

A Socially Constructed Human Right to the Self-determination of Indigenous Peoples

Un constructo social de los Derechos Humanos para la autodeterminación de los pueblos indígenas

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Summary: 1. The social construction of indigenous peoples. 2. Limits on indigenous rights to autonomy and diversity. 3. Internal self-determination of indigenous peoples. 4. An indigenous human rights state. 5. Conclusion. References

Abstract: I propose a human right to self-determination for indigenous peoples as a something in each case developed by the indigenous people and valid only if embraced by that people. That is, I approach human rights as social constructs toward (1) arguing for the social construction of indigenous peoples themselves, (2) with certain limits on indigenous rights to autonomy and diversity even as they construct collective rights for themselves, (3) in this way achieving the internal self-determination of indigenous peoples, whereby an indigenous people would design its own human right to self-determination without thereby undermining individual rights, (4) by means of a social and political movement that I conceive as a metaphorical «human rights state.»

Keywords: indigenous peoples, human rights, self-determination, social construction, individual rights, collective rights, «human rights state»

Resumen: Propongo un derecho humano a la autodeterminación de los pueblos indígenas como algo a desarrollar en cada caso por el pueblo indígena y válido sólo si es aceptado por ese pueblo. Es decir, abordo los derechos humanos como constructos sociales para (1) defender la construcción social de los propios pueblos indígenas, (2) con ciertos límites a los derechos indígenas a la autonomía y a la diversidad incluso cuando construyen derechos colectivos para ellos mismos; (3) logrando así la autodeterminación interna de los pueblos indígenas, mediante la cual un pueblo indígena diseñaría su propio derecho humano a la autodeterminación sin minar los derechos individuales, (4) por

medio de un movimiento social y político que yo concibo como un metafórico «Estado de derechos humanos».

Palabras clave: pueblos indígenas, derechos humanos, autodeterminación, construcción social, derechos individuales, derechos colectivos, «derechos humanos»

Consider the idea of human rights borne specifically by «indigenous peoples» or «indigenous populations» or «persons belonging to indigenous peoples,» however defined. And consider the idea of indigenous human rights regardless of whether such rights might be entirely new rights or instead the recognition of rights already implicit in, say, this or that international human rights instrument. Imagine that such rights include a people's right to define itself as *indigenous*; to preserve the group's cultural integrity,¹ including freedom from forced assimilation into the dominant culture within the nation state, hence freedom from programs of nation building that deny the status of indigenous peoples as distinct; no dispossession of lands, territories and natural resources historically associated with the indigenous population, and no transfer of the indigenous population; and a right to free, prior, and informed consent about state plans for developing lands, territories and natural resources associated with the indigenous people. All of these rights rest on a right more fundamental: the right to *self-determination*. A group may pursue self-determination within a nation state, as some form of self-government or regional autonomy, perhaps to «freely determine» the group's political status and institutions or to «freely pursue» economic, social and cultural development. Or a group may seek self-determination as a right to secede from that state²— if, say, victimized by ethnic cleansing.³

¹ Which is hardly unproblematic: «Attention to cultural integrity necessarily leads us to have regard for certain types of groups in ways that we do not for others»; on grounds of cultural integrity, «we tend to attach greater importance to groups that comprise or generate distinctive cultures more than to other types of groups»; «cultural groups are accorded a certain set of rights that other types of groups are not» (Anaya 1997: 223).

² According to Thornberry (2002) and Morgan (2007), among others, many indigenous representatives do not view themselves as advocating new rights. According to Xanthaki (2007: 173), «if indigenous peoples are recognized as beneficiaries of the right to self-determination, they will not automatically have the right to secede.»

³ Not all such rights are proclaimed in all international instruments, although these and more are listed in perhaps the single most significant instrument for indigenous peoples, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), adopted by the U.N. General Assembly in 2007. Like all international instruments, it does not enjoy international consensus. It was adopted with 144 states in favor, 4 against (Australia, Canada, New Zealand and the United States), and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, the Russian Federation, Samoa and Ukraine).

Indeed, exactly what such a right might entail is entirely contingent and likely differs among different indigenous peoples and perhaps over time for the same people. Moreover, it is hardly clear in any given case how likely a right to self-determination (in international law or as a human right) will enable a people to freely determine the major features of their legal and political status within the nation state, and to freely pursue their economic and social development while controlling development on indigenous lands and of indigenous resources. Nor is it clear what any given indigenous people might require, as a putatively distinct people, to survive as distinct or to preserve unique cultural and social features. Indeed, «indigenous peoples' own desires vary significantly as to the degree of autonomy or self-determination that they pursue» (Stamatopoulou 1994: 78).

As a social construct, a human right to self-determination for indigenous peoples is made not discovered; it does not exist prior to its establishment by those who would be affected by it. This approach can cope with various challenges posed by any notion of human rights specific to indigenous peoples. I deploy it (1) to argue for the social construction of indigenous peoples themselves, (2) with certain limits on indigenous rights to autonomy and diversity even as they construct collective rights for themselves, (3) in this way achieving the internal self-determination of indigenous peoples, whereby an indigenous people would design its own human right to self-determination without thereby undermining individual rights, (4) by means of a social and political movement that I conceive as a metaphorical «human rights state».

1. The social construction of indigenous peoples

The term *indigenous people* is indeterminate. No single definition has ever been consensually embraced either by scholars or by possible or plausible addressees of the definition. The differentiation between indigenous and nonindigenous is deeply problematic. As members of species that evolved in Africa around 200,000 years and, between 50,000 and 80,000 years ago, populated all other continents except Antarctica, all humans are equally indigenous as a species. To be sure, common usage of the term *indigeneity* focuses on dimensions of human life political not biological.⁴ One political dimension is

⁴ For example, one aspect of a political construal of the term *indigeneity* is unjust dispossession of lands in the sense, for example, of Pope Urban II who, in 1095, issued a papal bull titled *Terra Nullius* (territory never before subject to any state's sovereignty

group identity. Like membership in the contemporary nation state, membership in an indigenous people rests on a particular framing of specific historical experiences.

There is no single plausible, appropriate, or just way to understand all indigenous groups. In any given case, the term *indigenous* must be specified in ways sensitive to the peculiarities of that group. Each group is distinct from every other, and groups are hardly homogenous. Claims such as there are «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 «while only about 5 per cent of the world's population, indigenous peoples account for nearly 15 per cent of the world's poor» (International Labour Organization (n.d.)),⁵ risks homogenizing indigenous groups *inwardly*, as if all members of an indigenous community were like-minded or shared the same self-understanding as indigenous. And they risk homogenizing groups *outwardly*, as if all indigenous communities were indigenous in the same way.

In the face of such indeterminacy, a social constructionist approach to indigenous peoples recommends itself. It regards indigeneity as made not found, socially constructed not «natural.»⁶ This holds for indigenous persons, and it holds for any plausible human rights of indigenous peoples. That is, both human rights and indigenous peoples can only be what the relevant human communities agree they are. Any definition of indigenous peoples or of human rights is morally relative as well as historically and culturally perspectival. Such definitions are «political» in nature, first

and thus without first (state-based) occupants) that asserted in fact not sovereignty-less territory but rather the right of Christian Europeans to seize the territories of non-Christians, in particular to seize Muslim lands while prosecuting the First Crusade. Another example is John Locke's notion of *vacuum domicillem*: «Founded in the era of natural law, and used by Locke specifically to justify English colonialism in the Americas, is the notion that land that was not "worked" was no one's property. An extension of this was the idea that those who did not work the land, that is, "Indians", were just a part of the natural, "un-owned" landscape. Hence, land unworked by "advanced" human beings was "empty," the vacuum» (Nelson 2009: 5). See also Arneil (1996). Or consider Barelli's (2010: 972) claim that indigenous peoples are «entitled to special protection property rights by virtue of their culture, special relationship and long connection with the region.»

⁵ See International Labour Organization (n.d.).

⁶ This approach rejects common linguistic usage where to claim that someone is indigenous is necessarily to make a claim about origins, that someone is related to some particular territory in some «natural» fashion, which quality marks the person as «native.

of all as a product of the human imagination in the sense of Benedict Anderson's (1991) notion of «imagined community.»

As a political term, one term unavoidably invested with the speaker's value commitments, the term indigeneity cannot be defined in any value-neutral way. One political question is: Whose values should determine? Who should decide what an indigenous people is? Anthropologists?⁷ No consensus. International law? Generally unenforceable and in practice never global.⁸ The United Nations? No consensus and mostly confined to the power of rhetoric. While the UN *Declaration on the Granting of Independence to Colonial Countries and Peoples* announced in 1960 a right of peoples to self-determination,⁹

⁷ Cultural anthropology in particular is a science of differences, even as it may sometimes face political imperatives to stress what is shared across diverse cultural borders. As the UN drafted its human rights declaration in 1947, the American Anthropological Association (AAA), dedicated to the study of profound and enduring cultural difference, disputed the notion of rights valid across all cultural boundaries (even as many cultures overlap at points, and even as all cultures to various extents are hybrids). The AAA sought to discourage the drafting committee accordingly, querying the UN Human Rights Commission that drafted the Universal Declaration: «How can the proposed Declaration be applicable to all human beings and not be a statement of rights conceived only in terms of values prevalent in the countries of Western Europe and America?» For «what is held to be a human right in one society may be regarded as anti-social by another people, or by the same people in a different period of their history» (AAA 1947: 539, 542). The nub of this critique is that a rights claim is a cultural claim, because rights are cultural artifacts; and that as cultural artifacts, rights are valid only for the cultures in which they resonate, that is, for the local community alone. In other words, cultural «validity» is always local; hence no culture is universally «valid,» even as many artifacts, despite their origins at specific times in specific cultural regions, today have achieved more or less universal embrace. These include natural science, modern medicine, various types of engineering, and various technologies (but note: these are artifacts not woven of normative tissue, unlike human rights and other moral claims). If cultural validity is local, then some human rights claims will conflict with some aspects of some of the cultures beyond the particular one making a particular claim about human rights. Fifty years later the AAA officially embraced the idea of human rights, finding the idea compatible with «anthropological principles of respect for concrete human differences, both collective and individual, rather than the abstract legal uniformity of Western tradition» (AAA 1999). AAA's 1999 statement coheres with its 1947 statement: it maintains that irreducible cultural differences exist no less than tensions between such differences and the uniformity of any system of normative rules (including human rights). But now the AAA argued that human rights norms can be reconciled with irreducible cultural differences among different communities. Tellingly, it neglected to say just how (likely it was unable to say just how).

⁸ According to Cirkovic (2006/2007: 391), «international law has constructed a particular meaning of indigenous identity and entitlement that is inconsistent with the self-image of indigenous peoples as nations.»

⁹ 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples*, General Assembly Resolution 1514 (Fifteenth Session), at 66 U.N. Doc. A/4684 (1960).

it declined to define *peoples* and left interpretation to «the regional checks and balances of power,» leaving the indigenous vulnerable to the interests of regional powers (Stamatopoulou 1994: 66). How about each nation state? Abidingly anxious not to lose any control over its sovereign territory, the nation state easily finds itself in tension with indigenous peoples.¹⁰

Still, as I will argue, the nation state is political phenomenon most relevant to indigenous peoples. I will also argue that only indigenous peoples can define themselves as such, even though others often define them. According to Ronald Niezen (2003: 221), the «concept “indigenous peoples,” developed principally within Western traditions of scholarship and legal reform» and has «nurtured the revival of “traditional” identities.» For its part, indigenous peoples’ movements (international law, scholars, and political movements both within and beyond indigenous communities) make «use of ideas that facilitate identity formation,» indeed «ideas developed largely by nonindigenous sympathizers» — including the proposal I make in this article (ibid. 217). Indigenous movements have found emancipatory resources

¹⁰ 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). As a term, and as the corresponding international political movement beyond states, the term *indigenous peoples* is largely a twentieth-century political phenomenon. Indigenous identity constructed as a history of suffering is a contemporary reaction to nineteenth and twentieth century nation building that often either forcibly assimilated the indigenous or relocated them into isolation. And while the indigenous are then viewed as victims, they can be constructed in terms of a promised recovery and triumph. In the first vein, for example: the «term *indigenous* refers broadly to the living descendants of preinvasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forms of empire and conquest» (Anaya 2004: 3). In the second vein: «They are *indigenous* because their ancestral roots are embedded in the lands on which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. And they are *peoples* in that they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past» (Anaya 2009: 1). In either case, identity politics is fraught with perils, as Eagleton (2000: 129) notes: «If identify politics have ranked among the most emancipatory of contemporary movements, some brands of them have also been closed, intolerant and supremacist. Deaf to the need for wider political solidarity, they represent a kind of group individualism which reflects the dominant social ethos as much as it dissents from it ... At the worst, an open society becomes one which encourages a whole range of closed cultures.»

in some of the «ideas of dominant societies,» and even in colonial history's «oppressive ideas about the colonized» (ibid.).

To be sure, some self-identified indigenous groups have contributed as well, transforming the term *indigenous peoples* from a marker of shame and failure into a positive marker of proud cultural tradition and even wisdom worthy of state protection and some form of autonomy and self-determination. And for the «first time, indigenous peoples had access to their own UN forum» —the Working Group on Indigenous Populations, 1982— which became a world forum for indigenous peoples' movements» (Daes 2009: 48). And in a «first for international law, the rights bearers, indigenous peoples, played a pivotal role in the negotiations» on the content» of the most comprehensive relevant instrumental instrument, the UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in 2007 (Charters and Stavenhagen 2009: 10).¹¹

From the standpoint of political theory, and guided by the sociological approach of social construction, I will argue that the term *indigeneity* is useful where it contributes to the analysis of human experience and to efforts to change political communities in ways that make them more just, for example in addressing historically unequal power relations among different groups within particular political communities. But the term *indigeneity* is unhelpful where it becomes a rationale for trumping the rights or preferences of individual members of the indigenous group, or where it ignores or denies the inevitability of change along many dimensions of social life in the name of some distant past or some imagined cultural or biological «purity.»¹²

As I deploy it, social construction rejects any primordial approach as well as «notions of peoples with “characteristics”» or «groups

¹¹ In fact, «international human rights law increasingly recognizes that “minorities and indigenous peoples should have more control in the conduct of their own affairs”» (Charters 2008:492-493, citing Gilbert (2006: 195)).

¹² Among other difficulties with defining indigenous peoples. If the group itself is to decide whether it is indigenous, perhaps some groups may wrongfully claim that status and whatever rights might attend it. In some instances, self-definition might spur forms of ethno-nationalism with consequences disastrous for the both the indigenous group and the larger political community. After all, different groups that might think of themselves as indigenous likely operate in a field of differential power relations and structural inequalities and may be in competition with each other. Compare Kenrick and Lewis (2004). And in cases of ethnic conflicts, self-defining indigenous groups might unintentionally exacerbate latent tensions among competing ethnic groups, or otherwise destabilize the nation state confronting multiple claimants characterized by any number of major or minor differences in culture, political vision, and historical experience – whereby not all claimants can be accommodated.

[that] self-agglomerate on the basis of free association, or self-identify on the perception of boundaries between themselves and “others”» (Thornberry 2002: 59). With Rogers Brubaker and Craig Calhoun I would argue that «people are “situated in particular webs of belonging”; that «ethnic and other forms of solidarity provide networks of mutual support, capacities for communication,» and that «frameworks of “culture and social relationships are as real as individuals”»; that «no one lives outside particularistic solidarities»; that «it is important to think of solidarities in the plural»; and that «solidarities are organized in a variety of ways» (Brubaker 2003: 556-557).

In other words, I treat groups as «constructed, contingent, and fluctuating» (ibid. 554). I «problematize[s] groupness and question axioms of stable group being» (ibid.). I reject that idea of ethnic groups as «entities» and cast as «actors» (ibid.). I do not «frame accounts of ethnic, racial, and national conflict in groupist terms as the struggles “of” ethnic groups, races, and nations» (ibid.). And I note the «variety of forms (other than bounded groups) which affinity, commonality, and connectedness can take» as well as the «variety of ways in which ethnicity “works”» (ibid. 555).

But social construction is not the view that people can freely construct themselves and their social world in any they might wish, for example with regard to their identity. On the one hand, «“there is room for the evolution and regional specificity of the concept of ‘indigenous’ in practice”» (Thornberry 2002: 58). Indeed, the situation, condition, history, needs and aspirations of various indigenous groups vary greatly. On the other hand, «Neither governments nor indigenous peoples favour the exponential growth of “indigenism” as a vehicle to carry all kinds of claims by sundry collectivities» (ibid. 57).

Further, I do not treat «individuals abstract enough to be able to choose all their “identifications,”» nor do I treat «ethnicity as essentially a choice of identifications,» nor do I «neglect the omnipresence of ascription,» nor do I assert «“that cultural difference” should be valued only as a matter of individual taste – identifications”» (Brubaker 2003: 555-556). I «do not treat individuals as primary» nor do I treat identification as «freely chosen by abstract individuals»: self-identifications interact with ascribed identifications and categorizations, «especially those employed by powerful, authoritative institutions – above all, the modern state» (ibid. 556).

Patrick Thornberry notes a «range of claimants to indigenous status,» whereby some cases, such as the Boers and the Rehoboth Basters, are particularly difficult. In short, the «conceptualization of indigenous peoples cannot be a simple exercise in description. The

question of who is indigenous is mired in politics, suffused with ethical considerations and questions centering around the justifications for a new focus in human rights instruments and a specifically addressed body of rights. ... [I]nternational law itself plays a constructive (or deconstructive) role through recognition processes and incentives for groups to access international norms through configuration or re-configuration as indigenous. Against the State-inspired stratagems which would restrict the scope of "indigenous peoples", self-defining indigenous groups correlate self-definition with self-determination... Logically, this is like pulling yourself up by your bootstraps, since it presupposes an answer to the prior question of who is entitled to self-determination» (Thornberry 2002: 60).

But rather than regard this «pulling yourself up by your bootstraps» as a problem, I regard it as a program. I propose that indigenous peoples who seek recognition of a human right to self-determination for indigenous peoples regard themselves as the authors of such a human right, addressed to themselves.¹³ I draw upon an approach to human rights I develop elsewhere (Gregg 2012; Gregg 2016b), as authored by their own addressees and valid only if freely embraced by those addressees.

2. Limits on indigenous rights to autonomy and diversity

How indigenous peoples are socially constructed may have distinct consequences for them and others. As Pierre Bourdieu (1986: 13) notes, «nous produisons ils catégories selon lesquelles nous construisons le monde sociale et ... ces catégories produisent le monde.» Constructing

¹³ According to Ahrén, some international instruments tend to regard «people's rights» as human rights. On the one hand, international instruments such as the United Nations Universal Declaration vests rights in individuals rather than groups and communities. On the other hand, Ahrén «points to how international legal instruments, most notably, the 1970 United Nations (UN) Declaration on Friendly Relations, extended international legal validity to decolonisation projects by reimagining the right of self-determination as vesting in colonised peoples» (Macklem 2009: 488). Further, the «African Charter on Human and Peoples' Rights, International Labour Organization Convention No. 169, the work of various UN treaty monitoring bodies» and the UN Declaration on the Rights of Indigenous Peoples all «speak of human rights in collective terms,» showing that «international law has broken away from a binary commitment to state sovereignty and individual rights to embrace the proposition that non-state forming peoples possess human rights in international law» (ibid.). But the project for a human right to self-determination for indigenous peoples should target the nation state more than international law, as I argue in later pages.

the social world in legal categories, in this way even transforming it, is consequential if the nation state reinforces these constructions. At the same time, by «conceptualising relative claims in juridical terms, international human rights law is even more hegemonic than cultural relativists realise» (Macklem 2009: 501). And if «total acculturation is the goal, (penal) law can be an instrument to accomplish that goal» whereby such reasoning may even «lead to a form of “ethnocide”» (Van Broeck 2001: 12).

I will argue that, just as a social construction can modify its social context, so that social context may well modify the social construction in turn. That is, human rights, even as a social construct, may entail meanings that affect those groups claiming human rights. According to Thornberry (2002:428), as «indigenous groups structure their claims in the language of human rights, so human rights structure the modes of social representation and the potential responses.» In particular, when «confronted with a dominant group, a minority group does not always lose its traditional values»; rather, «through a process of ethnicity-creation and reinforcement, some values might well become more important than in the “traditional culture”» (Van Broeck 2001: 12).¹⁴

¹⁴ Which is not to say that indigenous peoples are minority peoples, but this is a matter of definition.» Castellino (1999: 396) for example says, on the one hand: «After denial of self-determination to minorities, indigenous peoples began to consider themselves to be in a category higher than that of minorities. This would enable them to set forth claims for self-determination. Indigenous peoples point out that their claims to self-determination are different from those of minorities since they have even fewer rights than the former.» On the other hand he quotes Caportorti, Special Rapporteur in the UN «Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities,» who defines *minority* as a «group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion and language» (ibid. 401). All of these characteristics might be attributed to indigenous peoples but perhaps the indigenous are marked by additional features. Or perhaps indigenous peoples are best understood as one kind of national minority. Like non-indigenous national minorities, indigenous peoples have long inhabited a specific territory they regard as their homeland. They regard themselves as culturally distinct from the majority or dominant society into which they have been absorbed. According to Will Kymlicka, national minorities all «formed functioning societies, with their own institutions, culture and language, concentrated in a particular territory, prior to being incorporated into a larger state». The incorporation of such national minorities is usually involuntary, as a result of colonization, conquest or the ceding of territory from one imperial power to another, but may also occur voluntarily, through some treaty or other federative agreement. Examples of national minorities within Western democracies alone include «Indigenous peoples, Puerto Ricans, and Québécois in North America, the Catalans and Basques in Spain, the Flemish in

I would construct a human right to indigenous self-determination in just this sense, as a two-way street connecting individual rights with collective rights. The social construction of a human right to self-determination specific to indigenous peoples would then be bounded with respect to the degree of regulatory autonomy or cultural diversity allowed the indigenous community vis-à-vis the larger national community. Some of these boundaries may chafe: «human rights are 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 human rights, as there are with ... self-determination» (Thornberry 2002: 428). Some indigenous communities may well reject any human 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 placing such limits on an indigenous right to autonomy and diversity, I claim that special minority rights for an indigenous people cannot do the work intended if the rights of individuals within the community are trumped by collective rights. A human right to indigenous self-determination needs to accommodate individual rights and values within collective rights and values. The idea and practice of religious tolerance offers one example of how this is possible. Experience in the West has shown that allowing individuals freedom of religious belief and practice does not diminish the collective interests

Belgium, the Sami in Norway, and so on. Most countries around the world contain such national minorities, and most of these national minorities were involuntarily incorporated into their current state — a testament to the role of imperialism and violence in the formation of the current system of “nation-states”» (Kymlicka 1988: 217). As I argue, the relationship of indigenous peoples to the nation state is one of the features most significant to the question of a possible human rights to the self-determination of indigenous peoples. Here Kymlicka (1999: 282) distinguishes between incorporated national groups (Catalans, Puerto Ricans, Flemish, Scots, Québécois), who are *stateless nations*, that is, nations that sought but failed in the competition among nations to constitute themselves as states, on the one hand and, on the other hand, indigenous peoples (the Sami, the Inuit, and American Indians) who long existed largely outside the system of states, more or less «isolated from that process until very recently, and so retained a pre-modern way of life until well into this century» (ibid.). Be that as it may, Scheinen (2005: 13) plausibly argues that «being indigenous does not *automatically* bring with it being “a people”» and that the «perceived unity of all indigenous peoples in the world is a fallacy if one tries to be serious about how specific rights flow from the fact of being an indigenous people» (ibid.).

of different faiths. Rather, it supports 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. An individual right to freedom of conscience tracks individual rights to freedoms of expression and association in that all of them are often exercised by individuals in concert with other individuals. In this way individual rights can further collective interests and rights. Given the multiplicity of such interests and rights, individual rights can support cultural diversity of groups within society—and allowance for diversity, as I argue in later pages, is key to indigenous rights. Precisely civil and political rights of the individual, enjoyed regardless of the individual's membership in this or that group, help preserve those memberships. Similarly, indigenous peoples who enjoy a human right to collective self-determination do not thereby undermine the collective interests of the nonindigenous population or of the nation state. Special rights that would help maintain their fragile ethnic particularism in the face of economic and cultural forces of the larger, surrounding society need not violate right of all citizens to individual equality of treatment.

With regard to human rights, universal respect for diversity (such as traditional indigenous beliefs and practices) entails *not* respecting at least some plausible candidates for universal norms. The Corte Constitucional de Colombia, for example, says of itself that it defends «some universal ethical minimums which allow the specificity of different cultures to be transcended and to build a framework for understanding and dialogue between civilizations.»¹⁵ Yet it immediately identifies a «tension between the constitutional recognition of ethnic and cultural diversity and the establishment of fundamental rights. While the latter are philosophically based on transcultural norms, supposedly universal respect for diversity involves the acceptance of world views and value standards that are different and even contrary to the values of universal ethics.»¹⁶

Human rights for indigenous peoples might be constructed in any number of ways, including the following. One might argue that indigenous peoples are due the same citizen's rights as every other member of the political community. Or one might argue that indigenous peoples are due special rights of cultural diversity that

¹⁵ Sentencia T-254/94, 30 May 1994, ¶10; cited in Gómez Isa (2014: 736).

¹⁶ Corte Constitucional de Colombia (C.C.) (Colombian Constitutional Court), Sentencia T-254/94, 30 May 1994, ¶ 10 (Colom.), cited in Gómez Isa (2014: 736).

non-indigenous members of the community are not due, above all: a human right to collective self-determination as a people. The second option allows behavior acceptable within the indigenous community even if in violation of other, non-indigenous constructions of human rights. It entails that the constitution (among other laws of political community) does not apply to all citizens equally. Inequality is justified, on this interpretation, by the imperative of recognizing some forms of diversity as appropriate in contexts involving an indigenous people.

What might the option entail with regard to a possible human right to life? If, logically speaking, such a right forms the basis for the possibility of all other rights, then it would seem to be the most fundamental of human rights and, consequently, one that admits of no plausible restrictions. In that case, it could not allow for any and all kinds of diversity within indigenous communities within the nation state. The Inter-American Court of Human Rights makes just that claim: «Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible.»¹⁷

But the term *restrictive approach* is highly interpretable. Reasonable people, and different peoples, may well disagree as to what constitutes a restriction. For example, is capital punishment a restriction?¹⁸ Or does a right to life not entail the individual's right to continued existence if found guilty of a capital crime? For example, might a right to life imply «life» in the sense of a right to live the «authentic» or preferred way of life of an indigenous people? According to Asier Martínez Bringas (2003), indigenous people view a human right to life as a «right to territory, the right to their own culture and the right to ethno-development, for which the right to self-determination, the right that combines them all, is required.»¹⁹ For at least some indigenous peoples, he claims, a fundamental right to life implies a right to political and cultural self-determination—but only for the indigenous, not for the non-indigenous.

Alternatively, the term *restrictive approach* might emphasize restrictions on the internal autonomy of the indigenous community, on grounds that individuals within indigenous communities are vulnerable to mistreatment by communal authorities no less than to oppression by the non-indigenous authorities of the nation state. In other words, collective

¹⁷ Case of the «Street Children» (Villagran-Morales *et al.*) v. Guatemala, Merits, Inter-Am. Ct. H. R. (Ser. C) No. 63, ¶ 144 (19 Nov. 1999), cited in Gómez Isa (2014: 740).

¹⁸ Does any indigenous people impose the death penalty for any offence?

¹⁹ Cited in Gómez Isa (2014: 740).

rights provide the indigenous people with an autonomy that could, in principle, allow for abuses of individual members —under circumstances in which collective human rights offer no protection against indigenous beliefs and practices that violate individual human rights.

In that case, *maximal* indigenous autonomy would mean *minimal* legal restrictions on the indigenous, for example with regard to «internal relations of the community itself, that is to say, when all the elements defining a particular situation involve an indigenous community: both the perpetrator of the conduct and the injured party belong to the community, and the events have taken place within the territory of that community. In that case, the limits on indigenous autonomy should be minimal,» which means, according to Felipe Gómez Isa (2014: 739), citing the Corte Constitucional de Colombia, «what is at stake is basically the “subsistence of the group’s cultural identity and cohesion.”»²⁰

In one case the Colombian court found that the «expulsion of the community member and his family from the indigenous territory placed the members of the family in a «disadvantageous economic and social situation.» Here the punishment «went beyond the person of the offender,» rendering the punishment «disproportionate and contrary to international human rights treaties»²¹ because «expulsion entails a complete break with their cultural environment and the lapsing of their anthropological filiation.»²² The court found this punishment «materially unjust because it encompasses the members» of the guilty person’s family, a circumstance that violates the «fundamental rights to due process and the physical integrity of his children.»²³ In this spirit, and speaking of indigenous peoples, Emiliano Borja claims that the «presumption of innocence, the right to a defense and to due process» need to be «interpreted from a different viewpoint» —that is, different from the viewpoint of the larger political community— because the values of peace and social equilibrium in the indigenous community «require other very important supra-individual components to be taken into consideration.»²⁴

²⁰ Corte Constitucional de Colombia, Sentencia T-349/96, 8 Aug. 1996, ¶ 2.2 (Colom.).

²¹ Corte Constitucional de Colombia, Sentencia T-254/94, 30 May 1994, ¶ 15, cited in Gómez Isa (2014: 750).

²² Corte Constitucional de Colombia, Sentencia T-254/94, 30 May 1994, ¶ 10, cited in Gómez Isa (2014: 750).

²³ Corte Constitucional de Colombia, Sentencia T-254/94, 30 May 1994, ¶ 10, cited in Gómez Isa (2014: 751).

²⁴ Borja (2006), p. 673, cited in Gómez Isa (2014: 751).

But just how much autonomy should an indigenous people enjoy vis-à-vis the larger society? As Alosno Gurmendi Dunkelberg (2015: 18) points out, 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. Certainly, the fact that the victim is a member of an indigenous community is a significant subjective factor to analyze in any definition of torture, but the problem here is that the interpretation that defenders of indigenous corporal punishment propose would end up subjecting indigenous individuals to a more permissive torture standard when compared to other vulnerable groups.» Gurmendi Dunkelberg concludes that «indigenous corporal punishments should be measured against the general definition of torture, as embodied in the relevant treaties and jurisprudence. Under such rules, it is fairly clear that corporal punishments are generally considered banned and that there is a strong resistance against them at international fora. Therefore, provided that any adjustment of indigenous customary law respects the right of indigenous communities to prior consultation, there would seem to be no particular reason why members of indigenous communities should see their human rights subjected to harsher standards only due to their indigenous identity. International human rights law seeks to protect individuals first» (ibid. 25-26).

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.»²⁵ So construed, human rights specific to indigenous peoples are collective rights—some potentially in conflict with human rights constructed as individual rights. Consider crimes such as homicide, torture, and slavery. These are not everywhere understood and defined in the same way; there is no cross-cultural consensus as to whether they are sacrosanct in all circumstances. So too, then, with a putative human right to life, or a human rights-based prohibition of torture or of slavery.

²⁵ Corte Constitucional de Colombia, Sentencia T-349/96, 8 Aug. 1996, ¶ 2.2 (Colom.), cited in Gómez Isa (2014: 738). How might a court of law distinguish between different degrees of indigenous autonomy (or different degrees of restricting autonomy to safeguard interests of the whole political community) when determining the proper extent of indigenous normative and jurisdictional autonomy?

In the self-understanding of the Columbian court, to recognize cultural diversity *to any extent* is to practice moral relativism *to some extent*.²⁶ Some indigenous communities may understand some forms of violence or some types of punishment in ways different from non-indigenous communities. Some indigenous peoples may have doubts «as to whether the use of forced labor for punishing certain types of behavior in some indigenous communities can be considered slavery, something which has been rejected by both indigenous communities themselves and in legal writings and case law» (Gómez Isa 2014: 746). On one account cited by Felipe Gómez Isa (*ibid.* 746), that of Emiliano Borja, penalty in some indigenous communities «does not try to just express punishment as a sign of social condemnation but primarily seeks to restore balance to the social life of the group and attain the peace disturbed by the behavior of the perpetrator.»²⁷

In one case, the Corte Constitucional de Colombia claims that in non-indigenous communities, «punishment is inflicted because a crime has been committed,» whereas in indigenous communities, punishment is inflicted to «re-establish the natural order and in order to dissuade the community from committing offences in the future.»²⁸ In another case the court draws on testimony of an indigenous person to conclude that imprisonment, a punishment widely practiced in the non-indigenous community, in the case of indigenous lawbreakers should be replaced with that of 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. For example, regarding physical punishment of indigenous persons for certain offenses, Emiliano Borja writes: «one of the fundamental principles governing the social life of indigenous peoples and their law and punishment system are the principles of reciprocity, of balance, and social peace. The aim of the penal system is to restore the balance that was disturbed by the conduct being punished. The punishment not only has an individual dimension in that it punishes the wrongdoer, but also seeks to restore community harmony. It is within this framework of interpretation and understanding that the traditional practice followed

²⁶ Much work in the disciplines of anthropology and legal sociology, as in other social sciences, does not deal in cultural universals but rather in normative and cultural relativism. Hence appeal to either cannot establish some kind of intercultural consensus.

²⁷ Borja (2006), p. 675, cited in Gómez Isa (2014: 746).

²⁸ Sentencia T-523/97, 15 Oct. 1997 (Colom.), cited in Gómez Isa (2014: 746).

in certain communities of inflicting physical punishment using stocks or the whip (fuate) should be analyzed» (ibid. 746).²⁹

According to the Corte Constitucional de Colombia, «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.»³⁰ Important to the court is whether a particular punishment, including one rejected as unjust by the non-indigenous community, such as stocks or whips, is an «authentic» aspect of the indigenous community's customs and mores, and one in which the «community itself sees as valuable because it is highly intimidating and does not last long.»³¹

In short, a human right to indigenous self-determination cannot be a right to unchecked autonomy of the indigenous authorities within the indigenous community. With respect to «indigenous idiosyncrasies with regard to trials and penalties,» Felipe Gómez Isa (ibid. 748) states that «indigenous communities are not required to apply the principle of legality in the same way as it is applied in the ruling society.» He cites the Corte Constitucional de Colombia to the effect that legal justice requires avoiding «a complete disregard for the typical ways in which indigenous judgment norms and rituals, the preservation of which is what is being sought.»³² Further, article 246 of the Constitution of Colombia «requires that trials in indigenous communities ... be carried out “according to their norms and procedures”» —but surely not all norms and procedures. In some cases they should be carried out according to the norms of the larger, national community in which the indigenous people is embedded.

3. Internal self-determination of indigenous peoples

I propose a particular form of social construction: *self*-identification of a people that would then assign itself the human rights peculiar to itself in line with its self-identification as indigenous. I propose that an indigenous people define itself and that it do so within boundaries I develop below. The notion that the indigenous might properly identify themselves is already present in some international instruments that

²⁹ Borja (2006), p. 674, cited in Gómez Isa (2014: 746).

³⁰ Sentencia SU-510/98, 18 Sept. 1998, ¶ 57, cited in Gómez Isa (2014: 746).

³¹ Sentencia T-349/96, 8 Aug. 1996, 8 Aug. 1996, ¶ 2.4.2.2, cited in Gómez Isa (2014: 746).

³² Sentencia SU-510/98, 18 Sept. 1998, ¶ 2.3, cited in Gómez Isa (2014: 748).

declare —without defining indigenous peoples— their «right to identify themselves as indigenous and to be recognized as such.»³³ Yet these instruments hardly facilitate a notion of self-identification when offered within an elite discourse that is itself deeply and perpetually divided as to how best to understand indigenous peoples, human rights, and a possible human right to the self-determination of indigenous peoples.

Toward facilitating the idea of indigenous self-identification, I would note that, on the one hand, human rights constructed by their own addressees would not constitute a weapon of an overbearing West wielded against defenseless developing communities in the West and in other parts of the world. On the other hand, constructed rights do not treat individuals as if in a vacuum, independent of all contexts, or as atoms. They do, however, recognize similar vulnerabilities of all individuals (to pain and exclusion, for example) as well as similar needs (say, for respect). Moreover, some human rights can be constructed as individualistic and some as collective. I argue that the relationship between the indigenous and the encompassing non-indigenous community cannot be reduced to a tension between traditional communalism and modern individualism — between communal cultural practices, on the one hand, and human rights of the individual, on the other. That tension is certainly present but it is not deadly if indigenous peoples construct human rights as part of a weave of multiple kinds of rights: the civil and political rights of all citizens of the nation state, as well as minority rights for the indigenous peoples of that nation state, as well as human rights.

If an indigenous people were to construct its own human right to self-determination, it would do well to weave together civil and political rights, minority rights, and human rights with respect to the following eight concerns (among many others): protection from ethnic cleansing or genocide; engagement with the contemporary social, political, economic and cultural environment; the rule of law; remedial rights to address the consequences of past injustices; the right to decide who to admit to the community; protection of indigenous languages; communal boundaries drawn so as to concentrate the indigenous and to resist population transfer; and an emphasis on the nation state rather than on international law for the recognition and enforcement of indigenous human rights.

³³ For example, U.N. Doc. E/CN.4/Sub.2/1992/33: Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-Fifth Session, Agenda Item 14 (1993): «Discrimination Against Indigenous Peoples, Report of the Working Group on Indigenous Populations on its eleventh session»; here, p. 53.

First, an indigenous people would not likely construct a human right for itself as a human right to secession — except in one case. If one argues that the nation state should lose its right to territorial integrity if it commits ethnic cleansing or genocide against the indigenous, or if the nation state is unable to prevent other parts of society from committing such acts, then secession suggests itself as a viable understanding of the external self-determination of an indigenous people.³⁴ On this understanding, the gravest human rights violations trigger a right to secession, or at least: non-violation by the state, or by groups within the nation state, constitutes a condition of state sovereignty and national territorial integrity.³⁵

While a right to external self-determination challenges the principle of territorial integrity, a right to internal self-determination does not.³⁶ By a *right to internal self-determination* I mean the right of a people to «choose its own political and economic regime —which is much more than choosing among what is on offer perhaps from one political or economic position only» (Cassese 1995: 101). Such a right is an «ongoing right. Unlike *external* self-determination for colonial peoples,» for example —which «ceases to exist under customary international law» once implemented— a «right to internal self-determination is neither destroyed nor diminished by its having already once been invoked and put into effect» (ibid.).

A right to *internal* self-determination might include the indigenous people's right to participate in the life of the national community along political, economic, social and cultural dimensions —and to do so while maintaining aspects of a distinct way of life along some political, legal, economic, social and cultural dimensions. It might include a people's «right to have their specific character reflected in the legal system and in the political institutions of their country, including

³⁴ Cf. Gregg (2016a), chapter 9.

³⁵ Barelli (2011: 414-415) finds no evidence of clear support in international law for such a condition of state sovereignty and national territorial integrity: nation states practice «realpolitik when dealing with remedial secession claims» and «no international legal document has thus far expressly referred to the existence of this right.»

³⁶ Even as evidently «Some states are reluctant to accept the term “peoples” when referring to indigenous nations because of the implicit threat of demands for self-determination, perceived by some as possible secession» (Stamatopoulou 1994: 78). Speaking in the context of various United Nations working group reports of the United Nations, established in accordance with a commission on human rights resolutions, Quane (2005: 663) remarks that «Most of the states are prepared to accept a right to self-determination for indigenous peoples, provided that it does not threaten the territorial integrity of the state. This means that indigenous peoples will only have a right to internal self determination in normal circumstances.»

cultural autonomy as well as administrative autonomy, wherever feasible» (Daes 2009: 62). Cultural autonomy refers to cultural survival, whereby «equality rights alone would not protect indigenous peoples against assimilationist state policies» (ibid. 63). And it may not violate human rights of individuals or «impair the territorial integrity of those sovereign states that were conducting themselves in compliance with the principles of international law» (ibid. 62).

Correspondingly, a right to *collective* self-determination is not necessarily a right to secession, and a right *collectively* to own ancestral lands need not challenge state sovereignty. There is nothing inherent to the collective nature of a collective right *as such* that necessarily encourages secessionist claims or otherwise necessarily impacts political unity and territorial integrity.

Still, states willing to embrace a right to self-determination for an indigenous people will do so only on the understanding that doing so will not compromise the state's territorial integrity. These states find support in international instruments, which tend to be state-centric. The United Nations Charter of 1945, for example, urges respect for the principle of territorial integrity for the nation state.³⁷ The United Nations Declaration on the Rights of Indigenous Peoples of 2007 states, in article 3: «Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.» But then in article 4 it immediately qualifies self-determination in expectable ways: «Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs ...» In short, no nation state will interpret a right to indigenous self-determination as a right to indigenous secession or independence, that is, a right to *external* self-determination.³⁸

³⁷ Chapter 1, Article 2, Paragraph 4: «All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state ...»

³⁸ The adoption of the UNDRIP was delayed because of signatories' concern about any possible implication of indigenous peoples' right to self-determination. Consider, for example, Daes (2009: 59) report on the opinion of a Canadian representative to the working group drafting the UNDRIP: he «questioned the assertion that indigenous peoples and nations were subjects of international law. International law was created by states, through agreements or practice, and there were no indications that states recognized indigenous peoples and nations as subjects of international law. In his view, therefore, it would be incorrect to include in the declaration something that was not, in fact, supported in international law.» Or consider Errico's (2007: 757-758) discussion

Second, a human right to *internal* self-determination cannot mean that the indigenous people either declines to engage with the contemporary social, political, economic and cultural environment or that, doing so, the people somehow forfeits claims to a right to self-determination. Self-determination does not mean the preservation of some kind of rights-generating distinctive way of life or incommensurable cultural authenticity — but rather the means to determine aspects of the people's interaction with the non-indigenous community, including aspects of its adaption to, at points even assimilation into, the social, legal, economic and cultural environment.

This could mean moving from a community in which individuals have traditionally ascribed identities to one in which they choose their identities. It could mean moving from values and institutions that emphasize favoring the group over the individual to values and institutions that emphasize protecting the individual from the group. And it could mean recognizing such non-indigenous bodies as the national courts to adjudicate and enforce minority rights locally. Such rights might best be made internal to the national constitution — along with the human right to indigenous self-determination. Here the problem is developing a system of courts and a legal culture to which the indigenous could trust to judicial review some of their internal disputes, decisions, and arrangements. However difficult that goal may be, it is better than looking to some international body and international legal instruments to monitor and adjudicate such issues.

Third, an indigenous people might construct human rights as a notion of individual civil rights to lead one's life in political community by one's best lights, and notions of individual political rights to participation in the community's self-determination. An indigenous people might configure the processes of political self-determination in various ways. One way is democratic. If one argues that the internal self-determination of indigenous peoples is necessarily a right to democratic self-determination, then the right to self-determination

of a provision «recalling respectively the principles of the Charter of the United Nations and the Vienna Declaration and the Programme of Action,» that «[n]othing 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 United Nations or construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States.»

involves for some traditional communities the adoption of norms of some non-indigenous communities.³⁹ If, instead, one argues that replacing the traditionally non-democratic governance of indigenous peoples with democratic self-determination would violate the people's cultural integrity, then one does not understand democratic self-determination to be a human right.⁴⁰ In that case one would still need to support the rule of law that, in indigenous communities, would protect individual members from human rights violations.

Fourth, an indigenous people might construct an *internal* human right to self-determination as a right to remedy the consequences of past injustices perpetrated by colonialism⁴¹ or by today's non-indigenous community. Remedial rights properly expire once their goal has been achieved. Here the goal here is fairness and equality in the integration of indigenous peoples into the larger society (including some autonomy in deciding the limits and forms of integration). The goal is the health and welfare of the indigenous people within the nation state, not its engineered permanent distinctions from the larger national community. Hence a right to self-determination is not an inherent right but a contingent one: it obtains as long as needed to achieve its goals. It is not a right to permanent difference for the sake of difference.

The goal is to connect aspects of indigenous life with aspects of the legal and institutional organization of the nation state, in ways in which the indigenous people participate on fair terms, with reasonable prospects of obtaining some of its goals, just as the non-indigenous community faces reasonable prospects of not obtaining all of its goals. The goal is not for the indigenous people not to change; the goal, rather, is to shape that change, to give it a direction desired by the indigenous. Thus self-determination cannot mean the complete and uncompromising preservation or cultivation of the indigenous

³⁹ Anaya (1999: 109-100), for example, views indigenous self-determination as inherently human rights-friendly and correspondingly expects indigenous governments should be democratic.

⁴⁰ I do not; see Gregg (2016a).

⁴¹ The status of colonialism in the construction of indigenous peoples is complex. Eide (2009: 40-41) for example writes that «differences between the situation in the African and Asian territories colonized but not extensively settled by Europeans, and the situations in the Americas, Australia and New Zealand where overpowering European settlement had taken place, is that decolonization gave back power.» He also asserts that because indigenous peoples will better realize their aspirations in the language of human rights than in the language of decolonization, they have stretched the «human rights platform to include collective rights involving a degree of separation and self-determination» (ibid. 41).

people's «otherness» over against the non-indigenous community. It cannot mean preserving a more traditional way of life and eschewing a more modern way of life. It cannot mean that the indigenous (or non-indigenous) community polices the borders of the indigenous people's «otherness» to enforce their social, cultural, political, and economic isolation from the larger community. (Note that the argument from deep cultural difference is belied by the fact the indigenous peoples have long been participating in many aspects of non-indigenous life.)

Fifth, an indigenous people would want to enjoy, with respect to their traditional lands, the right that the citizens together enjoy with respect to non-citizens: the right to decide who to admit and to impose on those admitted obligations (such as learning the community's language). This might mean that the non-indigenous could not settle non-indigenous persons on indigenous land without the prior consent of the indigenous. It would constitute a restriction on the free mobility of all citizens within the national territory, and in that sense it would limit some civil rights of non-indigenous citizens. The communal interests of the national community are similar to the communal interests of the indigenous community with the difference that the indigenous enjoy mobility throughout the country whereas the non-indigenous have less mobility within indigenous territories. The national community seeks to preserve national identity and to protect national security; the indigenous community would preserve aspects of indigenous identity and to protect against the dilution of their likely fragile community through homogenization with outside citizens.

Sixth, linguistic assimilation into the majority language of public life and education, and in the everyday life and work of the indigenous, is a standard policy of nation states. A similar policy for an indigenous people might allow the indigenous language(s) to survive into future generations despite the culturally homogenizing forces in a national environment dominated by another language. Such a right is a special right, a minority right, not enjoyed by the non-indigenous. It is implausible as a human right. The goal might be first bilingual and then fully «intercultural» schooling at the primary and secondary levels, and perhaps at the tertiary level as well. The «fundamental goal of education has usually been to assimilate indigenous peoples in the dominant culture (“Western” or “national”, depending on the circumstances), leading to the consequent disappearance or, at best, marginalisation of indigenous cultures within the education system. To a large extent, this is still the prevailing view in some education systems, despite the existence of legislation that sets specific objectives in this area» (Stavenhagen 2015: 255). Instead, the goal should be

to enable indigenous «children and youth to acquire knowledge and skills that will allow them to move ahead in life and connect with the broader world,» rather than a «means of forcibly changing and, in some cases, destroying indigenous cultures» (ibid.).⁴²

Seventh, if an indigenous people is not concentrated territorially, it will not constitute the kind of local majority that might allow it to achieve representation in political fora beyond the indigenous territories. And self-determination may depend on such representation. A minority right for the indigenous might encourage boundaries drawn so as to concentrate the indigenous or at least not to further disperse the indigenous population. Another minority right might seek to regulate — by drawing internal boundaries — the extent to which the national government might weaken or undermine local indigenous political power and mechanisms of self-determination (such as group-based political representation and perhaps a right of veto over national plans for the use of indigenous lands and their resources). This would be a right to protect against usurpation or disempowerment by the non-indigenous majority.

Eighth, indigenous and nonindigenous peoples alike would do well to seek the construction and observance of a human right to indigenous self-determination inside and through the nation state rather than through international law, which provides little if any benefit to the indigenous and which cannot be well enforced in any case. States may disregard international law, in any case. So the primary venue for the realization of indigenous rights needs to be the nation state. Self-determination would then mean: a nation within a nation, an indigenous nation within a non-indigenous nation. That configuration does not challenge nation state sovereignty at the international level. Rather, it challenges nation state sovereignty internally, to accommodate the indigenous in remedial ways and in compensation for historical injustices that victimized the indigenous. It also challenges nation state sovereignty in the sense of encouraging a more pluralistic configuration of the entire polity: «peoples who have rights to self-determination nested within their rights as citizens of states» (Niezen 2003: 148).

⁴² Not to mention various material problems quite beyond rights: «Many indigenous people experience difficulties in gaining access to schools» but also problematic: «Although the right to education is universally recognised, indigenous peoples still do not exercise it fully. The degree of illiteracy, poor academic achievement and poor school attendance, especially at the middle-school and higher levels, tend to be higher among indigenous peoples than in the rest of the population» (Stavenhagen 2015: 255).

The most effective route to this goal would be the constitutionalization of indigenous self-determination. Constitutionalization would mean measuring the legitimacy of power within the nation state and within the indigenous community by the same legal standards — and by the same human rights norms, at least in aspiration of the nation state incorporating human rights in the domestic constitution. This is an important degree of assimilation. But assimilation need not mean the cultural and other reduction of the indigenous community to the non-indigenous. It need not mean the imposition of a fully foreign way of life through law or administration. Ideally, assimilation would mean cooperation between the two nations or communities in a spirit of coexistence, with mutual respect, toward mutual benefit, and on the basis of shared legal and human rights norms. Those laws and norms inevitably will require both communities to change in some respects. Even if they ask more of indigenous communities than of non-indigenous communities, they measure both by the same standard.

Assimilation so understood could then be an element of internal self-determination, namely as a «right of the population concerned to freely express its wishes about its destiny,» where «choice among the various alternative ways of safeguarding its basic rights primarily belongs to each minority group» and «ought to be made by the people concerned,» although «it needs afterwards to be endorsed by the national authorities, or, in the event of disagreement, negotiated and agreed upon with those authorities» (Cassese 1995: 352).⁴³ To argue that that standard is solely the standard of the non-indigenous community is to indulge in the politics of radical cultural difference that are belied by the many ties and interactions between the two communities. It would also preclude the construction of human rights for the indigenous people inasmuch as human rights locally constructed need to apply to all parts of the nation state equally (even if different nation states were to construct human rights in somewhat different ways).

4. An indigenous human rights state

The constitutionalization of a human right to indigenous self-determination would constitute the *internal* self-determination not

⁴³ Elsewhere I develop methods of resolving normative disagreement under conditions of moral pluralism, cultural diversity, and normative disagreement: cf. Gregg (2002); Gregg (2003a); Gregg (2003b).

only of the indigenous people but indeed of the nation state in which the indigenous are embedded. A right to *internal* self-determination, as a collective right, plausibly entails rights of self-identification but also of group autonomy and perhaps self-government, such as administrative or local autonomy over matters such as health, education, and public services. Self-determination in local affairs might extend over many affairs, from education and employment, culture and religion, housing and employment and social welfare, as well as the natural environment and the management of land and resources. It would continually monitor the indigenous group's relation to the nation state.

In these ways, self-determination of indigenous peoples entails control over territory, for example where cultures and ways of life are viewed (by indigenous and non-indigenous alike) as depending on access and rights to traditional natural resources, toward the people's deciding aspects of its own future and some forms of development. At the same time, the regulation of education, say, or land rights, might remain in the legal and administrative purview of the nation state inasmuch as such interests are national in scope.

Such a right is distinguished from a right to *external* self-determination, as secession leading to a territory's international status as a sovereign entity. But if a right of indigenous peoples to *internal* self-determination might be thought necessary for the enjoyment of other human rights, including rights of the individual, then a human right to *external* self-determination as secession threatens to undermine the human rights project. For the project of advancing a free embrace of human rights around the world to the greatest extent possible at any given time needs the cooperation of nation states in the recognition and protection of human rights of individuals and groups. Of the nation states that might recognize some human rights to some extent, none will cooperate with a notion of human rights that could potentially undermine national integrity and national security. Not surprisingly, international law, driven as it is by the interests of nation states, does not recognize units, groups, or associations within states as enjoying some kind of free-floating right to self-determination under international law. (The ILO Convention, for example, recognizes a «principle of self-identification» for indigenous peoples but notes immediately that its usage in no way implies any kind of rights in the sense of self-determination under international law.)

Further, «standard» *state-centered human rights* are challenged by «special» *human rights for indigenous peoples* but only when the latter

threaten the integrity of the nation state. They do so if constructed as a right to self-determination, and if in turn a right to self-determination is constructed as a right to secession.⁴⁴

On the one hand, a right to self-determination is implausible as a grant of a self-identifying indigenous people to itself. Self-determination is possible only as something granted and restricted in various ways by the relevant nation state. In fact, «economic, social, cultural and environmental circumstances that surround and determine the particular ways of life of indigenous communities,» rather than some universally valid moral insight, would determine what a restriction is in any given context (Gómez Isa 2014: 740).⁴⁵

On the other hand, the notion of human rights specific to indigenous peoples is undermined by the idea that all peoples have an *equal right* to self-determination (the United Nations Charter of 1945 asserts just that: the «equal rights and self-determination of peoples»). If *all* peoples can self-determine, and if self-determination means secession, the nation states inhabited by indigenous peoples would be massively destabilized. Yet the venue and guarantor of human rights recognition and protection is the nation state (if such a nation state exists in any given case). In short, a right to self-determination cannot be generalized to all peoples within the nation state. A universal right to self-determination is incoherent: if all groups achieved self-determination, political community would be impossible.

Human rights framed in terms of an *existing relationship between the individual and the state* miss the mark if the claimed right of an indigenous people is not recognized by the relevant nation state. To achieve that recognition, a social and political movement is necessary. To that end, I propose framing human rights in terms of the relationship between an indigenous people and what I call the «human rights state» (Gregg 2016b).⁴⁶ A particular human rights state seeks to transform the corresponding nation state, which inhabits a legal space and exercises potentially unlimited legal authority within that space. This exclusionary logic — national sovereignty excludes all other legal

⁴⁴ This discussion assumes that at least some indigenous peoples would want to secede, which may not often be the case: «state concerns about threats to territorial integrity are unfounded because most indigenous peoples have no desire for secession» (Quane 2005: 663).

⁴⁵ Of course the mere assertion of such a right provides no information about the source of such a right or how the nation state might limit it. International instruments specify neither the nature of limitations nor their legal basis.

⁴⁶ The following account of a human rights state draws on Gregg (2016a).

authorities — entails that no citizen enjoys human rights if the nation state in which he or she resides declines to offer them. Exclusionary logic undermines the human rights project, which operates with a logic of inclusion: inclusive of persons regardless of their citizenship status or territorial location, and notwithstanding a world organized into nation states.

While distinct from the legal community of the nation state, the metaphorical human rights state is an actual community composed of a network of self-selected actors — indigenous advocates for an indigenous people and for their human right to internal self-determination within the nation state. Each human rights state operates within or alongside a corresponding nation state, yet independent of that nation state in that, unlike a nation state, a human rights state recognizes the self-authored human rights of its members. A human rights state challenges the corresponding nation state to embrace human rights as integral to itself and to the domestic constitution. It challenges a nation state to absorb the corresponding human rights state into itself, in this way reducing the reach of national sovereignty to the extent necessary to allow for the internal self-determination of the indigenous people within that nation state.

Indigenous actors generate membership in a human rights state; they do so through their individual participation in a human rights-inspired form of «sovereignty-free» membership. A metaphorical human rights state needs no physical or topographical sovereignty to be a sphere for human rights-advocacy by its members acting in concert, attempting to persuade the corresponding nation state to adopt a human right to the internal self-determination of an indigenous people. Individuals who advocate that their nation state give up a measure of its sovereignty to adopt, into the national constitution, a human right to indigenous self-determination thereby render themselves members or «citizens» of that particular human rights state. Advocacy is itself constitutive of membership in a human rights state. Indigenous advocates «perform» human rights among themselves, at first only within a human rights state but always as an argument, example, and exhortation addressed to the corresponding nation state.

A human right to indigenous self-determination internal to the nation state means: in its legislative, judicial, and executive branches, the nation state is no longer the sole source, foundation, and center of all legitimate domestic power and for all domestic law. *Internal* refers to incorporation of a human right to indigenous self-determination in the national constitution. Such a nation state, thus modified, is no

longer free of all non-domestic legal restraints in its treatment of its own indigenous citizens.

When I advocate the domestic constitutionalization of human rights, I seek the benefits of constitutionalism understood as the application of several principles: accountability, separation of powers, equal protection of the rights of all citizens (indigenous and nonindigenous alike), and legally enforceable constitutional limits to the exercise of law-making and regulatory powers. These limits should secure the equality of indigenous and non-indigenous citizens even as the indigenous enjoy a particular human right to internal self-determination.

A human rights state would exercise «deontic powers.»⁴⁷ By *deontic* I mean a form of recognition that invests a person in an office with powers that bind his or her addressees. 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 so regarding themselves, 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 but 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, the custom of judicial review). The decisions are binding because the community regards them as binding.

By *status* I mean a rights-bearing capacity that a political community can ascribed to individual members of the community. In particular, a human rights state ascribes human rights-bearing status to all human beings. And a human rights state advocating a right to indigenous self-determination ascribes that right to all members of the 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 with status functions with deontic powers. Status functions with deontic powers are vital to social stability.

A status function is possible only if embedded within a system of social recognition. Recognition of status functions has the force

⁴⁷ With respect to deontic powers and status functions (but not with respect to human rights or indigenous peoples), I draw here on Searle (2010).

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 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).

As individuals who form an advocacy group within the nation state to challenge the nation state to adopt a human right of indigenous people to internal self-determination, the self-selected, self-identified «indigenous people,» are already self-determining as a social and political movement within the corresponding nation state. The self-identification of a people is an act of self-determination; a «right to self-determination underpins all other claims advanced by indigenous peoples,» such as rights to participate, «in a spirit of partnership and mutual respect» (Barelli 2011: 435), in decision-making processes for the development of indigenous lands and to preserve the indigenous culture (Quane 2005: 656).

A human rights state does not pursue *universal* human rights; it pursues human rights *within* a particular nation state. In our present context, it seeks recognition of an indigenous right to internal self-determination. It seeks recognition from the particular nation state in which the indigenous peoples live.⁴⁸ A human rights state might advocate for internal self-determination as some form of territorial autonomy short of secession, for example as an indigenous people's right to determine its local government and policies as well as some economic activities.

Autonomy here is partial not total: the indigenous people would decide some local issues independently of the nation state but, at the same time, would participate in the nation state for example wherever decisions of the nation state affect them, such as management of land and resources. Autonomy here means internal self-determination of the indigenous community as a right to participate in the larger national community. Internal self-determination is then related directly to participatory rights, not necessarily as a right to democracy or even

⁴⁸ Universal rights as such are unlikely. But the idea of universally valid norms may serve as a standard by which to measure contemporary communities. And it may serve as an aspiration toward which social movements might strive. Further, «universal ethics» are likely to be Western ethics. In any case, there is no universal agreement on possible universal ethics.

as a veto right (let alone a right to secession except as a remedial right in the case of extreme crimes against the people) but certainly to a right to be consulted by the nation state in matters affecting their lives. A right to participate is also a right to criticize inadequacies in the realization of that right, for example where it fails to «guarantee that the dialogue between indigenous peoples and States will be on an equal footing» (Barelli 2011: 435).

Autonomy would not mean complete cultural autonomy. A human right to self-determination would not privilege indigenous cultural diversity *as such* but rather favor or accommodate some instances of diversity yet not others. For example, the goals of justice might not entail cultural preservation. Consider one or more possible distinctions between an indigenous and a non-indigenous, national culture. Jeroen Van Broeck (2001: 5) relates such a distinction «to what can be called the cultural and ideological background or basis of the “legal system”. A dominant culture is considered the culture which provides the ideological basis of the penal law or the penal rule on which the defendant is tried. The minority culture denotes the cultural background of the defendant’s group that does not share the same cultural norms and values as the dominant culture with respect to certain issues. The cultural values that are incorporated in the “legal system”, and more specifically in its penal law, determine which culture can be seen as dominant» (Van Broeck 2001: 5). Further, the values of individuals raised in the indigenous culture «may at times conflict with the values of the majority culture. To the extent that the values of the majority are embodied in the criminal law, these individuals may face the dilemma of having to violate either their cultural values or the criminal law» (Note 1986: 1293).

In any case, cultural preservation cannot be a self-justifying goal. All traditions contain elements of injustice and, from a human rights perspective, those elements should be eliminated. A human rights state should advocate for indigenous human rights only insofar as those rights serve justice, and where justice is not understood merely as the survival of an endangered indigenous culture. For example, the Corte Constitucional de Colombia is mistaken when it claims that indigenous legal autonomy should be limited only minimally because at stake here is «the subsistence of the group’s cultural identity and cohesion.»⁴⁹ For the court would then allow for a possible

⁴⁹ Corte Constitucional de Colombia, Sentencia T-349/96, 8 Aug. 1996, ¶ 2.3 (Colom.), cited in Gómez Isa (2014: 739).

«cultural offence». According to such a defense, «persons socialized in a minority or foreign culture, who regularly conduct themselves in accordance with their own culture's norms, should not be held fully accountable for conduct that violates official law, if that conduct conforms to the prescriptions of their own culture» (Magnarella 1991: 67). To be sure, the dominant, non-indigenous legal system will not classify all offences by members of an indigenous community as cultural but only those in which culture in some sense is thought to play a significant role, and where that «same act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation» (Van Broeck 2001: 5).

Consider how a human rights state might operate with respect to two of the problems posed by a right to indigenous self-determination with respect to justice. *First, a human rights state must insure that deference to diversity in indigenous justice does not entail unjustifiable forms of inequality in treatment.* Human rights peculiar to indigenous peoples are more plausible if consistent with human rights ideals that can plausibly aspire to eventual universal validity. A right shared only by the indigenous might be justified if the consequences of the discrimination against the non-indigenous were benign in consequence. Those consequences could be benign if they addressed past wrongs suffered by the indigenous forebears, or if they contributed to providing a «level playing field» between indigenous and non-indigenous, yet without in turn demeaning their social and political position in the nation state.

For example, an indigenous human rights state might argue that some rights need not apply to all citizens equally. Inequality might be justified in the sense of some forms of diversity, where tolerance for some diversity aims at preserving fragile and endangered indigenous cultures that may have suffered the depredations of more dominant, foreign cultures.

Consider a different example: an individual suffers inequality if the administration of indigenous justice is harsher than the justice meted out in the nation state. But is the nonindigenous person treated unequally if indigenous justice is more lenient than justice in the nation state? Perhaps not, if leniency can be rationally related to an overall scheme of justice no less rigorous than that of the scheme of the nation state as a whole, yet one that preserves an indigenous way of life no less acceptable to the members of the indigenous people than the non-indigenous scheme is acceptable to the nation-state citizenry overall. But the indigenous scheme would need to allow members of

the indigenous people who dissented to opt out of the indigenous scheme and to accept the terms of the non-indigenous scheme. Not allowing movement in the other direction should be disallowed inasmuch as the larger scheme of justice includes all persons whereas the indigenous scheme is available solely to members of the indigenous people. Here we have a particular example of what a indigenous human rights state might advocate in advocating an indigenous right to self-determination.

Second, a human rights state must insure that collective indigenous human rights do not compromise the human rights of individual members of the community. The indigenous people's scheme of justice, like its way of life, should always be open to challenge both internally, by members, as well as externally, by non-members. For any plausible scheme of justice need always to be able to justify itself with good reasons. For example, an indigenous human rights state would not advocate minimal legal restrictions on an indigenous scheme of justice just because it is indigenous. But it could so advocate if penalties imposed are not disproportionate to the offense; if penalties do not violate the accused's right to due process; if penalties do not have disastrous, unintended consequences on other, innocent persons, such as the offender's family.

An indigenous human rights state would provide good reasons for its advocacy of collective rights and, in that context, address possible conflicts between collective and individual rights. For example, if homicide, torture, and slavery are unacceptable as practices by individuals, they cannot be acceptable as practices by groups that operate in terms of collective rights. But a human rights state that advocates an indigenous right to internal self-determination might dispute, over against the national political community, practices that it does not interpret as violations of prohibitions of homicide, torture, or slavery — for example, the claim that the punishment of forced labor is not tantamount to slavery, or that the punishment of forced labor is, for an indigenous people, a just alternative to the punishment of imprisonment. If a human rights state cannot persuade the nation state, the relevant practices should be regulated no differently than those of the general community.

An indigenous human rights state could certainly argue to the nonindigenous community that indigenous notions of legal punishment in terms of restoring social peace and communal harmony are not peculiarly indigenous aspiration but only in means. That is, it could argue that the national community might in principle aspire to such goals. An indigenous human rights state

might argue that the larger community, in failing to achieve its ultimate goals with regard to legal punishment, might consider adopting some indigenous practices if they are found to better achieve those goals.

Or a human rights state might suggest that the overall political community's rejection of the indigenous infliction of physical punishment, say by stocks or whips, is more just (because, say, it is brief and has a deterrent effect) than practices embraced by the larger community, such as capital punishment (because execution is permanent and may have no deterrent effect). The indigenous may regard capital punishment as unjust, indeed unjust from a human rights standpoint that the indigenous better realize than the nonindigenous community.

Further, a human rights state advocating a right to indigenous self-determination must address diversity with respect to legal norms of procedure, interpretation, judgment, and adjudication, and with regard to principles of legality such as individual responsibility, due process, impartiality, presumption of innocence, and right to defense. In conversation with the non-indigenous community, the indigenous human rights state must balance some regard for distinctly indigenous norms and principles of law with norms and principles that aspire to universal embrace—such as never allowing collective rights to deprive dissenting members of their individual rights, or protecting groups particularly vulnerable in minority and majority populations alike, including women, children, the elderly, the poor, and the handicapped. By *balance* I mean, for example, that an indigenous people's human right to self-determination is subject to critical examination and limitation by principles that guide the nation state overall, at least insofar as that nation state may be regarded as more or less just. If the nation state is more or less unjust, the indigenous self-determination should have greater rather than narrower scope.

5. Conclusion

Significant for an indigenous human rights state is the fact that «self-determination emerged from and justified a *state-centered* international legal order» (Cirkovic 2006/2007: 382). For the self-determination of an indigenous people is only possible within a state-centered legal order—opposing that order wherever it violates human rights but also seeking to change that order in ways to make

it more human rights-friendly.⁵⁰ An indigenous human right to self-determination seeks integration into the constellation of nation states rather than distance or exit from it. A human rights state, as a social movement composed of self-selected indigenous persons, advocates for an indigenous human right to internal self-determination vis-à-vis the nation state in which the indigenous people is embedded.

In short, the task of a human rights state for indigenous peoples is to find a path from self-identification to self-determination *within the corresponding nation state*. That path will involve the indigenous people's re-interpretation of itself, along some dimensions, to render it more human rights-friendly. Re-interpretation is important to the possibility of an indigenous people's internal capacity for change (perhaps sometimes following outside encouragement). The indigenous community must be able to decontextualize its self-understandings and deep traditions with regard to individual human rights where these are threatened by collective human rights. And it must be able to reconsider, reinterpret, and in some cases transform aspects of its culture and sacred legacy in the context of advancing human rights—those of the indigenous people no less than those of the non-indigenous community. To do so, an indigenous people need not invoke human rights universally valid a priori; it can invoke the far less taxing notion of human rights as contingent social constructs. Fundamental rights are not fundamental because they are inherently so; they are fundamental because communities persuade themselves that they are fundamental, contingently, as a matter of social construction. Attention to indigenous cultural diversity is one element in pursuing a human right to internal self-determination of an indigenous people.

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⁵⁰ For example, by modifying the nation state in ways that would allow for the realization of border-crossing human rights, namely by reducing state sovereignty to the extent necessary to make increasing cosmopolitan human rights possible, even as human rights originate locally and initially with only local validity.

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