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Indigenous Peoples' Identity vs. State's Right to Integrity: An Asia Overview

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Abstract

Indigenous and tribal people groups number around 370 million people living in 70 different countries. Indigenous inhabitants are usually understood as maintaining an identity in relation to a specific territory, and tribal peoples who may share indigenous characteristics are often people forcibly resettled from another territory yet maintaining their tribal social structure. Whenever the topic of indigenous peoples' rights is encountered in international fora, it invariably opens a discussion on state's internal instability; and particularly, the issues of self-determination and the right to identity typically raises fears on the part of states. It is therefore worth investigating the right to identity in the context of guaranteeing state integrity. If identity is defined as the right to be someone non-identical to state citizenship, and, at the same time, as a right to be united with someone else who is in the same position, the question arises whether a legal claim might be lodged regarding one's collective 'independence' of state determinations. Before any resolution to this dilemma can be proposed, however, the two conceptual sources of the potential conflict should be defined — the state and indigenous people, and next, the right to identity oneself. This topic is widely discussed by scholars and politicians in North America, but much less in Asia. This article examines issues around the definition of indigenous people as well as their role and position in a given state framework; it also attends to the problematic issue of the parameters of the state's own identity — specifically in relation to the Asia regions.

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Indigenous inhabitants are usually understood as peoples consistently living on a specific territory, and tribal peoples are often people forcibly resettled from another place yet having maintained tribal social structures.¹ When the topic of indigenous peoples' rights is routinely referred to in international policy or legal fora, it often opens up a discussion concerning a given state's instability 'from the inside'. In particular, the issues of self-determination and the right to identity, raises some necessary concerns on the part of state entities. It is therefore worth analysing the issue of the right to identity in the context of normative guarantees to state integrity.

1. Definitions of the state

The theory of state encompasses numerous, frequently contradictory, definitions as well as concepts and theories regarding its origins and formation. Thomas Hobbes (1588–1679) often provides reference for early conceptions of the modern state, asserting that our original instinct for survival relates to a permanent state of fear and anxiety. This, in turn, entails a state of a continuous conflict with neighbours, making consistent peace and affluence an exception not a norm; in Hobbes's view, the solution to this situation is subjecting an otherwise wild and independent human nature to the governing power of a single agency. A ruler in this capacity is not a party to a contract, and Hobbes's state model has often been cast as an ideal model for absolute or totalitarian rule. Hobbes's notional state also assumed the exclusive participation of the people in its creation: the state is planned and created in such a way so as to ensure absolute safety, welfare and compliance in a collective and incontestable consensus.²

An early critic of Hobbes's influential rationale for a state was Samuel von Pufendorf (1632–1694), who asserted the obligation to protect society from a ruler; he understood the state as a useful

organisation, protecting against those who acted against natural law. John Locke (1632–1704) further developed a protected collective cohesion with the seminal concept of 'social contract', where, similar to Pufendorf, a principle of reciprocity governed the relation between people and rule or state. In Locke's view, Hobbes's prehistoric man was not led by fear, but acting under the influence of the laws of nature he was bound to, notably the inviolability of life, freedom and the property of other; even in a primal state, he could expect reciprocity from others. Being aware of such reciprocity, the notional prehistoric man surrendered power and assigned it to the community, with a possibility of revoking the rights established by it. A state can be said to be born on the basis of an agreement formulated in this way, and people unite in one such community become subjected to jointly established norms and laws. Tribunals can be created to which they could appeal and which also punished infringements, and the members of the community could elect the actors in such tribunals from among themselves, with that act of empowerment being a seminal moment of what we understand as 'civil society'. As in a process of election, however, the will of the majority tended to prevail over the minority or individual, and a main task of authority was not just to exercise power but to protect the limited power of others, such as protecting the ownership rights of its members. Locke's original political theory led to a widespread rejection of the arbitrary power of absolute rule and presented the possibility of replacing an authority (that violates rights) with an election of the people who had established it in the first place; new representative forms of government could be devised that carried with it an obligation to act in accordance with the expectations of the community that elected it.³ Later, the concept of state was defined by its institutionalisation and legal complexification of such processes and its functionalism (in a psychological and social context). From a legal point of view, the modern state was primarily defined during the 7th Pan-American Conference in Montevideo (Uruguay) publishing the now

¹ C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (accessed 3.04.2019).

² J. M. Kelly, *Historia zachodniej teorii prawa*, Kraków 2006, pp. 230–239.

³ *ibidem*, pp. 241–242.

famous international legal statement of the *Montevideo Convention on the Rights and Duties of States* (1933). Three factors herein define the modern state: a territory, people and power. Three criteria of the structural elements of a state are legally decisive: power over a given territory has to be effective, which means that the state manages a stable population as much as borders and boundaries unilaterally; and as a state it is recognised as such by other state entities (of which it engages international relations). Thus, the state has the facility to manage legal relations with other state entities, both productive and potentially conflicting. In this sense, independence and sovereignty is the basis of international relations.⁴

Without analyzing the modern concept of the state in detail, there is one dimension of this original international legal definition of state that is central to this article: that a stable population living on a geographically defined territory must identify with that state as well as being subject to it.⁵ Some similarities in conceptualisation can be also traced in some Asian philosophies,⁶ which often place the filial piety⁷ as a root of all common virtue, and as cornerstone of morality and the foundation of the state. For Han China, the foundation of the state was the family, where central authorities negotiate power sharing with local clans. In this sense, the state and the extended family unit mirror each other, except that there is little space for the development of an interrelated entity of civil order or society.⁸ Professor Zhiwel Tong has defined the state as the subject of power, not the subject of rights; the subject of state ownership is the state, and

ownership is a civil right, which means that the state is one of the subjects of civil rights, and also enjoys civil rights.⁹ On the other hand, Indian jurist and reformer, Babasaheb Ambedkar (1891-1956), perceived the state as a necessary institution but acting under a categorical condition. The source of state's existence comes from society, economy and religion, and the condition is a necessary faith from the people in the validity and moral authority of the state. If that is not the case, the state is just a facade for anarchy (or law-less rule, in this case the rulership of the state). The state therefore has a pragmatic role to play: firstly, it is responsible for maintaining the right of its subjects to life and the forms of liberty that allow for such a faith to be expressed; secondly, the state offers justice or the arbitration of collective co-existence and the exercise of the power of liberty; thirdly, the state instils trust by promising freedom from want and from fear. In this sense, the state is a tool or an instrument used to maintain a citizens' happiness.¹⁰ The last voice to be evoked in this narrative discussion on the definition of the state is Mohanda Karamchand Gandhi (1869-1948), who largely rejected Western concepts of state and state sovereignty. Building his political philosophy on the *dharma* — the Hindu concept of 'influences', which shape the moral feeling and the character of people and become the code of conduct — Gandhi defined this general conscience of a people as central to state rule. This was not a fixed code of rules, but a living power, which at once rules, develops and evaluates a society. Christian ethics and humanism also played a role in Gandhi's framework, which amounted to a total critique of the western concept of state as the organisation of violence. Informed by his personal experience of colonial state institutions, Gandhi's priorities were the harmonious freedom and moral sovereignty of the social collective. Against Hobbes, individuals were not irreducibly individual and not only collective in terms of their investing their own self-determination in an authoritarian

⁴ R. Kłosowicz (ed.), *Państwa dysfunkcyjne i ich destabilizujący wpływ na stosunki międzynarodowe*, Kraków 2013: pp. 11 -37.

⁵ H. Dudkiewicz, *Prawo międzynarodowe w kwestii państwa upadłego*, [in:] R. Kłosowicz, A. Mania, (ed.), *Problem upadku państw w stosunkach międzynarodowych*, Kraków: 2012, pp. 79 - 83.

⁶ Confucian, Chinese Buddhist and Taoist ethics.

⁷ Respect to one's elders, parents and ancestors. Ch. Ikels, *Filial Piety: Practice and Discourse in Contemporary East Asia*, Stanford University Press 2004: p.1.

⁸ *filial piety* [in:] *Encyclopaedia of Asian Philosophy*, ed. O. Leaman, Routledge 2001: pp. 197 - 198.

⁹ Z. Rong, *Right, Power, and Faqanism: A Practical Legal Theory from Contemporary China*, Leiden, Boston: Brill 2018: pp. 129 - 132.

¹⁰ K. Raghavendra Rao, *Babasaheb Ambedkar*, Sahitya Akademi 2003: pp. 37 - 39.

entity of pure abstract and indifferent rule. The ideal state (*Swaraj*) is where railways, hospitals, army and navy, as well as law and courts, exist, but are governed by free people, free from bureaucratic interments of oppression, and free not to conform to collective regulation. Government exists, but is based on popular consent, and the same principles of equality, truth and non-violence of all society; government has a function but no internal superiority to other forms of social organisation.¹¹

This brief discussion is concluded with the observation that traditional definitions of the state, West and East, assume a certain identification, trust, assent or faith in the state (or entity of rule) on behalf of a coherent and cohesive 'people'. How is state defined under conditions of irreconcilable ethnic diversity, where distinct groupings and absolute forms of unity and identity between separate groups within a single territory, and where the state is experienced by these groups as an imposition and an artificial construct. A condition of tacit (and perhaps open) conflict between a people group and the state may persist, which may lead to state disintegration, or just a weakening of sovereignty over a defined territory, or perhaps just an imposition of arbitrary rule. As counterfactual to the above concept of state, it is possible that brute rule succeeds in maintaining control of a diverse populace and a particular territory but without a consenting populace and where its population does not identify with it. In the era of international law, however, this cannot be recognised as a valid state formation. Nonetheless, can a specific group of people threaten the state in terms of their subjective non-identification with it? Can the lack of effective sovereignty over a segment of territory and a unit of its population threaten the necessary integrity of the state and its existence as legitimate state? While Asia holds many differing conceptions of state unity, authority, assent and belonging, and so on, international law is built on western political philosophy. We must therefore take

¹¹ A. Pasricha, *Rediscovering Gandhi vol. 4: Consensual Democracy: Gandhi on state power and politics, Gandhian studies and peace research series*, Concept Publishing Company 2010: pp. 8 - 12.

these conceptual problems as formulated into an Asian state context. What is the relation between state integrity and ethnic identity within an Asian state model?

2. Definition of the ethnic group in international law

We encounter a problem similar to the definition of the essence of the state with the definition of the term "indigenous people." In Polish literature, some authors, e.g. Magdalena Kryńska-Kałużna,¹² use the term "ludność tubylcza" [autochthonous people]. She makes an attempt at defining "indigenous" under international law, referring mainly to two conventions: International Labour Organisation no. 107, and no. 169.¹³ The approach of Kryńska-Kałużna, however, deviates significantly from the contemporary understanding of indigenous peoples in international law. An international legislator uses the term "indigenous people" in terms of a group of people or a tribe, living on a particular territory, having its own culture, language and customary law.¹⁴ As one important element of this definition is the moment, rejected by Kryńska-Kałużna, of the so-called "First Contact".¹⁵ This is the indigenous peoples' contact with another ethnic group, in which or from which they acquired a dominant or subservient position at some point of historical time. The result of such first contact is the loss of effective sovereignty over territory, and being occupied in favour of another people group(s) threatening culture or language.¹⁶ Thus,

¹² M. Kryńska-Kałużna, "Indianin" w świetle prawa, *Ameryka Łacińska*, 1 (79) 2013: p. 107.

¹³ Both conventions, in Art. 11 and Art. 15, respectively, define, in a descriptive way, ethnic people by using such phrases as: the first inhabitant, an ethnic group, original people or the first people. Indigenous & Tribal Peoples' rights in practice, A guide to ILO Convention no. 169, International Labour Standards Department, 2009: pp. 27 - 30.

¹⁴ United Nations Declaration on the Rights of Indigenous Peoples, Resolution no. 61/295 of the United Nations General Assembly of 13 September 2007.

¹⁵ R. A. Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800*, New York 1997, p.37

¹⁶ It is worthwhile indicating that the UN Declaration on the Rights of Indigenous People does not define at all the term "Indigenous People." Only in the preamble to the Declaration is there a description of indigenous peoples by means of the above-mentioned

the translation of the term “indigenous” as “tubylec” [autochthon] proposed by Kryńska - Kałużna does not comply with legal methodology. The term “tubylec” or “tubylcze” [a noun and adjective of autochthon] does not encompass all attributes by which indigenous peoples are defined. Her work, in its etymology, refers exclusively to one feature of indigenous peoples, which is the priority of living on (and occupation of) a defined territory. However, other features are bypassed, notably the cultural or language, an internal legal system or code of conduct, and, most importantly, a distinct, different identity. For no identification with the state as the good of all is inhabitants.¹⁷ Such an understanding of indigenous/ethnic peoples is proposed in the aforementioned conventions of the International Labor Organization. This definition is based on the definition of indigenous peoples notably proposed by Martinez Cobo. He defined indigenous people as groups, people, communities, which have the history of living in a given area before colonisation or conquest, the result of which is settlement on their territory of another group of indigenous peoples, which considers itself different from other social groups living on the territory or some parts of it. They do not constitute a group prevailing on a given area and are therefore forced to take steps aimed at preserving their culture and identity, which has been passed over for generations; they have their own ethnic identity in combination with their own culture, legal and social system (or variation thereof). A crucial condition is *continuity*, in a time trajectory, of the existence of a given social group on a given area, and factual sovereignty on this area of the ancestors of a given group, as well as cultural and language differentiation. These conditions are associated with the right to identity of indigenous people, and this is, as Hilary N. Weaver wrote, like opening of a Pandora's box. Without analysing this topic in detail, it should nonetheless be noted that literature on this matter distinguishes three

attributes. In addition, Art. 33 of the Declaration gives Indigenous Peoples the right to self-determination. The United Nations Declaration on the Rights of Indigenous People, United Nations, March 2008: p. 12.

¹⁷ Tubylec - 1. człowiek należący do rdzennej ludności miejscowej, 2. stały mieszkaniec jakiegoś terenu, Słownik Języka Polskiego PWN, <https://sjp.pwn.pl/sjp/tubylec;2531245.html> (accessed 3.04.2019).

spheres of identity: self-identification, community identification and external identification. There also pertains cultural identity, as one form of self-identification by people. Thus, identity means a common origin and identification with a common ancestor and/or common heritage, which leads to a social unification. Identity is shaped in the process of noticing and recognising one's own otherness against another social group.¹⁸ The right to identity understood in this way has been guaranteed to indigenous peoples in Art. 33 of the UN Declaration on the Rights of Indigenous People.¹⁹ The right to identity is thus the right to recognise otherness of a given social group from another group, in this case, a prevailing one and, further, warranting the right to self-determination and self-governance.

However, what is important is the recognition by a given state of a particular group as an ethnic group on a given area. Some states, despite recognising earlier a given group as ethnic in their later legislation, clearly refuse to award such a status and exclude them from the list of privileged ethnic groups. Such situation concerns, for instance, the population of the Chittagong Hill Tract,²⁰ currently living on the territory of Bangladesh. In the first constitution of Pakistan of 1956, Pakistan recognized a special status of Chittagong as ethnic people and confirmed it next in its constitution of 1962. Unfortunately, in 1964, the Chittagong population was removed from the list of autochthonous tribes, and the state of Bangladesh created in 1971, together with the constitution of this country adopted in 1972, does not mention the rights of indigenous people or

¹⁸ H. N. Weaver, *American Indian Quarterly*, vol. 25, no. 2 (Spring 2001): pp. 240 - 242.

¹⁹ United Nations Declaration on the Rights of Indigenous Peoples, <https://www.humanrights.gov.au/publications/un-declaration-rights-indigenous-peoples-1> (accessed 3.04.2019).

²⁰ Hill Tract is a place populated by Bawn, Chakma Tanchangaya, Tipra, Lushai and Khumi peoples, living on territories on the south-eastern Bangladesh. R. Ch. Roy, *Land Rights of the Indigenous Peoples of the Chittagong Hill Tracts, Bangladesh*, Copenhagen 2000, pp. 19 - 20.

even recognizes the existence of such groups on the territory of Bangladesh.²¹

Indigenous people/ethnic minorities are thus an internally and externally organised group of citizens of a given state, whose rights are guaranteed by international law. A fundamental right granted to them is the right to self-determination, yet this potentially threatens the existence of the state, which ceases to be monolithic and its territory is populated by indigenous people/ethnic minorities who reduce its stability. The examples shown above demonstrate the struggle of the indigenous people to be recognised or at least identified by lawmakers. What can be observed is the policy of denial towards indigenous people, or even hostility, an example of which is a state's attitude towards the Chittagong population. This leads to the assumption that, besides recognising this fact on an international level, an Asian state chooses to revert an indigenous status of a groups previously recognised as indigenous. By denying their dignity as such, the policy implication of this state is assimilation of such groups with society, potentially leading to their disappearance. This is not an inadvertent action but a purposeful behaviour of a state, which evidently works with a strong conception of homogeneity, favoured over diversity. The background of this tendency is the fact that most modern Asian states are governed by extended families whose historical and networked power is rooted in clan or tribe. The existence of clan or tribe, whose rights the state is obliged to recognise under the international legal regime, may risk upsetting the monopoly of a dominant tribe or relations between familial and tribal groups within the state-society complex. One reason why a state is not willing to recognise the existence of an indigenous people within its borders is the problem of recognition in relation to representation: this group will enter the networked space of shared power, whose coordinates are already determined. This observation originates with Babasaheb Ambedkar, who also says that the state is the purpose of

necessity, just as are its laws and internal structure.

Furthermore, regarding Asian states in postcolonial situations, the terms "ethnic minorities" and "indigenous people" should be understood in relation to each other. Historically, colonialism was also a reconfiguration of the indigenous order and often where dominant groups emerged by force or patronage, and such internal configurations can be seen over the region. This is why, following Martin Cobo, the terms indigenous, nation and ethnic minority, can be used interchangeably, depending on the state legal language.

3. The state's integrity principle vs. the right to identity

The principle of a state's integrity is grounded in the conditions that give rise to its constitution: currently it becomes necessary to satisfy the interests of different social and ethnic groups existing within state boundaries. A constitution is a legal act which incorporates various interests within the state, defends the integrity of a state entity and guarantees state integrity. A constitution fulfils two principle aims: it aims at state unification in terms of uniform values and legislation, and, additionally, it gives ethnic minorities a guarantee of respecting their rights and freedoms. It guarantees the lack of discrimination and equality in rights towards the majority. It also aims at elimination of national and ethnic minorities' demands, which might result in state's disintegration. Ralph Rerzlaff has asked how strong bonds between the minority and the dominant group have to be in order to guarantee relative loyalty of a minority group to the dominant group.²²

In 1947, India, gained its independence and broke free from Great Britain's domination; and as most post-colonial countries, it fell into chaos. One can distinguish several basic ethnic groups (or rather religious minorities): Muslims, Scheduled Castes, Sikhs, Indian Christians, Anglo-Indians Paersees,

²¹ R. Ch. Roy, *Land Rights of the Indigenous peoples of the Chittagong Hill Tracts, Bangladesh*, Copenhagen 2000: pp. 44-47.

²² R. H. Retzlaff, 'The problem of communal minorities in the drafting of Indian Constitution', in R.N. Soann ed. *Constitutionalism in Asia*, New York 1963: p. 55.

and indigenous Adivasis and Nagas. Furthermore, it overlapped with a religious conflict between Hindus and Muslims. Years of conflict and uncertainty led to developing a system in which ethnic and religious minorities remained under the exclusive influence of a dominant group of Hindus. It led to growing separatist movements on the part of the Muslim minority, which started to demand its independence. Great Britain, acting from the position of a “Big Brother,” made some attempts at mediation in order to introduce more freedom and independence of ethnic minorities at the local level. Finally, on 16 May 1946, dominant social groups developed a consensus in the form of the Statement of May 16th, which was submitted to Great Britain as a joint position of the future Indian state. We can read in the statement that it is the goal of the persons signing the statement to create a joint and uniform state, with a weak centre, self-government division, with provinces autonomy, and guaranteeing rights to minorities. Particularly, this last statement contributed to the problems on the part of the Indian constituency, since granting rights, or even limited autonomy, to ethnic peoples contradicted the idea of united and strong India; on the other hand, they could not totally exclude minorities’ rights, as it would lead to rebellion and state destabilisation. Thus, the state arguably remained the hostage of minorities.²³ Under the auspices of the British Crown, talks over the shape of the future constitution started; a committee for ethnic minorities and excluded areas was set up, which was divided into the following subcommittees: fundamental rights, ethnic minorities’ rights, tribal rights and excluded areas rights. However, there was still a conflict between Muslims and Hindus, as a result of which on 29 February 1947 the British Crown announced that by June 1948, at the latest, power will be handed over to the local people of India. The consequence of it was the Statement of 3 June 1948, based on which two states were created: India and Pakistan. Thus, the earlier unified state (a British colony) was divided into two independent states. The result of this was, however, significant

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R. H. Retzlaff, ‘The problem of communal minorities in the drafting of Indian Constitution’, in R.N. Soann ed. *Constitutionalism in Asia*, New York 1963: pp. 58 - 59.

weakening of the position of the Muslim population and marginalisation of its rights in the process of creating a new independent state.²⁴ The Indian state lost its territory to the benefit of indigenous peoples of Pakistan. Lack of any identification with the Indian state and exercising of the right to its own identity caused disintegration of the Indian state. The state was unable to stop the process of separation and ethnic groups were not willing to stay within the borders. They didn’t associate with the Indian state ruled by the Hindu tribe and were strong enough to separate decisively.

However, the issue with indigenous peoples’ rights did not end with detachment of Pakistan from India. Afterwards, the problem with citizenship remained. The Indian Constitution of 1950 and the Citizenship of India Act (1955) created a kind of a paradox in the history of both countries. On the basis of the two documents, the inhabitants of Pakistan and India were given the right to choose citizenship during some time interval. Within five years between the two documents, the inhabitants of both countries enjoyed relative freedom of movement on the basis of different travel documents; yet, the very issue of citizenship was not fully regulated in the constitution. Part II Arts. 5 - 11 regard mainly the question: who is a citizen of India? The answer to the question asked in the constitution was found only as late as in 1955, when the Citizenship Act entered into force. Nonetheless, pursuant to Arts. 5 to 8, India recognized two categories of citizenship acquisition: by origin and by residence. The Citizenship Act distinguished citizenship by birth, by descent, by registration, by naturalization, by incorporation of territory to India and, since 1986 by citizenship through accounting for in the Assam Accord.²⁵ A change made in 1986 gave citizenship of India to any person of the Indian origin (*ius sanguinis*), who settled down in Assam before 1 January 1967 and came from a specific territory, including persons

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R. H. Retzlaff, ‘The problem of communal minorities in the drafting of Indian Constitution’, in R.N. Soann ed. *Constitutionalism in Asia*, New York 1963, p. 60.

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A. Roy, *Mapping Citizenship in India*, Oxford 2010: pp. 30 - 38.

whose names were listed in the elections register of 1967 and were residents of Assam before its formal inclusion in India.²⁶ The specifics of the Assam region in India related to the region diversification and adoption of the principle: different yet equal. Differences consisted, first of all, in cultural and ethnic otherness of this region, including recognition of ethnic otherness of Assam. The issue concerned ethnic otherness of the Assam population from other groups living in India, which, after India's division in 1947, prevailed in Assam Province, and enjoyed considerable autonomy and independence. Assam is populated mainly by the Nagas and Adivasi and other tribes recognized by the Indian constitution as the Scheduled Tribes.²⁷ In the incorporation act of Assam into India, preservation of the ethnic unity of that area played a big and significant role. When promising in the incorporation act respect for ethnic otherness of Assam, the government kept the role of the final judge in immigration matters and those regarding granting citizenship. Protecting the state unity, the government remained the final judge in matters regarding settlement and naturalization in the Assam area. This policy resulted in protests of the Assam population against the influx of "aliens," who changed the ethnic picture of Assam dramatically. It was particularly visible during the elections in 1979, when the number of people entitled to vote in provincial elections grew from 45,000 up to 70,000. It led to mass protests in November 1980 against an unstable situation of the "aliens" in Assam. The political situation in Assam and boycott of central elections had an impact on the whole country, as a result of which political destabilization occurred in the region and it became necessary to resolve the situation fast. Troops were sent to Assam in order to stabilize the situation and re-elections were held, as a result of which the Illegal Migrants (Determination

by Tribunal) (IMDT) Act was adopted in 1983. The final agreement, which became effective in 1985 regulated the issues of cultural otherness of Assam and regulated anew the issues of citizenship. Yet, what is most important, is that one of the effects of this agreement was resignation of the whole government elected in the 1983 elections, dissolution of the General Assembly and new elections were called for December 1985, with the application of new criterion of establishing citizenship.²⁸ Therefore, for the second time in the 20th century, the existence of the Indian state and its internal stability was threatened, owing to exercising of identity rights by indigenous people.

The second problem was a long political debate within the committee of national minorities, in which two main social groups, namely, Muslims and Scheduled Castes, clashed. At the turning of 1949, social consultations over the constitution draft, were held with particular minority groups, which had their representatives in the Constituency regarding their position about safeguards and guaranteeing seats in the parliament. The issue concerned mainly the Muslim community, the representatives of which stated that they did not need to be guaranteed such right in the constitution. The consultations did not bring any effect, since Muslims and Sikhs were unable to develop one position. As a result of the said committee's and the advisory committee's work, the position of ethnic groups was shaped in the constitution as follows: Scheduled Castes received reserved seats and the right to vote in general elections, and also to participate in those elections. Indian Christians and Parsees were not rejected and not granted any special rights at the same time. Anglo-Indians obtained rights to preserve their own educational system and a privileged position in their access to some administrative (public service) positions. Sikhs and Muslims were not given any privileged position, pursuant to Art. 292: reservation post service, reservation posts in the Cabinets, creation of the administrative machinery to ensure adequate supervision and protection of the

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A. Roy, *Mapping Citizenship in India*, Oxford 2010: p. 38.

²⁷ Scheduled Tribes and Scheduled Castes are recognised as per provisions of Art. 341(1) and 342(1) of the Indian Constitution. According to both legal norms, this is up to the President of the state to specify the castes, race and tribes or parts of the group which Indian constitution is granting some special provisions and guarantee state support, Chapter XI Special representation for the service of SC/ST, <https://dopt.gov.in/sites/default/files/ch-11.pdf>, visit: Auguste 17, 2019.

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A. Roy, *Mapping Citizenship in India*, Oxford 2010: pp. 98 -106

minority.²⁹ The Scheduled Tribes were in that time disregarded by the lawmakers and until 1989, when the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, was passed, and revised in 1995, when the new one was passed.³⁰ This leads us back to the statement made above that in order to secure its domination the dominant group in the Indian state had to fight against indigenous people interest and to deny their rights. The Indian state, built historically on the caste system, is still especially sensitive to such matters. The Assam incident proved that the state is not willing to accept diversity within its borders. However, the position of indigenous people, their internal strength, the ability to organise themselves and political implications of such group for the state's stability will usually lead to the following three scenarios: detachment of a particular territory from the mother state, recognition of some ethnic minorities' rights, and full assimilation of such group with some secured distinctive rights such as legal religious freedom. The first scenario has already happened and the third scenario is anticipated by the state and the state policy is aiming to achieve this goal. The second scenario, mostly anticipated by the ethnic minorities, is now denied by the state and the state is not willing to go into that direction.

A much different approach to the rights of indigenous peoples exists in the People's Republic of China, where philosophy of filial piety is dominant and also the state construction is different than India. The constitution of China effective since 1982, amended in 2004, contains an open catalogue of rights and freedoms granted to citizens and nations within territorial boundaries of the People's Republic of China. Chapter II includes provisions concerning human rights, such as the right to life, freedom, property ownership and the right to equality of the citizens of the People's Republic of China. This catalogue of rights and freedoms attributable to every

citizen of China. It means a rise in the importance of human rights, which presently constitute the foundation of the state, whereas earlier, through included in the constitution of 1952, were one of numerous principles of state functioning. The constitution distinguishes in Art. 33 the equality of all citizens towards law; Art. 4 includes the principle of equality of all nations; and Art. 5 states equality of every human being towards any other human being. Also, legislation recognised the equality of individuals and organizations, whereas Art. 48 of the constitution provides for the equality of women and men in access to political, cultural and economic spheres of life. Equality within the scope of political rights is also crucial.³¹ On the other hand, Art. 34 includes the principle of political equality. It should be emphasised that the interpretation of the above-mentioned provisions is crucial, as since 2000, they have been understood not as the rights of townsmen or peasants (everyone is equal in their place of residence), but as rights independent from the place of residence, origin, race and religion.³²

However, the People's Republic of China is not a homogenous country and is populated by about 56 recognized ethnic groups, including 44 enjoying limited autonomy granted by the state based on the filial piety traditional approach. Indigenous people in China are referred to as "autonomous

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R. H. Retzlaff, 'The problem of communal minorities in the drafting of Indian Constitution', in R.N. Soann ed. *Constitutionalism in Asia*, New York 1963, pp. 71 -72.

³⁰ The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, <https://tribal.nic.in/actRules/SCST-Rules1995.pdf>, visited: Auguste 17, 2019.

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The aforementioned amendment to the Constitution related directly to the events of 2003, and specifically March 2003. On 17 March, in the city of Guangzhou, a 27-year-old Sun Zhigang, who stayed in an internet café after dark without his temporary residence card, was arrested by the local police. He was treated as an illegal immigrant. He died after a few days as a result of injuries he suffered as a result of brutal beatings in prison. Owing to an article published in the *South Metropolitan Daily*, the public opinion became interested in Sun's case and a national campaign began leading to punishment of those who caused Sun's death. One year later, the Chinese government decided to reform the constitution and detail the issues of human rights covered by the constitution. The government decided to depart from the traditional perception of the individual in the Chinese law "infected" with Confucianism as a dogma of superiority of shared rights over individual's rights; an individual should subject his/her rights and himself/herself to the common good. Mentality change and a wider access to "western" knowledge have enabled opening of the Chinese society to human rights. Q. Zhang, *The Constitution of China: a contextual analysis*, Oxford, 2012, pp. 70, 197 - 220.

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Q. Zhang, *The Constitution of China: a contextual Analysis*, Oxford 2012: p. 198

nations," which, on the basis of the declaration of the Peoples Liberation Army of October 1947, acquired the right to be joined freely to China. The state policy towards indigenous peoples was sanctioned in the same period, where, without opening a discussion on the right to national minorities' self-determination, limited rights to their own identity were guaranteed. The legislator cleared separated minorities from the predominant Han group and granted them rights not within one Chinese nation, where one group acquires certain privileges, but as an independent nation in one united states. The highest freedom and the right to decide were granted to the Han group, whereas other groups function on the basis of the Outline for Implementation of Nationality Regional Autonomy.³³ In consequence, five autonomous regions were created, having the right to self-governance (Art. 112), 140 autonomous areas, 31 autonomous prefectures and 104 autonomous municipalities. They have the right to regional self-governance, which includes, inter alia, the right to use, record and develop their own language, right to respect, preserve and practice own culture, traditions and customs.³⁴ Autonomous nations were also granted the right to have their own representative in the party and local bodies of state administration. They have also the right to run their own financial policy.³⁵

Not all autonomous nations, however, have been granted the right to self-determination. The Tibetan minority was denied the rights which are most important for its identity, namely, the right to practice religion and freedom of religion. Despite significant weakening of the communist ideology, the government still desires to control strongly the beliefs of the population living on the Chinese territory, which, in reality, leads to an increasing aggression and separatist tendencies

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introduced in 1952 and repeated in the constitution and the Law on National Regional Autonomy in 1984.

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The right includes also the obligation, on the part of the government, to guarantee them the right of access to the government administration and running court proceedings in their own local language.

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Q. Zhang, *The constitution of China: a contextual analysis*, Oxford, 2012, pp. 110 - 11.

among indigenous peoples. Introduction of the prohibition of religious freedom has led in Tibet to uncontrolled riots and growing separatist tendencies in this region, where the population their made an attempt at separating from the state. Zhang even stated that the lack of warranting the freedom of religion to indigenous peoples is a barrier to the unity of the Chinese state.³⁶

In general terms, however, the China example shows that from the legal perspective, the state is able to accommodate ethnic minorities within its borders without actually losing the general power. Shifting the competence between the state and the organized minority will (in theory) allow the minorities to obtain minimum control over their members and to preserve their identity and cultural integrity. As has already been pointed out, the position of indigenous people within the Chinese borders depends on the state's interest in having such group, on the one hand, and the ability of such group to organise itself and the ability to assimilate some elements of the dominant tribe structure without losing their identity, on the other. When the state is not willing to recognize the rights of ethnic minorities, like in case of Tibet, it will lead to an internal conflict the final result of which will depend on many factors. What can be observed in the political structure of such state is that ethnic minorities and the state have decided to compromise: they have the right to express their self-determination, but within the frameworks of state structure created by the Han tribe. This mutual compromise is not supported by the state's willingness to recognize ethnic minorities' rights, but it relies on the state's necessity to safeguard its integrity and dominant Han tribe's position. It follows the tradition of filial piety, but in a limited way. The state is not fully interested in negating ethnic minorities' rights to self-determination, unlike in Bangladesh or India, where the state is seeing a greater risk in such recognition and is strong enough to suppress ethnic minorities' demands to recognize their rights. In case of China, also economic factors may

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ibidem, pp. 240 - 242.

be beneficial, together with the tendency to secure integral and external power towards blocking the most dominant ethnic groups.

approach, it can lead to state de-stability and denial of indigenous peoples' rights.

4. Concluding Summary

Assessing the foregoing cases on the grounds of international law, we should recognise that a mere guarantee of the right to identity to indigenous peoples does not *de facto* lead to state destabilisation. Reasonable granting of those rights and guaranteeing respect for them will *de facto* not cause separatist movements.

Recognition of that right on the international area will undoubtedly strengthen the position of indigenous peoples, but internal legal regulations could also prevent any movements which might disintegrate the state. The India example as the mixture of Western ideology and Gandhi philosophy, evidences that forcing assimilation or a full adaptation of the culture of dominant ethnic group can easily lead to internal conflict and state destabilisation. Disintegration is a process caused by an erroneous internal policy. The approach based on the filial piety looks in favour of the indigenous identity rights; however, it has its flaws, since it does not focus on indigenous people as a socially integrated entity but as an association of families. However, the filial piety philosophy accommodates indigenous people in the state as independent from the state body and secures their rights as well as their autonomy. Also, the *dharma* concept, with some modification, can secure the indigenous people's right to identity, as it eliminates the state administration's power over its subjects. The *dharma*, understood as the will of all people, leads to a non-violent state, in which the government represents an overwhelming majority of people,³⁷ however, it can still lead to the supremacy of a dominant group. This leads to the conclusion that the traditional approach to the state model based on the state Asian tradition and philosophy will, in some way, secure the state's stability and indigenous peoples' rights to self-determination. However, when it is mixed with the Western

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A. Pasricha, *Rediscovering Gandhi vol 4: Consensual Democracy: Gandhi on state power and politics, Gandhian studies and peace research series*, Concept Publishing Company 2010: pp. 13.