

# The Indigenous Rights State

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## Introduction

The notion of indigeneity is problematic in deployment because it is indeterminate in meaning. It retains political potential if it is not deployed as a global category to ground a general or universal right of indigenous peoples. Its potential lies in pursuing each particular case of indigenous rights-claims locally: within the nation state. This alternative to legal internationalist indigenism is an “indigenous rights state”: a metaphorical state of self-selected activists who advocate for indigenous internal self-determination within the corresponding nation state. Just as every nation state is significantly different from every other, and just as local goals differ greatly from community to community, so is every indigenous rights state unique.

To develop my proposal for an “indigenous rights state” as a means of advancing relevant political interests, I address (1) the political challenges of indeterminacy in politics, (2) the untenable notion of a general or universal right of indigenous peoples, (3) the social construction of indigeneity as a political act in the nation state, (4) possibilities for indigenous internal self-determination in the nation state, (5) my proposal for “indigenous rights states,” (6) and three issues any indigenous rights state confronts: securing individual rights in the context of group rights; the inherent tension between group rights and political liberalism; and the fraught relationship between the idea of an indigenous rights state and the legal, moral, and political aspiration to normative internationalism (the aspiration of the human rights idea, for example).

## 1. The Political Challenges of Indeterminacy

One widespread understanding of *indigeneity* refers to an abiding distinctiveness: to objective or immutable or freestanding, abiding, characteristics of a certain kind of people, “indigenous” people, peoples somehow originary in contrast to other members of the same evolved human species who are not “indigenous.” Yet any attempt to specify a general meaning for this term fails. None of the following questions, for example, have definite, unequivocal answers capable of consensus among scholarly observers, let alone among the affected groups:

- Can a group acquire indigeneity or lose it?
- Are there degrees of indigeneity?

- Can indigeneity be extended to groups outside the category (groups not previously regarded as possessing indigeneity)?
- Is an indigenous population an ethnic minority or is it something else altogether?
- Is a “first people” indigenous but not an autochthonous group (such as the Bushmen)?<sup>1</sup>
- To qualify for the status of an “indigenous” group, must an indigenous group live together in a particular, delimited territory?<sup>2</sup>
- Is “indigeneity” some particular type of diversity within a political community distinct from other types of politically relevant diversity?<sup>3</sup>
- Is “indigeneity” some kind of biological category?<sup>4</sup>
- Are “indigenous” peoples necessarily defined by the experience of “settler colonialism”?

No single definition has been embraced consensually by those who regard themselves as indigenous; none has been embraced by scholars of indigeneity.<sup>5</sup> The same holds for nation states: While the Philippines enshrines the notion of indigenous peoples in its state documents, China’s government rejects the term for what it calls China’s “national minorities.” The governments of Bangladesh, India, Indonesia, and Myanmar regard all members of their respective populations as “indigenous,” none a particular kind of group embedded in a larger society. Some peoples in Africa describe themselves as indigenous in ways incompatible with various of the internationalist understandings on offer (Nyamnjoh 2007). A coalition of ethnic minorities in Thailand identifies members’ indigeneity with the rise of the modern Thai state, which in turn views this coalition of ethnic minorities as illegal migrants (Morton 2017).

If no single trait or feature is necessary to the definition of the term *indigenous* (and none is agreed upon), and if traits featured in one understanding are not featured in others—for example, claims to being the first inhabitants of a territory, or to having suffered colonization by foreign powers—then the term is indeterminate in meaning. It is indeterminate for individuals and groups, for those who identify as indigenous and for those who do not, for nation states as well as for cultures and communities.

The term is usually a claim to difference of some kind, marking off the minority indigenous communities from the larger, nonindigenous communities in which they are embedded. Thus no one argues that, as members of a species that evolved in Africa around 200,000 years ago (and then populated all other continents except Antarctica between 50,000 and 80,000 years ago), all humans are equally indigenous *as a species*. But what that difference might be, and of what magnitude, is always and everywhere a

<sup>1</sup> Cf. Nyamnjoh 2007.

<sup>2</sup> For example, most self-identified indigenous Australians live in towns and cities rather than in a particular territorial community (Taylor and Biddle 2008).

<sup>3</sup> Nigeria and Canada claim that they each regard internal diversity adequately and that the addition of indigeneity would be otiose.

<sup>4</sup> Consider, for example, the Rehoboth Bastards of Namibia, descended from primarily Dutch men from the Cape Colony and Khoi and other African women; they regard themselves as indigenous.

<sup>5</sup> Absent a universally accepted definition of indigenous peoples, the nation state can always argue that it can best decide the issue. And in the past, “states would decide who constituted indigenous ‘people,’ thus ignoring the emphasis on self-definition that had emerged from over 20 years of debate in UN fora” (Oldham and Frank 2008, 7).

matter of significant disagreement. Many other differences are not a problem: Without loss of identity, indigenous groups may identify with their group of origin but simultaneously with the larger, surrounding society, just as they can assimilate some of that surrounding society's values, ways of life, and political commitments. Indeed, some degree of assimilation to the largest of surrounding societies, the nation state and its cultures—assimilation, for example, through schooling—sometimes might even contribute to the emergence of indigenous identity and the quest for indigenous rights.

One goal of making distinctions is political: Which groups in a political community will bear rights, for example, and what kinds of rights vis-à-vis other communal groups? Precisely a politics of *difference* may allow a community of *identity* to emerge, for example “natives” in distinction to foreign “settlers” (where differences between the two may include a gaping maldistribution of rights and other forms of inequality).

Another goal of marking differences: to facilitate an indigenous group's attainment of the identity to which it aspires.<sup>6</sup> And because group identity is always particular, because each group's identity as indigenous is unique, different indigenous groups do not identify as indigenous in the same way. Like membership in the contemporary nation state, membership in an indigenous people rests on a particular framing of a range of particular phenomena, some of which I discuss.

Hence claims about all indigenous peoples as such, claims that deploy a global notion of *indigenous*, undermine the differences central to any politically usable notion of indigeneity. Consider the claim of “more than 370 million indigenous persons all over the world” (Oldham and Frank 2008, 5); or that “indigenous peoples constitute about 5 per cent of the world's population [...] spread across over 70 countries” or that “indigenous people make up only 5 percent of the world's population, but 15 percent of the world's poor” (Hammer 2015, 454). Such claims undermine their implicit assertion of the difference between indigenous and nonindigenous peoples. They do so by homogenizing indigenous groups *inwardly*—as if all members of an indigenous community were like-minded or shared the same self-understanding as indigenous. They equally risk homogenizing groups *outwardly*—as if all indigenous communities were indigenous in the same way.

But if, in any given case, the term *indigenous* is specified in ways peculiar to a particular group—whereby there is no single or necessary way to specify any given indigenous group—then the term is no longer indeterminate. Each time it is employed in this manner, it is used with a particular referent. Such usage reflects the fact that each indigenous group is distinct from every other. And it need not imply that any group is homogenous internally.<sup>7</sup>

So why use the same term for a category in which each referent is different from every other? After all, instead we could posit general features already widely used in the discourse on indigeneity, for example: “first-order connections (usually at small scale) between group and locality,” connections of “belonging and originariness and deeply felt processes of attachment and identification” (Merlan 2009, 304). This approach allows for very different kinds of connections, forms of belonging, and relationships to territories. For among groups that describe themselves as indigenous,

<sup>6</sup> Identity politics is fraught with perils. As Eagleton (2000, 129) notes, they can be emancipatory but just as well “intolerant and supremacist,” “deaf to the need for wider political solidarity,” a kind of group individualism as a closed culture.

<sup>7</sup> I develop the notion of indigeneity as both social construct and political tool in Gregg 2019b.

there is no “global attachment” to a locality, to particular ways of life, to particular cultures or social identities or groups of people.

To avoid hypostatizing what is, after all, a social construct, we need to be conscious that a politics of identity and difference is a politics of *consciously* choosing among features, traits, histories, and so forth. Here, none of the choices are necessary in the sense that any group could be constructed in any number of ways (which various ways may not agree or correspond with each other). For example, “assertions of pride in what came to be called *aboriginality* in the 1960s” tended to “downplay ‘white’ ancestry by inverse application of a ‘one-drop’ principle” (Merlan 2009, 309). Here we have choice inasmuch as how one measures indigeneity is a particular choice among alternatives. For example, to say that someone is *indigenous* because he or she is more than  $x\%$  indigenous in descent still confronts the fact that the standard (any particular value of  $x$ ) can only be arbitrary.

If indigeneity is treated as an identity, and if rights advocacy is based on the claimant’s supposed indigeneity, then identity politics is a politics of relations. It is a politics of relations between indigenous activists, on the one hand, and elites, professional sectors, and governmental institutions of dominant societies, on the other. Indigeneity then describes a relation between two or more “peoples,” whereby the nature of the relation is determined by kinds and degrees of recognition or nonrecognition. For example: “indigenouness, independently of biological or cultural continuity, frequently is the outcome of governmental policy imposed from above and from the outside” (Stavenhagen 1994, 14–5, quoted in Muehlebach 2003, 244). Another example: The International Labour Organization (ILO 1989) speaks of “indigenous peoples” as “tribal peoples” descended “from the populations which inhabited the country [...] at the time of conquest or colonisation” (Art. 1) and who, because of that history, remain in need of governmental support to become free of “discrimination,” “force or coercion” (Art. 3), to attain “equal footing” in “rights and opportunities” enjoyed by “other members of the population” (Art. 2), and to preserve “their own customs and institutions” (Art. 8) as well as rights to ancestral lands with their natural resources.

## 2. The Untenable Notion of a General or Universal Right of Indigenous Peoples

Indigeneity treated as an objective phenomenon precludes a general or universal notion of indigenous peoples, such as the notion offered in the United Nations’ declaration of a UN International Year for the World’s Indigenous People in 1992:

The world’s estimated 300 million indigenous people are spread across the world in more than 70 countries. Among them are the Indians of the Americas, the Inuit and Aleutians of the circumpolar region, the Saami of northern Europe, the Aborigines and Torres Strait Islanders of Australia and the Maori of New Zealand. More than 60 percent of Bolivia’s population is indigenous, and indigenous peoples make up roughly half the populations of Guatemala and Peru. China and India together have more than 150 million indigenous and tribal people. About 10 million indigenous people live in Myanmar. (United Nations 1992)

But if, by contrast, indigeneity is treated as a social construction, then indigenous peoples can be understood to be self-defining rather than being defined by others, as in the UN declaration. On the one hand, who better than self-identifying indigenous groups to define their indigeneity? Hence the reasonableness of the International

Labour Organization's (Art. 1 ILO 1989) provision: "Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply" (a convention that, of course, binds only signatories). On the other hand, self-definition is a matter of political strategy (cf. Peeters 1993). Political is the question: Which groups' self-definition will find recognition within their political community? Why is it that some groups can self-define but not others? While no global discourse of indigeneity can answer this question, a local discourse (one within a nation state) might: by addressing claims to indigeneity locally, not globally, with reference to very particular factors.

Treating each local case as unique offers the promise of extending political agency to self-identifying indigenous groups. Historically, many such groups have been deprived of agency. Some have been deprived where attempts to construct a "vibrant international indigenous peoples' movement in the 1970s" were "driven primarily by groups from areas of European invasion and settlement" (Kingsbury 1998, 421).<sup>8</sup> Others have been deprived where the "global native rights movement has been led by residents of the northern hemisphere commonwealth countries" (Brysk 2000, 101). In short, indigenous peoples are deprived of agency if they are captured by social constructions not of their own making and with which they disagree (whereby sometimes the addressees of the constructions eventually adapt, adopt, and reproduce the construction).

### 3. The Social Construction of Indigeneity as a Political Act in the Nation State

If indigenous peoples can only be what the relevant human communities define them to be, then any definition of them is *political* in the specific sense of a contestation of values. That is, political commitments are morally relative and culturally perspectival; they are not value-neutral, ahistorical, or somehow simply given. In this sense, politics often involves competition among rival commitments. Correspondingly, the term *indigeneity*, invested in any given usage with particular value commitments, is not value-neutral. As a social construction, it is itself historically contingent, culturally perspectival, and morally relative. Hence the political question: Whose values should determine the content of any particular definition of an indigenous people?

There cannot possibly be one single answer to this question, of course. Ronald Niezen (2003, 221) points out that the values determining the content of any particular definition of an indigeneity likely come from multiple sources: The idea of indigenous peoples "developed principally within Western traditions of scholarship and legal reform" and has "nurtured the revival of 'traditional' identities" (ibid.). Further, indigenous peoples' movements have drawn on ideas developed "largely by non-indigenous sympathizers" (ibid., 217).<sup>9</sup> Indeed, indigenous movements have found emancipatory potential precisely where one might least expect it: in some of the "ideas of dominant societies," indeed even in colonial history's "oppressive ideas about the colonized" (ibid.).

<sup>8</sup> Here is just one example of how relevant groups differ markedly from each other: The Sami of Norway, Sweden, Finland, and Russia were not invaded in this sense.

<sup>9</sup> Nonindigenous advocates for the indigenous intellectuals and professionals; see Ramos 1998 regarding Brazil.

In a world in which the basal unit of political organization is the nation state, the core venue for the political contestation of competing values is the nation state. Nation state recognition of claims by indigenous groups, if effective, will be more effective than any recognition offered by international instruments, whether declarations, treaties, or law. For the nation state, unlike the international arena, can make the term *indigenous* determinant, hence useful politically. In later pages I argue that *making the term determinant* is best pursued as a bottom-up politics in which the self-identified indigenous peoples achieve meaningful consultation with the state toward cooperation that accounts, through compromise on both sides, for some of the respective interests of both the indigenous peoples and the nation state.

To be sure, differences among nation states are crucial; some respond to activist movements with support and recognition; others respond with imprisonment and torture. The prospects for indigenous rights always depend crucially on the particular nature of the relevant nation state at any given time. While liberal states offer greater promise for responding positively to indigenous movements, they hardly guarantee a positive response. While authoritarian states offer much less promise, sometimes some authoritarian states have their own reasons for allowing such movements and for responding to them in some positive ways.

Some nation states offer potential for the juridification of indigeneity—that is, for anchoring recognition of and rights for indigenous peoples in the domestic legal system. Juridification can take a wide variety of forms, such as acknowledging a group's claim to be indigenous in some mutually agreed upon sense, or recognizing some parts of indigenous customary law, or rights to land and its development, or protection from predatory extractivists, or even to self-isolation from the larger, non-indigenous community.

Further, the nation state, quite unlike international organizations or NGOs, in some cases may assume responsibility for indigenous peoples living within it in ways that can enable indigenous self-determination. Thus it might take responsibility for the social and economic problems generated by the systematic exclusion of indigenous peoples, for example by integrating them better into the educational system and the labor market. It might take some responsibility for dealing with problems internal to some indigenous communities, from poverty and unemployment to domestic violence, sexual abuse, alcoholism, and drug addiction.<sup>10</sup>

#### 4. Indigenous Internal Self-Determination in the Nation State

Above all, the nation state—unlike international organizations or instruments—can recognize a group's status as indigenous toward framing that status as entailing legal rights to some form of internal self-determination within the nation state.<sup>11</sup> On the one hand, *internal* self-determination does not destroy the nation state in its self-determination vis-à-vis other nation states. On the other hand, a group cannot self-determine internationally but only locally, that is, within the nation state.

Indigenous groups in some nation states may be able to advance their claims by means of an immanent critique of that state and its dominant society. That is, groups

<sup>10</sup> For a discussion of the Australian case, see Altman and Hinkson 2007.

<sup>11</sup> The present article elaborates the proposal for indigenous self-determination I first offer in Gregg 2017a.

might call attention to disparities between the principles and values the society claims for itself and its failure to extend them to the indigenous peoples. In some states, they might perceive themselves in part through the lens of rights promised by liberal democratic society, such as self-determination and freedom of identity. They might then join this lens to one more peculiar to their particular community, as follows.

Indigenous groups seeking to advance their claims by engaging the corresponding nation state confront any number of political decisions. For example, does the group seek equality with the wider population or perhaps special rights not available to that population? From a standpoint of legal equality among citizens, liberal societies generally view special rights skeptically. Norway's Sami people sought not special rights but language rights and their own, consultative parliament (without executive powers). They found widespread support among the general population and were thus able to conduct an immanent critique of a society that has not always followed, adequately or consistently, principles to which it subscribes, including legal equality.

Internal self-determination is to be distinguished from external. A right to *internal* self-determination, as a collective right, entails rights of self-identification but also to some degree of group autonomy and some degree of self-government, such as administrative or local autonomy over matters such as health, education, and public services. Self-determination in local affairs may extend from education, employment, culture, and religion to housing, employment, and social welfare.

To be sure, most states may be reluctant to grant such rights. If so, they likely are even more reluctant to allow internal self-determination to extend to the natural environment, for example in the exclusive possession and management of "traditional" indigenous land and its resources. Yet the self-determination of indigenous peoples may often entail control over territory where cultures and ways of life may be viewed (by indigenous and nonindigenous alike) as dependent on access and rights to that territory and its natural resources. Self-determination in this context refers to an indigenous people's deciding some aspects of its own future as well as some forms of development (unless the form of self-determination sought is a right to self-isolation).<sup>12</sup> *Some aspects but not all*: The regulation of education, say, or land rights, may remain in the legal and administrative purview of the nation state if the state understands such interests to be national in scope.

A right to *internal* self-determination is distinct from a right to *external* self-determination, namely, secession leading to a territory's international status as a sovereign entity. If a right of indigenous peoples to *internal* self-determination is necessary for the enjoyment of other group rights, including rights of the individual, then a group right to *external* self-determination as secession would in fact undermine the group rights project.

Even if a group right to self-determination is not constructed as a right to secession, two concerns remain. First, an indigenous people's right to internal self-determination cannot be realized in a political vacuum. Self-determination is implausible as a private grant of a self-identifying indigenous people to itself. On the contrary, self-determination is possible only as something granted or recognized by the relevant nation state. That grant or recognition is plausible only with various

<sup>12</sup> I address the issue of indigenous peoples seeking self-isolation in Gregg 2019a.

restrictions. An indigenous community may have a particular way of life; restrictions on aspects of that way of life will be particular to a given people, along the various dimensions—social, cultural, economic, spiritual, culinary, healthcare-related—that determine that way of life. State-imposed restrictions need to be sensitive to the particularities of any given way of life. Restrictions formulated in universalistic ways cannot be sensitive. For example, international law binding on all countries cannot be sensitive to the particular circumstances obtaining in any one country. In particular, international law cannot recognize the ways in which an appropriately constructed form of self-determination may differ from indigenous community to indigenous community. By contrast, a given state's sensitivity to the particular features and circumstances of the country's indigenous peoples is sensitivity to a fundamental tension. I speak of the tension between a group rights-pluralism that recognizes the possibility of more than one plausible conception of what group rights are, on the one hand and, on the other, the aspiration for what may be impossible: a universally valid normative basis for indigenous group and individual rights.

Second, the idea that all groups or peoples within the nation state have an *equal right* to self-determination undermines the nation state. If *all* groups and peoples were accorded a right self-determine, where self-determination meant secession, then many if not most nation states would cease to exist.

## 5. The Indigenous Rights State

The nation state is the sole venue for possible group rights; it alone can recognize and protect them. Not every nation state will do so, of course, but only those constructed to do so (a construction I now turn to). I propose that indigenous peoples author their own group right to self-determination and then seek state recognition and juridification of such a right.<sup>13</sup> The question is: How can any particular nation state be challenged toward recognizing a right of indigenous peoples to some degree of internal self-determination?

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP 2007) proclaims indigenous peoples' right to self-determination. Article 5 declares their right

to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 46 declares:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the UN, or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the integrity or political unity of sovereign and independent states.

These provisions are multiply problematic. Article 4's blanket claims about rights neglect a consequential fact: the vast array of different kinds of states and, thus, the

<sup>13</sup> I develop the idea of addressees of human rights simultaneously as the authors of those rights in Gregg 2012; I defend it against critics in Gregg 2014 and 2017b.

very significant differences, from state to state, in prospects for state recognition of Articles 4 and 46. UNDRIP blithely assumes homogeneity across different indigenous peoples and their circumstances. Typical for international instruments, it unquestioningly and unreflectively follows a top-down logic: Rights appear to be the gratuitous grant of an international elite, with no role for local indigenous agency. Further, Article 46 could be interpreted to negate all the promises of Article 4 if, as seems likely, the right to self-determination promised by Article 4 in some ways necessarily qualifies the state's "integrity or political unity" (even though it need not destroy it). A group's internal self-determination diminishes the state's sovereignty to the extent that the indigenous people, and not the state, decide some matters otherwise decided by the state, from matters of justice to education to territorial regulation. Further, UNDRIP cannot usefully apply to "indigenous peoples" as such because the term is indeterminate and contested.

I propose an alternative to UNDRIP's conception of rights of indigenous peoples: what I call an "indigenous rights state" (IRS). It provides a means to state recognition of indigenous rights as an aspect of the nation state's domestic legal order and constitution. It does so without relying on indiscriminately homogenizing, and usually unenforceable, international instruments.

An IRS is a polity of the political imagination: It is not a territorial entity but exists in the minds and purposes of its self-selected, activist members, in this case members of the self-identifying indigenous community. As an imaginary polity, the IRS orients the activists' behavior in advocating for indigenous rights vis-à-vis the corresponding nation state. The term *imagined* here does not mean "not real" but rather "socially constructed." The IRS socially constructs indigenous rights and does so by means of a social and political movement addressed to the nation state as well as to the nonindigenous community. This is a kind of *politics by metaphor*, as I will explain.<sup>14</sup>

As a movement by its adherents, an IRS might be analogized to a backpack. Participants in an IRS carry their self-authored indigenous rights with them wherever they go in the nation state. In this way they performatively transfer the nation state's legislative function to themselves, but only with respect to the indigenous rights they claim for themselves. With like-minded political confrères, indigenous advocates work toward substituting, as much as possible, the status quo with their imagined alternative. They do so first of all by granting themselves the very rights they seek from the state. A group that self-authors its own rights over against a state that does not recognize those rights engages in demonstrative advocacy. Advocacy through self-authored rights involves symbolism: The indigenous rights state, as a *metaphorical* state of self-selected activists, symbolizes a nation state that has integrated indigenous rights into the domestic legal order (moving from recognition among fellow activists within the IRS social movement to recognition by the addressees of that movement, namely, nonindigenous citizens and the nation state). It involves solidarity among indigenous advocates, substituting the nation state's prepolitical solidarity generators of blood and ethnicity, or language and religion, or beliefs about a shared fate, with the self-conscious, politically reflected solidarity of an indigenous group that seeks recognition and rights on the basis of its particular indigeneity. And it involves appeals to the public in multiple senses of *public*: It seeks

<sup>14</sup> I first develop the notion of a human rights-promoting politics of metaphor in Gregg 2016; I elaborate on it in Gregg 2020.

public, communal acknowledgment of the indigenous rights advocated by the IRS, that is, local, domestic recognition in a public political space shared by recognizers and recognized alike—for without eventual recognition by the movement's address-ees, self-authored rights fail their goal.

For the IRS, political imagination is political behavior. By *political behavior* I mean that the participants themselves formulate and communicate their demands. They do so often in an environment hostile to what they advocate. They do so by creating a space for themselves to promote the addition of special indigenous rights to general national citizenship rights. By mobilizing political commitment within the IRS, they attempt to generate the solidarity and trust among diverse advocates (who will not agree on all aspects of constructing their own indigenous rights) that fuels political advocacy.

I emphasize two features of this proposal: (a) an IRS functions in ways analogous to contemporary phenomena in complex modern societies and (b) its success depends crucially on the corresponding nation state.

(a) An IRS exercises “deontic powers.”<sup>15</sup> By *deontic* I mean a form of recognition that invests a person in an office with powers that bind citizens. Consider by analogy members of a liberal constitutional democracy. They regard themselves as bound even by those judicial decisions they view as wrongly decided. By regarding themselves as legally bound, they recognize the binding (or deontic) normative power of the “status function” (defined below) that a political community assigns to judicial holdings. Such decisions are binding not because of anything inherent in the decisions themselves. They are binding because of the deontic power of the court’s formal legal status, as defined by the constitution, and by its status as defined over time by historical practice (in the United States, for example, by the custom of judicial review). The decisions are binding because the community itself freely regards them as binding.

By *status* (in the term *status function*) I mean a rights-bearing capacity that a political community can ascribe to individual members of the community. An IRS ascribes indigenous rights-bearing status to members of its own group. An IRS advocating a right to indigenous self-determination ascribes that right to all members of that particular self-defined indigenous people.

A *status function* is a work of collective intentionality. Members of a community—in this case, an indigenous people—generate, recognize, and perpetuate a status function collectively. Every person born into a particular community is born into any number of already existing social institutions each with status functions with deontic powers. Status functions with deontic powers are vital to social stability because they define norms of behavior. For example, a person in office has a status function with regard to official powers that she loses when she leaves office.

A status function is possible only if embedded within a system of social recognition. Recognition of status functions has the force of normative obligations. These may be socially enforced duties, requirements, permissions, authorizations, or entitlements. Status functions carry deontic powers in that “they carry rights, duties, obligations, requirements, permissions, authorizations, entitlements, and so on” (Searle 2010, 8–9). They are “positive” as rights and “negative” as obligations. They

<sup>15</sup> With respect to deontic powers and status functions (but not with respect to indigenous rights or indigenous peoples), I draw here on Searle 2010.

are essential to social life; once recognized, deontic powers “provide us with reasons for acting that are independent of our inclinations and desires” (ibid., 9).

(b) Indigenous rights framed in terms of an existing relationship between the individual and the state will never obtain in fact if the relevant nation state does not recognize the rights claimed by the indigenous people in question. And recognition within any political community is never guaranteed, even where the legal order provides for recognition. Gaining recognition for rights claimed by nonelites and marginalized groups is usually a matter of daunting political and social struggle, often unsuccessful. An IRS is one form of organizing that struggle. It does not preclude other forms. For contingent reasons, it may succeed in some cases but fail in many others. The initial goal of creating a community of activists is itself challenging, let alone the ultimate goal of transforming the corresponding nation state and its political culture. But as a *bottom-up* approach *internal* to the indigenous community, it may advance the project for indigenous rights in ways that an internationalist, top-down approach, external to the political community, cannot (even as one need not preclude the other).

A particular IRS seeks to transform the corresponding nation state. That state inhabits a legal space and exercises potentially unlimited legal authority within it. The nation state’s exclusionary logic is the fact that national sovereignty excludes all other legal authorities (with the few exceptions of some international treaties under some circumstances and, in the case of some weak states, impositions by some powerful states). This logic has a powerful entailment: that no citizen enjoys indigenous rights if the nation state in which he or she resides declines to offer them. The nation state’s exclusionary logic too easily undermines the indigenous rights project.

By contrast to the nation state, that project operates with a logic of inclusion. Indigenous rights can be inclusive of indigenous persons in ways not captured by their citizenship in the nation state. They can be inclusive of members of the indigenous community because they are particular to that community: self-determination that is particular to one community within the nation state. While a right to self-determination, at an abstract level, might be the same for all indigenous peoples, for each indigenous people self-determination is unique to that people.

While the IRS is metaphorical (it needs no physical or topographical sovereignty to be a sphere for indigenous rights-advocacy), and its members are “virtual citizens,” the rights that indigenous advocates “perform” among themselves are real within the IRS. They function as an argument, example, and exhortation addressed to the corresponding nation state, and to its nonindigenous population, for including indigenous rights within the domestic legal and social order.

A right to indigenous self-determination *internal* to the nation state means: the incorporation of a right to indigenous self-determination into the national constitution. That incorporation would not preclude internationalist advocacy for indigenous rights as well. While the internationalist approach argues that the state should not be free of all nondomestic legal restraints in its treatment of its indigenous citizens, each IRS argues that national sovereignty cannot justify the denial of special rights to indigenous citizens.

## 6. Three Issues Confronting an Indigenous Rights State

Each IRS, in ways appropriate in its particular nation state, needs to show how special rights, above all a right to internal self-determination, need not undermine equal

citizenship of all members of the nation state. Each IRS needs to show how that particular right can be *integral* to the self-understanding of its particular nation state. In this difficult, complex, and uncertain attempt, an IRS must address three sources of tension: (1) between individual rights and group rights, (2) between group rights and political liberalism, and (3) between internationalism and an indigenous rights state.

### *6.1. Tension between Group Rights and Individual Rights*

Group rights for indigenous peoples could be constructed in any number of ways. I consider a group right to indigenous self-determination as a two-way street connecting individual rights with collective rights. The social construction of an indigenous right to self-determination would be defined in part by its boundaries: bounded with respect to the regulatory autonomy or cultural diversity allowed to the indigenous community vis-à-vis the larger national community. Some of these boundaries might chafe: rights can be “double-edged” in the sense that the rules of the game “will not suit all indigenous societies. There are losses and gains in trading in the currency of [group] rights, as there are with [...] self-determination” (Thornberry 2002, 428). Some indigenous communities may well reject any group rights

inconsistent with some of the cherished features of some indigenous societies: the authority of elders (which can stand in the way of representative democracy), the duty of children (especially as it applies to labor and the “cruelty” that can be found in some rites of passage), and the subservience of women (expressed above all in marriage duties and exclusion from politics). (Niezen 2003, 220)

In short, collective rights could provide an indigenous people with an autonomy that allows for abuses of individual members. The Corte Constitucional de Colombia claims that in nonindigenous communities, “punishment is inflicted because a crime has been committed,” whereas in the indigenous communities it has been concerned with, punishment is inflicted to “re-establish the natural order and in order to dissuade the community from committing offences in the future.”<sup>16</sup> In another case, the court draws on testimony of an indigenous person to conclude that imprisonment—a punishment widely practiced in the nonindigenous community—in the case of indigenous lawbreakers should be replaced with forced labor. According to the court, the understanding of slavery (if forced labor under these circumstances can be understood as slavery) is relative, and properly so. No less relative are norms of punishment with respect to type of punishment: Type may properly vary depending on the lawbreaker’s indigenous status. According to the Corte Constitucional, “determination of the severity of a certain penalty,” to “establish whether or not it constitutes torture or cruel, inhuman or degrading treatment, can only be done in light of the circumstances of the specific case.”<sup>17</sup> Important to the court is whether a particular punishment, including those (such as stocks or whips) rejected as unjust by the non-indigenous community, is an “authentic” aspect of the indigenous community’s

<sup>16</sup> Sentencia T-523/97, 15 Oct. 1997 (Colom.), cited in Gómez Isa 2014, 746. I focus here on a Latin American context simply to preserve my focus in Gregg 2017a and 2019a. In Gregg 2019b I discuss indigenous peoples in other parts of the world.

<sup>17</sup> Sentencia SU-510/98, 18 Sept. 1998, par. 57, cited in Gómez Isa 2014, 746.

customs and mores, a punishment the “community itself sees as valuable because it is highly intimidating and does not last long.”<sup>18</sup>

As this example suggests, limits on an indigenous right to autonomy and diversity would surely follow from the legal and moral self-understanding of the nation state and its nonindigenous population. (They are much less likely to follow from international instruments such as UNDRIP, for reasons I explain.) From the standpoint of a liberal democratic nation state, for example, self-granted human rights of an indigenous people are only possible if they allow not only for group rights but for rights of the individual as well. Such a state and its nonindigenous citizens are more likely to accept internal indigenous self-determination that constructed—as a right internal to that self-determining community—an individual right to freedom of conscience, expression, and association. A liberal democratic nation state could not easily accept internal indigenous self-determination if self-determination entailed little or no autonomy of individual members. Such an entailment would contradict the nation state’s emancipatory interest in indigenous self-determination: The liberal goal of allowing scope to the indigenous community for pursuing a way of life, a communal self-understanding, a possessive relationship to traditional lands and their resources, would be undermined by illiberal consequences for individuals. The same could be said for the liberal goal of allowing for diversity within the political community. That is, individual rights have the same logic as various forms of diversity of groups within society: the reasonable accommodation of some kinds and some degrees of difference within a political community. An indigenous community embedded in a liberal nation state would betray that logic if indigenous self-determination entailed no allowance for diversity within the indigenous community. The challenge here is in balancing group and individual rights within the self-determining indigenous community. And the challenge also lies in balancing indigenous collective self-determination with the collective interests of the nonindigenous population and of the nation state. Meeting that challenge would be special rights that help maintain the indigenous community’s fragile ethnic particularism in the face of economic and cultural forces of the larger, surrounding society without violating the right of *all* citizens, indigenous and nonindigenous alike, to individual equality of treatment.

Toward meeting that challenge, indigenous internal self-determination should not extend to complete autonomy within the nation state. For example, to regard corporal punishment as culturally relative—with one standard for the indigenous community and another for the larger community—“would work against the very indigenous populations it seeks to protect and empower” (Gurmendi Dunkelberg 2015, 397). It would do so if “interpretation that defenders of indigenous corporal punishment propose” ended up “subjecting indigenous individuals to a more permissive torture standard when compared to other vulnerable groups” (*ibid.*).

By contrast, the Corte Constitucional de Colombia advocates the “maximization of the autonomy of indigenous communities and, therefore, the minimization of restrictions on those which are essential for safeguarding interests of a higher order.” It does so on the theory that “only with a high degree of autonomy is cultural survival possible.”<sup>19</sup> This argument fails when considered in light of acts which some groups

<sup>18</sup> Sentencia T-349/96, 8 Aug. 1996, par. 2.4.2.2, cited in Gómez Isa 2014, 746.

<sup>19</sup> Corte Constitucional de Colombia, Sentencia T-349/96, 8 Aug. 1996, par. 2.2 (Colom.), cited in Gómez Isa 2014, 738.

at various times have defended as culturally acceptable: slavery (from Genesis 9:25 to Article IV, Section 2, Clause 3 of the United States Constitution, for example), torture (such as the US Central Intelligence Agency's torture of Khalid Sheikh Mohammed, a principal architect of the 9/11 attacks, while in military custody at the Guántanamo Bay detention camp in 2007), even homicide (such as "honor killings" as a cultural practice in Egypt, Jordan, Lebanon, Morocco, Pakistan, the Syrian Arab Republic, Turkey, and Yemen, among other countries). Precisely because such actions are not everywhere understood or defined in the same way, human rights, indigenous and otherwise, must always exceed idiosyncrasy. Precisely because some human rights will conflict with others inasmuch as different rights may well derive from different normative systems, no particular conception of human rights should be hermetically sealed off from alternative conceptions. In the case of female genital cutting, for example, a human rights debate likely pits an individual's right to bodily integrity (conceived as a human right) against her community's right to the preservation of its cultural integrity (also conceived as a human right).<sup>20</sup>

Toward meeting that challenge, one might consider how the liberal state seeks to accommodate individual rights and values within collective rights and values. Experience in the West has shown that allowing individuals freedom of religious belief and practice does not need to diminish the collective interests of different faiths. Indeed, it can support those interests by rendering different faiths equal to each other in terms of legal rights and freedoms, by allowing them to perpetuate the membership of present members and to recruit new members, and by allowing new groups and new faiths to form.

The goal of obtaining nation state recognition for an IRS in the sense of incorporating, into the domestic social and legal order, the rights advocated by the IRS, depends on nation state cooperation. Note that international organizations cannot perform the nation state's function: integrating self-granted indigenous human rights into the only legal order that could guarantee such rights.

## 6.2. Tension between Group Rights and Political Liberalism

While political liberalism can accommodate difference in a variety of ways,<sup>21</sup> it is hardly culturally neutral (Taylor 1994). It is distinctly hostile to forms of difference that oppress the individual, a possibility with many kinds of group rights.

Even then, a group right in the form of an indigenous right to internal self-determination can be compatible with some liberal values, such as defense of a minoritarian way of life, or freedom and scope to advocate in the public sphere for the group's interests through political participation and contestation. Indeed, if a human right to indigenous self-determination is constructed such that individual rights place limits on some collective rights, then indigenous rights are much more likely in liberal democratic communities than in authoritarian ones. If indigenous individuals are equal before the nation state, they are not equal *as indigenous persons* but rather *as citizens*. And that status may challenge some forms and practices of indigeneity, such as special rights and state neutrality vis-à-vis different groups within the polity.

<sup>20</sup> See Gregg 2012, 178–81.

<sup>21</sup> From "differentiated citizenship" (Young 1989) to liberal multiculturalism (Kymlicka 1995), for example.

An IRS might itself be constructed with some liberal features, in part because even a colonized population's contact with the colonializing population may have exposed it (even if unevenly or hypocritically) to such salutary features as the rule of law, due process, freedom of expression and assembly, and rights of the individual vis-à-vis the group.<sup>22</sup>

### 6.3. *Tension between Legal Internationalism and an Indigenous Rights State*

Even internationalist approaches to indigenous peoples tend to be state-oriented. Perhaps one should not be surprised; the United Nations, for example, is an organization of states. Corn tassell (2007, 155) argues that it works on behalf of member states rather than for the welfare of other kinds of political community, reflecting state interests sometimes to the disadvantage of indigenous interests. Further, both liberal and authoritarian states are generally threatened by internationalist claims, such as Article 26 UNDRIP. It provides that "indigenous peoples" have a "right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired," as well as to "own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use," and that states "shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."<sup>23</sup> In considering whether nation states might abide by such provisions, one notes that there is little evidence that states generally become "conditioned [...] to the acceptance of new norms, standards and concepts through participation in international fora" (Minde 2003, 99).

To be sure, the indigeneity that seeks rights by organizing as an IRS will never become a "form of transnational solidarity invading the institutional space of states" or a "counterweight to the hegemonic strategies of states" (Niezen 2003, 198). After all, an IRS does not project indigeneity globally. Nor does it presuppose, across different IRSs, agreement on the term *indigeneity* or on any particular political commitment, values, goals, or even conception of indigenous rights. But like internationalist language, an IRS itself might sometimes have international consequences. Above all, in some cases it might prove useful as a model, or even a standard, for other excluded, minoritarian groups: a model of building international audiences to pressure states that resist discussions important to these groups such as, in the case of indigenous peoples, self-determination and claims to ancestral lands and resources, criticizing exploitative economic powers (foreign and domestic), or identifying ways in which liberal democratic equality may undermine plausible claims for special indigenous rights.

<sup>22</sup> For examples with respect to Australia, see de Costa 2006. In this context Merlan (2009, 316) speaks of "areas in which claims, although perhaps differently grounded in the thinking of claimants (e.g., in originary occupation), can be viewed by courts through familiar lenses (as 'property rights' or special statutory systems and arrangements to guarantee their equivalent)."

<sup>23</sup> Note that the liberal democratic United States, Australia, Canada, and New Zealand voted against UNDRIP as a threat to territorial integrity and national unity, even though all four acknowledge the historical injustices perpetrated against their respective indigenous peoples.

## Conclusion

My proposal for an IRS is a proposal for political localism. By approaching the term *indigenous* and the phenomenon of indigeneity in terms of a potential IRS, indigenous political participants and scholarly observers alike can focus attention on the main addressee of claims to a human right to indigenous self-determination: the corresponding nation state. This focus makes clear that “indigenous rights” are most realistically framed as state-based rights, rather than as global or, if framed as human rights, then as indigenous human rights authored by their indigenous addressees. This is because their possible recognition and protection in most cases rely directly on the nation state. Recognition and protection of indigenous rights also extend to such matters as political representation, duties of consultation, rights to self-government and land, legal pluralism, and affirmative action.

The notion of an IRS is localist in other ways. Outcomes desirable for rights-claimants, the nation state, and the larger society are more realistic, better specified, and grounded where the advocates argue on the basis not of an internationalized, indeterminate notion of indigeneity but rather in terms of particular claims based on the unique features of any given case. Thus one indigenous state may argue for equality, for example, whereas another for restitution in light of historical injustices. And one group may define itself in ways that some other self-defining groups may reject, for example in terms of ethnicity. Further, the localism of an IRS approach is able to address the tension between competing strains of equality<sup>24</sup> and respect for diversity, tension between excluding some kinds of difference but including other kinds.

And yet the localism of an IRS approach does not render it narrowly state-centric. That approach does not place responsibility for indigenous rights, or social and political advocacy of such rights, entirely on the state. It emphasizes bottom-up collective agency and in this way may facilitate and magnify indigenous agency. It recognizes that advocates cannot simply rely on the state or liberal cultural or international instruments to work on behalf of indigenous peoples. Such agency is generally invisible in top-down internationalist discourse, law, and declarations. And it can be obscured by expectations that the liberal culture of international instruments automatically work to benefit indigenous aspirations.

Nor does the localism of an IRS approach rule out indigenous concerns with relevant international forces, such as the role of foreign as well as domestic capital in denying or violating indigenous claims to land ownership and the exploitation of natural resources, let alone such international forces as extractivists, gas and oil interests, illegal loggers, evangelizing missionaries seeking to culturally assimilate indigenous peoples, and narco-traffickers.

Finally, an IRS approach is possible across a variety of different nation states. For example, the relevant rights-enabling conditions in liberal democratic states obviously differ from those in authoritarian states. The former may insist that an indigenous group follow one or the other understanding of human rights standards; an authoritarian government may not. In a liberal state, an IRS may not seek to transcend the constraints of political liberalism, whereas an IRS in an authoritarian state may

<sup>24</sup> Equality can take many different forms: of condition, of outcome, of opportunity; for individuals, for groups; formal (guaranteed rights to something) as distinct from substantive (e.g., economic wherewithal to access formal rights).

well need to transcend some constraints of authoritarianism, such as its general intolerance of movements of political opposition or of diversity in political organization and orientation, content and means. An IRS in authoritarian states faces particular issues of building alliances, mobilizing popular support, and political participation in general. And an IRS approach is possible in different world regions. An IRS in some Latin American contexts may find alliances with movements for democratization (Yashar 2005). By contrast, an IRS in some African contexts may face antidemocratic deployments of indigeneity (Geschiera 2005).

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