Sao Jose do Buriti, before the aforementioned carbon off-set initiative could have been established. It is not suggested that the indigenous communities have knowledge of the properties of every type of tree including those foreign to their immediate surroundings. It is suggested that with such negotiations occurring the indigenous people would have been in a position to share their traditional knowledge of the land, including the type of trees that the soil could support, and the principles required to retain biodiversity. With this information, the World Bank would have had a duty to test the properties of the trees to ensure compatibility. This would have enhanced the chances of the preservation of the flora and fauna, which would have in turn allowed the continuation of the aforementioned cultural practises.

As is evident from the previous chapter, sole stewardship, which is similar to the IPA, is not a complete solution in itself to the preservation of biodiversity and corresponding culture.[37] One of the reasons for this is that it does not address the issue of harm occurring proximate to the borders of areas of sole stewardship.[38] While sole stewardship would have been adequate as a land justice solution, it would necessitate buttressing with environmental protection to enhance protection of the flora and fauna.

3.4. Land Justice Defined

[37] Chapter 2, 2.4.1. Indigenous Protected Areas p.56-61
[38] ibid

'Land justice' is a term appearing frequently but without definition, in indigenous land rights discourse.[39] Nevertheless, a definition can be derived from the various concepts that frequently appear within the context. In the article 'An Historical Perspective on the Struggle for Land Justice in Victoria',[40] the concern for land justice is equated with ensuring that 'traditional owners receive the inheritance that has been wrongfully taken from them.'[41] This finds resonance in Lane's article, which further extends this principle by adding that re-acquisition of custodial lands, ought to occur through legal processes with the resolution of conflicts commonly accompanying the process.[42] While Atkinson includes returning land, which was forcibly dispossessed in his usage of the term 'land justice',[43] Lane extends his definition to include the protection of interests, or rights, in land, which would include those rights that equate to less than title to the land, such as hunting, fishing, and the performance of ceremonial acts.

The return of land, and title to land already in the possession of those seeking title, appear to be at the apex of land justice, as regards indigenous peoples of the New World. The Australian Aboriginal Land Commissioner stated that one of the aims of land rights was 'the doing of simple justice to a people who have been deprived of

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[39] Lane, M.B., 'The Role of Planning in Achieving Indigenous Land Justice and Community Goals' (2006) 23 Land Use Policy 385-394; Christopher, A.J., 'Indigenous Land Claims in the Anglophone World' (1994) 11(1) Land Use Policy 31-44; Atkinson, W., 'Not One Iota of Land Justice: Reflections on the Yorta Yorta Native Title Claim 1994-2001' (2001) 5(6) Indigenous Law Bulletin 19

[40] Atkinson, G., Mark, B., 'An Historical Perspective on the Struggle for Land Justice in Victoria' (2007) www.ntsv.com.au/document/**Land-Justice**-in-Vic-23Aug07-NNTT.pdf

[41] ibid 12

[42] Lane, M.B., 'The Role of Planning in Achieving Indigenous Land Justice and Community Goals' (2006) 23 Land Use Policy 385, 385

[43] Atkinson, W., 'Not One Iota of Land Justice: Reflections on the Yorta Yorta Native Title Claim 1994-2001' (2001) 5(6) Indigenous Law Bulletin; Atkinson, W., 'Balancing the Scales of Indigenous Land Justice in Victoria 2006' in Land, Rights, Law: Issues of Native Title, Native Title Research Unit, AIATSIS, Canberra (2006) Vol. 3, No. 5,

their land without their consent and without compensation.'[44] He further adds that the first essential step is the provision of land holdings and the preservation of spiritual links with the land.[45] This is the definition of land justice that shall be adopted by the thesis; thus land justice is defined as:

The doing of justice to a people who have (1) been deprived of their land without their consent and without compensation, (2) lost effective control of their land without their consent and without compensation. Justice mandates that traditional owners receive the inheritance that has been wrongfully taken from them.

In this conceptualisation, land justice is forward looking, thus the focus is inheritance. The focus is not on what was taken from the dead but rather on the requirements of current generations in order to enable forward movement. Inevitably the past cannot be ignored but it shall be dealt with only to the extent that is required to enable all parties of dominant and subservient cultures to move forward.

The lands forming the focal point of the thesis are first, those currently occupied by indigenous people to which no recognised legal title resides in the people, and secondly, those that have been forcibly dispossessed of indigenous people, which are not in private ownership.[46]

3.5. Summary

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[44]Australia, Social Justice for Indigenous Australians 1991-92, Parliamentary Paper 191/1991, Australian Government Publishing Service, Canberra (1991) 14

[45]Australia, Social Justice for Indigenous Australians 1991-92, Parliamentary Paper 191/1991, Australian Government Publishing Service, Canberra (1991) 14

[46] It has been suggested that in partial settlement of the Sioux claim on the Black Hills, the interest of the award money should be used to enable the Sioux nation to purchase private property in the Hills, which should subsequently obtain reservation status. This suggestion has much merit but a critique thereof is beyond the scope of this thesis thus shall not be considered further. See Lazarus, E., 'Same Black Hills, More White Justice: Senator Daschle's Provision Granting Barrick Gold Company Immunity From Liability' (24th Jan. 2002) http://writ.news.findlaw.com/lazarus/20020124.html

It has been submitted that land injustice has its roots in colonialism, during the Enlightenment, following which many indigenous people were forcibly dispossessed of land or at least lost effective control of their land.[47] This has perpetuated into the present day thus, the need for land justice. As a means of elucidating the conceptual embodiment of land justice, it has been examined in the context of various communities of concern.

This examination highlights that the loss suffered due to loss of land and loss of effective control of land is impoverishment on many levels including culturally, economically, politically, socially and spiritually.[48] It has been acknowledged that though affected indigenous people do not form a homogenous group, they have the aforementioned in common.

The types of land justice cases forming the focal point of this thesis are cases where expropriation has occurred but lands are not in private ownership and those cases where land is currently occupied by indigenous people to which no recognised legal title resides in the people. This includes cases where title to land is inappropriate, perhaps due to the types of resources held by the land, but legally recognised stewardship would be appropriate.

The significance of the rights contended for in this thesis, namely; cultural protection, environmental protection and land justice, have hitherto been stated in terms of importance to enhanced global ecological sustainability. The following

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[47] Hitchcock, R.K., 'International Human Rights, the Environment, and Indigenous Peoples' (1994) 5 Colo. J. Int'l Envtl. L. and Pol'y 1, 10; Kirsch, S., 'Lost Worlds: Environmental Disaster, "Culture Loss," and the Law' (2001) 42(2) Current Anthropology 167; Singel, W.T., and Fletcher, M.L.M, 'Power, Authority, and Tribal Property' (2005-2006) 41 Tulsa L. Rev. 21, 21

[48] Kirsch, S., 'Lost Worlds: Environmental Disaster, "Culture Loss," and the Law' (2001) 42(2) Current Anthropology 167, 178

chapter shall address the importance of land justice to the indigenous people of the New World, vis-à-vis other rights contended for by these communities. It shall be submitted that it should be accepted as one of the cornerstones of indigenous rights.

Chapter 4

An Appropriate Cornerstone for Indigenous Rights

4.1. Introduction

As well as being an integral component of creating greater ecological sustainability, land justice also serves as an appropriate cornerstone for indigenous rights. The five conceptual structures of indigenous peoples' claims, as defined by Kingsbury are: (1) human rights and non-discrimination claims; (2) minority claims; (3) self-determination claims; (4) historical self-determination claims; (5) claims as indigenous peoples, including claims based on other agreements between indigenous peoples and states.[1] The point of unification of these conceptual structures is the struggle for the preservation of a way of life. Even the most politically contentious, self-determination and sovereignty claims, are predicated on the desire to preserve a way of life.

> Sovereignty and self-determination protect the freedom of communities to take their own path, against what should be the proper balance between developmental, environmental and social values.[2]

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[1] Westra, L., *Environmental Justice and the Rights of Indigenous Peoples* (Earthscan Padstow 2008), 248; Kingsbury, B., 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' (2002) 34 New York University Journal of International law and Politics 189. For a discussion on the shortcomings of each conceptual structure see Westra, L., 248-252.

[2]Nollkaemper, A., 'Sovereignty and Environmental Justice in International law' in Ebbesson and Okowa (eds.) *Environmental Law and Justice in Context* 253, 265 (Cambrige University Press 2009)

The recognition of sovereignty and the right to self-determination are much sought after by many indigenous communities. Inherent in the aforementioned quote are the main reasons underpinning the quest; namely, to protect their freedom to pursue their own ways of life, untrammelled by incursions into their environment and social values, by what would be regarded as improper development.

As can be deduced from the lack of positive responses from governments, these requests are viewed with considerable apprehension as they involve surrendering territory to a new sovereign. It is submitted by this chapter that in satisfaction of the aforementioned freedoms and conceptual structures, land justice would be an appropriate compromise and cornerstone for indigenous rights. Land justice would enable indigenous people the freedom to pursue their ways of life, without requiring national governments to surrender territory. Furthermore, it would endow the successful communities with legal might to oppose, or at least negotiate with a strong bargaining hand, developments threatening to encroach on their lands.

This chapter shall analyse self-determination, ecological integrity and land justice as cornerstones of indigenous rights. It shall be submitted that land justice is in fact the foundational right upon which all other rights can be built, thus an appropriate cornerstone for indigenous rights. Finally land justice and the evolution of law shall be explored.

4.1.1. Self-determination as the Cornerstone of Indigenous Rights

Self-determination is regarded, by the dominant discourse, as the foundational right of indigenous people.[3] The struggle for the right of self-determination is premised on the UN doctrine of self-determination[4] as read from a human rights perspective, which includes rather than excludes indigenous peoples.[5] Nevertheless, application to cases concerning indigenous peoples has been largely unsuccessful. Factors contributing to this are first, that 'Peoples' in the U.N. Charter remains undefined and the exact content of the right remains unspecified,[6] secondly, there is no uniform

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[3] Anaya, S.J., *Indigenous Peoples in International law*, (2nd edn OUP 2004); Gros Espiell, H., 'The Right to self-Determination: Implementation of United States Nations Resolutions' UN Doc. E/CN.4/Sub.2/ 405/Rev. 1, NY, UN; For background on the reasons underpinning the intensification of the fight for self-determination, see Hitchcock, R.K., 'International Human Rights, the Environment, and Indigenous Peoples' (1994) 5 Colo. J. Int. L.and Pol'y 1, 10; Westra, L., *Environmental Justice and the Rights of Indigenous Peoples* (Earthscan Padstow 2008) 12, 251; Anaya, J. 'Self-Determination As A Collective Right Under Contemporary International law' in Aikio P. and Scheinin, M. (eds) *Operationalizing the Right Of Indigenous Peoples to Self-Determination* (Åbo Akademi University, Turku 2000)

[4] Charter of United Nations, 1 United Nations Treaty Series xvi, 1946, Article 1

[5] The traditional view is that self-determination is a right, which is not applicable to Indigenous Peoples. See Declaration on the Granting of Independence to Colonial Countries and Peoples GA Resolution 1514(VX), 14 Dc. 1960, Article 1, which expressly excludes peoples sharing borders with their colonizers. See also Umozurike, O., *Self-Determination in International law* (Hamdon, CT, Archon Books 1972) 72. This view has been enhanced by the Declaration on Principles of International law Concerning Friendly Relations and Co-operations Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), Annex, 25 UN GAOR, Supp. (No.28), UN Dec. A/5217 (1970), at 121. This declaration discourages external interference in struggles for self-determination occurring within a sovereign states borders. This has served to add weight to the argument that self-determination does not apply to indigenous peoples by depriving them of an international forum to have disputes resolved. The human rights perspective deals with self-determination from an angle of moral imperative based on the values of minimum rights of human freedom and equality. See Anaya, S.J., 'A Contemporary Definition of the International Norm of Self-Determination' 3 (1993) Transnational Law and Contemporary Problems 133; Buergenthal, T., 'Codification and Implementation of International Human Rights' in Henkin, A.H. (ed.) *Human Dignity: The Internationalization of Human Rights: Essays Based on an Aspen Institute Workshop* (New York 1979) 15

[6] Neuberger, B., *National Self-Determination in Postcolonial Africa* (Boulder 1986), 6, 8, 61, 70; Neuberger suggests that the right of secession is not included under the right of self-determination (See also Anaya, S.J., *Indigenous Peoples in International law* (2nd edn OUP 2004) 112), and suggests two categories of application, grand self-determination and small self-determination, the former referring to true state independence, and the latter referring to internal structures. Hannum, H., *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press 1990) 49; Hannum suggests two possible, territorially based, applications of self-determination, internal and external, the former referring to the absence of foreign interference, the latter referring to emancipation of colonial peoples. See also Cassese, A., *Self-Determination of Peoples* (Cambridge University Press1995). For a more comprehensive account see Westra L., *Environmental Justice and the Rights of Indigenous Peoples* (Earthscan Padstow 2008) 11-17

definition of self-determination,[7] and thirdly, state compliance has been poor.[8] With regards to self-determination, little has been yielded in terms of that which is actually being contended for by indigenous peoples.[9]

Westra acknowledges the 'interdependence between the basic survival rights of indigenous peoples, their biological integrity and the ecological integrity of their lands',[10] which are the very factors motivating the struggle for self-determination.[11] However, Westra opposes the view that self-determination is the foundational right of indigenous peoples,[12] and seeks to replace it with ecological integrity.[13] Amongst the other factors considered in support of this stance is the idea that self-determination could inadvertently open doors to 'free' development including ecologically unsound developments. Her main contention with self-determination as the foundational right is the idea that in theory, the indigenous people could agree to

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[7] Espiell, H.G., Implementation of United Nations Resolutions Relating to the Right of Peoples under Colonial and Alien Domination of Self-Determination. A Study Prepared by a Special Rapporteur (NY: United Nations, 1981), E/CN.4/Sub.2/405; see Pomerance, M., Self-Determination in Law and Practice, (1982) at 15, where Pomerance criticises Espiell's attempt to define self-determination. See also Hannum, H., *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press 1990) 15

[8] Cassese, A., *Self-Determination of Peoples* (Cambridge University Press 1995); Westra L., *Environmental Justice and the Rights of Indigenous Peoples* (Earthscan Padstow 2008) 14

[9] As the struggle for self-determination intensified, Convention 107 was revised to be more reflective of the fact that indigenous peoples wanted more involvement politically, and to address the fact that the original text permitted the removal of indigenous peoples from ancestral land. See Barsh, R.L., 'Revision of ILO Convention No. 107' (1987) 81 AM. J. Int. L. 756; International Labour Organisation Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, art. XIII, par. 1, 328 U.N.T.S. at 256; International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382. Despite these changes, nothing concrete seems to have been delivered.

[10] Westra L., *Environmental Justice and the Rights of Indigenous Peoples* (Earthscan Padstow 2008) 17

[11] Hitchcock, R.K., 'International Human Rights, the Environment, and Indigenous Peoples' (1994) 5 Colo. J. Int. L.and Pol'y 1, 10

[12] Westra, L., 'Environmental Rights and the Human Rights: the Final Enclosure Movement' in Brownsword, R. (ed) *Global Governance and the Search for Justice*, vol.4 (Oxford:Hart 2004) 107-120

[13] Westra, L., (n. 10) 28 - 36

rent the land to a hazardous chemical plant, thus contravening environmental progress.[14]

It is also submitted by Westra that self-determination is inadequate as the foundational right, as it 'does not tie any group to a specific land base',[15] and a large part of the land battle is the fact that alienation from cultural land causes death to a whole way of life and community.[16] The *sui generis* relationship with their territories is what makes indigenous people and their ways of life a beacon of hope for the future of humankind.[17] In the absence of cultural lands, self-determination misses the mark.

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[14] Westra L., *Environmental Justice and the Rights of Indigenous Peoples* (Earthscan Padstow 2008) 16. Whilst the possibility exists, this suggestion is at odds with her later argument that indigenous peoples' unique form of interdependence with the land is such that compromising the integrity of the land would compromise severely their survival, (Westra, L., (2008) 30). For a further counter-argument to Westra's 'free' development argument, see LaDuke, W., *All Our Relations: Native Struggle For Land And Life* (South End Press 1999) 132.

[15]Westra, L. Environmental Justice and the Rights of Indigenous Peoples (Earthscan Padstow 2008) 250; The link between land and self-determination (Art.1, I.C.C.P.R.) can be established by invoking culture under ICCPR Art. 27; See HRC *Mahuika et al. v. New Zealand,* Communication No.547/1993, 56th sess, Supp No 40, 3, UN Doc A/56/40 (Vol. II) (2000); see also United Nations Declaration *on the* Rights *of* Indigenous Peoples*, G.A.* Res. 61/295*,* Annex, U.N. Doc. A/RES/61/295 *(*Sept. 13, 2007*)*

[16]Rodriguez-Garavito, C.A., and Arena, L.C. 'Indigenous Rights, Transnational Activism and Legal Motivation: The Struggle of the U'wa People in Colombia' in De Sousa Santos, B. and Rodriguez-Garavito, C. (eds) *Law and Globalization From Below* (Cambridge University Press 2005); Brysk, A., *From Tribal Village to Global Village: Indian Rights and International Relations in South America* (Stanford University Press 2000)

[17]Westra, L., *Environmental Justice and the Rights of Indigenous Peoples*, (Earthscan Padstow 2008) 250-51As Westra highlights, the type of self-determination generally sought after is more akin to the internal type as exists in Canada, for example, which speaks of improved relations with State power base, rather than the complete independence; See also Scheinin, M., 'The Right to Self-determination under the Covenant on Civil and Political Rights' in Aikio, P., and Scheinin, M., (eds) *Indigenous Peoples Right to Self-determination* (Turku: Abo Akademi University 2000) 198. Here it is asserted that self-determination for indigenous peoples also guards against the deprivation of their own means of subsistence. UN Draft Declaration of the Working Group on Indigenous Peoples, Art.3.

4.1.2. Ecological Integrity as the Cornerstone of Indigenous Rights

The basis for Westra's proposal that ecological integrity is the foundational right,[18] is the unique form of interdependence between people and land, and also the fact that their territory is the only area where they have the right to perform activities.[19] Based on this, Westra suggests that where activities compromise the normal function of the eco-system, ecological integrity is compromised, thus affecting their biological integrity, hence, 'life, health and normal function.'[20] Westra, in effect argues that without ecological integrity of their land, indigenous people will not live long enough to have other rights realised. To further protect such lands, buffer zones are suggested, which involve controlling the use of surrounding areas in order to protect the core land.[21]

The main criticism of this theory has been that ecology is insufficient to drive public policy,[22] thus, a middle path, 'dictated in part by human, not merely biocentric theory,'[23] is required. The first wave of environmentalism had ecology at its core,

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[18] Westra L., *Environmental Justice and the Rights of Indigenous Peoples* (Earthscan Padstow 2008) 28 - 36
[19] ibid 30
[20] ibid
[21] ibid 31; see also Karr, J., 'Defining and measuring River Health' in Pimentel, D., Westra L., and Noss R., (eds) *Ecological Integrity: Integrating Environment, Conservation and Health* (Island Press 2000); Westra, L., *Living in Integrity: A Global Ethic to Restore a Fragmented Earth* (Lanham, MD: Rowman and Littlefield 1998).
[22] Shrader-Frechette, K.S., McCoy, E.D., *Method in Ecology: Strategies for Conservation* (Cambridge University Press 1993); Shrader-Frechette, K.S., 'Hard Ecology, Soft Ecology, and Ecosystem Integrity' in Westra, L. (ed.) *Perspectives on Ecological Integrity* (Dordrecht, The Netherlands 1995); Westra L., *Environmental Justice and the Rights of Indigenous Peoples* (Earthscan Padstow 2008) 32
[23] Shrader-Frechette, K.S., 'Hard Ecology, Soft Ecology, and Ecosystem Integrity' in Westra, L. (ed.) *Perspectives on Ecological Integrity* (Dordrecht, The Netherlands 1995) 141

and was not particularly successful in greatly impacting public policy, thus substantiating the above.[24]

It is my submission that Westra's suggestion of ecological integrity as the foundational right presupposes the fact that the status of indigenous lands of any given territory, has been settled in favour of the indigenous people. Unless indigenous people obtain a legal right over land, arguing for the cessation of activities, on the basis that they impair ecological, thus biological integrity would be extremely difficult. At the most, the result would be that the indigenous peoples in question would be relocated.[25] Buffer zones could be extremely instrumental in protecting the ecological integrity of indigenous land but where title is uncertain, there most likely would not be an actionable case. Whilst Westra's ecological integrity model need not be simply an empty metaphor,[26] without granting title to land or stewardship over land, it would be extremely difficult to contend for such a right. Furthermore, as it would neither address broader issues of environment that are contended for,[27] nor cause other rights to unfold, it is insufficient to act as the foundational right.

4.1.3. Land Justice as the Cornerstone of Indigenous Rights

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[24] Preservationists argued against allowing economic factors to dictate the shape of the natural landscape. Muir, J. *The Yosemite* (New York 1912), 255-262; Nash, R. *The American Environment: Readings in The History of Conservation* (Reading, Mass 1968); Jones, H.R., *John Muir and the Sierra Club* (San Francisco 1965) 148; Fultz, F.M., 'Hetch Hetchy: A Valley of Wonders Now Threatened With Extinction' (May 1909) The World To-Day 529 – 530.

[25] Since colonisation, the trend has been to further dispossess and relocate indigenous peoples rather than accommodate on lands, which they possess where this would impede development. See Gibson, A.M., 'Indian Land Transfers, in Handbook of North American Indians: History of Indian-White Relations' vol. 4 (Washburn, W.E. ed., Washington D.C. 1988) 211

[26] Shrader-Frechette, K.S., 'Hard Ecology, Soft Ecology, and Ecosystem Integrity' in Westra, L. (ed.) *Perspectives on Ecological Integrity* (Dordrecht, The Netherlands 1995) 141

[27] Text to n.1

Land justice is a right capable of causing other rights contended for, including the aforementioned, to unfold; thus, it is submitted that land justice is the foundational right of indigenous people. Where land justice is obtained, ecological integrity can be, more easily pursued, and would have a more concrete context. Additionally, with land justice some of the factors fuelling the struggle for self-determination would no longer be of issue, such as development programmes depriving indigenous peoples of lands and resources.[28] For this reason, it is my submission that land justice is the cornerstone of indigenous peoples' rights rather than other rights suggested by literature.

4.2. Land Justice and the Evolution of Law

To date, indigenous people have largely struggled to secure compensation, where compensation is appropriate, or restoration of land.[29] It is my submission that this is the result of not allowing the tools of analysis to evolve in step with the evolution of law. In order for losses to be justiciable, indigenous people have had to frame grievances using the language and frameworks of the court of the dominant culture. As those ideals and frameworks determine available remedies, the result is often that there is no legal remedy, within the nation State, where a grievance cannot be appropriately framed. Where the grievance can only be framed to a certain degree,

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[28] Hitchcock, R.K., 'International Human Rights, the Environment, and Indigenous Peoples' (1994) 5 Colo. J. Int. L.and Pol'y 1, 10

[29] The prevailing thought is that these land claims ought to be dismissed see Singer, J.W., 'Well Settled?: The Increasing Weight of History in American Indian Land Claims' (1993-1994) 28 Ga. L. Rev. 481, 483; See generally Morison, S.T., 'Prescriptive Justice and the Weight of History' (2005) 38 Creighton L. Rev. 1153, 1177; Singer, J.W., *Introduction to Property* (Aspen Publisher 2001) 716-717 where Singer mentions that not all claims were resolved due to the volume.

within existing frameworks, the remedy is either insufficient, or there is a complete miscarriage of justice.[30]

Historically such cases have been presented before national courts, and have been framed as property law cases despite the fact that they do not fit neatly into the category.[31] In the West, 'the concept of property is constrained by assumptions about economic value and governed by commodity logic,'[32] thus property belongs to the commercial law area of Western legal systems. Contrariwise, in indigenous cultures, the 'idiom of kinship and belonging'[33] may best conceptualise the relationship between people and land.[34] In such cultures, land is not only a means of subsistence, but it is also the foundation of identity, providing a link between the past, present and future; linking the deceased with the born and the unborn.[35] The land provides resources, essential to life, cultural practises, and the continuation of cultural

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[30] Newton, N.J., 'Indian Claims for Reparations, Compensation, and Restitution in the United States Legal System' in Brooks, R.L. (ed.) *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustices* (New York University Press 1999) 166, 261; Singel, W.T., and Fletcher, M.L.M., 'Power, Authority, and Tribal Property' (2005-2006) 41 Tulsa L. Rev. 21, 22. Where it had been accepted that land had been forcibly dispossessed, the U.S. courts were unwilling to allow an action for the eviction of hundreds of landowners but they were prepared to allow an action for trespass by way of compromise (*County of Oneida v Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985); *Oneida Indian Nation of N.Y. v County of Oneida*, 414 U.S. 661 (1974); *Cayuga Indian Nation of N.Y. v Pataki*, 165 F. Supp. 2d 266 (N.D.N.Y. 2001); *Cayuga Indian Nation of N.Y. v Cuomo*, 1999 WL 509442 at 8 (N.D.N.Y.)). The position on compromise was later over-ruled *Cayuga Indian Nation of N.Y.,* 413 F.3d at 266 (2d Cir. 2005)

[31] In discussing the case of the Marshallese, Kirsch suggests that 'The case before us requires that we take as an empirical question the kinds of relationships that the Marshallese have toward their land: are they modelled after relations of kin, of property, or both?' Kirsch, S., 'Lost Worlds: Environmental Disaster, "Culture Loss," and the Law' (2001) 42(2) Current Anthropology, 167, 169; see also Rose, D.B., *Nourishing terrains: Australian Aboriginal views of landscape and wilderness* (Australian Heritage Commission 1996)

[32]Kirsch, S., 'Lost Worlds: Environmental Disaster, "Culture Loss," and the Law' (2001) 42(2) Current Anthropology 167, 176; Rose, C.M., *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Westview 1994) 295.

[33] Kirsch, S., 'Lost Worlds: Environmental Disaster, "Culture Loss," and the Law' (2001) 42(2) Current Anthropology 167, 169

[34] *ibid*, 173; Hirsch, E., *The Anthropology of the Landscape: Perspectives on Space and Place* (OUP 1995) 1-30; Rose, C.M., *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Westview 1994) 5

[35] Said, E., *Orientalism* (Routledge and Kegan Paul Ltd. 1978)

knowledge, all of which are inextricably linked.[36] Alienation from land is alienation from a life source causing, amongst other things, disenfranchisement and marginalisation. Land is not simply commerce. Land is life.

In order for land justice to be attained, the manner in which indigenous land cases are decided needs to evolve. The law is living and constantly evolves,[37] yet the manner in which indigenous land cases are decided does not appear to have developed in step with the law. To yield success, different framing of the land issue is necessary. Indigenous people neither contend for simply a property right, nor the right of self-determination, the struggles have simply taken this form because the western worldview has no paradigms that sufficiently characterise the true nature of the claims. The right for which they contend is a whole way of life, the extinction of which undermines greatly their right to life, and the global pursuit of a more sustainable future for all mankind.[38] The human rights framework would allow a more equitable outcome than the status quo, allowing justice for indigenous people.

This progression would also reflect the international community's objective of enhanced ecological sustainability[39] by increasing the likelihood of key areas of biodiversity remaining in the hands of indigenous peoples. Not only could land

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[36] For example, the Marshall islanders planted and nurtured trees, which were used, when matured, for the construction of various types of canoes used for transportation and fishing. Without access to the raw material, canoes could not be constructed and without the canoes, fishing would cease. This illustrates the fact that land and life are inextricably linked. Kirsch, S., 'Lost Worlds: Environmental Disaster, "Culture Loss," and the Law' (2001) 42(2) Current Anthropology 167, 174; Weiner, A., *Inalienable Possession: The Paradox of Keeping While Giving* (University of California Press 1992), 104.

[37] *Tyrer v United Kingdom* (1978) Series A no. 26, para. 31

[38] See chapter 2

[39] UNCED, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev. 1, reprinted in 31 I.L.M. 874 (1992); U.N. Conference on Environment and Development (UNCED), Agenda 21, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I); UNCED Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests, U.N. Doc. A/CONF.151/26 (Vol.III)

justice play a central role in pursuit of ecological sustainability, land justice would also serve as a cornerstone of indigenous rights, without debates of secession arising as per self-determination.[40]

4.3. Summary

In order to act as foundational right, the right contended for must be a right capable of allowing other rights integral to the survival of indigenous communities to unfold. It has thus been submitted that self-determination is inadequate as a foundational right of indigenous people of the New World, as it 'does not tie any group to a specific land base'.[41] This is important, as a large part of the land battle is the fact that alienation from cultural land causes death to a whole way of life and community.[42] It has also been submitted that ecological integrity is insufficient as a foundational right as it presupposes that title to the land at issue has been agreed in favour of the indigenous community. Without granting title to land or legally recognised stewardship over land, it has been argued that it would be extremely difficult to contend for ecological integrity. Furthermore the ecological integrity model is insufficient in itself to address broader issues contended for by indigenous communities such as cultural survival, which is contingent upon access to traditional lands. It has therefore, been submitted that land justice is the cornerstone of indigenous rights ensuring many of the freedoms contended for in pursuit of self-determination and the rights encapsulated by ecological integrity.

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[40] See n. 6
[41] See n. 15
[42] Rodriguez-Garavito, C.A., and Arena, L.C. 'Indigenous Rights, Transnational Activism and Legal Motivation: The Struggle of the U'wa People in Colombia' in De Sousa Santos, B. and Rodriguez-Garavito, C. (eds) *Law and Globalization From Below* (Cambridge University Press 2005); Brysk, A., *From Tribal Village to Global Village: Indian Rights and International Relations in South America* (Stanford University Press 2000)

In order for land justice to become a reality, it has been submitted that the manner in which such cases are adjudicated needs to evolve. Cases of indigenous rights must be brought within dominant legal frameworks; furthermore, applying the Human Rights framework would allow more equitable outcomes.

Part 2 shall examine the legal and ideological basis of the status quo of indigenous people of the New World, with specific reference to land justice. This shall occur through analysis of the legal principles and mechanisms employed in reducing the legal rights of these indigenous communities. Where legal wrongs have been committed in application of international law, and in the absence of satisfactory redress at domestic level, scope is provided for cases to be heard at international level, applying the Human Rights framework.

Chapter 5

Legal Principles and Mechanisms Underpinning Dispossession

5.1. Introduction

According to Enlightenment theories, a person's identity is developed by their ability to control the natural environment.[1] Thus, man demonstrated his rationality by working. Those who did not work the land, in a manner consistent with Western values were deemed not to have demonstrated rationality, hence could not be human, as the proof of humanity was rationality.[2] Such persons were thus classed as 'backwards', and regarded as nature to be dominated;[3] as a result, such persons were

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[1] Habermas, J., 'The Entwinement of Myth and Enlightenment: Re-Reading Dialectic of Enlightenment' (Levin, T.Y., (tr.)) (1982) 26 New German Critique, 13, 15; Adorno, T.W., Horkenheimer, M., Dialectic of Enlightenment, trans. by Cumming, J., (New York, 1972) at 54

[2] Hulme, P., Jordanova, L., *The Enlightenment and its Shadows* (London: Routlege, 1990) 29; A further, example of the Enlightenment borrowing from religion for its own ends, was the manner in which "Political theory in the Enlightenment substituted the social contract for divine right and emphasized natural human rights of political freedom and justice. Each of these ideas denied the absolute authority of monarchs." Hackett, L., *The European Dream of Progress and Enlightenment* (Cambridge University Press 1992) http://history-world.org/age_of_enlightenment.htm

[3] Cvijanovic, H., 'Carnal Enlightenment: The Myth of Enlightened Reason and Two Carnal Conceptions of the State' (2011) Politicka Misao, god. 48, br.1, 76, 84; Iriart, M.S., 'In the Shadow of the Enlightenment: From Mother Earth to Fatherland' www.ecpfem.org/journal

dispossessed of land.[4]

The dominant discourse regarding indigenous land rights has historically occurred within a conceptual framework endorsing liberal-legal ideals,[5] which is predominantly framed around the question of whether there was a misapplication, of the expanded version of the international law doctrine of *terra nullius.* The misapplication at issue is that pertaining to the populations that could, according to the times, be defined as 'backwards,' as such classification resulted in the dispossession of the people in question.

This chapter shall commence with a review of international law and methods of acquisition live during the time period in question. This shall be followed by a critical analysis of the discourse of *terra nullius* paying particular attention to Reynolds' *The Law of the Land*,[6] which was extensively referred to by the judiciary in the landmark case of *Mabo and Others v State of Queensland* (No.2).[7] It is submitted that had an historical and ideological analysis of the law been provided in *The Law of the Land*, the legal starting point in cases pertaining to land law may have been drastically altered in a manner favourable to indigenous people of the New World. Building on the frameworks of the emerging discourse, an historical and ideological analysis of the law is conducted with particular reference to the Marshall CJ cases.

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[4] See n.15 in chapter 1
[5] Ritter, D., 'The "Rejection of Terra Nullius" in Mabo: A Critical Analysis' (1996) 18 Sydney Law Review 5, 28
[6] Reynolds, H., *The Law of the Land* (Penguin, Ringwood Victoria 1987)
[7] (1992) 175 CLR 1

The purpose of this is to determine whether the dispossessions were the results of correctly applied laws, which had morally repugnant policies at their foundations, or whether the doctrine was deliberately misapplied in contravention with the rule of law. In the former case, a moral rather than legal wrong has been committed, thus the wrong may not be remedial in law. In the latter case, legal wrongs have been committed thus there must be redress in law.

5.2. International law and Methods of Territory Acquisition

International law recognises five modes of acquisition of sovereignty over territory;[8] however, only three of these are relevant in the present case; namely, conquest, cession and occupation of territory that is *terra nullius*. The applicable law in newly acquired territory is wholly contingent upon the mode of acquisition, hence the mode is crucial.

Acquisition of territory by conquest occurred by the use of military force to defeat the inhabitants of a territory.[9] The qualification for using this mode of acquisition was inhabitation of the territory by 'uncivilised'[10] persons, thus lands outside the Christian world.[11] Under the principles of international law, the laws of the territory continued until abrogated and formally replaced by the new sovereign,[12] and the new

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[8] See Oppenheim, L., International law, (1912), 284, the five modes are stated to be cession, occupation, accretion, subjugation (or conquest), and prescription.
[9] Oppenheim, L., *International law*, (London 1912), 302-307; see generally Korman, S. *The Right Of Conquest: The Acquisition Of Territory By Force in International law and Practice* (OUP 1996)
[10] Lindley, M.F. *The Acquisition and Government of International Territory in International law* (New York 1969) 26-27; Korman, S., *The Right Of Conquest: The Acquisition Of Territory By Force in International law and Practice* (OUP 1996) 41
[11] Lindley, M.F., (n. 10) 10, 24,
[12] *Campbell v Hall* [1558-1774] All ER Rep 252; Blackstone Commentaries, Book I (1765), chpt.4, pp 104—105, this proposition was affirmed in the following cases also cited by Brennan J., *Blankard v Galdy* [1738] EngR 444*, Campbell v Hall* [1774] EngR 5*, Beaumont v Barrett* [1836]

sovereign respected the property rights of the conquered inhabitants.[13] This was one of the two accepted modes of acquiring sovereignty and title to lands from 'uncivilised' people. Such lands were not regarded as uninhabited.[14]

The other means by which territory inhabited by 'uncivilised' persons could be acquired by a European power was cession.[15] The rule regarding the law in force following cession, which has been defined as 'the peaceful transfer of territory from one sovereign to another',[16] was the same as for conquered territories.[17]

Occupation of *terrae nullius* regulated rights amongst European nations against each other and gave exclusive rights to the discovering sovereign.[18] Prior to 1700, discovery[19] with the symbolic taking-of-possession was sufficient to constitute sovereignty and title to *terra nullius*.[20] Post 1700, actual occupation was required to perfect title.[21] Thus, acquiring *terra nullius* required the territory to be first physically discovered and secondly actually occupied on behalf of the claiming sovereign. The rule was that the settlers brought with them the law of their nation

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[13]Vattel, E., *Le droit des gens: ou, Principes de la loi naturelle appliqués a la conduite et aux affaires des nations et des souverains* (first published 1758, Clarendon 1964) 309-311; *Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543, (1823) 588, 593

[14]Lindley (n. 10) 26

[15] ibid 31

[16]O'Connell, D.P., *International law* (2nd edn., London 1970) 436, also see Oppenheim, L., *Oppenheim's International law*, pt.2 (Robert Y. Jennings and Arthur Watts eds., 9th edn., London 1992) at 680, also referred to in Lee, S., 'Continuing Relevance of Traditional Modes Of Territorial Acquisition In International law and a Modest Proposal' (2000-2001) 16 Connecticut Journal Of International law 1

[17] Blackstone Commentaries, Book I (1765), chpt.4, paras. 104—105

[18] *Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543, (1823) 573

[19] The principle of discovery stated that title to the founding government was good against all European governments once an act constituting possession had occurred. Lindley, M.F., *Acquisition and Government of Backward Territory at International law* (New York: Longroans, Green and Co. 1926) 129

[20] Simsarian, J., 'The Acquisition of Legal Title to Terra Nullius' (1938) 53 Pol. Sci. Q. 127; Von der Heydte, 'Discovery, Symbolic Annexation and Virtual Effectiveness in International law' (1935) 29 Am. J. Int'l L. 451

[21] Von der Heydte, (n. 20) 453

(i.e. the colonising nation),[22] as the land was physically uninhabited;[23] thus the law of the new sovereign was immediately effective without formal steps of implementation.

The modern, or expanded, concept of *terra nullius*, additionally classifies as *terrae nullius,* territories amenable to conquest by international law standards; thus, territories inhabited by populations whose civilisations were considered backward, and whose political organisation were not conceived according to Western norms.[24] This affected sovereignty but it did not affect the property rights of the inhabitants of the conquered territory.[25] However, it is application of this principle that was responsible for, and has perpetuated, the forcible dispossession of many of the indigenous people of the New World.

5.3. Terra Nullius and Indigenous Land Dispossession

The existence of the doctrine of *terra nullius* as part of international law in the 18th

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[22] Blackstone Commentaries, Book I, chpt. 4, para. 107

[23] See also Jennings, R.Y., *The Acquisition of Territory in International law* (New York 1963), which states the law in similar terms; See also Lindley, M.F., *Acquisition and Government of Backward Territory at International law* (New York: Longroans, Green and Co. 1926) 10. Here it is affirmed that uninhabited territory also not under the control of a sovereign was termed *terra nullius* without controversy

[24] Fiore, P., *International law Codified and its Legal Sanction* (New York 1918), 117-119; Lindley, M.F., *Acquisition and Government of Backward Territory at International law* (New York: Longroans, Green and Co. 1926) 10; Castles, A.C., 'The Reception and Status of English Law in Australia' (1963-66) Adelaide Law Review 2, 2; Borch, M., 'Re-thinking the Origins of Terra Nullius' (2001) 32 Australian Historical Studies, 117, 223; *Advocate-General of Bengal v Ranee Surnomoye Dossee* (48) (1863) 2 Moo N S 22, at 233-234; Ritter states that though opinions differ over the types of inhabited lands which were to be regarded as terra nullius under this expansion, the point of unification was that 'European colonial powers [had the right] to seize territory inhabited by indigenous people, on the basis that those people did not conform to European cultural norms'. Ritter, D., 'The "Rejection of Terra Nullius" in Mabo: A Critical Analysis' (1996) 18 Sydney Law Review 5, 8; Austin, J., *The Province of Jurisprudence Determined* (first published 1832, London 1968), 209.

[25] Fiore, P., *International law Codified and its Legal Sanction* (New York 1918) 423

century has largely been accepted by the dominant discourse.[26] Indeed, the majority of arguments favouring the position that a legal wrong has been committed contend from the perspective that at the time there was an error of fact as regards the status of the indigenous peoples, in terms of political organisation.[27] On this basis, they submit that land should be returned.

Reynolds'[28] approach, in *The Law of the Land*,[29] is paradigmatic of the dominant discourse. Reynolds focuses on explaining expropriation in terms of the legal and historical context but within the confines of a liberal-legal discourse. He begins by asserting the commonly held view, that in the 18th century there was a doctrine of *terra nullius,* which under-girded and overarched the principles of settlement.[30] He suggests that application of this doctrine occurred through the misconception that first, there was no political or social organisation, hence no law or sovereign, and secondly, there was no system of land tenure.[31] Reynolds suggests that the correction of these erroneous assumptions, decades after the dispossession, opened the doors for

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[26] See *Coe v Commonwealth; Advisory Opinion on Western Sahara* [1975] 1 ICJR 12, even in this case, condemning the enlarged notion of terra nullius, its status as having formed a part of international law, or the common law of England is not questioned but accepted; *Mabo and Others v State of Queensland (No.2)* (1992) 175 CLR 1, 40-42 (Brennan J.), again the enlarged notion of terra nullius and the accompanying denial of rights is repudiated on the grounds that 'common law should neither be nor be seen to be frozen in an age of racial discrimination.' The exact status of this notion of terra nullius is, once again, not questioned but just accepted.

[27] Tully, J., 'The Struggles of Indigenous Peoples for and of Freedom' in Ivison, D., and Patton, P.(eds.), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press 2000) 36, 44-45; Pinkoski, M, Asch, M., 'Anthropology and Indigenous Rights in Canada and the United States: Implications in Steward's Theoretical Project' in Barnard, A.J. (ed.), *Hunter-gatherers in History, Archaeology, and Anthropology* (New York 2004) 187-200

[28] Reynolds is extremely influential with his work being regularly referred to in relation to land rights cases, and his theory of *terra nullius* being applied in the *Mabo* (No.2) case

[29] Reynolds, H., *The Law of the Land* (Penguin, Ringwood Victoria 1987); Webber also comments on the vagaries of this approach of treating discriminatory practices against indigenous peoples as though they emanated from a simple misinterpretation of the common law. Webber, J., 'The Jurisprudence of Regret: The Search for Standards of Justice in Mabo' (1995) 17 (5) Sydney Law Review, 5; McNeil, K., 'A Question of Title; Has the Common Law Been Misapplied to Dispossess the Aboriginals?' (1990) 16(1) Monash ULR 91

[30] Reynolds, H., *The Law of the Land* (Penguin, Ringwood Victoria 1987), 12

[31] ibid 12-13

the recognition of Aboriginal prior possession as the starting point in legal debates.[32] The assumption underlying his theory is that the courts would have no choice but to recognise native title rights as it could be proven that Australia was not a *terra nullius* in 1788 and that at the time, there was institutional recognition of Aboriginal rights in Australia.[33]

There is a growing body of literature in the field questioning this position entirely, suggesting that it was not simply; 'blind adherence to a doctrine born of ignorance', that caused inhabited lands to be classified as *terra nullius*.[34] Proponents submit rather that the current position of indigenous people is the result of contravening international law during the period in question.[35]

Reynolds has been criticised, by those of the emerging discourse, for assuming that 'Aboriginal dispossession was simply a mistake' that could 'be rectified by the correct interpretation of the law'.[36] He has been further criticised for absolving the law itself of culpability.[37] This criticism stems from Reynolds identification of the aforementioned 'mistake' as the classification of Australia as *terra nullius* in 1788, and his suggestion that correction of this mistaken assumption is all that is required.

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[32] Reynolds, H., *The Law of the Land* (Penguin, Ringwood Victoria 1987) 174
[33] Ritter, D., 'The "Rejection of Terra Nullius" in Mabo: A Critical Analysis' (1996) 18 Sydney Law Review 5, 28
[34]Gollan, V., in Lilley, R. et al (eds), 'The Appropriation of Terra Nullius' (1989) 59 Oceania 222, 230; Borch, M., 'Re-thinking the Origins of Terra Nullius' (2001) 32 Australian Historical Studies, 117, 222-239; Ritter, D., 'The "Rejection of Terra Nullius" in Mabo: A Critical Analysis' (1996) 18 Sydney Law Review 5; Lilley, R. et al, 'The Appropriation of Terra Nullius' (1989) 59 Oceania 222
[35] ibid
[36] Ritter, D., 'The "Rejection of Terra Nullius" in Mabo: A Critical Analysis' (1996) 18 Sydney Law Review 5, 28; Gollan, V., in Lilley, R. et al (eds), 'The Appropriation of Terra Nullius' (1989) 59 Oceania 222, 230
[37] Ritter, D., 'The "Rejection of Terra Nullius" in Mabo: A Critical Analysis' (1996) 18 Sydney Law Review 5, 28; see also Gollan, V., in Lilley, R. et al (eds), 'The Appropriation of Terra Nullius' (1989) 59 Oceania 222, 229; Attwood, B., '*The Law of the Land* or the Law of the Land? History, Law and Narrative in a Settler Society' (2004) 2 History Compass 1, 7

It is submitted that whilst the aforementioned criticisms are justified, the criticism of Reynolds' position with regards to the 'British common law' is less straightforward. Though many expropriations were made in the name of the 'British common law', the actual English common law itself respected the property rights of all.[38] As will become evident shortly, the problem in this instance was that what was being applied in the name of the English common law, did not in fact represent the true position of the English common.

Gollan further states that Reynolds fails to provide an 'analysis or critique of the historical and ideological basis of law', thus is forced to argue that British 'settlement' and 'sovereignty' and 'empire' were 'inevitable.'[39] It is submitted that had an analysis been provided, the legal starting point in cases pertaining to land law may have been drastically altered in a manner favourable to the indigenous people.

Had *The Law of the Land* challenged the accepted historical backdrop in terms of law and policy, it would have raised important legal questions of how and when the expanded doctrine of *terra nullius* was formed. It would have also raised the question of when, if ever, it became a part of International law and the English common law, and if it has been correctly applied in case law.[40] It is my submission that the

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[38] See Blackstone (79) Commentaries, Bk.II, ch.1, para.7

[39] Gollan, V., in Lilley, R. et al (eds), 'The Appropriation of Terra Nullius' (1989) 59 Oceania 222, 231

[40] Borch states that 'there was no legal doctrine maintaining that inhabited land could be regarded as ownerless, nor was this the basis of official policy, in the eighteenth century or before. Rather it seems to have developed as a legal theory in the nineteenth century.' Borch, M., 'Re-thinking the Origins of Terra Nullius' (2001) 32 Australian Historical Studies, 117, 224; this claim was previously made by Lindley, M.F., *Acquisition and Government of Backward Territory at International law* (New York: Longroans, Green and Co. 1926); Simpson, G., 'Mabo, International law, Terra Nullius, and the Stories of Settlement: an Unresolved Jurisprudence' (1993) 19 Melbourne University Law Review 195

question of foundations of *terra nullius,* in *Mabo(No.2),*[41] could have moved beyond the issue of moral repugnancy and dealt with whether its foundations were sufficient to form law itself. Indeed it has been argued that in *Mabo,* 'the "doctrine of *terra nullius*" did not constitute a legal hurdle to be overcome'[42]. It has further been stated that:

> When Australia was first colonised by the Crown, neither *terra nullius* or any other legal doctrine was used to deny the recognition of traditional Aboriginal rights to land under the common law. Such a doctrinal denial would not have appeared necessary to the colonists, because the indigenous inhabitants of the colony were seen and defined by the colonists as intrinsically barbarous and without any interest in land. Thus the colonists required no legal doctrine to explain why Aboriginal people's land rights were not to be recognised under law because no doctrine was required for what was axiomatic.[43]

Ritter explains the problems this caused in the case of *Milirrpum v Nabalco Pty Ltd and the Commonwealth,*[44] which was the first Australian case to litigate the issue of Aboriginal land rights. The question at issue was, do Aboriginals hold a common law right to land? According to Ritter, there was 'no judicial authority of any sort that

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

[42] Ritter, D., 'The "Rejection of Terra Nullius" in Mabo: A Critical Analysis' (1996) 18 Sydney Law Review 5; Borch, M., *Re-thinking the Origins of Terra Nullius* (2001) 32 Australian Historical Studies 117, 222-239

[43] Ritter, D., 'The "Rejection of Terra Nullius" in Mabo: A Critical Analysis' (1996) 18 Sydney Law Review 5, 6; Banner, S. brings more clarity to this point by explaining that 'intrinsically barbarous' people resided in the 'state of nature.' The 'state of nature' was understood by the Europeans as a state in which the people had not appropriated lands as property due to the lack of even the smallest degree of social organisation and law. Thus where such people existed, it was axiomatic that rights in land could not be recognised under law as by their very nature, they did not own property in land, nor was there any law. Banner, S., 'Why Terra Nullius? Anthropology and Property Law in Early Australia' (2005) 23 (1) Law and History Review 95, 110

[44] (1971) FLR 141

provided a doctrinal explanation for why Aboriginal rights to land were not recognised'.[45] As it was not a land devoid of inhabitants, the concept of *terra nullius* was never raised.[46] It is submitted that by its notable omission, this case places a question mark over the acceptability of the expanded doctrine of *terra nullius* prior to the 19th century.

5.4. The Marshall CJ cases: Conquest and Discovery

In support of the proposition that there was no early precedent supporting an expanded doctrine of *terra nullius*,[47] Borch cites the Australian case of *Rex v Jack Congo Murrell*.[48] Whilst citing North America in support of this proposition, she does not cite any supporting authority despite the importance of U.S. jurisprudence in this area. The proposition can be more strongly substantiated by the U.S. Marshall CJ cases owing to his position as the 'progenitor of Indian Law'.[49] An analysis of the Marshall CJ cases shall be the focus of the remainder of this chapter.

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[45] Ritter, D., 'The "Rejection of Terra Nullius" in Mabo: A Critical Analysis' (1996) 18 Sydney Law Review 5, 6; for support of this view of the judicial irrelevance of *terra nullius*, see also Crawford, J., 'The Appropriation of Terra Nullius' (1989) 59 (3) Oceania 226, 228; Bartlett, R.H., 'Aboriginal Land Claims at Common Law' (1983) UWALR 293; Hookey, J., The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal lands in Australia? (1972) 5 Federal Law Review 85

[46] Van Krieken, R., 'From Milirrpum to Mabo: The High Court, Terra Nullius and Moral Entrepreneurship' (2000) 23(1) UNSW Law Journal 63

[47] Borch, M., *Re-thinking the Origins of Terra Nullius* (2001) 32 Australian Historical Studies 117, 237.

[48] 1836, Legge Supreme Court Cases, NSW, 72; it was stated in this case that New South Wales did not fall into any of the recognised categories of colonial acquisition on account of it having never been conquered, ceded or originally desert; for application of similar reasoning, see also case of *R v Bonjon* (1841), Parliamentary Papers, Papers Relative to Aborigines, Colonies, Australia 8 (1844), 148-55 (formerly reported in (1998) 3 Australian Indigenous Law Reporter 410-425), as cited in Borch, M., *Re-thinking the Origins of Terra Nullius* (2001) 32 Australian Historical Studies 117, 236

[49] O'Melinn, 'The Imperial Origins of Federal Indian Law: The Ideology of Colonization in Britain, Ireland and America' (Winter 1999) 31 Arizona State Law Journal 1207, 1271; Miles, A.S., Dagley, D.L., Oldaker, L.L., and Yau, C.H., 'Blackstone and American Indian Law' (2002) Newcastle Law Rev. 89, 93. Here it is stated that Chief Justice Marshall's opinions were often 'an echo of Blackstone.' See also Warden, L.C., *The Life of Blackstone* (Charlottesville, VA 1938), 325-329; The doctrine of discovery and extinguishment of native title, first appears in the following cases, *Fletcher*

Johnson v M'Intosh[50] is the Marshall CJ decision that imports the doctrine of discovery onto the U.S. legal landscape. This is subsequently developed in further case law and applied as a precedent in other jurisdictions.[51] Marshall CJ defines the principle in the following terms:

> [D]iscovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.[52]

Later on in his judgement he adds:

> [D]iscovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.[53]

The culmination of these statements suggests first, that whilst the discovering sovereign acquired title, it was only operative against other European powers, not

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v Peck 10 U.S. (6 Cranch) 87 (1810); *Johnson v M'Intosh* 21 U.S. (8 Wheaton) 543 (1823); *Worcester v State of Georgia* 31 U.S. (6 Pet.) 515 (1832)

[50] 21 U.S. (8 Wheat.) 543 (1823).

[51] *Johnson v M'Intosh* was applied in the Canadian case *Guerin v The Queen,* [1984] 2 S.C.R. 335 to the detriment of the indigenous people, and also in the Australian case of *Mabo v Queensland (No.2)*(1992) 175 CLR 1. See also Robertson, L.G., *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (OUP 2005), 144; Isaac, T., *Aboriginal Law: Cases, Materials and Commentary* (Saskatoon 1995); Frichner, T.G., 'Impact on Indigenous Peoples of the International Legal construct known as the Doctrine of Discovery, which has served as the Foundations of the Violation of their Human Rights' U.N. Doc. E/C.19/2010/13 (Feb. 4, 2010). Frichner's conclusion states that at least two governments other than the U.S., Australia, and Canada have applied *Johnson v M'Intosh;* see also Fletcher, M.L.M, 'The Iron Cold of the Marshall Trilogy' (2006) 82(3) North Dakota Law Review 627, 634 stating 'but after *Johnson,* the Doctrine of Discovery became a "well known fact."' Quoting Banner, S., How the Indians Lost Their Land: Law and Power on the Frontier (Harvard University Press 2005) 188

[52] *Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543, 573(1823)

[53] *Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543, 587(1823)

indigenous inhabitants.[54] Secondly, contrary to later assertions of what the law was at the time, according to Marshall CJ, the operation of the doctrine of discovery did not prejudice indigenous people with respect to title to land.[55] Title could only be extinguished through a subsequent act, namely purchase or conquest.

Marshall CJ appears to have expanded application of the doctrine of discovery, to inhabited lands; however, he maintains, that title to land vests in the indigenous people until a supervening act occurs; namely, purchase or conquest. This is the first appearance in case law of the application of this version of the doctrine. Marshall CJ does not however, conflate the state of habitation with *terra nullius,* thus where title to *terra nullius* is perfected by possession,[56] title to lands in Marshall CJs application occurs only on purchase or conquest.

Professor Banner's research provides a detailed account of the error of applying the doctrine of discovery to the Marshall CJ cases, or more broadly, to cases in the New World in general, with origins in an age pre-dating Marshall CJs time on the bench.[57] He asserts that the doctrine of discovery was not a time-honoured method for acquiring land from indigenous people and further demonstrates that the pre-1763

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[54] In stating the position of the discovering nation vis-à-vis the indigenous peoples Chief Justice Marshall, cites the Virginia Act and declares Virginia's, 'exclusive right of pre-emption from the Indians of all the lands within the limits of her own chartered territory, and that no persons whatsoever have, or ever had, a right to purchase any lands within the same from any Indian nation, except only persons duly authorized to make such purchase, formerly for the use and benefit of the colony, and lately for the Commonwealth'. *Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543, 574-588 (1823)

[55] See Pether, who states, 'the position adopted by the colonial courts…until the *Mabo* decision, was that when the British Crown colonised the continent it obtained absolute beneficial ownership of the lands of the continent together with its assertion of sovereignty.' Pether, P., 'Principles or Skeletons? *Mabo* and the Discursive Constitution of the Australian Nation' (1998) 4 Law Text Culture 115, 116; *Mabo and Others v State of Queensland (No.2)* (1992) 175 CLR 1

[56] See 5.2. International law and Methods of Territory Acquisition

[57] Banner, S., How the Indians Lost Their Land: Law and Power on the Frontier (Harvard University Press 2005) 10-48

colonial land policy was that indigenous peoples were to be treated as owners of their land.[58] This assertion is substantiated by the 1774 case of *Campbell v Hall,*[59] which recognised only two methods of acquiring inhabited lands; namely, conquest or cession.[60] Borch further adds:

> [T]here was no legal doctrine maintaining that inhabited land could be regarded as ownerless, nor was this the basis of official policy, in the eighteenth century or before. Rather it seems to have developed as a legal theory in the nineteenth century.[61]

Support for this assertion can be drawn from the fact that Marshall CJ, after pronouncing the United States a discovered colony, did not base the *Johnson v M'Intosh* decision on this doctrine of discovery;[62] rather he found an alternative basis for his decision, namely the 'pretension of conquest'.[63] With regards to the foundation of the U.S. government's authority, Marshall CJ offers this:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the

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[58] Banner, S., (n. 56); see also Henderson, J.Y., 'The Doctrine of Aboriginal Rights in Western Legal Tradition' in Boldt, M., and Long, J.A., (ed.) *The Quest for Justice* (1985) 185-220

[59] (1774), All E.R. Reprints (1558-1774), 254; see also see also *Mohegan Indians v Connecticut* (1703-1773) unreported;

[60] *Campbell v Hall* (1774), All E.R. Reprints (1558-1774), 254, 256

[61] Borch, M., Re-thinking the Origins of Terra Nullius (2001) 32 Australian Historical Studies 117, 224; this claim was previously made by Lindley, M.F., *Acquisition and Government of Backward Territory at International law* (New York: Longroans, Green and Co. 1926); Simpson, G., 'Mabo, International law, Terra Nullius, and the Stories of Settlement: an Unresolved Jurisprudence' (1993) 19 Melbourne University Law Review, 195-210

[62] Robertson makes this point in detail. Robertson, L.G., *Conquest By Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (OUP 2005) 95-116

[63] *Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543, (1823) 591; See Bradford, W., 'Beyond Reparations: An American Indian Theory of Justice' (2005) 66(1) Ohio State Law Journal 9

community originates in it, it becomes the law of the land, and cannot be questioned.[64]

Marshall CJ offers no further justification for the 'pretension' of which he speaks. It is my submission that the motivation for the 'pretension' was that whilst to suggest that the U.S. was acquired by conquest was factually untrue;[65] conquest of an inhabited State was a recognised mode of acquisition, as opposed to applying the doctrine of discovery to an inhabited country, which was unrecognised as a mode.[66] Marshall CJs unexplained move from discovery to conquest supports the view that the expanded definition of *terra nullius* was not operative during these times, thus could not have served to dispossess a single indigenous person. An analysis of the evolution of *Johnson v M'Intosh* suggests that the legal theory suggesting otherwise, arose from the misapplication of the case as authority for the proposition that the sovereign gained the right to extinguish native title on conquest.[67]

This proposition that the expanded definition of *terra nullius* could not be used to dispossess a single indigenous person is further emphasised by Marshall CJs explicit confirmation that indigenous peoples have absolute title to land in the cases of

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[64] *Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543, 591(1823)

[65] Newton, N.J., 'At the Whim of the Sovereign: Aboriginal Title Reconsidered' (1979-1980) 31 Hastings L.J. 1215, 1242; Conquest was an extremely narrow concept requiring physical possession to be brought about by force of arms. Oppenheim, L., *International law* (Lauterpacht, H., ed., 8th edn., New York 1955) 566-74

[66] Banner, S., *How the Indians Lost Their Land: Law and Power on the Frontier* (Harvard University Press 2005) 12; Lindley, M.F., *Acquisition and Government of Backward Territory at International Law* (New York: Longroans, Green and Co. 1926); Fletcher, M.L.M, 'The Iron Cold of the Marshall Trilogy' (2006) 82 North Dakota Law Review 627, 631-634

[67] *Tee-Hit-Ton Indians v United States* 348 U.S. 272 (1955), 279-280 where Justice Reed states that *Johnson v M'Intosh* is authority for the proposition that the sovereign gained the right to extinguish native title on conquest. This case is more fully discussed in chapter 7, at 132-133; see also *Oneida Indian Nation v. Cnty. of Oneida (Oneida I)*, 414 U.S. 661, 667 (1974); *Cnty. of Oneida v. Oneida Indian Nation (Oneida II)*, 470 U.S. 226, 234 (1985); *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 203 (2005).

Cherokee Nation v Georgia,[68] *Worcester v Georgia,*[69] and *Mitchel v U.S.*[70] He additionally acknowledges that, 'many people believed Indians had no right to their land because of their inferior culture,'[71] but fails to make a supporting ruling. This demonstrates that while it may have reflected the growing sentiment of the day, being considered 'backwards' was not a legal bar to land ownership, as would have been the case on operation of the expanded doctrine of *terra nullius*.[72]

Professor Banner also states that to suggest colonial land policy operated to deprive indigenous people of their land would have brought into question the validity of land titles of a large number of English property owners, as many foundation titles belonged to indigenous peoples.[73]

The 'pretension of conquest',[74] raised by Marshall CJ raises another set of issues. It suggests clearly that conquest did not occur; that is to say that there was no military might wielded to legalise the acquisition of sovereignty by the Europeans, thus land was acquired in contravention of international law. This theory of conquest was

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[68] 30 (5 Pet.) 1, 17 (1831)
[69] 31 U.S. 515, 544 (1832)
[70] 34 U.S. (8 Wheat.) 711, 745-746 (1835); Borch highlights the fact that the history of the colonial acquisition of North America undergoes changes during the Marshall, C.J. era, that is to say that in 1823 Marshall, C.J., accepts the country has been held under the fallacy of 'converting the discovery of an inhabited country into conquest'. *Johnson v M'Intosh,* 591. However, by 1831, in *Worcester v Georgia* 31 U.S. (6 Pet.) 515, 543-44 (1832), he speaks of the U.S. as being discovered but he still maintains that title to land resided in the indigenous people, stating that discovery 'gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell', thus it conferred a right of pre-emption.
[71] Newton, N.J., 'At the Whim of the Sovereign: Aboriginal Title Reconsidered' (1979-1980) 31 Hastings L.J. 1215; *Johnson v M'Intosh* 21 U.S. (8 Wheat.) 543, 573 (1823) ; see also Badcock W.T., *Who Owns Canada? Aboriginal Title and the Canadian Courts* (Ottowa: Canadian Association in Support of the Native Peoples, with the assistance of the Law Foundation of Ontario and the Ann Maytag Foundation, 1976), 11; Doyle-Bedwell, P.E., 'Evolution of the Legal Test of Extinguishment: From Sparrow to Gitskan, The Case Comment' (1993) 6 Can. J. Women and L. 193, 197
[72] This point is elaborated in the following chapter.
[73] Banner, S., *How the Indians Lost Their Land: Law and Power on the Frontier* (Harvard University Press 2005) 41; Frickey, P., 'Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law' (1993) 107 Harvard Law Review 381
[74] *Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543, 591 (1823)

consolidated in Blackstone's writings.[75] Later jurists have denied this position, asserting instead that the U.S. was discovered rather than conquered;[76] however, as has been submitted, the doctrine of discovery was inoperative in inhabited territories.[77]

5.5. Summary

It has been submitted that dispossessing indigenous people was not, as the dominant discourse suggests, the result of 'corrupted' legal definitions emanating from neutral and objective legal regimes.[78] Rather, it was the result of the contravention of the international law of acquisition of territories. It has been submitted that in the eighteenth and early nineteenth century, the principles of acquiring land that was *terra nullius* were insufficient to dispossess a single indigenous person, and that *terra nullius* referred exclusively to lands that were devoid of inhabitants.

It has been submitted that prior to, and at the time of, the Marshall CJ cases, there were only two accepted modes of acquiring inhabited territory: conquest and cession.

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[75] Blackstone, W., *Commentaries on the Laws of England*, (1765-1769), Introduction, sect.4, http://www.lonang.com/exlibris/blackstone/

[76] Story, J.L, *Commentaries on the Constitution of the U.S.* (Cambridge: Brown, Shattuck, and Co.1833), Book 1, Chpt.1 in general, but specifically paras.2, 8; Justice Story's claims, to the U.S. having been acquired by discovery, relies heavily on the dicta in *Johnson v McIntosh* (8 Wheat. 538)*;* however, he does not comment on the fact that it did not form the basis of the decision, rather it was conquest, nor does he appear to comment on Blackstone's position http://www.lonang.com/exlibris/story/. Blackstone's position was altered in a footnote by an editor of a later edition of his work, cf. note 23 in Blackstone, book 1, 94 where the editor, William Draper Lewis, quotes from an earlier edition by Sharswood (1878) to the effect that 'Sir William Blackstone considered the British colonies in North America as ceded or conquered countries ... But this was an error. The claim of England to the soil was made by her in virtue of discovery...' Borch, M., 'Re-thinking the Origins of Terra Nullius' (2001) 32 Australian Historical Studies, 117, 237

[77] See 5.2. International law and Methods of Territory Acquisition, 84-86

[78] Gollan, V., in Lilley, R. et al (eds.), 'The Appropriation of Terra Nullius' (1989) 59 Oceania 222, 229

In both cases the new sovereign respected the property rights of the conquered inhabitants.[79]

It can be concluded that the propositions for which *Johnson v M'Intosh* could be authority are (1) indigenous people of the New World had title to land, (2) title to land owned by indigenous people could only be acquired through conquest or purchase, and (3) 'backwards' people had capacity to have legal title to land. These propositions are affirmed by later Marshall CJ cases, namely; *Cherokee Nation v Georgia,*[80] *Worcester v Georgia,*[81] and *Mitchel v U.S.*[82] As these were the foundational cases of the expanded doctrine of *terra nullius* it is submitted that they were insufficient to form the law allowing acquisition by occupation of inhabited territory.

It is also highlighted that the *Johnson v M'Intosh*[83] 'pretension of conquest' creation indicates the contravention of international law in acquiring U.S. territories.

Having examined the foundational cases, the purpose of the next chapter is to examine the writings of the jurists credited with founding international law, to determine whether support can be derived for the expanded doctrine of *terra nullius*. Following this, Blackstone's writings shall be examined to ascertain the position of the English Common Law at the time.

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[79] Vattel, E., *Le droit des gens: ou, Principes de la loi naturelle appliqués a la conduite et aux affaires des nations et des souverains* (first published 1758, reprinted Clarendon Press 1964) 194, 309-311; *Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543, 588, 593(1823)
[80] 30 (5 Pet.) 1, 17 (1831)
[81] 31 U.S. 515, 544 (1832)
[82] 34 U.S. (8 Wheat.) 711, 745-746 (1835)
[83] *Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823)

Chapter 6

International law Jurists and "Desert Uncultivated"

6.1. Introduction

As asserted in the previous chapter, during the Enlightenment, societies that were not ordered according to Western ideals were regarded as 'backwards,' thus nature to be dominated.[1] It has further been asserted that the position of the dominant discourse is that *terra nullius* was applicable to inhabited territories where there was no political or social organisation, hence no law or sovereign, and no system of land tenure.[2] According to the dominant discourse, in such instances, indigenous people did not have title to land.[3] The mistake in need of rectification according to the dominant discourse is the misapplication, born of a mis-classification of some of the communities as 'backwards.'[4]

This chapter shall first submit that 'Standard of "Civilization"'[5] categories were inoperative as a means of divesting indigenous inhabitants of land rights. Secondly, it shall be submitted that amongst international jurists writing at the time, with the exception of Vattel, there is no support for the application of *terra nullius* to inhabited lands, neither did discovery grant a right of seizure of indigenous land to

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[1] See chapter 5, 5.1. Introduction p.91
[2] Reynolds, H., *The Law of the Land* (Penguin, Ringwood Victoria 1987) 12-13
[3] See n. 66 in chapter 5
[4] Reynolds, H. (n. 2)
[5] See 6.2. International law and 'Standard of "Civilization"' below

the discovering nation. It shall also be submitted that settlement of territory did not invest sovereignty in the settling nation.

'Desert uncultivated,' the English Common Law equivalent to *terra nullius*, shall be analysed. It shall subsequently be submitted that there was no recognition of application of the concept to inhabited territories. *Esto* it shall be submitted that even if it were recognised, while it would have been operative to change the sovereign, it would have been inoperative as regards dispossessing indigenous people of their lands.

6.2. International law and 'Standard of "Civilization"'

Prior to colonialism, according to European anthropologists, the world existed in three spheres of civilisation; '"savages," "barbarians" and civilized peoples'.[6] According to European norms and ideals, 'savages' were those regarded as least evolved socially and politically, 'barbarians' were more advanced than 'savages' but not advanced enough to constitute a State, and 'civilised' peoples were those who were in perfect conformance with European standards.[7] These categories, or the 'standard of civilization',[8] were important in terms of the emerging European international legal order because they established which peoples were to be regarded

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[6] Bowden, B. 'Globalization and the Shifting 'Standard of Civilization' in International Society' in International Society, Jubilee Conference of the Australian Political Studies Association (Australian National University 2002) 3 available at http://arts.anu.edu.au/sss/apsa/Papers/bowden.pdf

[7] Morgan, L.H. *Ancient Society* (first published 1877, Cambridge Mass.: Belknap Press1964) 5, 11

[8] For a fuller discussion on this point see Schwarzenberger, G., 'The Standard of Civilization in International Society' in Keeton, G.W., Schwarzenberger, G., (eds) *Current Legal Problems* (London 1955); Gong, G.W., *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press 1984); Bowden defines the 'Standard of Civilization' as 'the means by which peoples or nations have historically been admitted into or barred from the international society of states' Bowden, B., 'The Colonial Origins of International law. European Expansion and the Classical Standard of Civilization' (2005) 7 Journal of the History International law 1, 1

as States, thus legal persons, under international law.[9] It further determined which States were entitled to extraterritoriality, and also the rights of citizens of 'civilised' nations in these 'uncivilised' nations.[10]

As regards the 'Standard of "Civilization,"' Grotius states:

> [A] band of robbers is not a State. On this ground the Barbary States were never recognised by European nations; and the conquest of Algeria by France was not regarded as a violation of international law.[11]

Thus, Grotius' 'band of robbers', who were no doubt hunter-gatherers,[12] and those regarded as barbarous, were not regarded as States as is stated above, thus were amenable to conquest. Vitoria, writing before Grotius, also asserted that indigenous peoples of 'uncivilized' nations were better suited to being ruled, than governing themselves.[13] Again, the reference is regarding the capacity of a people to hold sovereignty, as opposed to a reference to capacity to own land.

6.3. International Jurists and the Expanded Doctrine of *Terra Nullius*

On analysis, it is evident that much of the dicta advanced, in support of suggestions that the international jurists credited with founding international law[14] supported the

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[9] This was important because the qualification for acquiring land by conquest was that 'uncivilised' people inhabited the territory See chapter 5, 5.2. International law and Methods of Territory Acquisition p.92

[10] Bowden, B., (n. 6), at 4; Fiore, P., *International law Codified and its Legal Sanction or Legal Organization of the Society of States* (EM Borchard, tr, New York 1918), 362

[11] Lorimer, J., *The Institutes of the Law of Nations: a treatise of the jural relations of separate political communities*, Vol. I, (Edinburgh: William Blackwood and Sons 1883) 160-161, as cited in Bowden, B. Globalization and the Shifting 'Standard of Civilization' in International Society (2002)

[12] Montesquieu, *The Spirit of the Laws*, Book 18 (Cohler, A.M., et al. eds., first printed 1748, Cambridge University Press1989) 290

[13] De Vitoria, F., *De Indis et de lure Belli Relectiones* (first published 1539, reprinted New York 1964) 120-128

[14] Vitoria and Grotius are regarded as such. While Vitoria presented the outline of an international community, Grotius, writing in the following century, repeatedly referred to him and affirmed his work See Scott, J.B., *The Spanish Origin of International law: Francisco de Vitoria and His Law of*

seizure of indigenous lands, actually inform the debate on sovereignty rather than domestic land rights.

Regarding the land rights of indigenous people on discovery, Vitoria's view, later adopted by Grotius,[15] was that discovery did not grant, to the discovering nation, a right of seizure of indigenous land. He further added that the colonisers were granted no greater a right on discovering indigenous lands than would have been granted to the indigenous people had the situation been reversed.[16]

According to these jurists, acquisition of inhabited lands could only occur by conquest or cession.[17] Grotius provides an exception permitting European encroachment onto indigenous soil, where:

> [W]ithin the territory of a people where there is any deserted and unproductive soil, this also ought to be granted to foreigners if they ask for it.[18]

Nations ((Publications of the Carnegie Endowment for International Peace, Division of International law 1934) 281, 283; see also Grotius, H., De Jure Belli ac Pacis Libri Tres [1625; The Law of War and Peace] Vol.2, Bk. 1 (Kelsey, F.W., tr., first published 1625, Oxford 1925) 187, 505

[15] Grotius, H., *Commentary on the Law of Prize and Booty* (Williams G.L., and Zeydal, W.H., trs., first published 1603, New York 1964), XII http://oll.libertyfund.org/?option=com_staticxtandstaticfile=show.php%3Ftitle=1718andItemid=27

[16] De Vitoria, F., *De Indis et de Jure Belli Relectiones* (first published 1539, reprinted New York 1964) 139; Wolff, writing in the 18th Century, expounds on this position. He states, 'no nation ought to do to another what it does not wish to be done to itself. Indeed, if it is allowable for one nation to occupy lands inhabited by another nation, because they have been hitherto unknown to it, by the same reasoning it will be allowable also for the second nation to occupy the lands of the first, or for any other foreign nation to do so.'
See Cavallar, G., 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' (2008) 19 Journal of the History of International law 181, 203.

[17] Borch, M., 'Re-thinking the Origins of Terra Nullius' (2001) 32 Australian Historical Studies 117, 233

[18] Grotius, H., *De Jure Belli ac Pacis Libri Tres* [1625; The Law of War and Peace] para. 2.2.17

However, he is clear regarding the fact that this does not constitute a transfer of *dominium,* which remains with the indigenous peoples; it simply allows settlers the right to occupy land.[19] This position is further entrenched in Grotius' discussion on 'unoccupied lands', which he distinguishes from 'desert[ed] lands'. The former describes those with a sovereign but no private owner, whereas the latter describes those lands that were never occupied, thus had no sovereign.[20]

Vitoria and Grotius also rejected the idea that indigenous peoples possessed inferior rights to other people, affirming their rights and dominion in both public and private matters.[21] It has been suggested that the principles underpinning the rejected views were first, the rhetoric of human rights pertaining to all;[22] secondly, the belief that indigenous peoples were neither insane nor irrational,[23] and thirdly that civilisation was simply the European pretext used to facilitate their greed.[24]

Wolff further extends the Vitoria-Grotius position by recognising the concept of 'jointly acquired ownership' of hunter gatherer societies and rejecting the idea that territory inhabited by such societies, though not currently in use, may become objects

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[19] Grotius, H., De Jure Belli ac Pacis Libri Tres [1625; The Law of War and Peace] (Kelsey, F.W., tr., first published 1625, Oxford 1925) paras. 2.2.1, 2.2.11, 2.2.17

[20] Grotius, H., (n. 19) para. 2.2.4.; Stone Peters, J., A '"Bridge over Chaos": De Jure Belli, Paradise Lost, Terror, Sovereignty, Globalism, and the Modern Law of Nations' (2005) 57(4) Comparative Literature 273, 286-287

[21] Grotius, H., *Commentary on the Law of Prize and Booty* (Williams G.L., and Zeydal, W.H., trs., first published 1603, New York 1964), Xiii.128; Wolff supports this assertion, see Wolff, C., 'Jus Gentium Methodo Scientifica Petractatum' in Scott, J.B. (ed.), *The Classics of International law* vol. 13 (Oxford: Clarendon Press 1934) 157-159, 310; Borch, M., 'Re-thinking the Origins of Terra Nullius' (2001) 32 Australian Historical Studies 117, 233

[22] Cavallar, G., 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' (2008) 19 Journal of the History of International law 181, 194

[23] 'Those who have the use of their reason ought to have the free choice of what is advantageous, unless another has acquired a certain right over them.' Grotius, H., (n. 19) para. 2.22.12

[24] Cavallar, G., (n. 22); Grotius, H., (n. 19) para. 2.22.12

of colonisation.[25] The tenor of Wolff's thesis regarding indigenous people was that 'civilised' nations had no right to divest indigenous peoples of liberty by imposing sovereignty on their territories.[26]

Vattel who has been portrayed as the 'great apologist for colonisation' counters this position.[27] As an advocate of the utilitarian argument, which allows indigenous boundaries to be restricted in favour of 'better use' by settlers, he draws a distinction between occupation that comes from roaming over the lands in terms of hunter-gatherers, and occupation resulting in settling the land in terms of European occupation.[28] Although he favours the rights of settlers to sovereignty,[29] and also the restriction of hunter-gatherer boundaries, he does not sanction the dispossession of indigenous people from the land on which they reside. This is reflected by his assertion that:

> …[P]rovided sufficient lands were left to the Indians, others might, without injustice to them, settle in certain parts of a region, the whole of which the Indians were unable to occupy.[30]

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[25] Wolff, C., 'Jus Gentium Methodo Scientifica Petractatum' in Scott, J.B. (ed.), *The Classics of International law* vol. 13 (Oxford: Clarendon Press 1934), para. 312, 159; Borch, M., 'Re-thinking the Origins of Terra Nullius' (2001) 32 Australian Historical Studies 117, 234

[26] Hunter, I., 'Natural Law, Historiography, and Aboriginal Sovereignty' (2007) 11 Legal History 137, 142; Cavallar, G., 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' (2008) 19 Journal of the History of International law 181, 203

[27] Borch, M., (n.17) 234; Cavallar, G., 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' (2008) 19 Journal of the History of International law 181, 205-207

[28] Vattel, E., 'The Law of Nations or the Principles of Natural Law' (1758), in Scott, J.B. (ed.), *The Classics of International law* (Washington DC 1916), paras. I.I8.208-I.I8.209; Flanagan, T., 'The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy' (1989) 22 Canadian Journal of Political Science 589, 595

[29] Vattel, E., (n.28) I.7.8I

[30] Vattel, *The Law of Nations*, vol.3, 143; this also reflected the position of the English common law, which allowed occupation of areas that were uninhabited. See *Geary v Barecroft,* 82 Eng. Rep. 1148 (K.B.1667); *Holden v Smallbrooke*, 124 Eng. Rep. 1030 (C.P. 1668)

As is evident, 'Standard of "Civilization,"' regardless of how low in the scale a people were, was not a bar to owning land. Furthermore, the proposition that inhabited lands could be treated as *terra nullius* was not supported by the majority of these early international jurists. Neither can it be supported that the result of a new sovereign was the abrogation of indigenous title to land.

6.4. 'Desert and Uncultivated' and the Expanded Doctrine of *Terra Nullius*

Despite the prominence of the international law concept *terra nullius*, in jurisdictions formerly governed by the English Common Law,[31] it did not in fact constitute any part of this law.[32] The principle was reflected in the English common law by Blackstone's 'desert and uncultivated'[33] and the general rule was that ownership could not be acquired by occupying land, which was already occupied by another.[34]

Blackstone, one of the most notable commentators of the English common law,[35] and one of the most cited in defence of the expanded application of *terra nullius*[36] recognised three methods of acquiring new territories; two in relation to inhabited territories and one in relation to territories devoid of people:

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[31] Australia, Canada, New Zealand, U.S.A.
[32] Ritter, D., 'The "Rejection of Terra Nullius" in Mabo: A Critical Analysis' (1996) 18 Sydney Law Review 5, 7
[33] Blackstone, W., Commentaries on the Laws of England, (1756), book I (1902), 93
[34] Blackstone (79) Commentaries, Bk.II, ch.1, at 7
[35] Blackstone's commentaries, published from 1765-1769, solidify legal thinking during his era. It has been suggested that for at least a century following, Blackstone's work became 'both the only law school and the only law library most American lawyers used to practice law in America for nearly a century after they were published. For generations of lawyers including John Marshall and Abraham Lincoln…the *Commentaries* became the Bible of American lawyers.' Boorstin, D.J., *The Mysterious Science of the Law, An Essay on Blackstone's Commentaries* (Cambridge, Mass. 1941), at ix, 4; see also Miles, A.S., Dagley, D.L., Oldaker, L.L., and Yau, C.H., 'Blackstone and American Indian Law' 6(1) Newcastle Law Rev. 89, 91; Warden, L.C., *The Life of Blackstone* (Charlottesville, VA 1938) 140-159. Miles, A.S., Dagley, D.L. and Yau, C.H., 'Blackstone and His American Legacy' (2001) 5(2) Australia and New Zealand Journal of Law and Education 1
[36] See *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 FLR 141, 201 (Blackburn, J.); *Cooper v* Stuart (1889) 14 App. Cases 286, 291

> Plantations or colonies, in distant countries, are either such as where the land are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations.[37]

Blackstone recognised only two modes of acquiring occupied land; namely, conquest and cession, a position that is later reflected by the King's Bench in *Campbell v Hall*.[38] The phrase 'desert and uncultivated' has been the subject of much debate and has often been cited as authority for the proposition that territories peopled by 'uncivilised inhabitants in a primitive state of society'[39] could be acquired by occupation. There is little evidence to support this construction and it has been suggested that Blackstone took the term 'desert and uncultivated' from a 1722 Privy Council decision, referring to Barbados, which was truly uninhabited at the time of British acquisition in 1625.[40] However, even if Blackstone had intended it to apply to 'uncivilised inhabitants in a primitive state of society', as late as 1835 there was still no support in case law for the proposition that occupation transferred title to land to the new sovereign.[41] Therefore, even on this construction allowing a new sovereign,

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[37] Blackstone, W., Commentaries on the Laws of England, (1765), book I (1902), 93
[38] All E.R. Reprints (1558-1774), 254, 256. This case was decided in the court of the King's Bench in 1774.
[39] *Milirrpum v Nabalco Pty. Ltd* (1971) 17 FLR 141, 201 (Blackburn, J.); see also Reynolds, H., The Law of the Land (Penguin, Ringwood Victoria 1987) 35
[40] See note 17, at 226; Case 15—Anonymous (1722), *Peere Williams* 2: 75—6, in McNeil, K., *Common Law Aboriginal Title* (Clarendon Press1989); Reynolds, H., The Law of the Land (Penguin, Ringwood Victoria 1987) 12, 35
[41] The latest of the Marshall C.J. cases, decided in 1835 contradicts the proposition that occupation of inhabited lands transferred title in land from the indigenous people to the new sovereign. See *Mitchel v U.S* 34 U.S. (8 Wheat.) 711, 745-746 (1835)

it is submitted that indigenous inhabitants retained title to land. This is in line with British government policy of the 18th Century, which regarded indigenous lands to be in the ownership of the indigenous peoples,[42] a point, which is further substantiated by historical records.[43]

Furthermore, Blackstone's writings on conquest explicitly state that he disagreed with:

> The seising of countries already peopled, the driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such conduct was consonant to nature, to reason or to Christianity, deserved well to be considered by those who have rendered their names immortal by thus civilising mankind.[44]

His first contention is that the countries are inhabited. Secondly, he refers to them as 'defenceless natives' rather than using derogatory terms. The basis for his antipathy

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[42] See Tully, J., 'Aboriginal Property and Western Theory' (1994) 11 Social Philosophy and Policy 171, see Shurtleff, N.B. (ed.), *Records of the Governor and Company of Massachusetts Bay in New England* (1853-54, reprint Boston Massachusetts 1968), 213, quoting Lord Mansfield who states that the country, despite its unimproved state, belongs to the indigenous inhabitants until they give it or sell it. See also Lester, G.S., *Inuit Territorial Rights in the Canadian Northwest Territories* (Tungavik Federation of Nunavut, Ottowa 1984), quoting Lord Northey, stating that the indigenous peoples of Connecticut were the owners and possessors of their lands.

[43] Cook was given two sets of instructions from two different masters; one instructing him that voluntary consent was required for settlement as the indigenous peoples that he would encounter were the legal possessors of the soil thus conquest was illegal, and the other instructing him, with the consent of the indigenous peoples, to take possession in the name of the Crown. Whilst the two positions differ, the constant is that the land belongs to the indigenous peoples. Beaglehole, J.C., *The Journals of Captain Cook on His Voyages of Discovery* (Cambridge 1955-74), 1:514; Bennett, J.M., and Castles, A.C., *A Source Book of Australian Legal History* (Sydney 1979), 253-54; Banner, S., 'Why Terra Nullius? Anthropology and Property Law in Early Australia' (Spring 2005) Law and History Review, 97

[44] Blackstone, W. Commentaries on the Laws of England (1765-1769), 17th ed. (1830), Bk II, Ch. 1; see also Borch, M., 'Re-thinking the Origins of Terra Nullius' (2001) 32 Australian Historical Studies 117, 226

was that conquest occurred merely on the basis of differences; namely, difference of language, religion, customs and government from the invaders. It is thus submitted that it would be inconsistent for Blackstone to simultaneously hold the view that territories of 'uncivilised inhabitants in a primitive state of society',[45] could be acquired by occupation, as such an assertion would be based on the aforementioned differences. Therefore, it is submitted that Blackstone could not have intended 'desert and uncultivated' to be construed with reference to 'uncivilised inhabitants in a primitive state of society'.

6.5. Acquisition of Territory and the Rule of Law

The expanded doctrine appears to have gained momentum and been accepted by jurists writing during and after the nineteenth century.[46] It appears that by the time cases were being decided in the nineteenth century, positivist interpretations, thus the expanded doctrine of *terra nullius* were being applied retroactively.[47] This mis-application of legal principles has served to legitimate the forcible dispossession of land from indigenous people.

As indeed the extended doctrine of *terra nullius* did not form a part of international law or the English common law during, or prior to, the eighteenth century,

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[45] *Milirrpum v Nabalco Pty. Ltd* (1971) 17 FLR 141, 201 (Blackburn, J.); see also Reynolds, H., The Law of the Land (Penguin, Ringwood Victoria 1987) 35.

[46] See for example Fiore, P., International law 431 (1929); Lindley, M.F., *Acquisition and Government of Backward Territory at International law* (New York: Longroans, Green and Co. 1926), chpt III and IV, 47; Partington, G., *The Australian History of Henry Reynolds* (AMEC, Adelaide 1994); Gray, J. 'The Mabo Case: A Radical Decision' (1997) XVII (1) Canadian Journal of Native Studies 33, 47

[47] See *Milirrpum v Nabalco Pty. Ltd* (1971) 17 FLR 141; *Mabo and Others v State of Queensland (No.2)* (1992) 175 CLR 1; *Cooper v Stuart* (1889) 14 App. Cas. 286, 291, after outlining a two-pronged test for the determination of *terra nullius*, consisting of 'he absence of settled inhabitants' and 'the absence of settled law,' Lord Watson introduces the concept of 'practically unoccupied'.

acquisition of territories, by such means, during this period constitutes a breach of international law.

6.6. Summary

The assertion of the emerging discourse that there was no precedent in eighteenth century British policy, or any legal doctrine in British law, for taking possession of inhabited land as if it were uninhabited is well substantiated. Moreover, within the wider framework of international law, the proposition that inhabited territory as *terra nullius* constituted a part of international law prior to the mid-nineteenth century is also without substantial foundations.

It has been submitted that the 'standard of civilization,' was important in establishing which peoples were to be regarded as States, thus legal persons, under international law. However, it has been argued that the categories did not divest indigenous people of rights regardless of their position on the scale.[48]

With reference to international jurists, it has been submitted that there is little support for the application of *terra nullius* to inhabited lands. Where jurists were in favour of the settlement of unoccupied land, it did not constitute transfer of sovereignty.[49] Furthermore, it is submitted that discovery did not grant, to the discovering nation, a right of seizure of indigenous land.[50]

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[48] See above 6.2. International law and "Standard of Civilization"
[49] Grotius, H., (n. 19)
[50] See n. 26

Regarding the English Common Law, it has been submitted that only two modes of acquiring occupied land; namely, conquest and cession, are recognised.[51] As regards 'desert uncultivated', it is submitted that it could not have been intended as a reference to territories inhabited by 'uncivilised' people.[52] It has further been submitted that even if it were intended as a reference to the latter, precedent indicates that it was inoperative as regards dispossessing indigenous people of their land.[53]

It is thus submitted that the deliberate contravention of international law, by colonising nations, is responsible for the dispossession of indigenous peoples of their lands. As legal wrongs were committed, due process that amounts to justice must be available.

The next chapter shall analyse the manner in which cases are currently being handled domestically. The purpose of this is twofold; first it may transpire that, in more modern times, justice is being served in domestic courts, as a means of making amends for the past. Secondly, where this is the case, it will avoid any unnecessary incursions into State sovereignty by an international court.

[51] See 6.4. 'Desert and Uncultivated' and The Expanded Doctrine of *Terra Nullius*
[52] ibid
[53] See n. 41

Chapter 7

Domestic Legal Approaches

7.1. Introduction

It has been established in the previous chapter that retroactive application, by the courts, of the expanded definition of *terra nullius* is a breach of the rule of law, which has served to perpetuate the injustice of dispossessing indigenous peoples of the New World. However, in the current era, courts are increasingly adopting a more apologetic stance as has been demonstrated by the *Mabo(No.2)*[1] case. In order to fulfil the *praxis* element of a new environmental paradigm, this position must translate into land justice for indigenous people. or conversely, do cases continue to be adjudicated in a manner that perpetuates the denial of rights and justice of indigenous peoples?

Through the analysis of case law, this chapter seeks to establish answers. Where a systematic denial of justice is evident, this chapter seeks to discover the reason in order to determine a way forward. Australia and Canada shall be dealt with first, due to the similarities between the jurisdictions with regards to the basis of title claimed by indigenous peoples and subsequent evolution of case law. Following this, an analysis of the U.S.A and New Zealand shall ensue. Rights contended for in the latter

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[1] *Mabo and Others v State of Queensland (No.2)* (1992) 175 CLR 1, para.41 (Brennan J.)

jurisdictions emanate from various treaties, in the latter case the Treaty of Waitangi. The situation in the U.S. may be further distinguished from the other jurisdictions on the basis that the indigenous people hold a unique position, that of domestic dependants, creating a relationship of ward and guardian. It shall become evident, on analysis, whether this status has increased the level of justice as compares with the other jurisdictions.

7.2. Australia

The subject matter in *Mabo v Queensland (No.2)*[2] was the land in Torres Straits, namely the Murray Islands. Following the annexation of these lands by the Colony of Queensland, in 1879, a proclamation was made to the effect that absolute beneficial title to all lands vested in the Crown, and all were henceforth subject to the laws of Queensland. The plaintiffs sought declaration that they were entitled to the land 'as owners; as possessors; as occupiers; or as persons entitled to use and enjoy the said islands'.[3]

7.2.1. Outcome

The judgement was in favour of the Meriam people to the effect that they 'are entitled, as against the whole world to possession, occupation, use and enjoyment of the Island'.[4]

However, this entitlement is subject to 3 limitations:

1. Right of pre-emption in the Crown.[5]

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[2] (1992) 175 CLR 1
[3] (1992) 175 CLR 1
[4] (1992) 175 CLR 1, para.97 (Brennan, J.)

2. It constitutes an equity rather than estate in land.[6]
3. Holdings are susceptible to extinguishment by the Crown.[7]

Simply put, the rights of the Meriam people to the islands survived annexation, rendering to the people, present day entitlement to the land.[8] However, what was further established was that their future on the land is precarious by virtue of the fact that their rights can be extinguished by exercise of the Crown prerogative.[9] As exercise of the Crown prerogative is a question of sovereignty it is a matter for international law and cannot be challenged in domestic courts in Australia.[10]

7.2.2. The Process of the Court

Whilst attempting to recognise obligations under the optional Protocol to the International Covenant on Civil and Political Rights, derogation from these obligations was permitted where the 'skeleton of principle' would be fractured. As stated by Justice Brennan:

> The Court [was] not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.[11]

Skeletal principles are those principles that give the law 'shape and…consistency', thus one such principle is the doctrine of tenure as without it, English land law is

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[5] (1992) 175 CLR 1, para. 21 (JJ Deane and Gaudron)
[6] (1992) 175 CLR 1, para. 22 (JJ Deane and Gaudron)
[7] (1992) 175 CLR 1, para.23 (JJ Deane and Gaudron), para. 97 (Justice Brennan)
[8] This ruling accords with the law established in chapters 5-6 that a change in sovereignty was inoperative to divest indigenous people of title to land.
[9] *Mabo (No.2*), para.32, (Brennan, J.)
[10] *Mabo (No.2*), para.32, (Brennan, J.)
[11] *Mabo (No.2)* para. 29, also see references at paras.43 and 47 (Brennan, J.)

devoid of shape and consistency.[12] Skeletal principles are legal doctrines without which there would be civil unrest, or without which the integrity of the law of the nation would be brought into question.[13] Therefore, the skeleton of principle is the limitation on the change that could occur.

This explains the creation of Native title, which purports to recognise indigenous land rights to an extent, without interrupting existing legal frameworks.[14] The degree, to which this type of title has been insufficient to address indigenous land justice, has caused some commentators to express the view that the skeleton of principle is the preservation of the common law's jurisdiction, legitimising an ongoing act of dispossession.[15] Moreover, continued adherence to the doctrine of *terra nullius* legitimises settler sovereignty.[16] In short, thus far the skeleton of principle has remained in tact, through the continued endorsement of existing liberal ideals and protection of frameworks of power from challenge.[17]

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[12] *Mabo (No.2*) para. 45 (Brennan, J.)
[13] *Mabo (No.2)* para. 29 (Brennan, J.)
[14] The concept of Native title is more fully explored on p.130; See also Flood, S., *Mabo: A Symbol of Sharing,* (3rd edn. Sydney 1993)
[15]Bartlett suggests that this is evident in the fact that 'Native title is subject to extinguishment…without the consent of the Aboriginal people or the payment of compensation', he further asserts that it operates to give 'paramountcy and validity to the interests of the settler society'. Bartlett, R.H., *The Mabo Decision* (Sydney 1993); Fisher, N., 'Out of Context: The Liberalisation and Appropriation of "Customary" Law As Assimilatory Practice' (2008) 4(2) ACRAWSA e-journal, 1, 6
[16] Bartlett suggests that without this adherence, the common law is rendered devoid of 'shape' and 'consistency'. Continued adherence to the notion that the application of *terra nullius* was the result of an error of fact regarding the status of the indigenous peoples, rather than a breach of the rule of law, means that no legal wrong was committed thus justifying, to a large extent, claims of sovereignty of the Crown. Bartlett, R.H., *The Mabo Decision* (Sydney 1993) xviii; Fisher, N., 'Out of Context: The Liberalisation and Appropriation of "Customary" Law As Assimilatory Practice' (2008) 4(2) ACRAWSA e-journal, 1, 9
[17] Fisher, N., 'Out of Context: The Liberalisation and Appropriation of "Customary" Law As Assimilatory Practice' (2008) 4(2) ACRAWSA e-journal, 12

Regarding the skeleton of principle, the qualifying questions determining whether a rule contravening contemporary notions of justice and human rights ought to be applied, were:

1. Is the particular rule an essential doctrine of the Australian legal system?
2. Would the disturbance caused by overturning the rule be disproportionate to the benefits flowing from the action?[18]

The first question determines the impact of a rule on the skeleton of principle, with the subsequent question determining whether an alteration of the principle in question would undermine, to a large and tangible extent, benefits bestowed by the rule under question. Evidently, Justice Brennan considers the doctrine of land tenure to form part of this skeleton of principle.[19] As a result, the answers to all legal questions arising from the case had to be answered in conformity with this rule, the limitations of which become extremely evident on analysis of the four-pronged approach, to deciding the case, outlined below.[20]

7.2.3. The Approach of the Australian Court

The question before the court as defined by Justice Brennan, who delivered the majority judgement, was,

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[18] *Mabo (No.2),* para. 29 (Brennan, J.)
[19] Reilly, A. 'From a Jurisprudence of Regret to a Regrettable Jurisprudence: Shaping Native Title From Mabo to Ward' (2002) 9(4) Murdoch University Electronic Journal Of Law, para. 15; *Mabo v Queensland (No.2)* (1992) 175 CLR 1 (Brennan, J.) 45; *Wik Peoples v Queensland* (1996) 187 CLR 1, 95 (Brennan CJ)
[20] See also Reilly, Reilly, A. 'From a Jurisprudence of Regret to a Regrettable Jurisprudence: Shaping Native Title From Mabo to Ward' (2002) 9(4) Murdoch University Electronic Journal Of Law

> whether [the annexation of the Murray Islands and their incorporation into Queensland] had the effect on 1 August 1879 of vesting in the Crown absolute ownership of, legal possession of, and exclusive power to confer title to, all land in the Murray Islands?[21]

Justice Toohey further broke this down:

1. What was the effect of annexation, involving questions of the presumption of vacancy and the position of the Crown on annexation by settlement?
2. What is the existence and nature of aboriginal interests, which may continue after annexation or be created by operation of the common law on settlement?
3. What is the capacity of the Crown to extinguish any such interests?
4. What is the consequence in law of any breach of trust or fiduciary obligations by the Crown to the Meriam people?[22]

Justice Toohey defined the chief question in terms of 'whether the rights of the Meriam people to the Islands survived annexation?'[23]

In disposing of the above stated questions, the court adopted the following approach:

1. It established the applicable law as enshrined by the common law with regards to modes of acquisition.

2. Recognised their present day obligations under the Optional Protocol to the International Covenant on Civil and Political Rights.

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[21] *Mabo (No.2),* para.23 (Brennan, J.)
[22] *Mabo (No.2),* para.7 (Toohey, J.)
[23] *Mabo (No.2),* para.22 (Toohey, J.)

3. A comparison of applicable law and original law of the land was conducted.

4. The current position of the Meriam people was established.

7.2.3.1. Establishing the applicable law as enshrined by the common law with regards to modes of acquisition

It is first affirmed, that the question of territorial acquisition by the Crown is not justiciable before municipal courts,[24] as it is deemed an act of State, thus is the domain of international law.[25] The aspect, which is justiciable is the body of law applicable in the seized colony. The court begins by ascertaining whether the rules of the international legal regime to which the court in *Mabo* refers, were correctly applied. It is submitted that this raises the question of which system of 'international' law ought to have been applied as first, the issue is between nations from disparate worldviews, rather than from the same worldview, and secondly, the European system was an emerging order, rather than the dominant order.[26] This type of discussion is beyond the scope of this thesis as one of the purposes is to determine whether the international law governing the colonisation nations was correctly adhered to, thus this shall not be explored further.

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[24] *Mabo (No.2)*, para.32 (Brennan J.)
[25] *Mabo (No.2)*, para.32 (Brennan J.)
[26]'In the sixteenth and seventeenth centuries, those who theorized on the *jus gentium*— Vitoria, Vasquez, Grotius, Pufendorf—viewed this law as universal and hence extendable to all peoples on earth. But the actual extension of Western *jus gentium* was in fact quite limited. It excluded the Muslim world, which since the seventh century had had its own Islamic law of nations (the so-called siyar), as well as the Chinese empire, which too had its own normative system that traced back to the Han Dynasty in the third century B.C. Like Western *jus gentium*, both of these normative systems claimed universality. Islam held itself out as a legal, social, political, and religious system to be extended across the entire world, while the Chinese system considered the emperor the worlds' sovereign.' Gozzi, G., 'The Particularistic Universalism of International law in the Nineteenth Century' (2010) 52 Harv. Int'l L.J., 73, 77; Yasuaki, O., 'When Was The Law Of International Society Born? An Inquiry of the History of International law from an Intercivilisational Perspective' (2000) 2 J.Hist. Int'l L. 1, 64

The *Mabo* court proceeded on the presumption that the expanded doctrine of *terra nullius* formed part of the English Common Law at the time in question.[27] As the bench never questioned this position, it meant that while the question of primordial justice could not be answered in the affirmative, the question of legality could,[28] thus it was accepted that due to the constructively uninhabited nature, of the territory, the law of the new sovereign, English common law, was immediately effective without formal steps of implementation.[29]

In order to satisfy the question of justice, it was concluded by the majority, affirming the position of the International Court of justice in its *Advisory Opinion on Western Sahara,*[30] that '[t]he concept of *terra nullius*, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned.'[31]

Justice Brennan further adds that,

> if the international law notion that inhabited land may be classified as *terra nullius* no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be "so low in the scale of social organization" that it is "idle to impute to such

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[27] See chapter 5 for a fuller discussion on *terra nullius*
[28] Reilly states that 'What makes a judgement "legal" is its conformity to a pre-existing authority, and this may differ from what makes it just which is the impact of the judgment on the particular set of facts. The law requires a link to the past, whereas justice requires an imaginative, empathetic, reinvention of the rule to meet the present circumstances.' Reilly, A. From a Jurisprudence of Regret to a Regrettable Jurisprudence: Shaping Native Title From Mabo to Ward, (2002) 9(4) Murdoch University Electronic Journal Of Law para.14; Derrida, J., 'Force of Law: The "Mystical Foundations of Authority"' in Rosenfeld and Carlson (eds) *Deconstruction and the Possibility of Justice* (New York Routledge 1992) 14
[29] *Mabo (No.2*) (Brennan J.) para. 33-36
[30] (1975) ICJR, paras. 85-86
[31] *Advisory Opinion On Western Sahara* (1975) ICJR, paras.85-86 (Judge Ammoun)

> people some shadow of the rights known to our law"…can hardly be retained.[32]

Thus, the Australian courts were to a certain extent, purged of the fallacy of *terra nullius,* in furtherance of justice. In order to safeguard against rupturing the skeleton of principle, the court could not proceed in any other direction regarding *terra nullius;* acceptance that the principle was morally repugnant and should no longer be accepted did not undermine the courts foundations, as would a finding that its application was in breach of the rule of law.

7.2.3.2 Optional Protocol to the International Covenant on Civil and Political Rights

This covenant, to which Australia is a signatory, imposes an obligation on members to legislate in a manner that gives effect to the rights under the covenant, and also provide legal remedies for violation thereof.[33] Article 2.1 stipulates that rights must be recognised 'without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status'.[34]

The court recognises the lack of congruence between the Australian common law and their international obligation in stating that:

> [A] common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is

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[32] *Mabo (No.2*), para.41 (Brennan J.)
[33] I.C.C.P.R Article 2.2, 2.3
[34] I.C.C.P.R.

> contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule...[35]

This obligation was subsequently read down in conformance with the skeleton of principle, thus establishing the precedent that granting human rights to indigenous peoples could be avoided in order to protect the skeleton of principle.

7.2.3.3. Revision of historically applied law

The proposition that the Crown, on first settlement, became 'absolute beneficial owner in possession of all colonial land'[36] was rejected, contrary to the position of the authorities cited.[37] The distinction between the Crown's title to land and the Crown's title to the colony was affirmed, thus it was rejected that 'sovereignty carried ownership in its wake.'[38] This clarified the position to the effect that acquisition of territory is the domain of international law, whilst acquisition of property is the domain of common law,[39] thus justiciable in a court of law. The common law rule that ownership could not be established by occupying land already in occupation was affirmed,[40] but with respect to the skeleton of principle it was subsequently stated that 'a basic doctrine of the land law is the doctrine of

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[35] *Mabo (No.2*) para.42 (Brennan J.)
[36] *Mabo (No.2*) para.44 (Brennan J.)
[37] *A-G v Brown* (1847) 1 Legge 312, *Randwick Corporation v Rutledge* (1959) 102 CLR 54, *Williams v A-G for New South Wales* (1913) 16 CLR 404
[38] *Mabo (No.2)* para. 46, (Brennan J.) Professor O'Connell draws this distinction in *International law* (2nd ed. London, Stevens 1970) 378, as applied in *Calder v A-G of British Columbia* (1973) 34 DLR 145, 210 (Hall J.)
[39] *Mabo (No.2*), para.45, (Brennan J.)
[40] *Mabo (No.2*), para.45, (Brennan J.)

tenure…and it is a doctrine which could not be overturned without fracturing the skeleton which gives [the] land law its shape and consistency.'[41]

It was further stated that:

> It is not surprising that the fiction that land granted by the Crown had been beneficially owned by the Crown was translated to the colonies and that Crown grants should be seen as the foundation of the doctrine of tenure which is an essential principle of our land law. It is far too late in the day to contemplate alloidal or other system of land ownership. Land in Australia, which has been granted by the crown is held on tenure of some kind and the titles acquired under the accepted land law cannot be disturbed.[42]

The result of this is that where indigenous people have been forcibly and wrongfully dispossessed of land, there is no remedy,[43] despite the finding of the court that the territory was occupied; hence, full rights to the land were, at the time of Crown acquisition, vested in the indigenous people.[44] Operating from this premise, land law cannot be changed. In terms of rights, there can only be recognition of an indigenous personal right in land, which is inalienable.

7.2.3.4. The current position of the Meriam people was established

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[41] *Mabo (No.2)*, para.47, (Brennan J.)
[42] *Mabo (No.2)*, para.49, (Brennan J.)
[43] This contravenes International Covenant on Civil and Political Rights, Articles 2(3), 26, 27
[44] Brennan J. buttresses the point that ownership resided in the original inhabitants by stating that 'the ownership of land within a territory in the exclusive occupation of a people must be vested in that people: land is susceptible of ownership, and there are no other owners.' *Mabo (No.2)*, para. 53

It was accepted, following the established line of authorities, that indigenous title to land could not be extinguished by a change in sovereignty.[45] It was established that the Meriam people owned the land of the territory in question.[46] However, in application of the Privy Council's decision in *Sobhuza II v Miller*[47] the Meriam people were described as having a burden upon the radical title of the Crown.[48] This burden does not amount to ownership as has already been asserted but rather a personal right.

Whilst it was acknowledged that 'in time laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too',[49] this did not appear to be reflected in the courts stipulated conditions for the enjoyment of native title:

1. The people must remain as an identifiable community.
2. The members must be identifiable as members by the rest of the community, living under the laws and customs of the community.
3. Native title is to be enjoyed under the traditionally based laws and customs, as currently acknowledged and observed.[50]

The primary problem here is the lack of clarity with regards to which laws and customs the community is to adhere; Brennan begins by acknowledging that changes

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[45] *Calder v Attorney-General of British Columbia* (1973) SCR, at 416, *Adeyinka Oyekan v Musendiku Adele* (1957) 1 WLR 876, at 880, *Amodu Tijani* (1921) 2 AC, 399, 407, *In Re Southern Rhodesia* (1919) AC 233
[46] *Mabo (No.2)*, para.53 (Brennan J.)
[47] (1926) AC, 525*,* the title of a community of original inhabitants was held to have survived as "a mere qualification of a burden on the radical or final title of whoever is sovereign."
[48] *Mabo (No.2)*, para.53 (Brennan J.)
[49] *Mabo (No.2)*, para.68 (Brennan J.)
[50] *Mabo (No.2)*, para.68 (Brennan J.)

occur, he then stipulates that adherence to laws and customs is a requisite, he then states that entitlement derives from traditionally based laws 'as currently acknowledged and observed.' Whilst it is clear that traditional law and customs regarding native title have to be observed, with regards to the second requirement, it is unclear whether the indigenous people are bound to laws and customs as they stand or whether they are simply bound to the laws and customs of the community as they evolve.

The third requirement also requires clarity; Native Title is neither a Common Law title nor an Aboriginal Law title; rather it is a recognition concept, which attempts to bridge the gap between Common Law and Aboriginal Law as regards title to land, by recognition of the former of rights under the latter.[51] Native title, hence cannot be enjoyed 'under the traditionally based law and custom' as it is forms no part of that law. The reference to 'currently acknowledged' laws indicates that a 'frozen in time'[52] concept has been adopted making it almost impossible for the evolution of Aboriginal laws and customs as their societies evolve.

7.2.4. Status of Indigenous Rights

The resulting position of the Meriam people, following Mabo can be summarised in the following manner: they were the owners of the land following colonisation. This ownership was then stripped of rights central to the concept of ownership under the common law, the right of alienation; hence the Meriam people have been left with a personal rather than a real right.

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[51] Slattery, B., *The Legal Basis of Aboriginal Title,* in Cassidy, F., (ed.), Aboriginal Title in British Columbia: Delgamuukw v The Queen (1992), at pp. 120-121; Walters, M., *British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v British Columbia* (1992), 17 Queen's L.J. 350, pp. 412-413

[52] *R v Sparrow* [1990] 1 S.C.R. 1075, para. 24-27

With regards to the requirements for extinguishment of the rights that it was held the Meriam people never lost, 'a clear and plain intention', by the Legislature or the Executive is the requirement.[53] With adherence to the skeleton of principle, at the end of Mabo, it has been established that the Meriam people have a surviving right, which may be extinguished at some undefined point in the future.

7.3. Canada

Australia and Canada do not share identical historical backgrounds as regards the handling of indigenous land rights; however, the evolution of law in the two jurisdictions are similar.[54] One of the main differences is the historical constitutional difference; in Canada, indigenous rights have constitutional recognition,[55] whereas in Australia, recognition is at common law.[56] Furthermore, the guiding principles used in determination of the content of indigenous title are dissimilar but the impact is the same.[57] Indigenous land rights in both jurisdictions remain vulnerable to the creation of third party interests,[58] and may still be infringed and extinguished by the Crown.[59]

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[53] *Mabo (No.2*), para.75 (Brennan J.)

[54] For other examples of work that deals with these two jurisdictions together, see Pearson, N., The High Court's Abandonment of the 'Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in *Mirriuwung Gajerrong* (*Ward v Western Australia* [2006] FCA 1848) and *Yorta Yorta Aboriginal Community v Victoria* (1999) 4 AILR 91, Sir Ninian Stephen Annual Lecture 2003, University of Newcastle; McNeil, K., 'The Vulnerability of Indigenous Land Rights in Australia and Canada' (2004) 42 (2)Osgoode Hall Law Journal, 271;

[55] Constitution Act, 1982, Schedule B to the Canada Act 1982 (U.K.), s.35(1) 1982, c.11; Royal Proclamation of 1763, R.S.C. 1985, App.II, No.1; Acknowledgement was not the general rule and this is reflected in the fact that little recognition was given to Aboriginal title in British Columbia, hence the plethora of B.C. case law (*Calder v A-G of British Columbia*, [1973] S.C.R. 313; *Guerin v The Queen*, [1984] 2 S.C.R. 335). McNeil, K., 'The Vulnerability of Indigenous Land Rights in Australia and Canada' (2004) 42(2) Osgoode Hall Law Journal, 271, 286.

[56] post *Mabo v Queensland (No.2)* (1992), 175 C.L.R. 1, the rights have been enshrined in the Native Title Act 1993

[57] In *Mabo(No.2)* it was held that native title receives its content from 'the traditional customs observed by the Indigenous inhabitants of a territory.' The requirement for proof of title was that the present day connection with the land was in accordance with traditional law and custom, and it had to amount to occupancy. *Mabo (No.2) v Queensland* [1992] 175 CLR 1, 42 (Brennan J.), 187 (Toohey,

7.3.1. Delgamuukw Test

In the case of *Delgamuukw*,[60] the Canadian *Mabo(no.2)* equivalent, a three-pronged test was established for determining aboriginal title:

1. The Land must have been occupied prior to sovereignty.

2. Where present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation, and

3. At sovereignty, that occupation must have been exclusive.

Occupation is pivotal to the establishment of indigenous title and is easily satisfied by the demonstration of a special relationship with the land, which can be determined with reference to cultural activities past and present.[61] However, once indigenous title has been acquired, there are limitations with regards to the uses to which the land may be put:

> if occupation is established with reference to the use of the land as hunting ground, then the group that successfully claims aboriginal title to

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J.); In *Delgamuukw* customs and traditions are less relevant and proof is predominantly by occupation. *Delgamuukw v Canada* (unreported decision) Supreme Court of Canada, NO. 23799 (11 Dec. 1997), para. 146-149 (Lamer C.J.); Moore, P., *Land, Rights, Laws: Issues of Native Title* Native Title Research Unit, (April 1998), no.22; Bartlett, R., 'The Content and Proof of Native Title: *Delgamuukw v Queen* in right **of** British Columbia' (1998) 4(9) Indigenous Law Bulletin 19

[58] McNeil, K., 'The Vulnerability of Indigenous Land Rights in Australia and Canada' (2004) 42 (2) Osgoode Hall Law Journal 271, 272

[59] In Canada, extingishment can be justified by satisfying the test laid out in *R v Sparrow* [1990] 1 S.C.R. 1075, 1099 see n. 76 below; *R v Van Der Peet*, [1996] 2S.C.R. 507, 538; in Australia, pursuant to *Mabo(No.2)*, it can occur by legislative or executive action as long as the intention to do so is plain and clear *Mabo v Queensland (No.2)* (1992), 175 C.L.R. 1, 64

[60] *Delgamuukw v British Columbia,* [1998] 1 C.N.L.R. 14, 143

[61] *Delgamuukw v British Columbia,* [1998] 1 C.N.L.R. 14, 128 (Lamer, CJ)

that land may not use it in such a fashion as to destroy its value for such a use (e.g. by strip mining).[62]

On the one hand this limitation appears to be a means of preserving the integrity of the land for posterity;[63] however, this objective is undermined by the fact that the limitation can be circumvented by surrender of the land and the subsequent extinguishment of native title.[64] Although native title to land is recognised, the impotence of this right is reflected by the Chief Justice's analogy with the situation faced by tenants under life estates.[65]

Tenants under life estates not only have limited rights of possession and use, but also have lesser rights than the remainder-man.[66] In the case of aboriginals, the present occupiers have as much right to the land as future generations (presumably Chief Justice Lamer's remainder-men); they are entitled to enjoy the same benefits and are subject to the same duties and obligations.[67]

The stipulation that the original use of the land must remain uncompromised into the future could act as a bar to the fulfillment of the purpose of the land. The purpose of the land could be subsistence; this may have taken on the form of hunting in a time

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[62] *Delgamuukw v British Columbia* [1998] 1 C.N.L.R. 14, 128

[63] Joffe, P., 'Assessing the Delgamuukw Principles: National Implications and Potential Effects in Quebec' (2000) 45 McGill Law Journal 155, 162; Bartlett, R.H., 'The Content of Aboriginal Title and Equality Before the Law' (1998) 61 Sask. Law Rev. 377, 388

[64] *Delgamuukw v British Columbia,* [1998] 1 C.N.L.R. 14, 128-130

[65] *Delgamuukw v British Columbia,* [1998] 1 C.N.L.R. 14, 130. This is the same analogy used in U.S. courts to describe the position of Native Americans; in *United States v Cook,* 86 U.S. (19 Wall.) 591, 594, 22 L.Ed. 210 (1873).

[66] Woodward, M.K., 'The Open Mine Doctrine in Oil and Gas Cases' (1956-1957) 35 Tex. L. Rev. 538, 538

[67] *Gabcíkovo-Nagymaros Project (Hung. v Slovk.),* 1997 I.C.J. 7, 107 (Sept. 25) (Sep. Op. Weeramantry); Weeramantry refers to the fact that indigenous peoples viewed the land 'as a living entity which lived and grew with the people…' thus born generations are not required to live a life of frugality and deprivation as a means of preserving the environment for the next, they are required to live sustainably.

passed but may need to take on another form due to the land being impotent for that particular purpose. This would require change in present times that may render the land unsuitable for hunting but suitable for other subsistence economies that would not result in degrading the land. However, Chief Justice Lamer prohibits such change by applying the doctrine of equitable waste, which prohibits 'wanton or extravagant acts of destruction', or acts, which would 'ruin the property'.[68] It is clear that this type of waste cannot be reconciled with a prohibition on developing the land sustainably and in manner, which accords with indigenous cultural paradigms.

Furthermore, where land is practically worthless except for a purpose such as strip mining, there is a presumption that 'the creator of the life-estate intended to allow the life tenant to mine the land and retain the proceeds as ordinary income; otherwise the life estate would be worthless'.[69]

7.3.2. Extinguishment

Canadian aboriginals, in the abstract, appear to enjoy a superior position to their counterparts in Australia by virtue of the constitutional protection awarded by section 35 of the constitution.[70] However, despite aboriginal title to land being 'recognized and affirmed',[71] by this constitution, subsequent case law testifies to the fact that courts are reluctant to recognize this constitutional right.[72] Thus land rights

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[68] *Delgamuukw v British Columbia,* [1998] 1 C.N.L.R. 14, 130; See also Burn, E.H., *Cheshire and Burn's Modern Law of Real Property* (14th edn. London: Butterworths 1988) 264, and Megarry, R.E. and Wade, H.W.R., *The Law Of Real Property* (4th edn. London, Stevens 1975) 105.
[69] Woodward, M.K., 'The Open Mine Doctrine in Oil and Gas Cases' (1956-1957) 35 Tex. L. Rev. 538, 538
[70] Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.
[71] Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11., McNeil, K. 'The Vulnerability Of Indigenous Land Rights In Australia and Canada' (2004) 42(2) Osgoode Hall Law Journal 271, 287
[72] In *R v Sparrow* [1990] 1 S.C.R. 1075, 1099, the established test of justification for derogation from constitutional protection of aboriginal title demanded a high standard (1) valid legislative objective,

remain extremely vulnerable and liable for extinguishment at the word of the executive, as per *Mabo.*

7.3.3. Skeleton of Principle

Canadian case law does not expressly refer to a 'skeleton of principle', but their approach accords with the skeleton of principle approach in *Mabo*. Although indigenous peoples 'perspectives'[73] must be taken into account, courts are only obligated to rule in favour of them insofar as, 'perspectives [can] be framed in terms cognizable to the legal and Constitutional structure.'[74] This principle has been further extended in *Delgamuukw* to conform to the skeleton of principle doctrine, thus aboriginal perspectives are only accommodated to the extent that they '[do] not strain

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(2) the obligation of the government to uphold its fiduciary duties towards aboriginals. 'Public interest' was held not to constitute a valid objection, rather 'the justification of conservation and resource management,' was held to be the only valid objection. The onus of proof, for both elements, was on the Crown. Failure to satisfy these objectives would result in the inapplicability of the offending legislation. In what is described by McLachlin J, in the subsequent case of *R. v. Van der Peet,* [1996] 2 S.C.R. 507, as a political decision in *R. v. Gladstone* [1996] 2 S.C.R. 723*,* Chief Justice Lamer redefines the test, validating public interest as an objective (p.75). This is contrary to the position established in *Sparrow* and results in a scenario whereby exclusivity on the part of the aboriginal people, will attract infringements of their constitutional rights in the 'public interest' (p.75). See also, McNeil, K. 'The Vulnerability Of Indigenous Land Rights In Australia and Canada' (2004) 42(2) Osgoode Hall Law Journal 271, 287 – 291. Instead of bringing the test back to the Sparrow position, *Delgamuukw* further embellishes the *Gladstone* position to include the transfer of Aboriginal land to third parties wishing to pursue agriculture, forestry or mining. If Aboriginals desire to pursue such activities on their own land, it was asserted that reduced licensing fees would be imposed (*Dekgamuukw,* para. 167). This indicates that even where Aboriginals have title, that title is never absolute but subject to change at the pleasure of the executive.

[73] Nicoll argues against the 'performative assumptions of perspective', arguing that conflation of indigenous ways of life, actions and laws under the term 'perspective' causes an intellectual disengagement from indigenous discourses, and is partnered by the assumption, by the dominant culture, of an omniscient position above them. Nicoll, F., 'De-facing Terra Nullius and Facing the Public Secret of Indigenous Sovereignty in Australia' (2002) 1(2) Borderlands e-journal, para. 16-21 http://www.borderlands.net.au/vol1no2_2002/nicoll_defacing.html; see also Monture-Angus, P., *Journeying Forward: Dreaming Aboriginal People's Independence* (Pluto Press, Annandale 2000) 134

[74] *R v Van der Peet* [1996] 2 S.C.R. 507, para.49

the Canadian legal and constitutional structure.'[75] This imposition places severe limitations on the level of justice that can be realised by aboriginals.

7.4. United States of America

A case representative of the United States of America's judicial system is *State of Vermont v Raleigh Elliott*[76], which accurately reflects the time-honoured application of precedent in this United States of America. Furthermore, it is prolific for its coinage of the 'increasing weight of history'[77] test.

'The *Elliot* case arose from a "fish-in" demonstration held on October, 1987 to draw attention to the Abenaki belief that tribal members possessed aboriginal rights to fish and hunt without a state license on the lands occupied by the tribe before contact with white settlers.'[78] The authorities were labouring under the assumption that the Royal Proclamation of 1763 had extinguished the Abenaki's title.[79] The legal question before the court was whether the Abekani's title to territory had been extinguished according to the laws of the colony?

7.4.1. Outcome

In the court of first instance, it was held that the tribe had aboriginal title; thus, they 'had from "time immemorial" continuously occupied the land', and the title derived

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[75] *Delgamuukw v British Columbia* [1998] 1 C.N.L.R. 14, para. 82
[76] *State of Vermont v Raleigh Elliott* 159 Vt. 102, 616 A.2d 210, (1992)
[77] *State of Vermont v Raleigh Elliott* 159 Vt. 102, 616 A.2d 210, 218 (1992)
[78] Daley, Y., 'Vermont Judge Rules Indians Holding Fishing, Hunting Rights' Boston Globe, Aug.15th 1989, 15
[79] Hatfield, M., 'Will the "Increasing Weight of History" Crush the Vermont Abenaki's Chances for Federal Acknowledgement?' (1998-1999) 23 Vermont Law Review 649

from such occupation had not been extinguished.[80] This decision was subsequently reversed and remanded by the Vermont Supreme Court.

7.4.2. The Process of the Court

It is clear from the manner in which the case has been reasoned, that protection of the skeleton of principle in *Elliott* was paramount. The limitations imposed by attempting to protect the skeleton of principle are evident. One such limitation was that the court was not free to deal with the validity of the Wentworth land grants because the outcome would have undermined every title to land in its jurisdiction, and the very authority of the court itself.[81] The court simply acknowledges the fact that 'the grants of the lands at issue may not have been authorised by the Crown',[82] and then dismisses the fact in the same sentences with no further mention of the contravention of international law. Furthermore, obligations under the Bill of Rights were ignored in order to preserve the skeleton of principle.

7.4.2.1. Establishing the applicable law as enshrined by the common law

The main tension in the *Elliott* case lies between two principles of law, the first was established in the Marshall CJ case, *Cherokee Nation v Georgia*[83] and confirmed in a subsequent Marshall CJ case, *Mitchel v United States.*[84] The second was born in *Tee-Hit-Ton Indians v United States.*[85] Whilst the Marshall CJ cases established as

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[80] *State v St. Francis,* No. 1171-10-86Fcr (Vt., Frn. Dist. Ct. Aug. 11, 1989)
[81] See below, 7.4.2.2. Application of Precedent, p.139
[82] 159 Vt. 102, 616 A.2d 210, 116 (1992)
[83] 30 U.S. (5 Pet.) 1, 48 (1832)
[84] *Mitchel v United States* 9 Pet. 711 (1835)
[85] *Tee-Hit-Ton Indians v United States* 348 U.S. 272 (1955). According to scholars, this case has echoes of *Lone Wolf v Hitchcock* 187 U.S. 553 (1903), which has been dubbed the *Dred Scott v Sanford* 60 U.S. (19 How.) 393, 451 (1857) of Native American case law*;* in *Dred Scott* it was held that slaves were not citizens of the U.S. but were 'merchandise and property'. See Singer, J.W. 'Well Settled?: The Increasing Weight Of History In American Indian Land Claims' (1993-1994) 28 Ga. L. Rev. 481; The decision in *Tee-Hit-Ton* is unconstitutional, contravening the 5th and 14th amendments,

principle that indigenous peoples' right of occupancy, or original Indian title, is 'as sacred as the fee simple of the whites'.[86] *Tee-Hit-Ton,* which was applied by the court in *Elliott,* to circumvent the 5th amendment obligation to compensate takings by eminent domain, reduced the meaning of original Indian title to 'permission from the whites to occupy'.[87] It was further explained, in *Tee-Hit-Ton*:

> This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legal enforceable obligation to compensate the Indians.[88]

This case stands in direct contravention with the precedent established in the Marshall CJ cases and explicitly undermines contemporary notions of justice and human rights.

7.4.2.2. Application of Precedent

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prohibiting the taking of private property for public use without just compensation and also the deprivation of life, liberty and property without due process of law. It also derives from extremely unsound reasoning. (See Singer for a fairly detailed analysis of *Tee-Hit-Ton's* unsound reasoning in his article 'Well Settled?: The Increasing Weight Of History In American Indian Land Claims' (1993-1994) 28 Ga. L. Rev. 481, 519 – 527) In *Tee-Hit-Ton*, the distinction was first drawn between 'original Indian title' and 'recognized Indian title'; the former was based on occupation by an Indian nation before sovereignty by a European nation was asserted. The latter arose from treaties or statutes recognising specified Indian groups as owners of assigned areas. This distinction allowed the United States to avoid liability on the basis that the property at issue, not deriving from a recognised title, could not constitute property in terms of the 5th amendment, thus could be taken without payment of compensation. Given that *Johnson v M'intosh* was treated erroneously by *Tee-Hit-Ton*, the court in *Elliott* ought to have been a little more hesitant in embracing it. See Singer, J.W. 'Double Bind: *Indian Nations v The Supreme Court*' (2005) 119(1) Harvard Law Review Forum (2005) 1, 4.

[86] *Cherokee Nation v Georgia* 30 U.S. (5 Pet.) 1, 48 (1832), 9 Pet. 711 (1835)

[87] *Tee-Hit-Ton Indians v United States* 348 U.S. 272 (1955), 279 (Reed, J.)

[88] *Tee-Hit-Ton Indians v United States* 348 U.S. 272 (1955), 279 (Reed, J.)

> It was an universal rule that purchases made at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held by the authority of the crown, gave a valid title to the lands; it prevailed under the laws of the states after the revolution…[89]

The first question that ought to have been answered by the State Supreme court was that pertaining to the validity of the Wentworth grants; the history of the case clearly outlines the fact that Governor Wentworth, as Governor of New Hampshire was authorised by the Crown to exercise power, with regards to land distribution, solely in New Hampshire. Wentworth, in an *ultra vires* act, made conveyances within the New York jurisdiction, which became the issue of a dispute between himself and the Governor for New York (grants were subsequently made by the governor of New York on the same tracts of land).[90] With regards to the law established in *Johnson v M'Intosh*[91] and subsequently clarified in *Mitchel v U.S.*,[92] these grants were invalid on the basis that they were not granted by one holding said land by the authority of the Crown.

With regards to New York, Governor Wentworth was an unauthorised citizen making a grant, bringing the case within the ambit of *Johnson v M'Intosh* where two grants had been made upon one tract of land; one by authorised personnel and the other by unauthorised personnel. It was held by Marshall CJ, speaking for the majority, that the title derived from the unauthorised grant was not such that could be

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[89] *Colin Mitchel Robert v The United States* 34 U.S. 711 (1835) (Baldwin, J.)
[90] *State of Vermont v Raleigh Elliott* 159 Vt. 102, 616 A.2d 210, (1992)
[91] 21 U.S. 543 (1823)
[92] 34 U.S. 711 (1835)

'sustained in the Courts of the United States.'[93] A strict application of *Johnson* would render the grants invalid, thus the Abenaki's the sole and 'rightful occupants of the soil, with a legal as well as just claim to retain possession of it and to use it according to their own discretion…'[94]

Instead of taking the above approach, the court in *Elliott* circumvented the matter entirely, focussing instead on the political changes induced by 'the realignment of jurisdictional boundaries.'[95] It was held that following this act, 'intent to extinguish [Indian title] became unquestionable.'[96] It is more plausible from the facts of the case and the history of the involved provinces that the only intent to extinguish, on the part of Governor Wentworth, was the intent to extinguish the rights and authority of Governor Cadwallader Colden, of New York over the territory in question. Successfully extinguishing the rights and authority of the Governor is distinct from successfully distinguishing the rights and authority of the Abenaki's and should have been treated as such.

7.4.2.3. Test Of extinguishment

The legal question before the court was whether or not the Abekani's title to territory had been extinguished according to the laws of the colony. *Johnson v M'Intosh* makes three assertions with regards to title:

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[93] *Johnson v M'Intosh* 21 U.S. 543 (1823) 604
[94] *Johnson v M'Intosh* 21 U.S. 543 (1823) 574
[95] *State of Vermont v Raleigh Elliott* 159 Vt. 102, 616, A.d 210, 116 (1992) (Morse, J.)
[96] *State of Vermont v Raleigh Elliott* 159 Vt. 102, 616, A.d 210, 116 (1992) (Morse, J.)

1. Discovery gives title to the discovering government as against all other European governments.[97]

2. Title can be acquired by conquest.[98]

3. In the absence of conquest, extinguishment of title can only occur by purchase or consensual transfer,[99] thus the sovereign of the discovering nation has a right of pre-emption with regards to the land of the original inhabitants.[100]

The first proposition adheres to the doctrine of discovery, which only affects title vis-à-vis other European nations with regards to discovered territory but is not effective to transfer title from indigenous people to the new sovereign, without prescribed events occurring.[101] The only method of extinguishment prescribed by *Johnson,* is that occurring when indigenous people voluntarily rescind their right to title via consent. In the absence thereof, there is no scope for extinguishment of title; thus, 'ultimate title' simply gives a 'right of pre-emption' in the new sovereign.[102] The test for extinguishment, as outlined by *Johnson*, and confirmed in later Marshall CJ

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[97] *Johnson v M'Intosh* 21 U.S. 543, 573 (1823)
[98] *Johnson v M'Intosh* 21 U.S. 543, 587 (1823)
[99] *Johnson v M'Intosh* 21 U.S. 543, 545 (1823) also see 602 where it is established in the Rhode Island charter that lands were 'seized and possessed, by purchase and consent of the said natives, to their full content,' thus demonstrating that it was a recognised and established practice among participating communities.
[100] *Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543, 585 (1823)
[101] This doctrine has been misapplied in the majority of cases pertaining to forcible land dispossession including *Elliott.* According to *Elliott,* In *Johnson v M'Intosh,* the Court applied the doctrine by 'assigning dual, or split, property rights to the discoverer nation on the one hand, and Indian nations on the other.' This interpretation of the doctrine does not appear in *Johnson v M'Intosh*.
[102] *Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543, 585 (1823)

cases, hangs on whether or not consent is present on the part of the indigenous people.[103]

The test applied by *Elliott* for extinguishing indigenous land rights misconstrues *Johnson* to the effect that all that is required is consent from the sovereign,[104] omitting the required willingness of the indigenous people to sell.[105] Furthermore, it has been added to the *Buttz v Northern Pacific Railroad*[106] test as applied in *Santa Fe Pacific v United States*[107] to the effect that extinguishment can occur 'by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise.'[108] By classifying the issue as political, judicial review is barred.[109]

The main problem with this line of precedent is that the foundations are unsound; *Santa Fe* is established upon *Buttz*, which is founded upon a misapplication of *Beecher v Wetherby*.[110] *Santa Fe,* additionally, coins a new test: 'plain and unambiguous action',[111] on the part of the government, which is subsequently

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[103] *Cherokee Nation v Georgia* 30 (5 Pet.) 1, 17 (1831); 'the Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by voluntary cession to our government.' *Worcester v Georgia* 31 U.S. 515, 544 (1832); '[discovery] gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.' *Mitchel v U.S.* 34 U.S. (8 Wheat.) 711, 745-746 (1835); 'possession could not be taken without their consent.'

[104] *State of Vermont v Raleigh Elliott*, 159 Vt. 102, 616 A.2d 210, 213(1992)

[105] See n. 103

[106] *Buttz v Northern Pacific Railroad* 119 U.S. 55 (1856)

[107] *Santa Fe Pacific v United States* 314 U.S. 339 (1941)

[108] *Santa Fe Pacific v United States* 314 U.S. 339, 347 (1941)

[109] *Buttz v Northern Pacific Railroad* 119 U.S. 55, 66 (1856); *Beecher v Wetherby* 95 U.S. 517, 525 (1872).

[110] *Beecher v Wetherby* 95 U.S. 517, 525 (1872) Singer highlights the fact that the act, which is prohibited from judicial review by *Beecher* is 'the right of the government to grant the fee to Indian title' rather than 'the right of the government to extinguish Indian title.' Singer, J.W. 'Well Settled? The Increasing Weight of History in American Indian Land Claims' (1993-1994) 28 Georgia Law Review 481, 496-497.

[111] *Santa Fe Pacific v United States* 314 U.S. 339, 346 (1941)

applied in *Oneida County v Oneida Indian Nation*.[112] This part of the applied test is what leaves scope for Justice Morse to describe 'the doctrine of Indian title and its extinguishment', as lacking precision,[113] allowing him to exercise judicial activism.

The Supreme Court in *Elliott* disagreed with the trial court's application of the *Santa Fe* test and broadened the test, stating:

> [T]he legal standard does not require that extinguishment spring full blown from a single telling event. Extinguishment may be established by the increasing weight of history.[114]

In order to arrive at this conclusion, the court in *Elliott* altered the original language of the test from 'plain and unambiguous action' to 'clear and unambiguous intent.'[115] It is my submission that this slight change in wording significantly alters the test and changes it from objective to subjective. 'Plain and unambiguous action' connotes objectivity and is singular, thus unequivocally refers to a single defining event. '[P]lain and unambiguous intent' suggests that the act should undisputedly point to extinguishment, as per the first test; however, the substitution of 'intent' for 'action' on the other hand, removes the concept of a singular action defining the moment, paving the way for a cumulative 'weight of history'[116] test. This test has a much lower bar and is imprecise. Through the requirement of a defining action, the old test differentiated, quite clearly between *intent* to extinguish and *desire* to extinguish. The new test makes no such distinction.

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[112] *Oneida County v Oneida Indian Nation* 470 U.S. 226, 248 (1985)
[113] 159 Vt. 102, 616 A.2d 210, 214 (1992)
[114] 159 Vt. 102, 616 A.2d 210, 218 (1992)
[115] 159 Vt. 102, 616 A.2d 210, 115 (1992)
[116] *State of Vermont v Raleigh Elliott*, 159 Vt. 102, 616 A.2d 210, 218 (1992)

In application of the broader test, *Elliott* held that the 'series of historical events, beginning with the Wentworth grants of 1763 and ending with Vermont's admission to the Union in 1791 extinguished the aboriginal rights claimed...'[117] This decision is unsound for a number of reasons:

1. The Wentworth grants were illegal, as Wentworth had no authority over the jurisdiction in question.[118]

2. History indicates that the revolution causing the area now called the State of Vermont to break away from the State of New York was intended as an assertion of dominion over the land as against New York grantees with better title to the same land, rather than as against the Abenaki's.[119]

3. There can be no doubt that the protagonists of the revolution may have *desired* to extinguish Abenaki title; however, this was not their *intent* in acceding to the Union of States; intent was as stated above.

4. If admission to the Union connotes intent to extinguish title, it would necessarily follow that all rights of indigenous peoples across the U.S. were extinguished on accession to the Union. This is not the case.[120]

It is therefore submitted that the court did not manage to satisfy its own expanded test, thus native title was not extinguished.

7.4.3. Obligations under Bill Of Rights

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[117] 159 Vt. 102, 616 A.2d 210, 109 (1992)
[118] State of Vermont v Raleigh Elliott 159 Vt. 102, 616 A.2d 210 (1992)
[119] *State of Vermont v Raleigh Elliott* 159 Vt. 102, 616 A.2d 210,110-115, 120 (1992)
[120] Hatfield, M., 'Will the "Increasing Weight of History" Crush the Vermont Abenaki's Chances for Federal Acknowledgment?' (1998-1999) 23 Vermont Law Review 649, 657

Unlike in *Mabo* and *Johnson* where both courts appeared hesitant about transgressing 'contemporary notions of justice and human rights',[121] the court in *Elliot* comparatively, appears less concerned with safeguarding these rights of the Abenaki's. This is nowhere more evident than when *Tee-Hit-Ton*[122] is applied in an attempt to circumvent rights and duties arising under the Bill of Rights, more specifically, under the 5th and 14th amendments, prohibiting the taking of private property for public use without just compensation and also the deprivation of life, liberty and property without due process of law. It is evident that the status of 'ward', has rendered the indigenous peoples of the U.S.A. in no better a position than those of other jurisdictions.

7.5. New Zealand

In New Zealand, there are two sources underpinning Maori title rights, namely the Treaty of Waitangi and the Common Law, though rights contended for are originally founded upon the treaty. This single document, establishes title to land,[123] or 'full exclusive and undisturbed possession'[124] for all Maori, of all the land in New Zealand. The position of the Crown following Waitangi is a concession establishing a pre-emptive right; thus, the Crown in effect becomes the remainder man.[125] The focus here is to discover whether the approach of the court has been instrumental in causing and sustaining the widespread land dispossession of the Maori.

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[121] *Mabo (No.2)* para. 29 (Brennan, J.)
[122] *Tee-Hit-Ton Indians v United States* 348 U.S. 272 (1955)
[123] Title to land is established according to one theory of property law, which suggests that possession is the root of title. See the much cited U.S. case *Pierson v Post,* 3 Cai. R. 175 (New York Supreme Court 1805). See also Singer, J.W. 'Starting Property' (2002) 46 St. Louis U. L.J. 565
[124] Article II, Treaty of Waitangi
[125] ibid

The situation in New Zealand highlights more vividly than the other jurisdictions the importance of effective balances and checks between the legislature, the executive and the judiciary. An analysis of the evolution of case law with regards to Maori land rights demonstrates that even where the court has been prepared to march in step with the correct application of international law, or at times has been forced to, as per *Nireaha Tamaki v Baker,*[126] an over-empowered parliament has successfully managed to act in a manner which has served to undermine the courts.[127] Whilst indicating that land justice issues cannot be entirely resolved by recourse to the courts, the case of New Zealand also highlights acutely the importance and influence of the courts in resolution of such struggles.

Wi Parata v The Bishop of Wellington and The Attorney General

Unlike the previous cases studied in this chapter, *Wi Parata*[128] is an old case. The reason for its selection is that it demonstrates acutely the problems of adjudicating indigenous land cases in domestic courts. Furthermore, this decision is extremely important, emanating from the highest court in New Zealand, and continues to be reflected in government policy.[129] Thus it continues to reflect and inform the modern position.

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[126] (1901) NZPCC 371

[127] Leane, G W G, 'Fighting Them on the Beaches: the Struggle for Native title Recognition in New Zealand' (2004-2005) 8(1) Newcastle LR 65, 79

[128] *Wi Parata v Bishop of Wellington and The Attorney General* (1877) 3 NZ Jur (NS) SC 72

[129] *R v Symonds* (1847) NZPCC 387 established that indigenous title could not be extinguished without consent of the indigenous people. *Wi Parata*; however, retreats from this position holding that indigenous peoples had no enforceable property rights. Whilst *Te Weehi v Regional Fisheries Officer* (1986) 1 NZLR 680 resurrected usufruct and *Attorney General v Ngati Apa* [2003] 3 NZLR 643 raised the possibility of indigenous title to land, the situation has not, as yet, returned back to the position in *Symonds*. See also Charters, C., Erueti, A. (eds.), *Mãori Property and the Foreshore and Seabed: the Last Frontier* (Wellington: VUP 2007)

This case arose from an 1848 Ngatitoa land grant to the Lord Bishop of New Zealand for the purposes of establishing a school. The purpose of the school was to educate specifically the numerous Ngatitoa children. The original tract of land was part of a reserve for the Ngatitoa. At the time of the grant, the Ngatitoa were extremely numerous; however, the school was never established. Two years after the initial grant, the Crown granted the same tract of land to the Lord Bishop instructing a school to be established, 'for the education of children of our subjects of all races, and of children of other poor and destitute persons.'[130] Nearly 30 years after the initial indigenous grant, no school had been opened thus the indigenous people raised an action, first to contest the Crown grant, and secondly, for the return of the land on the grounds that the trust had failed on account of the drastically reduced tribe numbers.

The questions before the court were as follows:

1. Would the doctrine of *cy près*[131] be applicable?

2. To whom would the land revert following a failed purpose for the grant?

7.5.1. Outcome

It was held that the doctrine of *cy près* was applicable and that the land would not revert back to the surviving donors but to the Crown.

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[130] *Wi Parata v Bishop of Wellington and The Attorney General* (1877) 3 NZ Jur (NS) SC 72, 73
[131] '*cy près*', literally meaning, 'as nearly as possible', allows courts to take a failing charitable trust and apply it to another purpose that is close.

The court replaced the Crown's legal obligations to respect indigenous customary rights,[132] with unfettered discretion and unenforceable and non-justiciable moral obligations.[133]

7.5.2. The Process of the Court

Wi Parata provides the most explicit example of subordinating all aspects of the judgment to maintenance of the skeleton of principle. Indeed this effort transcends the court as parliament over-rides the rejection of the case by the Privy Counsel.[134]

7.5.2.1. Establishing the applicable law as enshrined by the common law

First it was established that the rules governing discovery of a backward nation were applicable, thus the right of pre-emption was vested in the Crown.[135] On the basis that any act of the Crown is an act of state thus unchallengeable in a court of law,[136] the 'facts' were reformulated in a manner that would cast the Crown on the correct side of the law.[137]

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[132] *R v Symonds* (1847) NZPCC 387; *In Re "The Lundon and Whitaker Claims Act 1871"* (1872) 2 NZCA 49

[133] Williams, D.V., 'Wi Parata is Dead, Long Live Wi Parata' in Charters, C., and Erueti, A. (eds), *Maori Property Rights and the Foreshore and Seabed: the Last Frontier* (Wellington: VUP 2007) 31-58

[134] See p.153

[135] *Mitchel v U.S.* 34 U.S. (8 Wheat.) 711, 745-746 (1835)

[136] Pendergast, C.J., held that 'in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice.' *Wi Parata v Bishop of Wellington and The Attorney General* (1877) 3 NZ Jur (NS) SC 72, 78

[137] The new 'facts' had to vest some sort of right to the land in the Māori whilst remedying the mischief of voiding the Crown grant. The new facts were comprised of the fiction that on discovering the Ngatitoa grant to the Bishop, the Crown intervened with a subsequent grant to a similar effect on the basis that the Ngatitoa's did not have capacity to grant the deed. For the purposes of the fiction, the land was ceded to the Crown, by the indigenous people and then conveyed to the Bishop (charitable trust). This sequence of events extinguished native title, thus when the trust failed, the land reverted to the Crown. *Wi Parata v Bishop of Wellington and The Attorney General* (1877) 3 NZ Jur (NS) SC 72, 75, 76 (Richard, J.); Tate, J.W., 'The Privy Council and Native Title: A Requiem for *Wi Parata*?' (2004) 12 Waikato L. Rev. 101, 107

The type of transaction entered into meets the criteria for establishing a charitable trust as the purpose is education and the beneficiaries are school-aged. The failure of the trust allowed consideration of the doctrine of *cy près*;[138] however, in order for the doctrine to be applied, it must also be established that there was general intent to devote to charity.[139] In the absence of this general charitable intent, *cy près* is inapplicable. In such situations, the property reverts to the settlors estate, which in the case at hand would be the Ngatitoa. The Supreme Court omitted to consider the 'general intent' criterion, instead it was presumed, where the facts would have suggested otherwise. It is quite clear from the facts that the doctrine of *cy près* was inapplicable in this case. On this basis, the land should have reverted back to the Ngatitoa.

Regarding the actions of the Crown, as was submitted on behalf of the plaintiff, the tract of land in question, formed part of the Ngatitoa reserve, and the rule concerning indigenous reserves was that no part may be conveyed, thus the Crown's conveyance in fee simple to the Bishop of Wellington should have been voided.[140] This point of legality was not addressed. Furthermore, for the reason stated, the grant of land, by

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[138]Thus as the original purpose of a school for the Ngatitoa children failed on account of the decline in population, the trust could legally be applied to the school for the education of children of all subjects of the Crown should that be regarded as within the spirit of the initial purpose.

[139] For operation of the doctrine, 3 criteria must be satisfied, '1) that the settlor has created a valid charitable trust; 2) that the purpose of the trust has become illegal, impossible, or impracticable to complete; and 3) that the settlor possessed a general, as opposed to a particular or specific, charitable intent that would not be defeated or thwarted by changing the terms or conditions of the trust if *cy près* is granted and the express terms of the trust are modified.' Johnson, A.M. Jr., 'Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Près Doctrine' (1999) 21 U. aw. L. Rev. 353, 354.

[140] *Wi Parata v Bishop of Wellington and The Attorney General* (1877) 3 NZ Jur (NS) SC 72, 73; the jurisdiction of the Land Court, under the Native Rights Act 1865 was denied on the grounds that the Crown was not bound under the act to submit to jurisdiction. The purpose of this was to retain Native title matters within the discretion of the Crown, thus circumventing Native rights enshrined within the Act. *Wi Parata v Bishop of Wellington and The Attorney General* (1877) 3 NZ Jur (NS) SC 72, 80; Tate, J.W., 'The Privy Council and Native Title: A Requiem for Wi Parata?' (2004) 12 Waikato L. Rev. 101, 105

the Ngatitoa's, for establishing a school for their children should not have been treated at law as an alienation of land; it should simply have been treated as Ngatitoa land, which had been set-aside for the purposes of establishing a school for Ngatitoa children.

Due to the aforementioned, it is submitted that the pre-emptive right in the Crown was not triggered.

7.5.2.2. Application of precedent and The Treaty of Waitangi

Precedent was handled in the following manner:

1. *R v Symonds,*[141] was the New Zealand Supreme Court[142] case holding the current law at the time of *Wi Parata.* Applying *Johnson v M'Intosh,*[143] it asserted the Crown's pre-emptive right to purchase indigenous lands, but with regards to indigenous rights, it held that;

   > It cannot be too solemnly asserted that [Native title] is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers.[144]

   The court in *Wi Parata* did not follow *R v Symonds* or *Johnson v M'Intosh,* on the grounds that they had erred in holding that tribes had *persona standi* as

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[141] *R v Symonds* (1847) NZPCC 387
[142] The Supreme Court of 1841 was not the court of last resort, which was the Privy Council. The Supreme Court of 1841, which continued until 1980 was a superior court, which became the High Court of New Zealand once a court of final resort; namely the 2004 Supreme Court was anticipated.
[143] 21 U.S. (8 Wheat.) 543
[144] *R v Symonds* (1847) NZPCC 387, 390 (Chapman, J.) See also Leane, G W G, 'Fighting Them on the Beaches: the Struggle for Native title Recognition in New Zealand' (2004-2005) 8(1) Newcastle LR 65, 75

a plaintiff in a court of law with regards to the impeachability of a Crown grant.[145]

2. Contrary to the position in *R v Symonds,*[146] the Treaty of Waitangi was declared a nullity on the grounds that 'No body politic existed capable of making cession of sovereignty, nor could the thing itself exist.'[147] It is unclear as to the purpose of this particular ruling as it was not of issue before the court, neither did it have any bearing on the final decision.

3. The *In re 'Lundon and Whitaker Claims Act 1871'*[148] Court of Appeal, which affirms the *Symonds* precedent that native title must be respected and cannot be extinguished without consent of the indigenous people, was not discussed in this context. Pendergast CJ's single reference to it was to make a broader point, which did not have any more than a tangential bearing on the case.[149]

4. The duty under the Native Rights Act 1865,[150] to remit all questions of native title to the Native Land Court was circumvented on the grounds that the Crown 'not being named in the statute is clearly not bound by it.'[151]

7.5.2.3. Test Of Extinguishment

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[145] *Wi Parata v Bishop of Wellington and The Attorney General* (1877) 3 NZ Jur (NS) SC 72, 80-81; Williams, D.V., '*Queen v Symonds* Reconsidered' (1989) 19 VUWLR 385
[146] *R v Symonds* (1847) NZPCC 387, 390
[147] *Wi Parata v Bishop of Wellington and The Attorney General* (1877) 3 NZ Jur (NS) SC 72, 78
[148] *In re "The Lundon and Whitaker Claims Act 1871"* (1872) 2 NZCA 49
[149] *Wi Parata v Bishop of Wellington and The Attorney General* (1877) 3 NZ Jur (NS) SC 72, 79; See also Tate, J.W., 'The Privy Council and Native Title: A Requiem for Wi Parata?' (2004) 12 Waikato L. Rev. 101, 103, here it is stated that positions contrary to the intended direction of Prendergast, CJ's were not confronted.
[150] Native Rights Act 1865, 29 Victoriae, No.11, s.5; Native Rights Act 1865, 29 Victoriae, No.71, s.21; Tate, J.W., 'The Privy Council and Native Title: A Requiem for Wi Parata?' (2004) 12 Waikato L. Rev. 101, 103
[151] *Wi Parata v Bishop of Wellington and The Attorney General* (1877) 3 NZ Jur (NS) SC 72, 80

The Supreme Court in *Wi Parata,* held that land transactions between the indigenous people and the Crown, were acts of State thus could not be examined by any court,[152] furthermore:

> [It] must be assumed, that the sovereign power has properly discharged its obligation to respect, and cause to be respected, all native proprietary rights.[153]

This rendered any test of extinguishment of native title obsolete, as there were no grounds on which a Crown grant could be challenged.

7.5.3. The Effect on Subsequent Case Law

Despite the criticism and rejection of *Wi Parata*, by the highest appellate court of New Zealand, the Privy Council, in *Nireaha Tamaki v Baker*[154] and subsequently in *Wallis v Solicitor-General,* [155] the courts of New Zealand refused to stand down from their position in *Wi Parata*.[156] The legislature, in disagreeing with the Privy Council, further entrenched the *Wi Parata* position by the enactment of the *Native Land Act 1909 (NZ).*[157] *Wi Parata* was subsequently applied in the 1963 case of *In re The Ninety-Mile Beach.*[158]

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[152] *Wi Parata v Bishop of Wellington and The Attorney General* (1877) 3 NZ Jur (NS) SC 72, 79
[153] ibid
[154] *Nireaha Tamaki v Baker* [1901] AC 561
[155] *Wallis v Solicitor-General* (1903) NZPCC 23
[156] *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655 (Court of Appeal)
[157] The legislature openly criticised the Privy Council for over-ruling *Wi Parata* and re-established it as a precedent. See McHugh, P. G., *The Maori Magna Carta* (OUP, Auckland 1991) 117 – 122 for a detailed account of the Privy Council's criticism and the subsequent refutation by the judiciary of New Zealand; Williams, D.V., *Wi Parata is Dead, Long Live Wi Parata* in Charters, C., and Erueti, A. (eds), Maori Property Rights and the Foreshore and Seabed: the Last Frontier, (2007) 31-58
[158] *In re The Ninety-Mile Beach* [1963] NZLR 461

In re The Ninety-Mile Beach applied Wi Parata in its entirety and further extended the position by holding that:

> the rights of the Maoris to their tribal lands depended wholly on the grace and favour of her Majesty Queen Victoria, who had an absolute right to disregard the Native title to any lands in New Zealand.[159]

The assertion was erroneous not least of all because Maori customary title is and was an established part of the common law of New Zealand as was affirmed in the later case of *Ngati Apa.*[160]

Although in 2003, the bench in *Ngati Apa* over-ruled *Ninety-Mile Beach* returning a more favourable position to the Maoris,[161] substantively, the Maoris have not managed to wield much from the decision. The reasons for this are twofold; first, due to what has been termed the 'Alice-in-Wonderland' legal moment: -

> Maori have been told that their common law native title (whatever it may be but possibly including an element of "exclusive use and occupation") did exist historically, was wrongfully denied them (for example in Re the Ninety-Mile Beach), is now "re-recognised" by the courts in Ngati Apa, but

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[159] *In re The Ninety-Mile Beach* [1963] NZLR 461, 468 (North J.); for detailed academic criticism of the case, see McHugh, P. G., *The Maori Magna Carta* (OUP, Auckland 1991) 117 – 126; Boast, R.P., *In re the Ninety-Mile Beach Revisited* (1993) 23 VUWLR 145

[160] *Attorney General v Ngati Apa* [2003] 3 NZLR 643, 700 (Tipping J.)

[161] 'The transfer of sovereignty did not affect customary property. They are interests preserved by the common law until extinguished in accordance with the law. I agree that the legislation relied on by the High Court does not extinguish any Maori customary property in the seabed or foreshore...*In re the Nintey-Mile Beach* was wrong in law and should not be followed. *In re the Ninety-Mile Beach* followed the discredited authority of *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, which was rejected by the Privy Council in *Nireaha Tamaki v Baker* [1901] AC 561. This is not a modern revision, based on developing insights since 1963. The reasoning the Court applied *In re the Ninety-Mile Beach* was contrary to other and higher authority and indeed was described at the time as "revolutionary"'. [2003] 3 NZLR 643, 651 (Elias CJ)

> now extinguished (in respect of the "territorial" aspect) by the government in the new Bill, yet may be hypothetically recognised again by the courts for the purpose of "discussions" about possible "redress" by the government.[162]

The second reason is that the court, in *Ngati Apa,* refused to make any firm decisions on issues of substantive law,[163] thus only the first question posed received an answer, namely:

> What is the extent of the Maori Land Court's jurisdiction under Te Ture Whenua Maori Act 1993 (the Act) to determine the status of foreshore or seabed and the waters related thereto?[164]

The answer given was that questions of the status of foreshore and seabed had to be determined by the Maori Land Court as such questions fell within its jurisdiction.[165] This is a slight deviation from the response to a similarly posed question in *Ninety Mile Beach*[166] where it was held that the Maori Land Court's decisions were only recommendatory, thus requiring acceptance by the Crown.[167] This would suggest that whilst the Maori Land Court has jurisdiction to hear cases, it does not displace the jurisdiction of national courts. For this reason, the court of *Ngati Apa* should have answered the question regarding the status of foreshore and seabed. If the national

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[162] Leane, G W G, 'Fighting Them on the Beaches: the Struggle for Native title Recognition in New Zealand' (2004-2005) 8(1) Newcastle LR 65, 71
[163] [2003] 3 NZLR 643, 670 (Elias CJ)
[164] ibid
[165] ibid; It has been suggested that this abdication of responsibility led to confusion as determination of Native Title had historically been the province of the Court of Appeal, the Maori Land Court dealing with freehold titles. Leane, G W G, 'Fighting Them on the Beaches: the Struggle for Native title Recognition in New Zealand' (2004-2005) 8(1) Newcastle LR 65, 66
[166] 'The question we are asked to consider in this appeal is whether the jurisdiction of the Maori Land Court to investigate the title to customary land and to issue freehold orders in respect thereof extends to the investigation of title to and the issue of land lying between mean high water-mark and mean low water-mark…?'[1963] NZLR 461, 466 (North J.)
[167] [1963] NZLR 461, 473 (North J)

court had found in favour of the indigenous people, this would have helped entrench the rights of indigenous peoples within the legal fabric of New Zealand; however, following *Ngati Apa* indigenous people have no clear rights and no security regarding title to land. The position of the Maori Land Court does not differ drastically from that in *Wi Parata,* in terms of the fact that the Maori Land Court has no binding authority and its decisions are subject to Crown approval. As it stands, the court in *Ngati Apa* retreated from the position in *In Re the Ninety Mile Beach* but left a void.[168]

7.5.4. Obligations under Bill Of Rights

The decision of *Ngati Apa* also raises questions with regards to a historically constitutionally protected right; the right to process of law. The court in *Ngati Apa* determined, first, that the Maori Land Court had jurisdiction to determine the claim, and secondly that in order to deny indigenous people in any given case, the opportunity of being heard in the Maori Land Court, the Crown had to prove unequivocally that the indigenous people could not succeed.[169] The issues raised are twofold; first, it is problematic that a claim could be barred on the basis that it has no real chance of success, as it is for the court, on hearing the facts, to decide whether the case succeeds. Secondly, even if the case is permitted to proceed to the Maori

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[168] As observed by Leane, 'the court was merely affirming the *possibility* of a customary title which Maori should have been able to assert as a matter of English common law from the very arrival of English settlers.' Leane, G W G, 'Fighting Them on the Beaches: the Struggle for Native title Recognition in New Zealand' (2004-2005) 8(1) Newcastle LR 65, 66. See also, *Attorney General v Ngati Apa* [2003] 3 NZLR 643, 649 para. 8-10 (Elias CJ), 673 para.106 (Gault, J.)
[169] [2003] 3 NZLR 643, 701 (Tipping, J.), 674 (Gault, J.)

Land Court, the decision has to be approved by the Crown before it has any legal effect, thus the Crown is still, as per *Wi Parata,* 'sole arbiter of its own justice'.[170]

7.6. Summary

Whilst it has been accepted in *Mabo(No.2)* that Enlightenment ideals and principles which allowed people to be relegated to a status where they were regarded as sub-human, stands condemned,[171] it is evident that the pursuit of an unfractured skeleton of principle causes a resurrection of these principles whenever cases deemed to threaten it arise.[172] Concerning the skeleton of principle, it appears that in every jurisdiction whether implicitly or explicitly, the main concern is to ensure that all decisions are subordinated to this principle for fear of an untenable legal system.

The outcome of such an approach highlights the fact that indigenous people do not fit easily into the constitutional structures of their respective jurisdictions.[173] As a result, they remain de-humanised and without lands, given that safeguarding the skeleton of principle has hitherto resulted in the denial of rights. In order to uphold the principle of equality before the law,[174] indigenous people must be brought within the legal frameworks of dominant cultures on both a national and international level.

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[170] *Wi Parata v Bishop of Wellington and The Attorney General* (1877) 3 NZ Jur (NS) SC 72, 78
[171] *Mabo (No.2) v Queensland* [1992] 175 CLR 1, para. 41 (Brennan, J.)
[172] Under positivism, indigenous peoples were physically present but legally insignificant. As their systems of organisations were not founded on the western model, they were denied status as subjects of international law. See Gray, J., 'The Mabo Case A Radical Decision' (1997) 17(1) Canadian Journal of Native Studies 33, 47; Ushakov, N.A., 'International law and Sovereignty' in Tunkin, G.I., (ed.) *Contemporary International law: Collection of Articles* (Moscow 1969) 97
[173] Singer, J.W. 'Double Bind: *Indian Nations v The Supreme Court*' (2005) 119(1) Harvard Law Review Forum 1, 2
[174] Dicey, A.V., *Introduction to the Study of the Law of the Constitution* (10th edn. London: Macmillan 1960), at 193. Dicey's second proposition regarding the rule of law is based on equality of all persons before the law. See also Berns who further adds, 'If we are to guarantee to individuals the equal protection of the law, we must ensure that the individuals are equally placed before it, not

Whilst courts are increasingly employing language of remorse with regards to the reduction of title to land of indigenous peoples, the legal wrongs identified in the previous chapters are not being dealt with domestically. For this reason, due process must be available at international level. The importance of this is fortified by the realisation that this denial of land justice for indigenous people is materially impeding significant progress towards creating a more ecologically sustainable globe.[175]

The purpose of part 3 is to propose modifications to the current legal approach in order to bring indigenous people within dominant legal frameworks, at both domestic and international levels. This is to allow first the issue of land justice to be adjudicated with respect to 'notions of basic fairness and justice',[176] and secondly the issue of environmental protection to be justiciable. Land justice shall be regarded not just in terms of property rights but also as in terms of Human Rights.

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simply in a formal sense, but in the context of their lives as a whole.' Berns, S., *Concise Jurisprudence* (Sydney, Australia: Federation Press 1993) 16

[175] See chapters 2-3

[176] *S v Zuma and Others* (CCT5/94) [1995] ZACC 1, para. 16 (Kentridge, AJ)

Chapter 8

A New Domestic Approach to Land Justice

8.1. Introduction

It has been established that the deliberate contravention of international law, by colonising nations, is responsible for the reduction of title to traditional land of indigenous people.[1] It has also been submitted that a breach of the rule of law was more thoroughly embedded by the retroactive application of international law, by domestic courts.[2] In modern times, whilst it has been recognised that wrongs were committed, domestic courts continue to uphold and apply the rulings of the older courts in order to retain an unfractured skeleton of principle.[3]

As a means of establishing *praxis* based on the *scienta* and *ethics* of Agenda 21, chapter 26, in accordance with a modern application of the stewardship ethic, the purpose of this chapter is to propose modifications to the current domestic legal

[1] See chapters 5-6
[2] Chapter 6, 6.5. Acquisition of Territory and the Rule of Law, p.116
[3] See chapter 7, 7.2.2. The Process of the Court, pp.121-123

approach in order to bring indigenous people within dominant domestic legal frameworks.

The situations in the ex-colonies of Africa differ drastically, in many respects, from those of the New World. One of the most notable differences is that, even where European settlement occurred in Africa, the indigenous people remained in the majority.[4] Regarding the question of indigenous sovereignty, Africa is of little assistance in resolving the situations in the New World, due to the fact that sheer number meant that indigenous Africans assumed political power after colonialism.[5] However, it is submitted that with respect to the issue of adjudicating land justice cases, many of the principles inherent in the processes can be transferred to the New World. This is mainly attributable to the fact that the return of sovereignty did not resolve the land issue; the return of land followed legal process where each case was judged on its own merits. It is for this reason that we turn to South Africa.

It is my submission that indigenous people could be brought within dominant domestic legal frameworks by adopting the approach of South Africa. In South Africa the primary basis for restitution of title to land is the Constitution, with claims based on Aboriginal title playing a secondary role; this contrasts with the approach taken in the English Common Law jurisdictions where restitution is primarily based on claims of Aboriginal title. It has been suggested that the reason for Aboriginal title occupying this secondary role in South Africa is mainly attributable to the

[4] Christopher, A.J., 'Indigenous land claims in the Anglophone world' Land Use Policy 1994, 11(1) 31-44, 42
[5] ibid

divisive role of ethnicity in the apartheid regime;[6] nevertheless, it is still instructive with principles still capable of being transferred to the Common Law world.

This chapter shall begin with a brief examination of transitional justice vis-à-vis land justice. It shall continue by demonstrating that South Africa still remains a suitable comparator with the aforementioned jurisdictions despite a disparate legal basis. The concept of equality before the law as regards indigenous people and the South African Constitution shall be discussed highlighting the applicability of principles to the aforementioned jurisdictions. Following this, Section 25 of the South African Constitution, guaranteeing the right to property shall then be analysed. Finally, the means by which Aboriginal title could be adjudicated, in a manner that brings indigenous people within dominant domestic legal frameworks, whilst also maintaining the skeleton of principle shall be discussed with specific reference to the case of *Alexkor (Pty) Ltd and Government of the Republic of South Africa v Richtersveld Community*.[7]

8.2. Transitional Justice and Land Justice

Addressing issues of land justice almost always requires a paradigm shift as regards the concept of justice, as justice in such scenarios is 'contingent and informed by prior injustice'.[8] It is difficult to address land justice without dealing to an extent

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[6] 'Elsewhere [i.e., North America and Australia] the notions of tribe, ethnicity and cultural exclusivity on which aboriginal title was based were critical to building a sense of identity among fragmented and demoralized indigenous communities. For many South Africans, however, the same notions are reminiscent of colonialism and apartheid…Ethnicity is too evocative of South Africa's history of racism to fit comfortably with the ideals of a post-apartheid era'. Bennett, T.W., 'Redistribution of Land and the Doctrine of Aboriginal Title in South Africa' (1993) 9 South African Journal on Human Rights 443, 475; see also Patterson, S., 'Land Restitution and the Prospects of Aboriginal Title in South Africa' (2003-2004) 8(3) Australia Indigenous Law Report 13, 15

[7] 2003 (12) BCLR 1301

[8] Teitel, R.G., *Transitional Justice* (OUP 2000), 6

with broader frameworks pertaining to transitional justice since in land justice claims, the law is often 'caught between the past and the future, between backward looking and forward-looking, between retrospective and prospective, between the individual and the collective'.[9] The requirement to look back is rooted in the need to address human rights abuses, whereas the requirement to look forwards is to enable all parties to move forward together.[10] Transitional justice has been described as disclaiming past illiberal values and asserting new liberal norms.[11]
As can be deduced from the previous chapter, the law during this time of transition when indigenous rights are being given recognition at various levels, is caught between differing social and political systems; dominant versus subservient culture and also between older systems based on ideals, which stand condemned in this present age, during this era of equality before the law and fundamental rights.

One of the main impediments to land justice that has been identified by the previous chapter is maintenance of the skeleton of principle and the fact that it often takes precedence over human rights; thus, abuses are perpetuated. Whilst past injustices have been acknowledged in the jurisdictions analysed, such injustices have not been considered politically or legally on a scale even vaguely reminiscent of that which occurred in South Africa. South Africa is an imperfect analogy, since the indigenous population exists as a large majority as compared with the jurisdictions of the aforementioned chapter; however, there are sufficient similarities between the

[9] Teitel, R.G., *Transitional Justice* (OUP 2000), at 6
[10] Gross, A.M., 'The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel' (2004) 40 Stan. J. Int.'l L. 47, 49
[11] ibid, 50; Teitel, R.G., Transitional Justice (2000), 6-7

jurisdictions to allow principles to be transferred to create a more equitable paradigm.

8.3. Land Tenure in South Africa as Compared with the English Common Law Jurisdictions

South African law is predominantly civilian whereas Australia, Canada, New Zealand and the United States are predominantly Common Law jurisdictions. Thus systems of land tenure between the former and latter categories have a different legal basis. However, both categories define the most complete type of ownership in terms of exclusivity of ownership.[12] Furthermore, communal land ownership, in both categories, is defined in terms of inclusivity, sharing the following characteristics:

- Land rights are embedded in a range of social relationships, including household and kinship networks, and various forms of community membership, often multiple and over-lapping in character.
- Land rights are inclusive rather than exclusive in character, being shared and relative, but generally secure.
- Access to land is guaranteed by norms and values embodied in the community's land ethic. This implies that access through defined social rights is distinct from control of land by systems of authority and administration.
- The rights are derived from accepted membership of a social unit and can be acquired by birth, affiliation, allegiance or transactions.

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[12] In a South African case it was held that 'Ownership is the most complete real right a person can have with regard to a thing. The point of departure is that a person, as far as an immovable is concerned, can do on and with his property as he likes…The absolute entitlements of the owner exist within the boundaries of the law'. *Glen v Glen* 1979 2 SA 1113 (T); See also *First National Bank of SA Ltd t/a Westbank v Commissioner, South African Revenue Services* (2002) 4 SA 768 (CC), para.51 affirming the constitutional protection of private ownership; Pienaar, G., 'The Inclusivity of Communal Land Tenure: A Redefinition of Ownership in Canada and South Africa?' (2008) 19 Stellenbosch L. Rev. 259, 260; Sidgwick defines U.S. land ownership as the right to exclusive use. Sidgwick, H., *The Elements of Politics* (New York: Macmillan and Co. Ltd. 1891); In Canada 'the holder's rights to land are most complete under the traditional freehold; they are exclusive to the owner, include various attributes of land, last forever, and can be divided and transferred without restriction' Pearse, P.H., 'Property Rights and the Development of Natural Resource Policies in Canada' (Sept. 1988) 14(3) Canadian Public Policy/ Analyse de Politiques 307, 309

- Social and political boundaries, and boundaries demarcating the use of resources, are usually clear, but often flexible and negotiable, and sometimes the source of tension and conflict.

- The balance of power between gender, competing communities, right-holders, land administration authorities and traditional authorities is flexible.

- The inherent flexibility and negotiability of land tenure rights mean that they are adaptable to changing conditions, but susceptible to acquisition by powerful external forces (like the state) or processes (like capital investments).[13]

Despite the disparate legal foundations, the similarities of communal land ownership, between both categories, are such that submissions in the case of *Alexkor (Pty) Ltd and Government of the Republic of South Africa v Richtersveld Community*[14] were based on key cases from the English Common Law jurisdiction; namely, the Australian case, *Mabo v Queensland (No.2)*[15]and the U.S. Supreme Court case, *Oneida Indian Nation v County of Oneida.*[16] After urging the court to accept that Aboriginal title was recognised by South African Courts, the argument submitted was that Aboriginal title survived annexation. These submissions were acknowledged but rejected at first instance on the basis that it would be *ultra vires* for the Land Claims Court to introduce the concept of Aboriginal title into South African law.[17] The status quo was thus maintained and it was held that on annexation by the Crown, all lands in Richtersveld became vested in the Crown. However, both

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[13] Pienaar, G., 'The Inclusivity of Communal Land Tenure: A Redefinition of Ownership in Canada and South Africa?' (2008) 19 Stellenbosch L. Rev. 259, 260; Brazenor, C., et al, 'The Spatial Dimension of Aboriginal Land Tenure' in Proceedings, 6th South East Asian Surveyors Congress, Fremantle, Western Australia; Kingi, T.T., 'Indigenous Agricultural Commodity Producers: Case Studies from New Zealand, Canada and Fiji' Institute of Natural Resources Massey University New Zealand, (2006) 1

[14] 2003 (12) BCLR 1301

[15] (1992) 175 CLR 1

[16] (1974) 414 US 661

[17] *Alexkor (Pty) Ltd and Government of the Republic of South Africa v Richtersveld Community and Others* 2001 (3) SA 1293 (LCC), 44 (Gildenhuys, A.J.); see also Patterson, S., 'Land Restitution and the Prospects of Aboriginal Title in South Africa' (2003-2004) 8(3) Australia Indigenous Law Report 13, 16

the Supreme Court of Appeal and the Constitutional Court over-turned the verdict of the Land Claims Court, instead adopting the approach of the *Mabo (No.2)* court. Thus it was held that '[t]he preferable rule, supported by the authorities cited, is that a mere change in sovereignty does not extinguish native title to land.'[18] Therefore, the starting point regarding Aboriginal title is concurrent in both the English Common Law jurisdictions and South Africa.

8.4. Indigenous People and Equality Before the Law

The rule of law[19] is 'the bedrock of civilised society',[20] and the courts are assigned the role of safeguarding its sacrosanctity.[21] One of the main principles of the rule of law is the equality of all persons before the law.[22] This must occur in more than just a formal sense but must permeate all areas of life for the individuals of whom the principle speaks.[23]

Currently indigenous people of Australia, Canada, U.S.A., and New Zealand have formal equality before the law to the extent that they are recognised as having legal standing in courts of law. Formal equality means like persons are treated alike and

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[18] *Mabo v Queensland (No.2)* (1992) 175 CLR 1, 57 (Brennan, J.)
[19] The rule of law is intended in the sense that 'all authority is subject to and constrained by law', thus eradicating the injustices caused by arbitrary rule by men. Gleeson, M., 'Courts and the Rule of Law' The Rule of Law Series, Melbourne University (7 Nov. 2001) http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_ruleoflaw.htm#_edn6
[20] Mansfield, J., 'How Balanced Are the Scales of Justice? The Rule of Law in Australia' (2007) 10 Flinders Journal of Law Reform 1, at 2, quoting Justice Keith Mason.
[21] Dicey, A.V., *Introduction to the Study of the Law of the Constitution* (10th edn., London 1960), 195
[22] See Dicey's second proposition, Dicey, A.V., *Introduction to the Study of the Law of the Constitution* (10th edn., London 1960) 193. See also Berns who further adds, 'If we are to guarantee to individuals the equal protection of the law, we must ensure that the individuals are equally placed before it, not simply in a formal sense, but in the context of their lives as a whole.' Berns, S., *Concise Jurisprudence* (Sidney, Australia: Federation Press 1993) 16
[23] Berns, S., (n. 22)

unlike persons are treated unlike.[24] The reality of social and economic differences existing between individuals and groups in society are not accounted for under formal equality, the underpinning rationale being that the extension of equal rights to all eliminates inequality.[25] Consequently, a just legal order is presupposed and the issue of socio-economic disparities is left unaddressed.[26] The new South African Constitution goes further than formal equality by declaring:

> We the people of South Africa…believe that South Africa belongs to all who live in it, united in our diversity. We therefore…adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights.[27]

The new South African Constitution was used as a means of reconciliation. To this end, the nature of the state was defined, including a broad definition of equality. The new constitution was a tool for addressing past, history and collective memory; furthermore, it defined social and economic rights including property and land rights. Whilst a jurisdiction such as the U.S. might not readily embrace the idea of making changes to the Constitution, changes could occur by adopting interpretations of the Constitution[28] that are inclusive rather than exclusive of indigenous people.[29] Such

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[24] Scales, A.C., The Emergence of Feminist Jurisprudence in Smith, P., (eds), *Feminist Jurisprudence* (New York 1993)
[25] Deane, T., *Affirmative Action: A Comparative Study*. (Pretoria: University of South Africa 2005) 286
[26] ibid
[27] South African Constitution (Constitution Act 108, 1996), preamble
[28] The Bill of Rights is contained within the first ten Amendments of the U.S. Constitution http://www.usconstitution.net/const.html
[29] The Bill of Rights: A Brief History. American Civil Liberties Union. March 4, 2002. The Bill of Rights originally excluded anyone considered to be Black, which included indigenous people.

an interpretative change could bring about the principles inherent in the new South African constitution; thus allowing land justice at domestic level without undermining entire legal systems.

Equality is broadly defined in the equality clause of the new South African Constitution; thus, prohibiting discrimination and empowering the government to engage in affirmative action.[30] The importance of equality to the new constitution has been further expressed in *Lewrie John Fraser v Children's Court, Pretoria, North and Others*[31] where it is stated 'the guarantee of equality lies at the very heart of the Constitution'.[32] Contrary to permitting derogation from the equality provision, as per the aforementioned jurisdictions,[33] affirmative action in favour of indigenous people has been enabled.

In order to address the socio-economic disparities caused by apartheid, the South African Constitutional Courts have broadly construed equality to include substantive equality rather than simply the uniformity mandated by formal equality.[34] In order to achieve substantive equality, the inequalities caused by apartheid are recognised by

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http://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/bill-rights-brief-history

[30] South African Constitution (Constitution Act 108, 1996), Article 9; Gross, A.M., 'The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel' (2004) 40 Stan. J., Int'l L. 47, 64

[31] *Lewrie John Fraser v Children's Court, Pretoria, North and Others* 1997 (2) SA 218 (T)

[32] *Lewrie John Fraser v Children's Court, Pretoria, North and Others* 1997 (2) SA 218 (T)

[33] 'The Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.' *Mabo v Queensland (No.2)* (1992) 175 CLR 1, para.29 also see references at paras.43 and 47 Brennan, J. See chapter 7 generally for other examples.

[34] '[E]quality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. [Equality] does not presuppose the elimination or suppression of difference' *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC), para. 132 (Sachs, J.)

the new Constitution,[35] thus in *Brink v Kitsoff*,[36] it was recognised that apartheid systematically discriminated against the indigenous people. This discrimination, it was held, extended to property ownership, employment, education, and the use of civil amenities including transport systems, libraries and access to parks. Consequently, it was held that due to the legacy of apartheid, the equality clause of the Constitution had to be interpreted in light of the past; thus it could be used to remedy the continued effects of past discrimination.[37] Furthermore, in the later case of *President RSA v Hugo*[38] it was stated:

> Equality, as the concept is enshrined as a fundamental right…means nothing if it does not represent a commitment to recognising each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, treat them as less capable for no good reason, or that otherwise offend fundamental human dignity[39]

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[35] See also the preamble to the South African Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000, which states 'The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people…The basis for progressively redressing these conditions lies in the Constitution which, amongst others, upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish'

[36] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC)

[37] ibid

[38] 1997 (4) SA 1 (CC)

[39] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para.41 (Goldstone, J.) citing *Egan v Canada* 124 DLR (4th) 609 (L'Heureux-Dubé J)

Thus dignity is central to the test of equality.[40] Additionally, central to substantive equality are difference and disadvantage, with the overall analysis being contextual.[41] A contextual analysis requires a move from an abstract comparison of like individuals to an investigation, within the socio-economic circumstances, of the impact of the rights violation.[42] Furthermore, it mandates an examination of the aggrieved party with respect to disparate social groups and within the appropriate historical context.[43]

In a test considering both material disadvantage and marring of individual dignity, *Harksen v Lane* [44] sets out the guiding criteria for ascertaining the impact of the rights violation:

> (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
>
> (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important social goal, such

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[40] Further support for this assertion can be drawn from the case of *S v Makwanyane* 1995 (3) SA 391 (CC), where it was held: 'The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right therefore is the foundation of many of the other rights that are specifically entrenched in chapter 3.' (Justice O'Regan); see also *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); *Harksen v Lane* NO 1998 (1) SA 300 (CC); *The City Counsel of Pretoria v Walker* 1998 (2) SA 363 (CC); Albertyn, C., Goldblatt, B., 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 S. Afr. J. on Hum. Rts 248

[41] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para.41 (Goldstone, J.), para, 112 (O'Reagan concurring)

[42] Albertyn, C., Goldblatt, B., (n. 40) 261

[43] See n. 41

[44] *Harksen v Lane* NO 1998 (1) SA 300 (CC)

> as...the furthering of equality … this purpose may... have a significant bearing on the question whether the complainants have in fact suffered the impairment in question;
>
> (c)…the extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.[45]

The main purpose of this test is to advance a more egalitarian society where people are regarded with equal dignity and respect regardless of group membership.[46] In pursuit of a more egalitarian society, the principles underpinning the guiding criteria in *Harksen* could be adopted in these other jurisdictions to ascertain the impact of rights violations.

The South African model of substantive equality for indigenous people could also be reflected in Australia,[47] Canada,[48] New Zealand[49] and the U.S.A.[50] through their

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[45] *Harksen v Lane* NO 1998 (1) SA 300 (CC) para. 51. For a comprehensive discussion on this test see Albertyn, C., Goldblatt, B., 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 S. Afr. J. on Hum. Rts 248

[46] See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para.41 (Goldstone, J.)

[47] The principle stated by Sach, J, in the South African case *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) (see n. 34) is consistent with the equality principle enshrined in Australia in *Waters v Public Transport Corporation,* stating: 'discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different.' (1991) 173 CLR 349, 402 (McHugh, J.)

[48] The right to equality is protected in Canada under Section 15 of the Canadian Charter of Rights and Freedoms; 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982.

[49] The New Zealand Bill of Rights Act 1990 does not explicitly refer to equality; however, equality before the law is transported into domestic legal frameworks in the Court of Appeal case, *Quilter v Attorney-General* [1998] 1 NZLR 523, where it is stated that equality is a core principle underpinning New Zealand's discrimination law. Additionally, it is indirectly affirmed by the reference to New

constitutions; however, this could be achieved through an interpretative change rather than a physical change.[51] This is mainly attributable to the fact that in these jurisdictions while the unequal treatment was no less severe, the sanctioning thereof occurred primarily through Acts of Parliament as opposed to constitutional instruments. In the U.S. constitutional sanctioning occurred primarily through case law; thus, the U.S. Supreme Court held, in *Dred Scott v Sandford*,[52] that while a Black person could be a citizen of an individual State, a Black person could not be a citizen of the United States neither were Black people protected by the U.S. Constitution. In *Plessy v Fergusson*[53] the U.S. Supreme Court held constitutional the 'separate but equal' doctrine. This was not explicitly over-ruled in *Brown v Board of Education*,[54] rather the doctrine ceased to be applicable to the education system.

As with the U.S.,[55] the Constitution of South Africa is regarded as 'the supreme law of the Republic',[56] which suggests that all other laws must advance the goals of the Constitution. This Constitution explicitly states that the country belongs to all

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Zealand's commitment to the ICCPR, which states, 'All persons are equal before the law and are entitled, without any discrimination to the equal protection of the law'. Article 26.

[50] The Constitution of the United States of America, amendment 14, guarantees equal protection of laws.

[51] Article 7 of the Universal Declaration of Human Rights, which the afore-mentioned jurisdictions have adopted, states 'All are equal before the law and are entitled without any discrimination to equal protection of the law'. Thus equality here could be interpreted in terms of substantive rather than simply formal equality. Universal Declaration on Human Rights, G.A. Res. 217A, U.N. Doc. A/810, 71 (1948). Such an interpretation would be consistent with the notes of the UN Human Rights Committee which state: 'The principle of equality sometimes requires states to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a state where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the state should take specific action to correct those conditions' General Comment No. 18: Non-discrimination: 11/10/1989. CCPR General Comment No.18, para.10

[52] 60 U.S. 393 (1857)

[53] 163 U.S. 537 (1896)

[54] 347 U.S. 483 (1954)

[55] Although the Constitution of the U.S. is the supreme law of the federation, its supremacy is shared with laws made in pursuit of the Constitution and all treaties made under the authority of the United States. See U.S. Constitution, Article VI.

[56] South African Constitution (Constitution Act 108, 1996), preamble

citizens living therein and that the Constitution seeks to heal the divisions of the past.[57] Without making such physical amendments to their constitutions, the U.S.A. could reflect these principles by broadening the scope of the provisions of their Bill of Rights to include indigenous people,[58] without derogation.

8.5. The Section 25 Right to Property

The system of land ownership in colonial and apartheid South Africa was skeletal in principle to the legal system, and was a hallmark of the apartheid regime.[59] The system sanctioned the divestiture of rights in land of the indigenous people for redistribution amongst settlers.[60] Consequently, indigenous people with interests in land forfeited these without compensation resulting in 80% of South Africa's population being restricted to 13% of the land.[61] The first step towards reformation of this system occurred through the Abolition of Racially Based Land Measures Act 1991,[62] reinstating the rights of indigenous South Africans. However, this measure only benefitted those with the means to participate in the market based land economy; thus a minority.[63] Following the abolishment of apartheid, the system of

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[57] ibid

[58] Specifically Amendments 5 and 14; the former outlaws deprivation of land, liberty and property without due process of law, and also mandating just compensation where there is a taking of land. Just compensation has been defined as 'the market value of the property at the time of the taking contemporaneously paid in money,' *Olson v United States,* 292 U.S. 246 (1934); *United States v 50 Acres of Land* 469 U.S. 24 (1984). The latter defines 'citizens of the United States', stating that the rights of these citizens shall be guaranteed, and that such citizens shall not be denied equal protection of law.

[59] Patterson, S., 'Land Restitution and the Prospects of Aboriginal Title in South Africa' (2003-2004) 8(3) Australia Indigenous Law Report 13, 13

[60] See Native Land of 1913 (Act No.27); Native Trust and Land Act 1936 (Act No.18); Group Areas Act 1950 (Acts No. 41)

[61] Patterson (n. 57)

[62] Act 108 of 1991

[63] Murphy, J., 'The Restitution of Land After Apartheid: The Constitutional and Legislative Framework' in Rwelamira, M., and Werle, G. (eds), *Confronting Past Injustices: Approaches to Amnesty, Punishment, Reparation and Restitution in South Africa and Germany* (Capetown 1996) 89, 114

land tenure became untenable due to its central position to the apartheid regime, thus land justice was primarily addressed through the new Constitution.

The main section dealing with land issues is section 25 of the Bill of Rights guaranteeing the right to property;[64] section 25(1) forbids the arbitrary deprivation of property, and section 25(7) mandates restitution or equitable redress where property was dispossessed as 'a result of past racially or discriminatory laws or practices'.[65]

The three elements central to redressing past land injustices are found in section 25(5)-(7):

> (5)The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
> (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
> (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

Thus there is an imposed duty on the State to enable citizens' access to land on an equitable basis, with the assistance of law and other measures. Additionally, people

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[64] Constitution of the Republic of South Africa, 1996, s.25
[65] ibid s.25 (7)

with legally insecure tenure are entitled to tenure that is legally secure; and the third element enables restitution and equitable redress for land injustices occurring after 19th June 1913. Section 25(7) of the Act is brought into force by The Restitution of Land Rights Act 1994,[66] and in pursuit of land justice, the Act permits the admissibility of types of evidence, which would be inadmissible in other courts of law including oral evidence that would otherwise fall foul of the hearsay rule.[67] Furthermore a right in land is broadly defined in the following terms:

> Any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.[68]

This broadens the scope of restitution from complete titles in land to less complete titles such as tenancies. However, the Act does not deal with claims arising from Aboriginal title, such claims are adjudicated under the common law.[69]

8.6. Security of Land Tenure

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[66] Restitution of Land Rights Act, 1994 (No.22 of 1994)
[67] ibid s.30. The admissibility, in these circumstances, of types of evidence that would ordinarily contravene the hearsay rule is an example of substantive equality. It recognises the social differences between the indigenous people and the settlers that would contribute to the former being unable to present evidence in conformance with the dominant legal order. Therefore, in pursuit of substantive equality and substantive justice, the rule has been modified.
[68] Restitution of Land Rights Act, 1994 (No.22 of 1994), s.1(xi)
[69] Patterson, S., 'Land Restitution and the Prospects of Aboriginal Title in South Africa' (2003-2004) 8(3) Australia Indigenous Law Report 13, 14; Bennett, T.W., and Powell, C.H., 'Aboriginal Title in South Africa Revisited' (1999) 15(4) South African Journal on Human Rights 449, 450

The South African constitution deals with the full gamut of property issues, including racially weighed distributions of land, forced segregation, land dispossession and tenure safety.

Dealing with land justice comprehensively is not a simple task and requires the integrated ideals of all affected parties. In South Africa, this was achieved through a government of National Unity, an interim constitution and finally a new constitution, and also a Truth and Reconciliation Commission.[70] However, dealing with the issue of lack of security of tenure[71] and legally recognised title to such lands already in possession is an area that could be tackled without too much upheaval comparatively. The change required in most cases is an interpretative change to the constitution, rather than actual change. As regards creating a more ecologically sustainable paradigm, remedying this area would be a major step towards enhanced environmental protection of indigenous habitats.

As has been brought to the fore in chapter two,[72] lack of both security of tenure and legally recognised title in the indigenous communities is a hindrance to effective management of these areas recognised as key biomes. Where tenure is communal, occupation has been continuous over long periods of time and the indigenous people have not been subject to forced removals but where absolute title is not required, land justice could occur by means of a statutory right providing tenure security.

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[70] Patterson, S., 'Land Restitution and the Prospects of Aboriginal Title in South Africa' (2003-2004) 8(3) Australia Indigenous Law Report 13, 14; see generally Gross, A.M., 'The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel' (2004) 40 Stan. J. Int.'l L. 47

[71] South African Constitution (Constitution Act 108, 1996), Article 25(6)

[72] Chapter 2, pp. 55-56

Pursuant to Section 25(6) of the Constitution, the Land Rights Bill of 1999 was drafted; however, the new Minister of Agriculture and Land Affairs took office in 1999, terminating work on the Land Rights Bill. Reasons submitted were that it was costly and required a 'nanny state' to protect people's rights.[73] It was replaced with a bill transferring title of state land to the indigenous communities. This was in contrast with the transfer of a legally secure statutory right, which did not amount to full ownership, which would have been the provision under the Land Rights Bill. It is submitted that while the Land Rights Bill may have been too complex and costly to deal with the scope of the problem in South Africa, it could find application in the New World due to disparate social and political contexts. The extent of State protection and involvement would be more amenable in Australia, Canada, New Zealand and U.S.A. because partnerships between indigenous people and non-indigenous people are required to most effectively manage biodiversity of protected areas.[74] Application would be appropriate in circumstances where security of tenure and indigenous stewardship are required rather than full title to land. This would include application to indigenous territories in forests where land has been set-aside for the indigenous communities on a semi-permanent but conditional basis. In such instances, the government, or government entity, retains the right to unilaterally extinguish the rights of the indigenous people.[75]

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[73] Cousins, B., and Claassens, A., 'Communal Land Rights, Democracy and Traditional Leaders in Post-Apartheid South-Africa' in Saruchera, M., (ed.) *Securing Land and Resource Rights in Africa: Pan-African Perspectives* (Capetown 2004) 139, 146. Cape Town: Programme for Land Agrarian Studies, University of the Western Cape.

[74] Chapter 2, pp.54-56

[75] 'The question of who owns the forests, who claims them, who has access to them and further, who *should* own them, are hotly contested in many forest regions of the world.' However, in order to combat activities such as illegal logging and in order to promote sustainable use, security of tenure must be addressed. White, A., and Martin, A., 'Who Owns the World's Forests? Forest Tenure and

> Property rights to forestlands and resources are often, if not usually, contested, overlapping or simply not enforced. Much of the global forest estate is characterized by confusion and insecurity over property rights. This insecurity undermines sound forest management, for without secure rights forest holders have few incentives—and often lack legal status—to invest in managing and protecting their forest resources.[76]

One of the most critical aspects of the Land Rights Bill was that it would have disallowed holders to be deprived of land without consent of the holder.[77] In drafting the Land Rights Bill, the initial aim was to grant full legal recognition to the rights of the indigenous people in the communality. However difficulties arose such as what would constitute a 'unit of ownership'?[78] The levels of community that had to be considered were tribes, wards and villages. Test cases indicated that vesting ownership at tribal level alone could serve to curb the decision making capacity of smaller groups as regards their lands, whereas the converse could deny rights inherent in the larger community to shared resources.[79] Therefore, such qualifying communal lands were registered as property of the State; however, the Lands Reform Bill delineated clear limitations on the rights of the State. As nominal owner of the land, the State's ownership 'would be an "empty shell", with high-content statutory rights

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Public Forests in Transition' in Sayer, J. (ed.), *The Earthscan Reader In Forestry And Development* (Earthscan 2005) 72, 74, 75

[76] White, A., and Martin, A., 'Who Owns the World's Forests? Forest Tenure and Public Forests in Transition' in Sayer, J. (ed.), *The Earthscan Reader In Forestry And Development* (Earthscan 2005) 72

[77] Cousins, B., 'More Than Socially Embedded: The Distinctive Character of 'Communal Tenure' Regimes in South Africa and its Implications for Land Policy' (July 2007) 7(3) Journal of Agrarian Change 281, 285

[78] ibid

[79] ibid; Claassens, A., 'South African Proposals for Tenure Reform: the Draft Land Rights Bill' in Toulmin, C., and Quan, J.,(eds), *Evolving Land Rights, Policy and Tenure in Africa* (DFID 2000) 247, 253

held by the occupants.'[80] Individual rights would be subject to group rules as agreed by the majority, and protected group rights would be relative to those shared with others.[81] In order to accommodate the various bundles of rights, boundaries would be flexible and determination of these would be based on which group would be affected by a particular decision. Thus, where a decision had to be made regarding logging practices, those affected by such a decision would be within the boundary, therefore, would be required to be consulted.[82] The statutory defined protected rights would protect at a minimum occupation, use, benefit and access, prior to delineating the precise scope of each protected right, in every eventuality.[83] Under the Land Reform Bill, delimitation of rights would occur at local level in order to retain the necessary flexibility, and as a mechanism for balancing group rights and individual rights.[84] Finally, under the Land Reform Bill, those under the Act had the right to choose or create a local institution to manage land rights. The chosen institution required majority support in order to receive government accreditation and on-going government support.[85]

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[80] Cousins, B., and Claassens, A., 'Communal Land Rights, Democracy and Traditional Leaders in Post-Apartheid South-Africa' in Saruchera, M., (ed.) *Securing Land and Resource Rights in Africa: Pan-African Perspectives* (Capetown 2004) 139, 145

[81] ibid

[82] Claassens, A., 'South African Proposals for Tenure Reform: the Draft Land Rights Bill' in Toulmin, C., and Quan, J.,(eds), *Evolving Land Rights, Policy and Tenure in Africa* (DFID 2000) 247, 255

[83] Cousins, B, and Claassens, A., (n. 78) 146

[84] ibid

[85] Cousins, B., 'How Do Rights Become Real? Formal and Informal Institutions in South Africa's Land Reform' (1997) 28(4) IDS Bulletin 59; Sibanda, S., 'Proposals for the management of land rights in rural South Africa' in Cousins, B., (ed.) *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century* (Capetown 2000). Cape Town/Johannesburg: Programme for Land and Agrarian Studies, University of the Western Cape/National Land Committee: 306–10; Cousins, Cousins, B., and Claassens, A., 'Communal Land Rights, Democracy and Traditional Leaders in Post-Apartheid South-Africa' in Saruchera, M., (ed.) *Securing Land and Resource Rights in Africa: Pan-African Perspectives* (Capetown 2004) 139, 145

This model would be effective where legal frameworks have not evolved to recognise indigenous ownership of forestlands and where responsibility for stewardship of forestlands have not been devolved to the indigenous communities inhabiting the specific area.[86] It allows the indigenous people autonomy to choose their own managing body, which must be agreed to by a majority, and must also be sufficient to receive government accreditation; thus, both actors, indigenous and government entity, are included. This is significant as form of management was one of the impediments to creating strong reciprocal partnerships identified in a previous chapter.[87] Since research indicates that the best results, in terms of biodiversity in protected sites, occur where there is synergy between indigenous and non-indigenous people,[88] in order for a proposed institution to receive government accreditation, it should be a requirement that both peoples are represented. This right to choose the governing institution should also serve to curb instances where 'partnership,' in reciprocal partnership, is skewed in favour of non-indigenous participants in terms of 'political power, economic resources and cultural domination.'[89] Strengthening the role of indigenous people in this manner should also curb the increasing hostility of such indigenous communities as regards reciprocal partnerships.[90]

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[86] It is increasingly being recognised that governments and public forest management agencies have not always been the best stewards of public forests; whereas, 'Indigenous and other communities are increasingly acknowledged for being important stewards of the global forest estate'. Sayer, J. (ed.), *The Earthscan Reader In Forestry And Development* (Earthscan 2005) 86

[87] Chapter 2, pp.54-56

[88] ibid

[89] Nepal, S.J., 'Involving Indigenous Peoples in Protected Areas Management: Comparative Perspectives from Nepal, Thailand, and China' (2002) 30(6) Environmental Management 748, 749

[90] ibid

The flexibility of boundaries, under the Bill and requirement to consult those affected by any given decision,[91] would serve to enhance participation of the indigenous communities in decision-making. This requirement is a management provision thus, redresses the balance of power in terms of those legally required to attend particular meetings. Furthermore, the strength of numbers would provide a forum where proposals emanating from the indigenous communities would be treated with more weight than under the models discussed earlier.[92] The position of the State as owner, and the requirement for government accreditation of the governing institution of the land in question vests enough control in non-indigenous parties to ensure that the partnership remains reciprocal rather than skewed in favour of indigenous participants; thus, ensuring access to shared resources and a voice in terms of decision-making. Finally the stipulation of the Land Rights Bill disallowing deprivation of land without the consent of the owner[93] provides the necessary security of tenure that is currently absent.

8.7. Maintenance of the Skeleton of Principle and Acquisition of Title to Land Based on Aboriginal Title

It has already been established that even where countries have recognised, to an extent, the wrongs that were perpetrated against indigenous people, case law demonstrates quite vividly that justice for indigenous people has become secondary to the maintenance of the skeleton of principle.[94] It is not axiomatic that justice for indigenous people necessitates a fractured skeleton of principle, nor that justice

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[91] Claassens, A., (n. 80)
[92] Chapter 2, pp.55-56
[93] Cousins, B., 'More Than Socially Embedded: The Distinctive Character of 'Communal Tenure' Regimes in South Africa and its Implications for Land Policy' (July 2007) 7(3) Journal of Agrarian Change 281, 285
[94] See the case analyses of the previous chapter

would undermine the foundations of courts in a manner that would render domestic courts impotent; this is demonstrated by the South African case of *Alexkor (Pty) Ltd and Government of the Republic of South Africa v Richtersveld Community*.[95]

South Africa's legal approach in *Alexkor (Pty) Ltd and Government of the Republic of South Africa v Richtersveld Community* is a clear example of the manner in which the legal question of justice with regards to indigenous land justice can be dealt with unencumbered by the political question of sovereignty.[96] It additionally demonstrates the manner in which today's rights can be applied to an injustice, which began in the past and is being perpetuated into this present age, grossly undermining internationally recognised fundamental rights.[97] Where the *Richtersveld* approach is employed, cases should be able to be resolved domestically without recourse to international courts.

The case of South Africa differs from the other jurisdictions in terms of the fact that forcible land dispossession of the indigenous people was not only institutionalised but also legalised by the 1913 Native Land Act.[98] Constitutional recognition has, in modern times, been given to the fact that the indigenous peoples were wrongfully

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[95] 2003 (12) BCLR 1301

[96] It is not being suggested that South Africa is without shortcomings as regards land justice, simply that the *Richtersveld* case contains some useful paradigms, which could be transferred to New World courts. *Cf.* South-Africa's short-comings, see Yanou, M.A., 'The 1913 Cut-Off Date for Restitution of Dispossessed Land in South Africa: A Critical Appraisal' (2006) 41 Africa Development 177-188; Van der Walt, A.J., *Constitutional Property Law* (Cape Town: Juta 2005)

[97] The South African approach is not without its fault, for example, under the act, 'history' begins in 1913 but annexation by the Crown occurred in 1847. This leaves 66 years of land dispossession unacknowledged and without resolution. *Alexkor (Pty) Ltd and Government of the Republic of South Africa v Richtersveld Community and Others*, 2003 (12) BCLR 1301, para.9

[98] See also Bundy, C., Land, Law and Power: Forced Removals in Historical Context in Murray, C., and O'Reagan, C. (eds.), No Place to Rest: Forced Removals and the Law in South Africa (Cape Town 1990) 3-11; South African Development and Trust Land Act (Act No. 18 of 1936)

dispossessed.[99] This clears the first hurdle with regards to dispossession, thus indigenous people need not prove that according to Western standards, they had title to the land they occupied at the point of dispossession.[100] What must instead be proven is that the actions that brought about the dispossession were the 'result of past racially discriminatory laws or practices'.[101] This is a more realistic burden to satisfy than the former. Moreover, constitutional recognition of land restitution alleviates threats to sovereignty.

Racially discriminatory practices has been defined under the Act as:

> …discriminatory practices, acts or omissions, direct or indirect, by—
>
> (a) any department of state or administration in the national, provincial or local sphere of government;
>
> (b) any other functionary or institution which exercised a public power or performed a public function in terms of any legislation.[102]

8.8. Alexkor (Pty) Ltd and Gov. of Rep. of South Africa v Richtersveld Community

The Richtersveld Community had inhabited the land, which was the subject of the legal action long before colonisation. After annexation by the Crown, they continued to occupy the land until the discovery of diamonds in the mid 1920's. Subsequent to

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[99] '[a] person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practice is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.' Constitution of the Republic of South Africa, Act 108 of 1996, Section 25 (7)
[100] For an example see *Delgamuukw v British Columbia* [1997] 3 S.C.R. 110, para.155
[101] The Restitution of Land Rights Act 22 of 1994, Section 2(1)(d)
[102] ibid, Section 1

this discovery, the Richtersveld's were deprived of access to their land, tract by tract, as government licences were granted to mining companies. In 1957 all of the land was vested in Alexkor Ltd and a fence was erected depriving the Richtersveld Community of all access.

The questions before the court were as follows:

1. What was the nature of rights in land of the Richtersveld Community prior to annexation?

2. What were the legal consequences of annexation on the subject land?

3. Was the dispossession the result of racially discriminatory practices?

4. What was the nature of rights in land held by the Richtersveld Community subsequent to the 1913 Native Land Act?[103]

8.8.1. Outcome

With regards to the legal consequences of annexation, the Privy Council decision, *Oyekan and Others v Adele,*[104] was applied to the effect that a change in sovereign was not synonymous with a change in land ownership. It was further held that 'racial discrimination lay in the failure to recognize and accord protection to indigenous land ownership while, on the other hand, according protection to registered title.'[105] This incongruence precipitated spatial apartheid, thus the dispossession was the result of racially discriminatory practices. Finally, it was held that the rights in land

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[103] *Alexkor (Pty) Ltd and Government of the Republic of South Africa v Richtersveld Community and Others,* 2003 (12) BCLR 1301, para. 18
[104] [1957] 2 All ER 785 at 788G-H
[105] *Alexkor (Pty) Ltd and Government of the Republic of South Africa v Richtersveld Community and Others*, 2003 (12) BCLR 1301, para.99

held by the Richtersveld Community were 'akin to that held under common-law ownership…Ownership of the subject land was held under indigenous law, which included the rights to minerals and precious stones.'[106]

8.8.2. The Process of the Court

> When interpreting any legislation, and when developing the common or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.[107]

This requirement to adjudicate and develop law in step with the Bill of Rights creates a different starting point from the aforementioned jurisdictions. Where the other jurisdictions dispense with these rights on the appearance of a threat to the skeleton of principle, South African courts are obliged to retain such rights at the centre of all decisions.

Furthermore, there is more emphasis on the separation of powers in this jurisdiction, which curbs judicial activism potentially providing greater scope for justice.[108] With greater emphasis on the separation of powers, complex political issues such as maintenance of the skeleton of principle are not left to courts to resolve but are more appropriately dealt with by the executive. The result of this is that decisions are made

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[106] ibid, para.102
[107] 1996 South African Constitution, Sect. 39(2)
[108] See *Du Plessis v De Klerk* 1996 (3), SA 850 (Constitutional Court)*; SA Assoc. of Personal Injury Lawyers v Health and Others* 2001 (1) SA 883 (Constitutional Court), para.26

on principle rather than policy.[109] These factors are well reflected by the process and decision of the *Richtersveld* court.

As the rights enshrined by the UDHR are supreme,[110] this position ought to be reflected by the aforementioned jurisdictions. This would not require a constitutional change; it would require an interpretive expansion to include indigenous people.[111]

8.8.2.1 Establishing the applicable law

The Privy Council decision of *Oyekan and Others v Adele*[112] was applied to the effect that sovereignty was acquired by the Crown under the Annexation Proclamation, giving it 'sovereign power to make laws and to enforce them, and, therefore, the power to recognise existing rights or extinguish them, or create new ones.'[113] As the majority of colonial decisions favoured the approach that 'mere change in sovereignty is not meant to disturb the right of private owners',[114] it was held that the rights of the Richtersveld Community survived annexation.

In light of chapters five and six of this thesis, which confirm this position, suggesting that neither the Common Law nor International law of the period in question

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[109] That is to say, decisions are made based on the rights afforded citizens under the Bill of Rights, rather than in the interest of the general welfare. Dworkin, R., *A Matter of Principle* (Oxford: Clarendon Press 1996) 69

[110] Universal Declaration on Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR]. UDHR is declaratory and has been described as a codification of customary international law. In addition to this, the ICJ has taken judicial notice of the instrument. Schwelb, E. *Human Rights and the International Community: The Roots and Growth of the Universal Declaration of Human Rights 1948-1963* (Chicago, Quadrangle 1964); McDougal, M., Lasswell,H., Chen,L. *Human Rights and World Public Order* 345, (Yale University Press 1980)

[111] This shall be discussed more fully in the following chapter.

[112] [1957] 2 All ER 785

[113] [1957] 2 All ER 785, 788B-C

[114] *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) BCLR 583 (SCA) para.69. *Oyekan and Others v Adele* [1957] 2 All ER 785, 788E-I, reinforced the fact that indigenous people of compulsorily acquired land must be compensated according to their interest despite the fact that it may be of a type foreign to English law.

supported the proposition that the rights of private landowners were disturbed by a change in sovereign, this position ought to be adopted by New World courts without further adjudication.

8.8.2.2. Application of Precedent and Obligations under Bill of Rights

The court in *Richtersveld* distinguishes the seminal cases, forming the fabric of international law, dealing with land rights and sovereignty.[115] This occurs on the grounds that contrary to these other jurisdictions, the South African constitution deals expressly with the issue of injustices occurring in a disparate legal climate to that of present day South Africa.[116] Whilst retroactive application of law is not the norm, 'the constitution allows for the retroactive application to dispossession of rights in land that took place after 19th June 1913.'[117] In terms of constitutional interpretation, *Du Plessis and others v De Klerk and Another,*[118] which applies *S v Zuma*[119] is applied.

The *Richtersveld* approach, as compared with approaches from cases of other jurisdictions, is exemplary; it first recognises that 'the previous constitutional system…was the fundamental "mischief" to be remedied by the new

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[115] *Calder v Attorney General of BC* (1973) 34 DLR (3d) 145 (SCC); *Mabo and Others v The State of Queensland* (No.2) (1992) 175 CLR 1 (HCA); *R v Van der Peet* (1996) 137 DLR (4th) 289 (SCC); *Delgamuukw and Others v British Columbia and Others* (1997) 153 DLR (4th) 193 (SCC); *Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58

[116] *Alexkor (Pty) Ltd and Government of the Republic of South Africa v Richtersveld Community and Others*, 2003 (12) BCLR 1301, para. 34

[117] ibid, para.36

[118] 1996 (3) SA 850 (CC); here it was held that there might be circumstances of gross injustice, perpetuated before the Constitution was in force, to which the enshrined rights in he Bill of rights could be applied retroactively.

[119] (CCT5/94) [1995] ZACC 1. This case held that cases had to adjudicated with respect to 'notions of basic fairness and justice.' Furthermore it established the *sui generis* interpretation of the Constitution.

Constitution.'[120] As such, where before there was no obligation to adjudicate in conformance with '"notions of basic fairness and justice", or with the 'ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration,'[121] the converse is now the case. In light of *Qozoleni v Minister of Law and Order*[122] it was held that, 'the Constitution must be interpreted so as to give clear expression to the values it seeks to nurture for a future South Africa',[123] and it is further added that 'embodying fundamental rights should as far as its language permits be given a broad construction.'[124] Section 35 of the constitution, which states that 'values which underlie an open and democratic society based on freedom and equality'[125] should be promoted, would suggest that these rights are attributable to all persons regardless of ethnicity.

This approach is in contradistinction with that of New World courts. In those courts, while it has also been accepted, as a matter of law that the indigenous people were wrongfully dispossessed, 'notions of basic fairness and justice'[126] continue to be subordinated to the skeleton of principle, thus depriving the indigenous people of fundamental rights, which in turn impacts the attainability of land justice.

8.8.2.3. Test Of Extinguishment

In South Africa there is no test of extinguishment to satisfy as it has been accepted as a matter of law and politics that indigenous title to land survived Crown annexation. In conformance with this ruling, the objective is restitution and equitable redress,

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[120] *Qozoleni v Minister of Law and Order* 1994(1) BCLR 75(E)
[121] *S v Zuma and Others* 1995 (2) SA 642, para. 16 (Kentridge AJ)
[122] *Qozoleni v Minister of Law and Order* 1994(1) BCLR 75(E)
[123] *S v Zuma and Others* 1995 (2) SA 642, para. 17 (Kentridge AJ)
[124] ibid, para.18
[125] See n. 120
[126] See n. 120 para.16

despite the fact of extinguishment.[127] Furthermore, indigenous law exists under the constitution thus is subject to the constitution and evolution must be consistent with the values of the constitution.[128]

In the New World courts, it has been held that indigenous title to land survived annexation yet tests of extinguishment continue to have primacy; only where it can be proven that title has not been extinguished may possession by the original inhabitants be maintained.[129] Where title has been successfully extinguished, this acts as a bar to having the land returned. Where there is a co-existing Crown title, Crown title prevails.[130] Where title has not been successfully extinguished, possession usually continues on the grounds that there is still a right of extinguishment in the government.[131] These positions must be re-evaluated in New World courts in order for land justice to occur.

It appears that the difference in outcome between New World courts and South Africa can be attributed to the fact that in South Africa, complex political issues such as maintenance of the skeleton of principle do not appear to have been left to the court to resolve. These appear to have been dealt with by the Constitutional Court's

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[127] South African Constitution, s.25(7)

[128] *Alexkor (Pty) Ltd and Government of the Republic of South Africa v Richtersveld Community and Others*, 2003 (12) BCLR 1301, para.51

[129] Pearson, N., 'Land Is Susceptible of Ownership' High Court Centenary Conference Canberra 9 – 11 October 2003 www.capeyorkpartnerships.com also see *Mabo (No.2)* (1992) 175 CLR 1

[130] Pearson, N., 'Land Is Susceptible of Ownership' High Court Centenary Conference Canberra 9 – 11 October 2003, 3 www.capeyorkpartnerships.com; *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Western Australia v Ward* (2002) 191 ALR 1; *Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538. See also Indian Claims Commission Act of 1946, 25 U.S.C. ss70-70v3 (1976) where the Indian Claims Commission is authorised only to award monetary compensation for successful claims of dispossession. See also Orlando, C.L., 'Aboriginal Title Claims In the Indian Claims Commission: *United States v Dann* And Its Due Process Implications' (1985-1986) 13 B.C. Environmental Affairs Law Review 241.

[131] In the U.S.; however, there are incidences where extinguishment has not occurred and a valid Indian title may exist; yet compensation has been the award rather than a continuation of the right in land. *Temoak band of West Shoshone Indians v United States*, 593 F. 2d 994 (Ct.Cl), 444 U.S. 973 (1979)

'recognition' of indigenous rights; it has been suggested that this keeps them contained 'within the legal system' and subject to constitutional values.[132]

Were the New World to follow this approach of separating political issues from legal issues, with each branch of government dealing with its own area, it would allow swifter decisions from the courts. Furthermore, the court would be more able to adjudicate in a manner that pertains to justice, as a fractured skeleton of principle would no longer be an issue for the courts but for the executive.

8.9. Summary

It has been submitted in this chapter, that despite a disparate legal basis, South Africa still remains a suitable comparator with Australia, Canada, New Zealand and the U.S. as regards land justice and that the principles of the former jurisdiction are transferable to the latter.[133] It has also been submitted that the concept of equality before the law as regards indigenous people must occur with respect to substantive rather than simply formal equality.[134]

It has further been submitted, with reference to Section 25 of the South African Constitution, guaranteeing the right to property, that land justice for indigenous people does not necessitate a fractured skeleton of principle.[135] The applicability of the rejected South African Land Rights Bill of 1999 to Australia, Canada, New

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[132] Mostert, H., and Fitzpatrick, P., 'Law Against Law: Indigenous Rights and the Richtersveld cases' (2004) (2) Law Social Justice and Social Development 7; *Alexkor (Pty) Ltd and Government of the Republic of South Africa v Richtersveld Community and Others*, 2003 (12) BCLR 1301, para. 34

[133] See 8.3. Land Tenure in South Africa as Compared with the English Common Law Jurisdiction, p.163

[134] See 8.4. Indigenous People and Equality Before the Law, p.165

[135] See 8.5. The Section 25 Right to Property, p.172

Zealand and the U.S. is discussed.[136] Finally, the means by which Aboriginal title can be adjudicated, in a manner that brings indigenous people within dominant domestic legal frameworks, whilst also maintaining the skeleton of principle is discussed with specific reference to the case of *Alexkor (Pty) Ltd and Government of the Republic of South Africa v Richtersveld Community*.[137] It has thus been submitted that justice need not undermine the foundations of courts in a manner that would render domestic courts impotent.

As regards *Alexkor (Pty) Ltd and Government of the Republic of South Africa v Richtersveld Community*,[138] it has been submitted that it should be accepted as a matter of law that dispossession was unlawful; thus, the burden that needs to be satisfied ought to be changed from proving that the loss of title[139] was wrongful to proving that it was the result of past discriminatory practises or something of this ilk. This is on account of the fact that there is great support for the proposition that the rights of private landowners were unaffected by a change in sovereign.[140]

It has also been argued that as the UDHR is supreme,[141] there ought to be a requirement to adjudicate and develop law in step with the fundamental rights enshrined therein. Furthermore, it has been argued that court decisions ought to reflect 'values which underlie an open and democratic society based on freedom and equality'. Finally, it has been submitted that 'embodying fundamental rights should

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[136] See 8.6. Security of Land Tenure, p.174
[137] 2003 (12) BCLR 1301
[138] 2003 (12) BCLR 1301
[139] Loss of title does not only refer to instances where possession of land has been lost, but includes the scenarios raised in chapter 3, where there is possession but no legal title. See 3.3. Indigenous People of the New World, pp.67-73
[140] See n. 114; see also chapters 5-6
[141] See n. 110

as far as its language permits be given a broad construction.'[142] This shall be the focus of the subsequent chapter.

[142] *S v Zuma and Others* 1995 (2) SA 642, para. 18

Chapter 9

Translating Principles into Law for Environmental Protection and Indigenous Land Justice

9.1 Introduction

One of the issues hindering the application of human rights to land justice cases is the concept of collective rights. Human Rights were initially framed to deal with individual rights,[1] in accordance with western neo-liberal ideologies, which champion individual freedom. Indigenous people own land together and in trust for future generations, which contravenes neo-liberal western ideals regarding alienability of land. Neo-liberals view collectivism as a major step towards communism; thus, Human Rights have not been expanded to include collective rights. However, indigenous collectivism need not be regarded as a conflict with neo-liberal ideals since the main emphasis of indigenous collectivism is collective responsibility rather than the diminution of rights.[2]

In order for ecological sustainability to be enhanced through indigenous traditional knowledge, the new standards enshrined in the various international instruments, as regards the role of indigenous cultures and traditional knowledge must be given their

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[1]See Waldron, J. 'Can Communal Goods Be Human Rights' (Paper delivered at conference on Development, Environment and Peace as New Human Rights, Oxford University, Oxford England 1987)

[2] Westra, L., Environmental Justice and the Rights of Indigenous Peoples (Earthscan Padstow 2008) 40 - 41

due weight.[3] Therefore, environmental protection, indigenous people's right to culture, and land justice (which underpins both),[4] must be rights capable of defence in courts of law. In order for this to occur, the former must constitute the type of right from which there is no derogation.

At its most basic level, 'a human right is a universal right; it applies equally to all individuals.'[5] At its most fundamental level, 'a human rights violation is a breach of duty owed by the state to individuals under its protection.'[6] The rights enshrined are peremptory norms, *jus cogens,*[7] and the corresponding obligations are *erga omnes*,[8] which means rights are non-derogable thus beyond the reach of the state, even in the

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[3] See chapter 2, pp.49-54

[4] See generally chapter 2; chapter 4, p.85

[5] Lee, J., 'The Under-lying Legal Theory to Support a Well-Defined Human Right to A Healthy Environment As A Principle of Customary International law' (2000) 25 Colum. J. Envtl Law 283, 287; See, UDHR, at art. 1**;** Preamble of the American Convention on Human Rights, ('Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection...'); European Convention for the Protection of Human Rights and Fundamental Freedoms, art.1; African Charter on Human and People's Rights, art. 2**;** and World Conference on Human Rights: Vienna Declaration and Programme of Action, art. 1.5, U.N. Doc. A/Conf.l 57/23 **(**1993) [hereinafter Vienna Declaration] ('All human tights are universal, indivisible and interdependent and interrelated.').

[6] Lee, J., (n. 5) 297; It has further been argued that the Universal Declaration of Human Rights constitutes higher law in its entirety. See Schwelb, E. *Human Rights and the International Community: The Roots and Growth of the Universal Declaration of Human Rights 1948-1963* (Chicago, Quadrangle Books 1964); McDougal, M., Lasswell,H., Chen,L. *Human Rights and World Public Order* (Yale University Press 1980) 345

[7] See Espiell, H.G., Report on the right of Self-Determination E/CN.4/Sub.2/405/rev.1 (1980) at 12, here it is argued that the principles embodied by the UDHR are of the nature of *jus cogens*; Sohn, L. 'The New International law: Protection of the Rights of Individuals Rather Than States' (1982) 32 Am U. L. Rev. 1, 14. For opposing views see Merron, T., *Human Rights In Internal Strife: Their International Protection* (Grotius Publications Cambridge1987) 58-60; Higgins, 'Derogation Under Human Rights Treaties' (1976-1977), Brit. Y.B. Int. Law 282.

[8] See *Barcelona Traction Light and Power Co. Ltd.,* (1970) ICJ Reports 3, para. 34. This is the *locus classicus* of *erga omnes obligations*. Whilst there may be other human rights that are *erga omnes* norms, four clear examples are the laws against genocide, slavery, racial discrimination and aggression (Ragazzi, M., *The Concept of International Obligations Erga Omnes* (Oxford 1997)); See also Posner, A.E., 'Erga Omnes Norms, Institutionalization, and Constitutionalism in International law' (2009) Journal of institutional and Theoretical Economics 1, 5-23.

absence of a parallel domestic provision.[9] The ramifications of this is that these rights may not be compromised through any means, except where international law has made an exception.[10]

The UDHR as adopted by the international community is sufficient to cover the aforementioned categories of indigenous communities' cases; the change that is required is a paradigm shift as regards the justiciability of collective rights. The right to culture, as regards indigenous people, has already been recognised as a justiciable right under the UDHR.[11] This chapter seeks to demonstrate how a teleological approach to Human Rights would also allow cases of land justice and environmental protection to be brought within the UDHR without deviating from the spirit of the declaration. The purpose of this is to demonstrate the existing legal framework within which such cases could be adjudicated at international level.

9.2. Collective Rights and Cultural Protection

Article 27 of the Universal Declaration of Human Rights endows mankind with the 'right to freely participate in the cultural life of the community'.[12] In order for cultural rights to be fully realised among indigenous people of the New World, the collectivity must be protected rather than simply individual rights. This is necessary as culture only exists within a collective body, thus rights can only be vindicated in

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[9] For a more comprehensive explanation of *jus cogens* see Parker, J. 'Compelling the Law of Human Rights' (1988-1989) 12 Hastings International Comparative Law Review 411, 414-416

[10] For example 'Incidental civilian casualties are not necessarily violations' to the right to life. Parker, J. 'Compelling the Law of Human Rights' (1988-1989) 12 Hastings International Comparative Law Review 411, 431

[11] *Sandra Lovelace v. Canada*, Communication No. 24/1977*:* Canada 30/07/81*,* UN Doc. CCPR/C/13/D/24/1977

[12] Universal Declaration on Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948), Article 27(1)

relation to this body.[13] The issues of culture and collectivity were dealt with in the Human Rights Committee of the United Nations communication *Lovelace v Canada,*[14] and *Ivan Kitok v Sweden.*[15]

The issue in *Lovelace* was the exclusion, under Canadian law, of a woman from the cultural collectivity on the grounds that she had married a non-indigenous man. She was not excluded under the law of the indigenous community to which she belonged, but under Canadian law. The impact of the exclusion was that she was henceforth denied the right to live on the reserve, participate in cultural activities such as fishing and hunting and lost the cultural benefits of living in an indigenous community.[16] It was held, under Article 27 that:

> [A] restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole.[17]

Thus Lovelace's Article 27 right to culture was resolved with regards to the collectivity. In this case it was held that denying Lovelace the right to reside on the reserve was neither reasonable nor necessary to protect the identity of the tribe, thus the exclusion under Canadian law was not upheld.[18]

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[13] Sanders, D., 'Collective Rights' (1991) 13 Human Rights Quarterly 368, 382
[14] *Sandra Lovelace v. Canada*, Communication No. 24/1977*:* Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977
[15] Human Rights Committee Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988)
[16] ibid
[17] See n.14, 312
[18] ibid

The aforementioned dicta was applied, seven years later, as the *ratio decidendi* to the case of *Ivan Kitok v Sweden,*[19] where once again the goal of protecting the survival of indigenous communities was held to be legitimate. This time the exclusion of an indigenous man, under Article 27, was justified on the grounds that he had been away from the community for a period and restrictions as regards reindeer herding were necessary for the survival of the community, due to the limited territories available for the activity. Therefore, once again a decision was made with respect to the rights of the collectivity.

9.3. Land Justice and the Right to Culture

One of the main threats to the indigenous right to culture is the lack of land justice. For land justice cases to be justiciable, they must be capable of being brought within the ambit of the aforementioned cases. Where indigenous land justice issues threaten to undermine the way of life of communities, requiring class actions to be raised, it is submitted that they are capable of being raised under *Lovelace* and *Kitok*. As has been asserted above, *Lovelace* and *Kitok* allow the collective rights of indigenous communities to be brought before the Human Rights Committee, thus land justice cases are justiciable in terms of the collectivity.

It is further submitted that land justice cases are capable of being adjudicated as a human right, under UDHR Article 27, as land justice is often a requisite for cultural survival.[20] The Human Rights Committee has demonstrated movement in this

[19] Human Rights Committee Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988)
[20] See n. 4

direction in the cases of *Lubicon Lake Band v Canada,*[21] *Ilmari Länsman et al v Finland*[22] and *Jouni E. Lansman et al v Finland.*[23] In *Lubicon Lake Band* the threat of modern activities, such as large-scale gas and oil extraction, were held to be in breach of the right to culture, due to the threat to the way of life of the indigenous community. Furthermore, the government was instructed to confer with the indigenous community before granting licences for exploitation of the land.[24] This was further extended in the *Länsman* cases where it was held that whilst the impact of individual activities may not of themselves constitute a breach of Article 27, the cumulative effects might, therefore must be considered.[25]

It is submitted that these cases have widened the scope of Article 27 to include cases were communities are rendered vulnerable due to the relationship between land and indigenous people coming under threat. Therefore, where the threat of relationship is at the crux of a land justice case, it is submitted that it falls within the scope of *Lubicon Lake Band* and the *Länsman* cases, thus is capable of adjudication under UDHR Article 27.

9.4. Environmental Protection

The majority of rights based instruments do not explicitly list environmental protection as a right. This is mainly attributable to the fact that at the time of drafting these instruments, environmental protection was not an issue of great concern on the

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[21] HRC Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) (1990)
[22] HRC Communication No. 511/1992 (8 Nov. 1994), U.N. Doc. CCPR/C/52/D/511/1992 (1994)
[23] HRC Communication No. 671/1995 (30 Oct. 1996), U.N. Doc. CCPR/C/58/D/671/1995 (1996)
[24] HRC Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) (1990); Hossain, K., 'The Human Rights Committee on Traditional Cultural Rights: the Case of the Arctic Indigenous Peoples' in Veintie, T., and Virtanen, P.K., (eds.), *Local and Global Encounters: Norms, Identities and Representations in Formation,* (Hakapaino Oy, Helsinki 2009) 29, 36
[25] ibid

international agenda. However, Environmental Protection can also be brought within *Lovelace* and *Kitok* in terms of adjudicating for the collectivity. With regards to Environmental Protection and right to culture, *Lubicon Lake Band* and the *Länsman* cases have sufficiently broadened the scope of Article 27 to include a degree of environmental protection, as large-scale gas and oil extraction constitute environmental issues. Where this approach fails, there is a growing body of case law, advocating a teleological approach to Human rights to accommodate environmental protection as a Human Right.

In his separate opinion in *Gabcikovo-Nagymaros Project*,[26] Vice-President Weeramantry demonstrates a teleological approach to Human Rights, imposing a duty on States of environmental protection, permitting no denial 'of human rights by the standards of their time.'[27] He states that:

> The protection of the environment is likewise, a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself…damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

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[26] *Gabcikovo-Nagymaros Project* (*Hungary v Slovakia,* 37 ILM 162 (1998)) (sep. op. Weeramantry) 91, http://www.icj-cij.org/docket/files/92/7383.pdf
[27] ibid 114

This teleological approach to human rights is reflective of the dicta in *Tyrer v United Kingdom*[28] stating that the convention is a living instrument and must be interpreted in the light of present day conditions.

Evidence that the protection of the environment is a vital part of contemporary human rights is inherent in Article 3 of the Legal Principles for Environmental Protection and Sustainable Development, adopted by the Expert Group of the Brundtland Commission, which states:

> States shall maintain ecosystems and ecological processes essential for the functioning of the biosphere, shall preserve biological diversity, and shall observe the principle of optimum sustainable yield in the use of living natural resources and ecosystems[29]

Moreover, there are in addition, almost sixty legally binding agreements, regarding environmental protection, encompassing issues from nature conservation to atmospheric pollution.[30]

Vice-President Weeramantry's assertion that 'damage to the environment can impair and undermine all the human rights', is acutely reflected by indigenous communities where, in the absence of environmental protection of their habitats, the contravention

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[28] (1979–80) 2 E.H.R.R. 1, para. 31; *Soering v United Kingdom* (1989) 11 E.H.R.R. 439; *Matthews v United Kingdom* (1999) 28 E.H.R.R. 361, para. 39. This method of interpretation is an entrenched doctrine of the ECHR, and also the Inter-American Court of Human Rights *Advisory Opinion on The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* IACtHR Series A 16 (1999)

[29] Legal Principles for Environmental Protection and Sustainable Development, adopted by the Experts Group on Environmental Law of the World Commission on Environment and Development (WCED), 18-20 June 1986, U.N. Doc. WCED/86/23/Add.1 (1986), Art. 3.

[30] State of the World's Indigenous Peoples. United Nations. Dept. of Economic and Social Affairs, Permanent Forum on Indigenous Issues (United Nations), United Nations. Statistical Division United Nations (2009) 98

of human rights such as the right to life and the right to health manifests in a more obvious way.[31]

9.4.1. Environmental Protection and the Right to Life

The indisputable connection between human rights and environmental protection is increasingly being acknowledged by regional courts; most notably the European Court of Human Rights,[32] the African Court of Human and Peoples Rights,[33] and the Inter-American Court of Human Rights.[34] There is, as yet, no regional Human Rights court covering Asia and Pacific, nevertheless; Indian courts have been exemplary in paving the way to a human rights based approach to environmental protection. The judiciary has re-interpreted, or extended the scope of, Article 21[35] of the Indian constitution to include harm to human life caused by environmental degradation.[36] In India, it is recognised that environmental protection is a natural corollary of human rights, thus human rights can be used to procure this end, without any need for new substantive environmental rights.[37]

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[31] Checker, M. 'Double Jeopardy: Carbon Off-sets and Human Rights Abuses' Carbon Trade Watch Nov.2010. Available at http://carbontradewatch.org; Lohmann, L., 'Regulation as Corruption in the Carbon Offset Markets' in Böhm, S., and Dabhi, S. (eds), *Upsetting the Offset: The Political Economy of Carbon Markets* (London 2009) 175-191

[32] See *Lopez-Ostra v Spain* Application no. 16798/90 where it was held that Spain was in breach of Article 8 with regards to environmental issues.

[33] *The Social and Economic Rights Action Centre and Another v. Nigeria* Communication no. 155/96 here it was held that there had been a breach under Article 16 (right to health) and Article 24 (right to satisfactory environment favourable to their development) of the African Charter of Human and Peoples Rights; see also *Kessy v. City Council of Dar es Salaam* 299 of 1988 High Court of Tanzania

[34] *Awas Tingni Community v Nicaragua* Inter-American Court Of Human Rights, (Ser. C) No. 79 (2001). Available at http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html

[35] Protection Of Life And Personal Liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

[36] Dam, S., 'Polluting Environment, Polluting Constitution: Is a "Polluted" Constitution Worse than a Polluted Environment?' (2005) 17 Journal of Environmental Law 17 383

[37] Takacs, D., 'The Public Trust Doctrine, Environmental Human Rights, and the Future of private Property' (2008) 16 New York University Environmental Law Journal 711; Shelton, D., 'Human Rights and the environment: what specific environmental rights have been recognised?' (2007) 35 Denver Journal International law and Policy 129. This approach has been followed in Pakistan, see

The right to life has been broadly construed by the United Nations Commission on Human Rights, which states:

> [The] state cannot perform its obligation to protect life without taking measures to decrease mortality of infants, to antedate industrial accidents, and to protect environment.[38]

This broad construction is becoming increasingly more evident across jurisdictions. It was held in the Indian case of *Subhash Kumar v State of Bihar*[39] that the right to life has at its core, the right to a healthy environment.[40] Similarly, at the Inter-American Commission on Human Rights, in the case of *Yanomani Indians v. Brazil,*[41] it was held that the right to life, liberty and personal security, of the Indians, was being violated by Brazil's failure to prevent the environmental degradation resulting in the loss of both lives and cultural identity of the Indians. The Nigerian case of *Gbemre v. Shell,*[42] brought under the African Charter, also conflated the right to life with right to a healthy environment, holding that gas flaring is a breach of the right to life.

Shela Zia v WAPD P.L.D 1994 S.C. 693. Here the Article 9 right to life was interpreted to include the right to a healthy environment.

[38] UN Doc CCPR/C/SR.222, para. 59; Veinla, H., 'Precautionary Environmental Protection and Human Rights' (2007) 1 Juridica International 91

[39] (1996) 1 SCC 119

[40] See also *M.C. Mehta v Kamal Nath*, *and Others*, W.P (Civil) No. 182 1996; *Chandra Bharan v. State* (1970) 2 SCR 600; *T. Damodhar Rao v. The Special Officer, Municipal Corporation of Hyderabad* 1987 AIR AP 171 where it was held that 'legitimate duty of the Courts as the enforcing organs of Constitutional objectives is to forbid all action of the State and the citizen from upsetting the environment.' See also The Human Right to a Clean Environment in India, available at https://community.iucn.org/rba1/RBA%20Wiki/The%20Human%20Right%20to%20a%20clean%20environment%20in%20India.aspx

[41] Inter-Am. C.H.R 7615, OEA/Ser.L.V/11/66 doc. 10 rev.I (1985).

[42] Federal High Court, Benin 14 November 2005, Unreported Suit No FHC/B/CS/53/05. http://www.climatelaw.org/cases

The ECHR construes the right to life more narrowly than the aforementioned jurisdictions; thus, no connection has been made, to date, with environmental protection. However, in the case of *Lopez Ostra v Spain*[43] a link was recognised between the Article 8 ECHR right to a private and family life and environmental protection.[44] It is evident that the idea of environmental protection as a human right is beginning to gather momentum.[45]

9.5. Land Justice and Genocide

In the absence of the guarantee of the right to life, genocide remains a threat. Genocide is a crime against humanity[46] and is globally recognised as violating *jus cogens*.[47] As has been asserted by previous scholars, there is little judicial guidance defining genocide.[48] It is submitted that the forcible dispossession of indigenous people from their land falls within the parameters of genocide as it causes 'physical and cultural annihilation'.[49]

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[43] 303-C E.Ct.H.R. (Ser. A), at 41 (1994)

[44] The issue in this case was environmental degradation in the form of noxious fumes from a waste disposal plant. Prior to this an Article 8 link with the environment was recognised in *Powell and Rayner v United Kingdom* 172 E.Ct.H.R. (Ser. A), at 5 (1990)

[45] Lee, J., 'The Under-lying Legal Theory to Support a Well-Defined Human Right to A Healthy Environment As A Principle of Customary International law' (2000) 25 Colum. J. Envtl Law 292

[46] The Genocide Convention forms a part of Customary International law as affirmed by Secretary General's Report pursuant to paragraph 2 of resolution 808 (1993) of the Security Council, 3 May 1993, S/25704.

[47] Brownlie, I. *Principles of Public International law* (Oxford, Clarendon 3rd edn. 1979) 512; Fitzmaurice, G., 'The Future of Public International law and of the International Legal System in the Circumstances of Today' Institut De Droit International, *Livre du Centenaire 1873-1973* (Basel: Karger Publishers 1973) 323; Parker K., 'Jus Cogens: Compelling the Law of Human Rights' (1988-1989) 12 Hastings International and Comparative Law Review 411, 430

[48] Parker K., 'Jus Cogens: Compelling the Law of Human Rights' (1988-1989) 12 Hastings International and Comparative Law Review 411, 431

[49] ibid; Independent Commission on International Humanitarian Affairs, Indigenous Peoples: A Global Quest For Justice (1987) 118

Westra has already made the case that cultural genocide satisfies the *actus reus* of genocide,[50] thus is actionable under Article II of the Convention on Genocide.[51] It is not the intention to transport Westra's submission in its entirety into this thesis; however, her application of some of the broad principles derived from case law could be instrumental for instruction on the manner in which land justice cases could be handled more meaningfully under this heading.

Westra's use of broad principles of the section on rape in the *Akayesu* case is helpful in demonstrating how the broad principles of rape as genocide may be applied to the same effect to the genocide of indigenous cultures, with regards to forcible land dispossession. This is attributable to the fact that both allow survival but irreversibly affect health leaving long-term bodily and mental harm. As this is enough to establish the *actus reus* of genocide, it is my submission that Westra could have taken the application further, as is my intention, by not only arguing for cultural genocide but actual genocide.

One of the reasons that Westra was not able to make a case for genocidal intent was due to a belief that this element of the crime belongs to the class of *dolus specialis*.[52]

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[50] Westra, L. Environmental Justice and the Rights of Indigenous Peoples (Earthscan Padstow 2008) 171-175

[51] Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948. Entry into force: 12 January 1951. [Hereafter referred to as the Genocide Convention]

[52] *Dolus specialis* refers to special or specific intent. Triffterer, O., 'Genocide, Its particular Intent to Destroy in Whole or In Part the Group As Such' (2001) 14 Leiden Journal of International law 339, 403; See Westra, L. Environmental Justice and the Rights of Indigenous Peoples (Earthscan Padstow 2008) 171-186

There is however, enough evidence in the field, to suggest that the standard for genocidal intent is *dolus eventualis*.[53]

Article 2 defines genocide as 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group' by:

(a) Killing members of the group

(b) Causing serious bodily or mental harm to members of the group…[54]

9.5.1. Causing Serious Bodily or Mental Harm To Members of the Group

With regards to criteria (b), in the ICTR decision of *Kayishema et al*[55] the Trial Chamber defines 'bodily and mental harm', as 'harm that seriously injures the health, causes disfigurement or causes any injury to the external, internal organs or senses.'

The case of *United States v Sioux Nation of Indians*[56] is the simple paradigm case of indigenous land dispossession, satisfying the *Kayishema* 'bodily and mental harm' criteria. The Sioux Tribes were expropriated of territory including the Black Hills, and forbidden from exercising treaty protected cultural activities such as hunting rights on this land, which had been set-aside for them by the Fort Laramie Treaty.[57] In addition to the guaranteed continuation of hunting beyond reservation boundaries,

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[53] *Dolus eventualis* refers to the situation where consequences other than the directly desired consequences are foreseen as a possibility but the perpetrator proceeds. Jung, A.M., 'Actus non facit reum, nisi mens sit rea: An Investigation into the Treatment of Mens Rea in the Quest to Hold Individuals Accountable for Genocide' 1-43, (2006) 11; See Triffterer, O., 'Genocide, Its particular Intent to Destroy in Whole or In Part the Group As Such' (2001) 14 Leiden Journal of International law 339

[54] Genocide Convention, Art. II

[55] (ICTR-95-I-T), judgement and sentence, 21 May 1999, par.109

[56] 448 U.S. 371 (1980); see chapter 3, pp.68-69

[57] *United States v Sioux Nation of Indians*, 448 U.S. 371, 380 (1980)

the Treaty also guaranteed subsistence rations until 1872,[58] by which time it was expected that the government would have assisted in assimilating the Sioux Tribes into yeoman farming culture.[59] The purpose of this was to give a means of subsistence.

Notwithstanding the Treaty provisions, the Sioux Tribes' hunting rights were abrogated shortly after the conclusion of the Treaty.[60] Thus once rations under the Treaty had lapsed and due to the neglect on the part of the government to assimilate the Sioux Tribes into yeoman farming, they were without a means of subsistence.[61] In order to prevent mass starvation, the Sioux Tribes were forced to continue subsisting on government rations.[62] According to reports, Congress decided to use the situation to expropriate the Sioux Tribes by operating a 'sell or starve' ultimatum.[63] It is self-evident that the result of starving people is impairment of health, leading to disfigurement causing injury to the internal organs or senses.[64]

Pine Ridge is a Sioux Tribe reservation, and illustrates much of the adversity that the Sioux Tribes encounter. Some of the houses have no electricity and unemployment hovers at around 80% suggesting that the Sioux were not able to subsist on the new

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[58] *United States v Sioux Nation of Indians*, 448 U.S. 371, 380 - 381 (1980)
[59] LaVelle, J.P., 'Rescuing *Paha Sapa*: Achieving Environmental Justice By Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation' (2001) 5 Great Plains Natural Resources Journal 40, 51 citing S. Exec. Doc. No. 9, 44th Cong., at 13 (2nd Sess. 1876) (journal proceedings of the Manypenny Commission) (speech of Charger of the Cheyenne River Sioux)
[60] *United States v Sioux Nation of Indians*, 448 U.S. 371, 380 (1980)
[61] LaVelle, J.P., 'Rescuing *Paha Sapa*: Achieving Environmental Justice By Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation' (2001) 5 Great Plains Natural Resources Journal 40, 51 citing S. Exec. Doc. No. 9, 44th Cong., at 13 (2nd Sess. 1876) (journal proceedings of the Manypenny Commission) (speech of Charger of the Cheyenne River Sioux)
[62] *United States v Sioux Nation of Indians*, 448 U.S. 371, 380 - 381 (1980)
[63] LaVelle, J.P., 'Rescuing *Paha Sapa*: Achieving Environmental Justice By Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation' (2001) 5 Great Plains Natural Resources Journal 40, 52 citing 133 Cong. Rec. 5267 (1987) (statement of Rep. Udall)
[64] *Kayishema et al*(ICTR-95-I-T), judgement and sentence, 21 May 1999, para.109

land of the reservation. Many of the people in Pine Ridge survive on food stamps and 'surplus government butter and cheese'.[65] Due to poverty, most subsist on a low protein high starch diet, which aggravates diabetes, leading to gangrene and eventually amputation in many cases.[66] Whilst it is perhaps too much of a leap to suggest that the diabetes could have been foreseen on the prohibition of cultural activities and confiscation of hunting weapons, it is reasonable to suggest that the ensuing poverty and its adverse impact on people's physical integrity, even leading to death, could have been foreseen from the 'sell or starve' ultimatum.

In addition to this,

> Land is inherent to Lakota people. It is their cultural centrepiece—the fulcrum of material and spiritual well being. Without it, there is neither balance nor centre. The Black Hills are a central part of this 'sacred text' and constitute its prophetic core.[67]

This is not simply an issue of an age that has passed, the struggle continues in this present age,[68] without their spiritual inheritance, the annihilation from cultural activities, hence unemployment and means of subsistence has had an adverse psychological effect, manifesting itself in the high rates of suicide, alcoholism and

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[65] Carlson, P., 'In the Year of 'Dance with Wolves,' Everybody Wanted to Be on the Senate Indian Affairs Committee. Nearly a Decade Later, it Can Hardly Get a Quorum' The Washington Post (23 February 1997); W06 available at http://www.emayzine.com/lectures/indian.htm

[66] ibid

[67] Pommersheim, F., 'Making All the Difference: Native American Testimony and the Black Hills' (A Review Essay) (1993) 9 N.D. L. Rev. 337, 352

[68] '…today, the struggle is ours. It belongs to the generation that are here.' (statement of Charlotte A. Black Elk, Black Hills Steering Committee) Sioux Nations Black Hills Act, s.1453, 99th Cong.ss3(5)-(6) (1985), reprinted in Sioux Nation Black Hills Act: Hearing on s.1453 Before the Select Committee on Indian Affairs, U.S. Senate, 99th Cong., S. Hrg. 99-844, 7-8 (1986), as cited in LaVelle, J.P., 'Rescuing *Paha Sapa*: Achieving Environmental Justice By Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation' (2001) 5 Great Plains Natural Resources Journal 40, 95

drug abuse on the reserves.[69] As such, it is argued that this fulfils the criterion, 'harm that seriously injures the health, causes disfigurement or causes any injury to the external, internal organs or senses', thus satisfying the *actus reus*.[70] Both bodily and mental harm have been caused in this case.

9.5.2. Killing Members of the Group

With regards to the intent criterion, *Akayesu* held that in the absence of a confession, intent could be inferred from the presumptions of facts, applying Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia, which stated:

> The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group- acts which are not in themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct.[71]

In application to *United States v Sioux Nation,* genocidal intent can be inferred from the fact that the Tribes were forcibly dispossessed of their land, and of hunting weapons and further forbidden, by the government, from hunting required for subsistence. A strong inference could be made suggesting that these acts would only Some commentators have referred to this on-going dispossession and attempted

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[69] Carlson, P., 'In the Year of 'Dance with Wolves,' Everybody Wanted to Be on the Senate Indian Affairs Committee. Nearly a Decade Later, it Can Hardly Get a Quorum' The Washington Post (23 February 1997); W06 available at http://www.emayzine.com/lectures/indian.htm; see chapter 3, p.68

[70] The actus reus is also satisfied in the case of *Jota v Texaco, Inc.,* 157F 3d 153 (2d Circ. 1998)

[71] International Criminal Tribunal for the former Yugoslavia, Decision of Trial Chamber 1, Radovan Karadzic, Ratko Mladic case (Cases Nos. IT-95-5-R61 and IT-95-18-R61), Consideration of the Indictment within the framework of Rule 61 of the Rules of Procedure and Evidence, paragraph 94; see also Triffterer, O., 'Genocide, Its particular Intent to Destroy in Whole or In Part the Group As Such' (2001) 14 Leiden Journal of International law 339-408. Triffterer demonstrates how this approach of determining intent is closer to the original *dolus eventualis* nature of genocidal intent, rather than the *dolus specialis* application preferred by some commentators.

assimilation as ethnocide, 'a dislocation of indigenous people from their homeland, destruction of their way of life, and denial of their culture and language'.[72] Others refer to it as genocide[73] and there is considerable over-lap between the classifications: 'ethnocide shares with genocide an identical vision of the Other: the Other is difference, certainly, but it is especially a wrong difference'.[74] Where genocide desires to eradicate difference to the extent that people will be exterminated for the cause, ethnocide seeks to assimilate so that all perceived negative aspects of a culture are dispelled and people of the 'undesirable' culture reflect those of the 'desirable' culture.[75] At first blush it would appear as though the case of *United States v Sioux Nation* could comfortably fit into either classification. However, it is my submission that it satisfies more comfortably the test for genocide. This can be inferred from the 'sell or starve'[76] ultimatum, which followed the Sioux Tribes vulnerability in terms of the fact that they had been cut off from their established means of subsistence by revocation of a Treaty clause. Moreover, they had not been taught the new method of farming, which would have provided a new means of subsistence, and they had been dispossessed of weapons and rations under the Treaty had ended. It was clear that this would cause Sioux Tribes to become decimated.

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[72] Weissbrodt, D., et al, 'Prospects for U.S. Ratification of the Convention Against Torture'(1989(83 Am, Soc'y Int'l Proc. 529, 547

[73] Carlson, J., 'South Dakota Indians Want Their Land Back' (Jan. 26 1992) Des Moines Reg. 1; LaVelle, J.P., 'Rescuing *Paha Sapa*: Achieving Environmental Justice By Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation' (2001) 5 Great Plains Natural Resources Journal 40, 81

[74] Clastres, P., 'Of Ethnocide' in *Archeology of Violence* (Herman, J., trs, Semiotext(e) 1994)) (1980) 43

[75] Clastres, P., 'Of Ethnocide' in *Archeology of Violence* (Herman, J., trs, Semiotext(e) 1994)) (1980) 44-45

[76] See n. 63

The aforementioned submission is buttressed by a report that an executioner declared the following, in a letter to a man, Buffalo Bill, famed for killing indigenous people:

> As far as I can estimate, in 1862, there were around nine and a half million buffalo in the plains between Missouri and the Rocky Mountains. All of them have disappeared, hunted for their meat, skins, and bones….At this same date, there were around 165,000 Pawnee, Sioux, Cheyenne, Kiowa, and Apache whose annual food supply depended on these buffalo. They also disappeared and were replaced by double and triple the number of men and women of the white race…This was a wholesome change and will be carried out to the end.[77]

The intention here is explicit. Whilst this was expressed in a bygone age, the level of poverty, the high rates of morbidity and disease on reserves occupied by Sioux Tribes in this present day do not serve to undermine the aforementioned intention.[78]

9.6. Summary

This chapter demonstrates that the change required for ecological sustainability to be enhanced through indigenous traditional knowledge, is not legislative but interpretative. It is submitted that for this to occur, the new standards enshrined in the various international instruments, as regards the role of indigenous cultures and

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[77] Clastres, P., 'Of Ethnocide' in *Archeology of Violence* (Herman, J., trs, Semiotext(e) 1994)) (1980) 51; LaVelle, J.P., 'Rescuing *Paha Sapa*: Achieving Environmental Justice By Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation' (2001) 5 Great Plains Natural Resources Journal 40, 84

[78] Thirty-nine percent of homes on the Pine Ride Reservation have no electricity; no public transport is available on the Reservation; many of the wells and much of the water is contaminated with poisons from activities such as farming, mining and open dumps; periodically residents are found dead from hypothermia; cervical cancer is 500% above the U.S. national average; 97% of the population live below the Federal poverty levels; the Indian Health Service is under-staffed, ill-equipped and under-financed. http://www.backpacksforpineridge.com/Stats_About_Pine_Ridge.html

traditional knowledge must be given due weight.[79] This, it is submitted, can occur through a teleological approach to human rights.

This chapter demonstrates the existing legal framework within which indigenous land justice cases and environmental protection for indigenous peoples could be adjudicated at international level. By bringing both issues within the ambit of the Human Rights Committee's *Lovelace v Canada,*[80] and *Ivan Kitok v Sweden,*[81] it is argued that first the collectivity may be adjudicated under UDHR Article 27, right to culture. Secondly, with the additional aid of *Lubicon Lake Band v Canada,*[82] *Ilmari Länsman et al v Finland*[83] and *Jouni E. Lansman et al v Finland,*[84] it is further argued that the absence of environmental protection and land justice often result in undermining the right to culture, thus where culture could be compromised, these elements fall within the scope of the aforementioned cases.

Beginning with Vice-President Weeramantry, the aforementioned approach is further substantiated by demonstrating the growing recognition of environmental protection as forming a part of contemporary human rights. Following this, the broader construction of the right to life, which includes environmental protection, is demonstrated to be gathering momentum across jurisdictions. Finally, in the absence of the guarantees of the right to life, the case of genocide as regards land justice is discussed.

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[79] See n. 3
[80] *Sandra Lovelace v. Canada*, Communication No. 24/1977*:* Canada 30/07/81*,* UN Doc. CCPR/C/13/D/24/1977
[81] HRC Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988)
[82] HRC Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) (1990)
[83] HRC Communication No. 511/1992 (8 Nov. 1994), U.N. Doc. CCPR/C/52/D/511/1992 (1994)
[84] HRC Communication No. 671/1995 (30 Oct. 1996), U.N. Doc. CCPR/C/58/D/671/1995 (1996)

Chapter 10

Conclusion

10.1. Research Question

The thesis began with this question:

> In pursuit of a sustainable environmental paradigm, is there need for revision of the current legal approach with regards to land justice and environmental protection for indigenous people of the New World?

This research was inspired by the Stockholm Declaration's recognition that '[t]o defend and improve the human environment for present and future generations has become an imperative goal for mankind…,'[1] the impetus of this was reflected by the Brundtland report, on sustainable development, in 1987,[2] and further expanded upon by the Rio Instruments in 1992.[3]

This proclamation imported the concepts of intra-generational equity and inter-generational equity into the discourse on environmentalism. While intra-generational equity addresses the issue of quality of environment that members of a generation

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[1]Stockholm Declaration at proclamation 6

[2] Our Common Future: report of the World Commission on Environment and Development - A/42/427 Annexe

[3] UNCED, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev. 1, reprinted in 31 I.L.M. 874 (1992); U.N. Conference on Environment and Development (UNCED), Agenda 21, U.N. Doc.
A/CONF.151/26/Rev.1 (Vol. I); UNCED Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests, U.N. Doc. A/CONF.151/26 (Vol.III)

owe to each other, inter-generational equity addresses the issue of quality of planet that present generations pass on to future generations. It addresses the ideal that '[a]s members of the present generation, we hold the earth in trust for future generations. At the same time, we are beneficiaries entitled to use and benefit from it.'[4]

It has been asserted by Shellenberger and Nordhaus that change leading to a more sustainable globe must be anchored to core values,[5] thus change will come slowly as a paradigm shift is required. However, intergenerational equity is a principle informing the ways indigenous people relate to the environment and it has been recognised that the principles rooted in the ancient fabric of these societies are pivotal for ecological sustainability.[6] Despite this acknowledgement, indigenous people living in communities, which are conducive to ecological sustainability, still struggle with access to land justice and environmental protection to the detriment of their cultures and also ecological sustainability. The purpose of this thesis was not to characterise indigenous people of the New World as the ideological other that must remain in a state of arrested development in order to save the world. It, instead, aimed to demonstrate a means of facilitating the continuance of indigenous cultures in a manner that would bring justice to those that history has wronged, whilst allowing present and future generations to benefit from the harnessing of traditional knowledge to increase ecological sustainability. Environmental protection not only acts as a means of protecting traditional lands for the continuation of the cultures, but also acts as a limitation to the type of development that could occur on such lands.

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[4] Weiss, E.B., 'Our rights and Obligations to Future Generations for the Environment' (1990) 84(1) The American Journal of International law 198, 199
[5] Shellenberger, M., Nordhaus, T. 'The Death of Environmentalism; Global Warming Politics in a Post-Environmental World' (2004) 22
[6] See chapter 2

Praxis is not simply satisfied in the act of returning title to land, or legally recognised stewardship, to the aforementioned indigenous people. It begins to be satisfied as old ideologies responsible for the status quo of indigenous people are exposed and stripped away. It begins to be satisfied as the role of indigenous cultures as regards enhanced ecological sustainability begins to be understood by those of the dominant culture. It begins to be satisfied as the new standards enshrined in the various international instruments, as regards this role, and traditional knowledge,[7] is enabled through legal systems and frameworks. It is more satisfied as partnerships between these people and people of the dominant culture occur in pursuit of enhanced ecological sustainability. It becomes more satisfied by the entire process culminating in bringing indigenous people of such cultures within dominant legal frameworks domestically and internationally.

The theoretical framework that ensued was that in order to achieve a more ecologically sustainable globe, *praxis* according with a modern stewardship ethic had to be determined. This required the examination of the legal and ideological basis of the status quo of indigenous people of the New World as a means to enabling ecological sustainability by giving indigenous people legal identity, and providing them with rights, in dominant legal frameworks.

The theoretical framework gave rise to the three hypotheses of this research:

1. One of the major causes of ecological un-sustainability in the global North is Enlightenment philosophies and ideals, which did not prioritise a stewardship ethic as regards the environment. This must be addressed by establishing

[7] See chapter 2, pp.49-54

praxis deriving from a modern application of the stewardship ethic.

2. The stewardship ethic inherent in indigenous cultures suggests that land justice and environmental protection for indigenous people of the New World would enhance ecological sustainability.
3. Entrenched Enlightenment ideals continue to adversely affect the manner in which indigenous land justice cases are adjudicated.

10.2. Summary

This research has demonstrated that Enlightenment philosophies are one of the major causes of this current ecological crisis. This is due in part to the thorough entrenchment of Enlightenment ideals advocating the tyrannical reign of man over the natural environment, to the diminution of a stewardship ethic; and due in part to the continuing influence of Enlightenment paradigms on the legal position of indigenous people and the manner in which their cases are adjudicated in courts of law.

Through examining case studies, and drawing attention to the acknowledgement of the role of indigenous people as regards ecological sustainability, in international instruments, the link between enhanced ecological sustainability and the survival of indigenous cultures has been demonstrated. Furthermore, the link between land justice and environmental protection in ensuring the survival of traditional knowledge and enhanced ecological sustainability has been illustrated. With land justice, rather than self-determination, as a cornerstone of indigenous rights, indigenous people can more easily be accommodated within dominant legal frameworks.

This research also demonstrates that reducing the legal title of indigenous people to traditional lands was not the result of corrupted legal definitions emanating from neutral and objective legal regimes but was the result of the direct contravention of International law of acquisition of territories. Neither International law, nor any legal doctrine in British law recognised the act of taking possession of inhabited land as if it were uninhabited, during the time frame in question. Furthermore, despite the fact that ideals allowing people to be regarded as sub-human, thus without legal status, stands condemned, the case analyses indicate that such ideals are resurrected, in modern times, whenever there is a perceived threat to the skeleton of principle. This acts as an impediment to creating a more ecologically sustainable globe as it denies land justice, thus an important aspect of the cultural safeguard, to indigenous people.

In response to protecting the skeleton of principle, it has been suggested that indigenous people are brought within domestic legal frameworks. It has further been demonstrated that the change that needs to occur at international level is not legislative but interpretive; a teleological approach to Human Rights has been adopted in order to give proper weight to the role of indigenous cultures and traditional knowledge as per the new standards enshrined in the various international instruments.

Enlightenment ideals, underpinning the drafting of the UDHR cater for individual, rather than collective rights; however, by bringing indigenous land justice cases and environmental protection within the ambit of the Human Rights Committee's

Lovelace v Canada,[8] and *Ivan Kitok v Sweden,*[9] the justiciability of the collectivity, under UDHR Article 27, right to culture is demonstrated. Additionally, with the assistance of *Lubicon Lake Band v Canada,*[10] *Ilmari Länsman et al v Finland*[11] and *Jouni E. Lansman et al v Finland,*[12] it is further suggested that the absence of environmental protection and land justice often result in undermining the right to culture, thus where culture could be compromised, these elements fall within the scope of the aforementioned cases. By this means, indigenous cultures are protected through land justice and environmental protection, and ecological sustainability continues to be enhanced.

10.3. Significant Conclusions

It is concluded in this thesis that Judeo-Christian ethics are not the root of this current ecological crisis; rather the change in Western values appears to coincide with the emergence of Enlightenment philosophies. This precipitated a change in worldview from theocentricism to anthropocentricism, where the prevailing ideologies were those that held mankind as occupying a position distinct from and above nature. Furthermore these ideologies precipitated social and cultural stratification of the human race, introducing hegemonic ideologies, which dispossessed indigenous people of lands and cultures pivotal to continued biodiversity. The culmination of the aforementioned precipitated the demise of ecological sustainability.

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[8] *Sandra Lovelace v. Canada*, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977
[9] HRC Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988)
[10] HRC Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) (1990)
[11] HRC Communication No. 511/1992 (8 Nov. 1994), U.N. Doc. CCPR/C/52/D/511/1992 (1994)
[12] HRC Communication No. 671/1995 (30 Oct. 1996), U.N. Doc. CCPR/C/58/D/671/1995 (1996)

The last operative, workable environmental paradigm was the Judeo-Christian stewardship tradition; the principles inherent in the stewardship ethic ought to be harnessed to curb the current ecological crisis. Agenda 21 satisfies the *scienta* and *ethics* of a modern stewardship ethic. Steps towards establishing *praxis* based on a modern application of the Judeo-Christian stewardship ethic can be made through implementation of the thesis' proposal, which addresses the role of indigenous people as per Agenda 21.[13]

In order for indigenous cultures to be protected, environmental protection must have a strong legal basis as a means of increasing the spatial extent of the power of indigenous communities.[14] Furthermore, land justice is required in order to redress the balance of power in favour of the indigenous people.

It has been concluded that *Johnson v M'Intosh* established the propositions that (1) indigenous people had title to land, (2) title to land owned by indigenous people could only be acquired through conquest or purchase, and (3) "backwards" people had capacity to have legal title to land; these propositions are affirmed by later Marshall CJ cases, namely; *Cherokee Nation v Georgia,*[15] *Worcester v Georgia,*[16] and *Mitchel v U.S.*[17] As these are the foundational cases of the doctrine of *terra nullius*, it has been concluded that the foundational cases were insufficient to form the law allowing acquisition by occupation of inhabited territory.

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[13] U.N. Conference on Environment and Development (UNCED), Agenda 21, U.N. Doc. A/CONF. 151/26/Rev.1 (Vol.), U.N. Sales No. E.93.I.8(1992), chapter 26, s.3
[14] See chapter 2, pp.49-54
[15] 30 (5 Pet.) 1, 17 (1831)
[16] 31 U.S. 515, 544 (1832)
[17] 34 U.S. (8 Wheat.) 711, 745-746 (1835)

With reference to Blackstone's antipathy for the basis on which territorial acquisition could occur through conquest, it is concluded that 'desert uncultivated' could not have been intended as a reference to territories inhabited by 'uncivilised inhabitants in a primitive state of society.'[18] It has further been submitted that even if it were intended as a reference to the latter, it would have been operative to change the sovereign but inoperative as regards dispossessing indigenous people of their land. This submission is based on the lack of legal precedent, even 100 years later, to the effect that territories inhabited by 'uncivilised inhabitants in a primitive state of society' were to be regarded as 'desert uncultivated.'[19]

The current legal approach to indigenous land justice is in fact an impediment to global ecological sustainability for two reasons; first, it does not recognise, very readily, collective rights as human rights, secondly, indigenous people are forced to exist outside dominant legal frameworks.[20] Without addressing the manner in which indigenous rights are adjudicated, more specifically land justice cases and environmental protection, global ecological sustainability will continue in a critical state.

A growing body of international instruments, pertaining to the important role of indigenous people in terms of ecological sustainability, is emerging; however, with the exception of Convention on Biological Diversity, they are 'aspirational declaration[s] with political and moral, rather than legal, force.'[21] It has been

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[18] See chapter 6, pp.114-116
[19] ibid; In 1955 Justice Reed made a ruling to this effect in *Tee-Hit-Ton Indians v United States* 348 U.S. 272, 279-280 (1955), see n. 58 in chapter 5
[20] See chapter 7
[21] Anaya, S.J., Weissner, S., 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment' Jurist Forum (Oct 2007)

concluded in this thesis that there is little need for separate instruments addressing indigenous peoples' rights; rather the need is to bring indigenous people within dominant legal frameworks. This was demonstrated by showing how land justice cases and cases of environmental protection can be brought within the jurisprudence of the Human Rights Committee.

Bringing indigenous people within domestic and international constitutional frameworks serves another purpose; it ameliorates fear of a fractured skeleton of principle by keeping indigenous peoples 'within the legal system' and subject to constitutional values.[22] The result of this would be that the plight for indigenous self-determination would be superseded by the plight for land justice. This is beneficial to nation states in terms of the fact that countries would remain undivided, under one sovereign.[23] It is beneficial to the global community in terms of the common goal of increased biodiversity.

10.4. Recommendations

The true contribution of indigenous people of the New World to ecological sustainability can only be fully realised through land justice and environmental protection. These are the means by which the principles inherent in traditional knowledge can be preserved and harnessed for application elsewhere; without

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[22] *Alexkor (Pty) Ltd and Government of the Republic of South Africa v Richtersveld Community and Others*, 2003 (12) BCLR 1301, para. 34

[23] 'Now, very few, if any, indigenous peoples actually had asked for anything approaching a threat to the territorial integrity or political unity of existing states. The goal of 'indigenous sovereignty', in particular, was mostly defined in the sense of cultural and spiritual reaffirmation much more than in the Western sense of independent political power.' Anaya, S.J., Weissner, S., 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment' Jurist Forum (Oct 2007)

movement away from systems entrenched in Enlightenment ideals, an increased quality of environment shall remain elusive.

In terms of *praxis* flowing from Agenda 21, evolution of the worldview of the global North to include indigenous people and traditional knowledge must occur. Dominant legal frameworks must reflect this in order for forward movement to occur. A teleological approach to Human Rights regimes is necessary to allow indigenous people rights that have eluded them. Furthermore, it should be accepted as a matter of law that the reduction of legal rights of indigenous people to traditional land was unlawful; thus, the burden that needs to be satisfied ought to migrate from proving that the reduction of title was wrongful to proving that it was the result of past discriminatory practises or something of this ilk.

Environmental protection must be a justiciable right, not only due to its ability to protect the integrity of the environment required for continuance of indigenous cultures, but also because it acts as a limitation as regards the type of development that could occur on lands with such status. Furthermore, it leaves the door open for the creation of reciprocal partnerships between indigenous communities and conservation managers for enhanced ecological sustainability. The inclusion of land justice redresses the balance of power and acts as a bar to the exclusion of indigenous proprietors from management. Moreover, it would enhance the likelihood that proposals of indigenous people, and non-indigenous participants would be treated with parity. Consequently, the favoured approach would shift from one that is purely science based to one that is a hybrid of science and social reality. Accordingly

a demonstration of how indigenous people could be accommodated within existing legal frameworks has been presented in this thesis.

10.5 Future Research

There is still much ground to be covered in terms of determining *praxis* pursuant to Agenda 21, as regards creating an ecologically sustainable globe. Addressing the issue of indigenous land justice and environmental protection is but a small part of the equation. Whilst this thesis addresses *praxis* with respect to Agenda 21's requirements of indigenous people of the New World, major strides towards an ecological sustainable globe will occur when *praxis* is considered with direct reference to the values of the dominant cultures of the global North.

It has been noted by commentators that, 'traditional indigenous worldviews embody an ethic of "sustainability" that could be emulated by world governments to mitigate the harms of industrialisation'.[24] This approach, whilst not without merit, is counter-intuitive in terms of the fact that research indicates that success would be more achievable where people are engaged around values perceived as important to them rather than where change is proposed 'around abstract concerns that lack relevance to everyday life'.[25] This thesis begins engaging with values that are important to dominant cultures in its approach to retaining an un-fractured skeleton of principle. However, there is much to be done in this area.

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[24] Tsosie, R. 'Climate Change Sustainability and Globalisation: Charting the Future of Indigenous Environmental Self-determination' (2009) Environmental and Energy Law and Policy Journal 189, 191. See also Krakoff, S., American Indians, Climate Change, and Ethics for a Warming World, (2008) 85 Denver University Law Review 865, 893-94; See also Tsosie, R., 'Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge' (1996) 21 Vt. L. Rev. 225, 273, 276

[25] Brulle, R.J., Jenkins, J.C., 'Spinning Our Way to Sustainability?' (2006) 19(1) Organization and Environment 82, 83

This thesis is only the beginning of that journey.

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