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# Descent, Culture, and Self-Determination: States and the Definition of Indigenous Peoples<sup>1</sup>

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**Abstract:** *Canada's concept of "status" – the definition of who is an Aboriginal person under the Indian Act – has its analogies in the administrative practices of many countries. However, the European colonial expansion produced great variety, with contemporary states now relying on multiple categories of definition; descent from an enrolled historical population is often arbitrarily combined with particular cultural or demographic attributes. Effective activism has, in recent decades, pushed states towards policies of Indigenous self-definition. However, this remains constrained and uneven. While the initial goal here is a critical survey of definitions of Indigenous status in the "settler states" of Australia, New Zealand/Aotearoa and the US, the article examines practices in Latin America, Scandinavia and Russia as well as Asia and Africa. It concludes with a discussion about ongoing challenges for state practices of definition, including the implications of the UN Declaration on the Rights of Indigenous Peoples.*

## Introduction

The dynamism and diversity of Aboriginal communities in Canada have been the subject of extensive debate and scholarship. The debate establishing the boundaries of the category of "Status," as defined by the Indian Act through its many revisions, has been particularly fraught. Rules determining status have had to respond to Indigenous resistance and litigation, practical questions to do with urbanization and demographic and cultural change, and a growing population of "Non-Status" people. This article surveys, for a Canadian audience, a number of other states that have sought to define Indigenous peoples, identifying trends and noting the nuanced ways in which the politics of Indigeneity presents itself in the twenty-first century.<sup>2</sup>

The "status" of an individual or community as Indigenous (Aboriginal, American Indian, or a host of analogous terms)<sup>3</sup> was originally an administrative marker, imposed

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2 An earlier version of this article was commissioned for a Canadian policy research workshop, "How Countries Other Than Canada Deal With Defining Indigenous People," Background Paper prepared for Office of the Federal Interlocutor for Métis and Non-Status Indians, Research Workshop (February 2012). Sebastien Grammond (2009) has undertaken a comprehensive analysis of the Canadian case.

3 Thus the article uses these terms, as well as the word "Indigeneity," which here denotes both the claiming and holding of such a status.

by colonial authorities on the original inhabitants of colonies to designate those who were entitled to access particular programs, or were subject to certain rules. This is still its primary purpose. The fact that these systems are deeply resented in many places or, contrarily, that individuals and communities so marked have taken control of membership rules, does not diminish the fact that “status” remains a tool of state reason and administrative control.

Status varies considerably in its boundaries, its entitlements, and its operation amongst the nations that use it. One scholar generalizes that, in the settler states (those like Canada), policies of negotiation with Indigenous peoples define potential claimants either according to a “race” model of definition that prioritizes ancestry or to a “nation” model that foregrounds membership in a tribe (Gover 2011, 10–11). However, the survey of state practices of definition undertaken for this article reveals three broad characteristics: *descent* (calculated in a variety of ways that require a demonstrable relation between present-day claimants and some prior unquestioned Indigenous community, sometimes including “blood quantum”); *cultural requirements* (e.g., language use, or “participation” in community life or certain economic practices); and *self-definition* (where states have devolved the power to manage their own membership rules to Indigenous communities, a possible step towards Indigenous self-determination). These characteristics are closely interrelated; many Indigenous self-definitions also use descent or cultural standards. Moreover, state impositions (such as numerical size) can be highly arbitrary, inter-subjective (requiring recognition by non-Indigenous communities living around claimants), or seek to approximate Indigenous practices of recognition.

The main task of this article is to provide a survey of varieties of state practice and to inform policy debate, taking into account practicalities such as pressures on status-holders from demographic trends, shifting cultural norms, and legal and institutional change, including the passage of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). It would be a good idea, however, to address the issue of case selection before turning to the cases themselves.

The survey undertaken below takes a global perspective but has not covered each instance of state definition. The approach has been to include states from the Americas, Oceania, Africa, and Asia,<sup>4</sup> starting with the Anglophone “settler states” most similar to Canada: the US, Australia, and New Zealand. In these countries, as well as in Scandinavia and Latin America (although to a lesser degree), the greatest attention has been given to creating administrative regimes for allocating entitlements or exerting authority as colonial settlements expanded, with agricultural and industrial modes displacing Indigenous hunter-gatherer and pastoral economies. It is in these countries now dominated by settler societies, moreover, that Indigenous peoples have been most politically effective during the twentieth century, with activists from these regions largely shaping common or global understandings of what Indigeneity is. These countries also resemble each other in terms of high levels of intermarriage/intercultural mixing; widespread penetration of capitalist modes of economy/livelihood; high levels of urbanization; rapid population/identification

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<sup>4</sup> It does not include cases from Europe, as this is a region where the politics of Indigeneity are rarely expressed as such and appear to be subsumed by debates about multiculturalism and immigration, and separatism and ethno-political autonomy.

growth of Indigenous peoples in the last thirty to forty years; and persistent marginalization of those groups in social and economic indices. These countries are also comparable because of the liberal and democratic legal and political frameworks in which debates and policy-making take place.

However, because the form of Indigeneity that evolved within the settler states has become a more significant phenomenon, creating international institutions and legal instruments, this survey covers less well-reported treatments of Indigeneity in the contemporary world, including Russia and several cases from each of Africa and Asia. What we begin to see, however, is that the expansion of the politics of Indigeneity beyond territories marked by European settler colonialism presents new challenges for the global movement of Indigenous peoples, as the growing coherence of an Indigenous movement and identity in a global framework has not been matched by an emerging conformity of state practice. Rather, the socio-political value of Indigeneity—as organizing concept, as source of solidarity, and as a basis for research and knowledge (such as on Indigenous or “traditional” knowledge)—is interacting with the specific histories and ethnocultural realities of individual nation-states to produce a wide range of laws and policy for the definition of Indigenous peoples.

I have imposed some limits on the types of definition included in the survey for reasons of space. My approach is to identify institutions at the highest level of government and administration that define and maintain direct relationships between the state and those individuals or communities designated as Indigenous. Therefore, the focus of this article is on constitutional and legislative clauses, and on administrative rules setting out terms of eligibility for public programs.<sup>5</sup> In some cases, these arrangements have been shaped by jurisprudential change. I have used census standards and data only in order to develop the context of comparison.<sup>6</sup>

### Anglophone Settler States

Since the US Supreme Court judgment in *Cherokee v. Georgia* (1831), the Federal government has been in a “trust”<sup>7</sup> relationship with the Indigenous peoples of the United States of America.<sup>8</sup> This relationship has underpinned a long and complex series of Federal actions intervening in Native peoples’ lives that often, effectively, redefined who they were. Practice in the US now varies according to jurisdiction and agency. As the American

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<sup>5</sup> This article is also limited by its use of primary materials in English and Spanish only, plus several translations of Scandinavian documents by colleagues.

<sup>6</sup> For a critical survey of the approaches taken by censuses to measure Indigenous populations, see Peters (2011). Morning (2008) surveyed 141 national censuses, noting that only 15 percent included questions on Indigenous or tribal identity. It should be stressed that both absolute numbers, as well as population trends, in state censuses are a part of colonial history, and need to be seen as being within a matrix of the forces of assimilation.

<sup>7</sup> A trust or fiduciary relationship is where a stronger party must be responsible for the interests of the weaker party.

<sup>8</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

Indian Policy Review Commission concluded in a 1977 report to Congress, “[t]he Federal government, State governments and the Census Bureau all have different criteria for defining ‘Indians’ for statistical purposes, and even the Federal criteria are not consistent among Federal agencies” (Gonzales 1998, 207).

However, there are three criteria of eligibility for services provided by the Bureau of Indian Affairs (BIA). An individual must either: be a member of a Federally Recognized Tribe; be at least one-half blood quantum of a tribe indigenous to the US; or must, for some purposes, be of one-fourth or more Indian ancestry. The most commonly used definition of “tribe” is that in the Indian Self-Determination Act of 1963, which uses the following wording: “‘Indian tribe’ means any Indian tribe, band, nation, or other organized group or community ... which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians”<sup>9</sup> (Garrouette 2003, 25).

In the past, federal recognition of a tribe occurred through treaties, Acts of Congress, executive actions, or decisions of the Federal Court. Since 1978, the US Department of the Interior has administered the Federal Acknowledgment Process (FAP) to determine claims by tribes for recognition (the overarching regulations of the FAP are known as 25 C.F.R. Part 83, and were last revised in 1994).<sup>10</sup> In 1994, Congress also passed the Federally Recognized Indian Tribe List Act (FRITLA), which set out the only three formal pathways via which a tribe could receive federal recognition: by Act of Congress, through the FAP, or through the decision of a United States court.<sup>11</sup>

Quinn has summarized these criteria as follows: that “a single Indian group has existed since its first sustained contact with European cultures on a continuous basis to the present; that its members live in a distinct, autonomous community perceived by others as Indian; that it has maintained some sort of authority with a governing system by which its members abide; that all its members can be traced genealogically to an historic tribe; and that it can provide evidence to substantiate all of this” (1990, 152). Acknowledgment combines both descent and cultural criteria, but excludes self-definition.

As of April 2011, the US government had received 350 applications for recognition;<sup>12</sup> seventy-one cases had been resolved, with seventeen acknowledged through the federal process and thirty-two denied, while nine received passage or restoration of specific federal

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9 Part 83: Procedures for Establishing That an American Indian Group Exists as an Indian Tribe. 25 U.S.C. § 450b(e) (1963), amended by Act of Oct. 5, 1988, 102 Stat. 2285 (1988).

10 Abbreviated form of 25 CFR Part 83, “Criteria.” <http://www.bia.gov/idc/groups/public/documents/text/idc-001115.pdf>.

11 US Department of the Interior, Indian Affairs, “Why tribes exist today in the United States—How is federal recognition status conferred?” <http://www.bia.gov/FAQs/index.htm> (accessed 31 January 2014).

12 See “Letters of Intent Received as of April 29, 2011,” <http://www.bia.gov/idc/groups/xofa/documents/text/idc013622.pdf>.

legislation by Congress.<sup>13</sup> FRITLA also created a Federal Register of Indian Tribes, which must be published annually by the Secretary of the Interior (Bureau of Indian Affairs, Interior, 2010). Typically, members of such tribes hold Indian identity, tribal citizenship cards, or “Certificates of Degree of Indian Blood.”

However, a degree of self-definition exists where tribes have taken control over their own membership rules. The authority of tribes over membership was first established in US law in 1905 in *Waldron v. United States*.<sup>14</sup> Garrouette has discussed the range of ways that recognized tribes define membership, noting that “blood quantum” is relevant in two-thirds of cases, and that the most common quantum is 25 percent (i.e., one full-blood grandparent; 1998, 15). Generally, an individual seeking membership must provide genealogical documentation proving lineal descent from someone included on the “base roll” of a recognized tribe, or be in a relationship with a tribal member who descended from someone named on the base roll. A base roll is an original list of members set out in a tribal constitution or other document that formalizes enrollment criteria, and needs to be approved by the BIA (Thornton 1997, 35).<sup>15</sup> Some tribes have membership rules that stress matrilineal or patrilineal descent, residency in tribal communities, and political involvement in or ongoing contact with the community.<sup>16</sup> Thornton found that tribes based primarily in reservation communities are significantly more likely to use blood quanta in their membership criteria (1997). More recently, Gover found that, since the beginning of the “self-determination era” of US Indian policy in 1970, tribes have increasingly used descent and blood quantum in their membership rules (2011, 112).

According to US government regulations, “acknowledgement of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes” (O’Brien 1991, 1469). Yet several categories of Native Americans that do not or cannot meet criteria for recognition by the federal government, in certain cases, remain eligible for certain programs. These include “terminated tribes,” “non-recognized tribes,” and “state-recognized tribes.”<sup>17</sup>

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13 See “Status Summary of Acknowledgment Cases (as of April 29, 2011),” <http://www.bia.gov/idc/groups/xofa/documents/text/idc013624.pdf>.

14 Garrouette notes that a few tribes are required to have certain criteria determined by the federal government (2003, 168). Where tribal constitutions reserve a power to pass future ordinances regarding membership rules, these in some cases are “subject to review” by the Secretary of the Interior. For an extensive collection of tribal constitutions setting out membership rules, see <http://thorpe.ou.edu/const.html>.

15 It should be noted that these rolls are highly contested in some cases. Many Indians with a determination to maintain their own traditions of identification resisted strongly these practices of registration, refusing to be enrolled. This has resulted in many descendants of such “traditionalists” finding that they cannot demonstrate their Indian identity for federal purposes today (Garrouette 2003, 22; Otis 1973, 40–46).

16 US Department of the Interior, Indian Affairs, “Guide to Tracing Your American Indian Ancestry,” 3–4. <http://www.bia.gov/idc/groups/public/documents/text/idc002656.pdf>. See also Garrouette (2003, 15–16).

17 An extended discussion of these categories is in O’Brien (1991, 1470–77).

Recognition of individuals is equally variable. The federal government defines and identifies individual Indians for the purposes of numerous specific programs, such as those legislated by the Indian Child Welfare Act (1978), as well as preferential employment in Indian agencies such as the BIA. Particular programs (ranging from housing and pensions for railroad workers to environmental protection and small business development) are also eligible to members of “underrepresented minority” populations for whom the federal government has a special responsibility, including Alaskan Natives. Indigenous peoples in US possessions and protectorates, such as Guam and American Samoa, are also eligible for certain forms of federal entitlement (O’Brien 1991, 1477–79).

Native Hawaiians, who were not formally acknowledged as “Native American” for the purposes of federal programs until the 1970s, have recently been the most active group in reforming status rules. Legislation like the Hawaiian Homes Commission Act (1921) had defined “native Hawaiian” as “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.”<sup>18</sup> In 2011, Native Hawaiians began coordinated legislative change with regard to their status and relationship to the federal government of the US.<sup>19</sup> The bill put forward would formalize the federal government’s trust responsibility to Native Hawaiians, resulting in Native Hawaiians being made eligible for federal programs, as well as creating a “Native Hawaiian governing entity... (and) a government-to-government relationship.”<sup>20</sup>

Almost simultaneous with the presentation of the bill, the Hawai’i State Legislature recognized Native Hawaiians as “the only indigenous, aboriginal, maoli population of Hawai’i,” and created a Native Hawaiian Roll Commission (NHRC) to create and publish a roll of “Qualified Native Hawaiians.”<sup>21</sup> Those qualified will elect officials to a convention to constitute a governing entity acknowledged both by Hawai’i and the United States. The enabling legislation does not instruct the NHRC as to the criteria for eligibility, but its initial report discusses the “mission and spirit” of their task, centering Indigenous understandings.<sup>22</sup>

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18 § 201.7. Hawaiian Homes Commission Act (1921). <http://www.hawaii-nation.org/hhca.html#%A4%20201>.

19 For the 112th Congress, see (S.675) and (H.R. 1250), “A BILL to express the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process for the recognition by the United States of the Native Hawaiian governing entity,” <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01250:/bss/112search.html>. Both bills are in committee at the time of writing.

20 The bill includes the need to establish a roll of electors, processes for elections as well as a constitution.

21 Act 195, Session Laws of Hawai’i, 2011.

22 “[C]reating a vessel for Native Hawaiians to sign on to an official register has historical and cultural importance and is not just a bureaucratic act ... [previous administrative] processes have divided Hawaiians, and the commission is resolved for this to be a process of *lōkahi*—unity ... The Commission understands that their *kuleana*—responsibility—is to publish a roll of qualified Native Hawaiians with the intent to facilitate the process under which Native Hawaiians may independently commence the process of Nationhood ...

When juxtaposed with enrollment in recognized tribes, US census data contextualizes some of the demographic shifts in Indigenous populations. In 2000, the census first allowed respondents to identify as belonging to more than one “race.”<sup>23</sup> It also broke down American Indian/Alaskan Native (AIAN) respondents into nearly 40 tribal identifications, from Aleut to Yuman. Those claiming only AIAN identity increased 18.4 percent between 2000 and 2010. Approximately 4.1 million persons claimed AIAN “alone or in combination with one or more other races” in 2000. Those claiming AIAN “alone” in 2000 numbered under 2.5 million persons.<sup>24</sup> By contrast, according to the BIA, the total reported 2001 tribal enrollment (that is, enrollment in recognized tribes) was 1,816,504.

What this survey of the US reveals is a bifurcation between the process of acknowledgment—the recognition of Indigenous nations by the state, using descent and elements of cultural practice as the criteria—and autonomy over internal definition, enabling a kind of managed self-definition. Individual modes of entitlement to social programs centre largely on descent.

### *Australia*

The Commonwealth of Australia is a federal union of six colonies. Each colony (which then became a state) had varied and overlapping practices for defining who was an “Aborigine,” an “Aboriginal person,” or a “member of the Aboriginal race.” McCorquodale has recorded at least sixty-seven different definitions since colonization (1987).

In stark contrast to the Canadian arrangement, the 1901 Constitution explicitly reserved legislative authority over Indigenous peoples to state governments, denying the federal government any role. It was not until 1967 that this was altered by referendum; a *concurrent* authority now exists. State government departments and legislation continue to use a variety of formulations (Australian Law Reform Commission [henceforth ALRC] 1986, para. 88), even within one jurisdiction (para. 93). After 1967, a definition relying on descent came into use in federal legislation, declaring that an “Aboriginal person ...

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The Commission understands that there are varied views as to how the process of Nationhood should be achieved. The Commission respects these views with the values of *aloha*, *hō‘ihi* (respect), *mālama* (to care), and *‘ike pono* (to understand what is fair). The Commission believes that in order to achieve its mission, it is important to strive for *laulima* (cooperativeness), *lōkahi* (unity), to be *‘onipa‘a* (steadfast) and to do what is *pono* (right), with the support of *‘ohana* (family, including ancestors).” Native Hawaiian Roll Commission. “Report to Governor Abercrombie and the Hawai‘i State Legislature, As Required by Act 195, Session Laws of Hawai‘i 2011” (December 28, 2011). [http://www.oha.org/images/stories/files/pdf/NHRC/1211nhrc\\_report\\_web.pdf](http://www.oha.org/images/stories/files/pdf/NHRC/1211nhrc_report_web.pdf).

23 US Office of Management and Budget. “Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity.” Federal Register Notice October 30, 1997. [http://www.whitehouse.gov/omb/fedreg\\_1997standards](http://www.whitehouse.gov/omb/fedreg_1997standards).

24 “Census 2000 Demographic Profile Highlights: Selected Population Group: American Indian and Alaska Native alone” and “Census 2000 Demographic Profile Highlights: Selected Population Group: American Indian and Alaska Native alone or in combination with one or more other races.” Available at US Bureau of Census, Fact Sheets, [http://factfinder.census.gov/home/saff/main.html?\\_lang=en](http://factfinder.census.gov/home/saff/main.html?_lang=en).



was a member of the Aboriginal race of Australia.” This was the approach of the Racial Discrimination Act of 1975, for example (Gardiner-Garden 2003, 5). Attitudes began to shift beginning with a 1981 internal administrative document, which noted: “Assessments of degree of descent were generally considered unreliable and capable of giving offence. Such definitions also failed to take sufficient account of concepts of self-identification and community acceptance”<sup>25</sup> This report included a three-part definition of an Aboriginal or Torres Strait person as someone who:

1. is of Aboriginal or Torres Strait Islander descent;
2. identifies himself or herself as an Aboriginal person or Torres Strait Islander;  
and
3. is accepted as such by the Indigenous community in which he or she lives.

The relative weight and clarity of each of these three criteria has been subject to interpretation and controversy. In fact, courts have become the most significant institutions in the process of reforming status in Australia. During the 1990s, a series of judicial rulings pointed to a more flexible definition, one that could expand and contract according to context. The first case concerned individuals whose deaths were to be investigated as part of the Royal Commission into Aboriginal Deaths in Custody; in 1990, the federal court ruled that even someone who did not identify, nor was recognized by a community, could be included in the investigations of the Commission (Gardiner-Garden 2003, 4).

After the 1990 case came more two cases pertaining to eligibility criteria for standing for and voting in elections to the Aboriginal and Torres Strait Islander Commission. In 1995 the federal court further strengthened the idea that descent could be interpreted as a matter of degree, in light of the strength of the other two criteria: “The less the degree of Aboriginal descent, the more important cultural circumstances become in determining whether a person is ‘Aboriginal.’”<sup>26</sup> Then, in *Shaw v. Wolf* (1998), the federal court found that descent might be established via the other two means: “Aboriginal identification often became a matter, at best, of personal or family, rather than public, record. Given the history of the dispossession and disadvantage of the Aboriginal people of Australia, a concealed but nevertheless passed on family oral ‘history’ of descent may in some instances be the only evidence available to establish Aboriginal descent.”<sup>27</sup>

Since the 1992 High Court decision in *Mabo and Others v. Queensland* and subsequent passage of the Native Title Act, the Commonwealth government has recognized certain Indigenous peoples as native-title holders.<sup>28</sup> Claimants must meet a “registration test”

<sup>25</sup> Department of Aboriginal Affairs. 1981. “Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islander.” Canberra: n.p., 1; quoted in ALRC (1986, para. 91).

<sup>26</sup> *Desmond Gibbs v Lyle Capewell, Australian Electoral Commission and Minister of Aboriginal and Islander Affairs* [1995] FCA 1048; (1995) 128 ALR 577 (1995) 54 FCR 503 (3 February 1995).

<sup>27</sup> *Edwina Shaw & Anor v Charles Wolf & Ors* [1998] FCA 389 (20 April 1998), paras. 8–11.

<sup>28</sup> *Mabo and Others v Queensland* (No. 2). (1992) 175 CLR 1, [1992] HCA 23.

set out in the Act: “identification of the area subject to the native title claim; a sufficient description to identify the persons in the native title claim group; a clear description of the native title rights and interests claimed; a sufficient factual basis for the assertion that the claimed native title rights exist, including the native title claim group’s continuing association with the area and continuing observation of traditional laws and customs; a current or previous traditional physical connection by at least one member of the native title claim group with any part of the area.”<sup>29</sup> In practice, it is a rigid framework for limiting membership of the entitlement group (Gover 2011, 174–75) and is quite distinct from the approach to status for the purposes of social policy.

Tasmania remains the site of bitter controversy about Aboriginality in an administrative context.<sup>30</sup> In the early 2000s, the federal government sought to create an Indigenous electoral roll for the state, which generated further controversy and litigation. Briefly, the independent commission charged with determining eligibility for the roll considered using DNA research drawn from the Human Genome Project to establish descent, in addition to archival and genealogical data, though this proposal was abandoned after vigorous criticism (see Gardiner-Garden 2003, 10).<sup>31</sup>

A problem throughout Australian history has been how to identify the descendants of unions between Indigenous and settler peoples. The colonial imagination and policy approach prior to the post-WWII period assumed that the less Aboriginal blood an individual had, the less Aboriginal they were. The story of the Australian “Stolen Generations,” similar in some respects to Canada’s history of residential schools, contains a long record of the coerced and forcible removal of children of mixed descent from Aboriginal families. This creates serious ethical and practical difficulties for a status system predicated on communal recognition and descent as criteria of Aboriginality.

As early as the 1970s, once the first substantial piece of land rights legislation had been enacted in the Northern Territory, the Aboriginal Land Commissioner could write that “there is nothing in the Act to compel the view that a person who is descended from both Aboriginal and non-Aboriginal ancestors cannot be considered an Aboriginal.”<sup>32</sup> Moreover,

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29 National Native Title Tribunal. “The Registration Test.” <http://www.nntt.gov.au/News-and-Communications/Publications/Documents/Brochures/The%20registration%20test.pdf>.

30 In the colonial imagination, as well as in contemporary popular culture, Tasmania is where Aborigines became “extinct,” with a fetish made of Truganini, the last “full-blood” to die in 1876; it is a story in many ways resonant of the history of the Beothuk in Newfoundland.

31 Genetic testing of claimants to Indigeneity has been advocated and carried out in New Zealand as well as Australia, though not with significant outcomes for state policy. In 2000, the state legislature of Vermont sought to introduce Bill H.809, which would have required DNA proof of American Indian identity in the provision of services. However, these measures fell in the face of widespread disapproval; many see such uses of genetic material as simply offensive and linked with past crimes of eugenics, as well as irrelevant as a marker of contemporary social identity. It does not seem an approach that states should or will take.

32 Aboriginal Land Commissioner. *Report*, AGPS, Canberra, 1981, paras. 119-21, referring to *Uluru (Ayers Rock) National Park and Lake Amadeus/Luritja Land (Claim)*, AGPS, Canberra, 1980, para. 114-16, cited in

recent recognition of the experiences of the Stolen Generations has given rise to a range of programs that intend to allow Indigenous peoples to reconnect with their identities and, where possible, their families. This adds further complexity to practices of definition.

It should be noted that popular culture in Australia has great difficulty acknowledging the Aboriginality of those with mixed antecedents (Sweeney and Associates 1996; Reconciliation Australia 2010, 32).<sup>33</sup> Under the circumstances, argues Gardiner-Garden, “the three-part definition has generally been found to help protect individuals from the tendency among ‘mainstream Australians’ to consider ‘real’ indigenous people as people living somewhere else and others as manipulating the system” (2003, 15). Interestingly, when the Australian Law Reform Commission investigated the recognition of Indigenous customary laws in 1986, it concluded that “it is not necessary to spell out a detailed definition of who is an Aborigine, and that there are distinct advantages in leaving the application of the definition to be worked out, so far as is necessary, on a case by case basis” (ALRC 1986, para. 95).

Censuses in Australia, which have been taken every five years since 1981, have inquired about the size of the Indigenous population. A significant rise in numbers in the last four censuses has been attributed both to a greater willingness amongst individuals to identify themselves as Indigenous and to the willingness of children of mixed marriages to identify themselves as Indigenous. However, the phrasing of the question does not allow respondents to identify themselves as both Indigenous and non-Indigenous (Gardiner-Garden 2003, 11). The 2006 census estimate of Indigenous persons was 517,000.<sup>34</sup>

Consequently, the Australian approach is firmly grounded in descent but the meaning of “descent” has become diffuse in Australia, and increasingly foregrounds self-regulated practices of communal recognition. The state primarily defines Indigenous individuals for the purposes of social services, with the exception being the corporate entities of native title-holders, who must show both descent and cultural continuity.

### *New Zealand*

For the Māori people of Aotearoa/New Zealand, it is *whakapapa* that establishes one’s identity as Māori. The term roughly means “genealogy,” or the story of belonging. However, statutory definitions of Indigenous identity in New Zealand (Māori) use descent as a definition of eligibility. Subsequent New Zealand legislation has adopted the self-referential descent approach that exists in Australia. According to the Maori Affairs Restructuring

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ALRC 1986 at para. 94.

33 However, a recent case found a high-profile newspaper columnist guilty of racial vilification in a series of columns called “White is the new black,” and “It’s so hip to be black,” which criticized individual Indigenous that he did not think had the right skin colour or cultural characteristics to be considered Aboriginal. See [http://blogs.news.com.au/heraldsun/andrewbolt/index.php/heraldsun/comments/column\\_white\\_is\\_the\\_new\\_black](http://blogs.news.com.au/heraldsun/andrewbolt/index.php/heraldsun/comments/column_white_is_the_new_black).

34 Australian Bureau of Statistics. “Experimental Estimates of Aboriginal and Torres Strait Islander Australians,” June 2006. <http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductbyCatalogue/9E334CF07B4EEC17CA2570A5000BFE00?OpenDocument>.

Act 1989, No. 68, “Maori means a person of the Maori race of New Zealand; and includes a descendant of any such person.” This is also the case for the Māori Electoral Roll.<sup>35</sup>

However, tribal membership is the critical issue for many, as it not only confers access to tribally based social services such as *marae* (on-reserve) housing or tertiary scholarships, but also reasserts *hapu* and *iwi* (sub-tribal and tribal affiliations) as the basis of identity, rather than the pan-tribal idea of Māori that emerged after colonization (Kukutai, 2004, 93–94). This is not a universal state of affairs, however, as organizations such as Te Whānau O Waipareira have elided the *iwi* and *hapu* bases of Māori identity, preferring a different way of establishing their client community: “whānau (family) are at the centre of everything we do ... (it) empowers whānau to choose their own direction and outcomes.”<sup>36</sup>

Gover has recently examined tribal membership rules under the process laid out in the Treaty of Waitangi, which is the framework in which Indigenous peoples pursue their claims against the state, and which requires greater institutional clarity of a tribe’s corporate identity. New Zealand policy is, primarily, to negotiate “usually [with] *iwi* or large *hapu* (tribes and sub-tribes) that have a longstanding historical and cultural association with a particular area,”<sup>37</sup> and requires claimant groups to produce a Deed of Mandate and then a constitution for the new Treaty Settlement Entity. This must come with matching rules for membership and beneficiary eligibility, both of which require ratification by majority vote (Gover 2010, 167–69).

Clearly there is both variety and dynamism in what constitutes status in New Zealand, and this probably reflects community values. Chapple, in a widely cited paper, argued that Māori identity was “multiple rather than singular, evolving rather than primordial, and fluid rather than rigid” (2000, 101). As Kukutai notes, “ancestry is often treated as an objective basis for identity and serves a gatekeeping function, albeit that the process of recalling ancestry has subjective elements” (2004, 91). The New Zealand census has, since 1991, enabled the counting of three characteristics that can be used differently to ascertain overall population numbers: ancestry, ethnicity (particularly language use), and *iwi* membership. The latter criterion was included because tribal authorities had lobbied for it (Chapple 2000, 91). If adherence to all three criteria (ancestry, ethnicity, and tribal affiliation) is counted, the 2001 census showed a “core Māori” population of just under 400,000. If descent is the sole criteria, the numbers increased to over 600,000 (Kukutai 2004, 92–95).

### *Scandinavia*

The Sámi are a multi-state Indigenous people, whose traditional territory of Sápmi comprises the northern section of the Scandinavian Peninsula (Norway, Sweden, and

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35 “The Electoral Act defines Māori as “a person of the Māori race of New Zealand; and includes any descendant of such a person. This includes Chatham Island Māori.” Elections New Zealand. *Maori Electoral Option – FAQ*. <http://www.elections.org.nz/maori/enrolment/maori-option-faq.html>.

36 Te Whānau O Waipareira. <http://www.waipareira.com/>. Thanks to Andrew Erueti for pointing this out.

37 See Office of Treaty Settlements, “What is a settlement?” <http://www.ots.govt.nz>.

Finland), as well as sections of the Kola Peninsula (see section on Russia below). The total population is roughly estimated at 70,000–100,000: 40,000–60,000 reside in Norway; 15,000–20,000 in Sweden; 9,000 in Finland; and 2,000 in Russia (UNHRC 2011, 4).

Each of the three Scandinavian countries has a Sámi parliament, which combines representative and administrative roles. While in many respects these are autonomous political institutions, each was created by state legislation and depends entirely on state funding. Much of that is designated for specific purposes to do with Sami language, education, and culture.

There is significant overlap across the three countries in determining eligibility to vote in Sámi parliamentary elections, with self-identification and language as the key criteria. For example, in Sweden, the Sami Parliament Act (1992; 2006) defines a Sámi as a person “who considers him/herself to be a Sami” and who meets one of the following criteria: he/she “can demonstrate a probability that he/she has or has had Sami as the language in the home, or ... can demonstrate a probability that one of his/her parents or grandparents has or has had Sami as the language in the home, or ... has a parent who is or has been included on the electoral register for the Sami Parliament, without this subsequently being decided otherwise by the county administrative board.”<sup>38</sup> The Swedish government has decided that it is up to each individual to decide what constitutes use of the Sami language “in the home.” However, a 2004 amendment allows for anyone on the electoral roll to challenge the status of anyone else on the roll (Beach 2007, 11–13). Additionally, in Finland, the legislation makes eligible anyone who is a “descendent of a person who has been entered in a land, taxation or population register as a mountain, forest or fishing Lapp” (a term which Sámi consider to be condescending).<sup>39</sup> The definition in these laws is used for other more recent legislation. For example, the Finnish Sami Language Act (1086/2003) defines a Sámi as an “individual as referred to in section 3 of the Act on the Sámi Parliament.”<sup>40</sup>

Each Parliament Act provides for a Sámi register, but there is some evidence that participation in the registration system is not yet widespread. In Norway, only around 14,000 out of the 50,000–65,000 Sámi are registered; in Sweden, the number is about 7,000 out of 17,000–20,000; and in Finland, around 5,200 out of 8,000.<sup>41</sup> Beach notes

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38 This is an English translation of the Act, available at <http://www.sametinget.se/9865>. In Norway, §2.6 of the Sami Act (1987), which established the Sametinget, describes the Sámi electoral register: “All persons who make a declaration to the effect that they consider themselves Sami, and who either have Sámi as their domestic language, or have or have had a parent, grandparent or great-grandparents with Sámi as his or her domestic language, or are the child of a person who is or has been registered in the Sámi electoral register may demand to be included in a separate register of Sámi electors in their municipality of residence.” Act of 12 June 1987 No. 56, concerning the Sameting (the Sami parliament) and other Sami legal matters (the Sami Act). <http://www.regjeringen.no/en/doc/laws/Acts/the-sami-act-.html?id=449701>.

39 The unofficial English translation is at <http://www.finlex.fi/fi/laki/kaannokset/1995/en19950974.pdf>. See also Skogvang (2009). Thanks to Mikkel Berg-Nordlie for these sources.

40 Sámi Language Act (1086/2003) s.3.2.2. <http://www.ciemen.org/mercator/bulletins/58-03.htm>.

41 International Work Group on Indigenous Affairs [hereafter IWGIA] (2011, 30).

that “some Saami fear that apathy already causes many Saami to refrain from joining the Saami electorate, and that if Saami language skills decline further over the generations, the potential electorate, not to mention those who actually register, will decrease severely” (Beach 2007, 11). However, enrolment is increasing in Norway, rising from 5,500 at the time of the first election in 1989 to almost 14,000 by the autumn of 2009.<sup>42</sup> Participation of those enrolled in elections appears to waver between 65 and 75 percent, and appears to be sensitive to contemporaneous legislative initiatives affecting Sámi rights. The gender ratio of those enrolled is skewed, as is the age profile, towards older males (Selle and Strømsnes 2010, 69).

Constitutional change in Sweden has meant that, as of January 2011, the Sámi are acknowledged as a distinct “people of Sweden.” Section 17 of the Finnish constitution recognizes the Sámi as an Indigenous people, acknowledging the right to cultural autonomy within the Sami homeland.<sup>43</sup> Article 110a of the Norwegian Constitution [Minority Rights of the Sami] declares, “[i]t is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life.”<sup>44</sup>

Additionally, legislation conferring rights and entitlements distinguishes between types of Sámi according to whether or not they practice reindeer herding on designated lands. In its original versions, passed in the late nineteenth and early twentieth centuries, this legislation was designed to restrict reindeer herding (perceived to be a backward economic practice) to limited areas, while protecting the responsible and productive agricultural enterprises of non-Sámi settlers from damage by reindeer herds. This legislation now gives rise to resentment amongst some Sámi excluded from the privileges, who want not only to keep reindeer herds but also want the associated rights to hunt and fish understood in the Sámi conception of “husbandry” (Beach 2007, 5).

In Sweden, the Reindeer Husbandry Act (1971) formalized territorial divisions for administering reindeer husbandry, now known as *samebys*, with each unit having an allotted reindeer quota to be distributed amongst *sameby* members. The original purpose of the divisions was “to provide a legally responsible entity for paying compensation to farmers whose property was damaged by reindeer herds.” Revised in 1993, the law now allows that anyone who had Sámi ancestry is eligible for membership in a *sameby*. However, this does not guarantee membership, which in practice is restricted because new members effectively dilute the reindeer quota. Effectively, the legislation also makes non-reindeer herding activities on *sameby* lands more difficult.<sup>45</sup> In Norway, the Reindeer Herding

42 Statistisk sentralbyrå (2009), “Sametingsvalet, 2009,” <http://www.ssb.no/sametingsvalg/>, cited in Selle & Strømsnes (2010, 69).

43 IWGIA (2011, 34); United Nations Human Rights Council (2011, 7).

44 Norway–Constitution. [http://www.servat.unibe.ch/icl/no00000\\_.html](http://www.servat.unibe.ch/icl/no00000_.html).

45 Beach (2007, 5-9); International Centre for Reindeer Husbandry, “Reindeer Husbandry in Sweden—Rights to Own Reindeer and ‘Sameby.’” [http://icr.arcticportal.org/index.php?option=com\\_content&view=article&id=176&Itemid=56&lang=en&limitstart=1](http://icr.arcticportal.org/index.php?option=com_content&view=article&id=176&Itemid=56&lang=en&limitstart=1).

Act (1978, revised 2007) determines that only those “who have the right to a reindeer earmark can conduct reindeer husbandry in the Sámi reindeer herding area. The right to a reindeer earmark requires that the person be a Sámi and that they, their parents or their grandparents have or had reindeer herding as their primary occupation.”<sup>46</sup> By contrast, Finland’s legislation regulates reindeer herding by any resident of a herding district, and is not reserved for Sámi at all.

It appears that Scandinavian state practice largely draws upon descent and cultural criteria. Eligibility requirements for the electoral rolls combine an obligation of individual self-identification with a demonstration of descent and/or a cultural standard of language. A provision for self-definition applies to a subset of the Sámi who continue in the reindeer economy to determine membership rules, and does so by entrenching multi-generational interactions of prior descent and cultural criteria.

### *Latin America*

The constitutions of Latin American states are primary defining documents for the region’s Indigenous peoples. Broadly speaking, they are rich and varied formulations that draw both on descent and cultural difference.<sup>47</sup> There has been considerable reform of these and related texts in recent decades, reflecting the numerical strength and growing organizational capacity of Indigenous peoples in democratic polities.

In Bolivia, for example, Article 30 of the revised Constitution of 2009 emphasizes both priority and cultural difference, and joins them with the term “peasant”: “The Indigenous peasant nation and people are the collectivity of people who share identity, language, historical tradition, institutions, territory and world vision ... whose existence pre-dates the colonial Spanish invasion.”<sup>48</sup> Legislation specifies this category even further, describing:

... the collectivity of people who descend from populations who pre-date the conquest and colonization, and who are located within the current borders of the state; possess history, organization, language or dialect or other cultural characteristics ... recognizing themselves as belonging to the same socio-cultural entity, maintain a territorial link in the function of administration of their habitat and social economic, political and cultural institutions.<sup>49</sup>

46 International Centre for Reindeer Husbandry, “Reindeer Husbandry in Norway—Rights to Own Reindeer.” [http://icr.arcticportal.org/index.php?option=com\\_content&view=article&id=175&Itemid=117&lang=en&limitstart=1](http://icr.arcticportal.org/index.php?option=com_content&view=article&id=175&Itemid=117&lang=en&limitstart=1).

47 It should be noted that there is a significant body of literature on Latin America that is assessing the limited forms of state recognition that are widespread through the continent, employing terms such as “neoliberal multiculturalism” (Assies et al. 2006, 40; Hale 2002; Stavenhagen, 2008). A common view is that while cultural difference has been recognized, often in sophisticated ways, it is not matched by implementation of the social, political, legal, and economic rights that should attend that recognition.

48 “Capítulo Cuarto, Derechos de Las Naciones y Pueblos Indígena Originario Campesinos.” <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html>.

49 “El Reglamento de las Organizaciones Territoriales de Base, de la Ley de Participación Popular.” Cited in Comisión Económica para América Latina y el Caribe (CEPAL) (2005, 18).

Recent legislative reforms gave greater autonomy to Indigenous peoples, particularly in matters of local law and justice, in what Barrera (2011) describes as a “plurinational state model,” where all ethnic communities “freely decide the course of their development, based on their own values, norms, and identities” (7–8). Sixty-two percent of Bolivians identified themselves as belonging to an Indigenous group in the 2001 census. Consequently, the question of group membership has devolved to communities and organizations, as is visible in the jurisdiction Indigenous legal institutions hold over individuals: “indigenous law shall apply to all individuals who are bound by a specific relationship to an indigenous group or who are considered members thereof.”<sup>50</sup> Precisely what this statement means will become more clear in the coming years.

The Constitution of Colombia did not define who Indigenous peoples are (Correa 2008, 7), but legislation promulgated in 1995 provided a definition of an “Indigenous community or group” as follows: “a group or group of families with Amerindian ascendancy, who have awareness of identity and share values, characteristics, cultural customs, as well as their own forms of government, management, social control or normative systems that distinguish them from other communities, whether or not they have property titles, or can be recognized legally or whether their *resguardos* (indigenous territorial reserves) were dissolved, divided or declared vacant.”<sup>51</sup> When there is doubt about a particular community, the Institute for Agrarian Reform of Colombia requests the Ministry of the Interior to conduct ethnological research to determine compliance. Correa has described this law as regressive, however, and as shifting power back towards state actors (2008, 8).

The Constitution of Peru recognizes Indigenous peoples using the same mix of culture and descent, with Article 89 of the constitution declaring that “Native and campesino communities have a legal existence and are juridical persons.” Again, an operating definition of those communities is provided in legislation. The Law on Indigenous People’s Right to Prior Consultation (2010), sets out objective and subjective criteria in Article 7:

The objective criteria are the following: 1) Direct descendancy from the original populations of the national territory; 2) Way of life and spiritual and historical links and with the territory that has been traditionally used and occupied; 3) Social institutions and distinct customs; 4) Cultural patterns and ways of living that are distinct from other sectors of the national population. The subjective criteria are to be related to the awareness of the collective group of possession of an indigenous or first nations identity. Peasant or Andean communities and native communities or Amazonian peoples can also be identified as indigenous or first nations peoples, as per the criteria laid out in this article.<sup>52</sup>

50 Art. 191 of the Bolivian Constitution and Art. 8–11 of the Bolivian Law on Jurisdictional Delimitation. Cited in Barrera (2011, 12).

51 Decreto 2164 de 1995. Cited in Correa (2008, 7). See original at [http://www.presidencia.gov.co/prensa\\_new/decretoslinea/1995/diciembre/07/dec2164071995.pdf](http://www.presidencia.gov.co/prensa_new/decretoslinea/1995/diciembre/07/dec2164071995.pdf)

52 Ley de Consulta Previa a los pueblos indígenas (2010). Artículo 7: Criterios de identificación de los pueblos indígenas u originarios. <http://servindi.org/pdf/AutografaLeyConsulta23Ago2011.pdf>.



Peru also has a law “to protect isolated indigenous and first nations peoples and in situations of initial contact,” which considers Indigenous peoples as “those who self-identify as such, maintain a distinct culture, are found in possession of an area of land, are part of the Peruvian state as per the Constitution. These include isolated indigenous people or indigenous people in a situation of first contact.”<sup>53</sup>

Article 56 of the 2008 Constitution of Ecuador declares that “Indigenous communities, peoples and nationalities,” along with other distinctive Ecuadorian communities, are recognized as having an inherent status in Ecuador. According to the Instituto Interamericano de Derechos Humanos (IIDH), self-definition using cultural characteristics is the key principle in the Constitution: “In exercise of this right and invoking their ancestry, indigenous people have self-defined themselves as nationalities—cultural nations—each with evidence of its distinct traits, including linguistic ones ... The exercise of this right of self-definition is the fundamental pillar of the political project of indigenous nationalities in Ecuador that constitutes the foundation for the construction of a pluri-national state” (IIDH 2009, 59).

When military dictatorship ended in Brazil, various articles in the country’s new 1988 Constitution reserved exclusive legislative power over Indians for the federal government (Articles 20, 22, 49, 109), while Chapter VIII set out the rights of Indians in detail. Article 1 of that chapter gives further context: “Lands traditionally occupied by Indians are those on which they live on a permanent basis, those used for their productive activities, those which are indispensable to preserve the environmental resources required for their well being and those necessary for their physical and cultural reproduction, according to their uses, customs, and traditions.”<sup>54</sup> However, no formal definition is provided in the constitution itself.

The language adopted by the state agency designed to implement the constitutional protections, Fundação Nacional do Índio (FUNAI), is more paternalistic, identifying “that portion of the population that has problems of adaptation to Brazilian society, motivated by the preservation of customs, habits or mere loyalties to a pre-Columbian tradition. Or, more broadly, any individual Indian recognized as a member for a pre-Columbian community who identifies and is considered so by the Brazilian population with whom they are in contact.”<sup>55</sup> This interpretation combines both self-identification and a dimension of mutual recognition.

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53 Ley para la protección de pueblos indígenas u originarios en situación de aislamiento y en situación de contacto inicial LEY N° 28736. Artículo 2: Definiciones. <http://www.legislacionambientalspda.org.pe/images/stories/normas/Normasfinales/Parte3/PueblosIndigenas/BaseLegal/Ley28736.pdf><http://www.legislacionambientalspda.org.pe/images/stories/normas/Normasfinales/Parte3/PueblosIndigenas/BaseLegal/Ley28736.pdf>

54 Brazil–Constitution 1988, [http://www.servat.unibe.ch/icl/br00000\\_.html](http://www.servat.unibe.ch/icl/br00000_.html).

55 Approximate translation of “O que é ser índio,” FUNAI. “Povos Indígenas,” <http://www.funai.gov.br/index.html>.

However, in the last decades, the portion of the Brazilian population identifying itself as Indigenous has increased dramatically: in the lower Amazon it now appears to encompass communities hitherto regarded (somewhat pejoratively) as *caboclo*—a type of mestizo “without value.”<sup>56</sup> Similarly, in the northeast of the country, over forty new tribes have been recognized by the state since the 1970s. In the view of one ethnographer, these are “composed primarily of African-descended individuals who possess few of the traditional cultural diacritics, who speak only Portuguese and whose Indianness is not always evident from their physical appearance but who nonetheless self-identify as indigenous” (French 2011, 1). Much of this dynamism is attributed to the clause in the 1988 Constitution according rights to the inhabitants of the former *quilombos*, or hiding places of fugitive black slaves. In the context of this article, it would seem that the definition of Indigeneity in Brazil is subject to a flux of social forces with novel modes of self-definition emerging.

The Constitution of Mexico contains extensive recognition and definition of Indigenous peoples in Article 2, which sets out the nation’s

pluricultural composition, sustained originally in its indigenous peoples ... who are descendants from the populations who lived in the territory of the country at the start of colonization and who maintain their own social, economic, cultural and political institutions ... Self-awareness of their indigenous identity must be a fundamental criterion ... (Indigenous) Communities ... are those who form a social, economic and cultural unit, established in a territory and recognize their own authorities according to their customs and traditions.<sup>57</sup>

Consequently, the Constitution makes a distinction between Indigenous peoples, who can show descent and maintain their own institutions based in cultural difference, and Indigenous communities, which are given official recognition on the basis of the above, as well as their establishment in a given territory governed by those institutions.<sup>58</sup>

Article 66 of the Constitution of Guatemala asserts that the state is composed of “diverse ethnic groups, amongst whom are indigenous groups of Mayan descent. The state recognizes, respects and promotes their ways of life, customs, traditions, forms of social organization, use of indigenous dress by men and women, languages and dialects.”<sup>59</sup> In 1995, as part of the conclusion of the conflict in the country, the government and the

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<sup>56</sup> Bolanos (2010, 65–66) discusses the complexities of these new forms of identification and claiming.

<sup>57</sup> Constitución política de los Estados Unidos Mexicanos. Artículo 2. <http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf>.

<sup>58</sup> Comisión Nacional Para El Desarrollo de Los Pueblos Indígenas. Conceptos Generales Sobre Pueblos Indígenas. [http://www.cdi.gob.mx/index.php?option=com\\_content&view=article&id=272&Itemid=58](http://www.cdi.gob.mx/index.php?option=com_content&view=article&id=272&Itemid=58) However, this distinction has been criticized for creating potential conflicts between specific Indi communities and larger Indigenous peoples to whom they belong, as well as incoherence in the way the law defines a “community.” See the discussion in Zolla & Zolla Márquez (2004).

<sup>59</sup> Sección Tercera: Comunidades indígenas. Artículo 66: Protección a grupos. Translation in Sieder (2011, 253).

guerillas of the Unidad Revolucionaria Nacional Guatemalteca reached an “Agreement on the Identity and Rights of Indigenous Peoples,” which set out in detail the five characteristics fundamental to the identity of the Maya (the Indigenous peoples of Guatemala):

I) direct descendancy from the ancient Mayas; II) Languages which contain a common Maya root; III) A world vision ... based in the harmonic relations of all elements of the universe, and in which the human being is only another element, the earth is mother of life, and corn is a sacred symbol, central core of their culture ... transmitted from generation to generation through material production and writing and ... oral tradition, in which women have played a determining role; IV) A common culture based in ... Mayan thought, a philosophy, a legacy of scientific and technological consciousness, artistic conception and aesthetics, collective historical memory, a community organization based in solidarity and respect ... ethical and moral values; and V) self-identification.

By far the most elaborate definition found in this survey, the language of the Guatemalan agreement is conscious of Indigenous categories and concerns that give substance to the general category of culture. To strengthen the commitments contained in the agreements, a range of reforms on Indigenous peoples’ rights were put to a national referendum in 1998, but were defeated (Sieder 2011, 252–53).

### *Russia*

Indigenous peoples are defined using both descent and cultural characteristics in Russian legislation as *korennie malochislennye narodi*, or “numerically-small indigenous peoples” (Shapovalov 2005), under the Federal Law on the Guarantees of the Rights of Indigenous Numerically Small Peoples of the Russian Federation (1999) (Petrov 2008). Shapovalov notes that the law applies to those who: “(1) live in territories traditionally inhabited by their ancestors, (2) maintain traditional ways of life and economic activity, (3) number less than 50,000 people, and (4) identify themselves as separate ethnic communities” (2005, 438).

The number 50,000 has been subject to debate. The rationale seems to be that many other relatively small communities, with populations between fifty and one hundred thousand, have their own “titular republics,” which are able to identify and protect their own populations. Originally the cut-off was 35,000. Shapovalov notes a discourse in Russia driven by “certain ethnographic studies showing that ethnic groups numbering less than 50,000 cannot self-develop and thus require special support from the State” (2005, 438). Newcity notes that such arbitrary numerical criteria have a long history, and were an important principle of Soviet nationalities policy (2008, 370).

What does recognition as a “numerically small Indigenous people” entitle one to? Guarantees range from group and individual rights to “land and renewable natural resources in the territories which they have traditionally occupied and where they engage in traditional economic activities”; self-government bodies “in places of compact settlement”; the right to education in keeping with tradition; compensation for industrial damage to their environment; and customary legal rights that do not state law (UNHRC 2010a, 7).

Quotas in local governing bodies exist, but require further legislation to become effective (Murashko 2005, 26; Xanthaki 2004, 79).

The Russian government keeps the official Unified List of Numerically Small Indigenous Peoples of the Russian Federation, which initially totaled twenty-six peoples. According to IWGIA's 2011 global survey, "41 are (now) legally recognised as 'indigenous, small-numbered peoples of the North, Siberia and the Far East'; others are still striving to obtain this status" (38). Sokolovskiy points out that those added after the initial twenty-six have tended to stretch the definitions, as they "do not practice hunting, herding, or fishing as subsistence economic activities." The list is further complicated by exemptions: the Republic of Dagestan is allowed to make its own rules under the law, and its official list (included in the Unified List) includes communities of more than 100,000 in both Dagestan and the Russian republic itself— including, oddly, ethnic Russians themselves (Newcity 2008, 372–73). Shapovalov estimates a total Russian Indigenous population of 350,000: "Calculations based on the data obtained during the 2002 census show that as of 2002 there were about 350,000 people belonging to numerically small indigenous peoples" (2005, 439; see also Petrov 2008, Table 1). According to Sokolovskiy, in the way the census is framed, the term all "peoples of Russia" provides a founding sense of Indigeneity, while further layers emerge through the category of "small-numbered peoples," which are officially listed (2007, 74).

Descent, then, is the key criterion in Russia, within the particular numerical population limit of 50,000, which is assumed to denote a cultural and developmental status. Self-definition is not part of the institutional landscape in Russia.

### *Africa*

Africa may be the least institutionally developed region in terms of Indigenous peoples' status, rights, or administrative frameworks. A 2005 report for the African Commission on Human and Peoples' Rights found that "very few African countries recognise the existence of indigenous peoples in their countries. Even fewer do so in their national constitutions or legislation" (ACHPR Report 2005, 47). It notes exceptions such as South Africa, where "the Khoe and San are generally acknowledged as the aboriginal and indigenous people who occupied the land long before the Bantu-speaking people did so. There is, however, yet to be a South African norm as to the meaning of 'indigenous peoples' and who qualifies for such status in South Africa." A 2009 survey of legislative provisions for Indigenous peoples done for the ILO found that, while many states recognized the ethnic diversity of their populations, "the term 'indigenous peoples' is not officially used in national legislation." Only one state, Cameroon, referred to "Indigenous populations" in its constitution. However, the report noted "a positive trend" in making provision for peoples who might be considered to be so (ILO Report 2009, 17–22). Once again, what is visible in such instruments is the use of descent, as well as of strong notions of cultural difference, including isolation and exclusion.

Botswana is a diverse country in which one tribal grouping, the Tswana, has historically dominated to the exclusion of other smaller tribal communities, including the Basarwa,

or San people, who number approximately 50,000 (UNHRC 2010b).<sup>60</sup> However, the government has long considered all communities as “Indigenous,” and so differences in status are strongly tied to variations in social and economic need and claim. However, a long period of overt discrimination favouring the Tswana in political institutions came to an end in 2008 with the passage of the Bogosi Act, which sought to regularize the recognition of traditional tribal governing institutions. The Act includes a broad power for Ministerial recognition of tribes in Part 2: “(1) The Minister, after consulting a tribal community ... may recognise that tribal community as a tribe. (2) In deciding whether a tribal community shall be recognised as a tribe, the Minister shall take into account the history, origins, and organisational structure of the community, and any other relevant matters.”<sup>61</sup> This implies both descent and cultural criteria, but reserves the power of definition as a prerogative of the state.

In 2010, the Democratic Republic of Congo (DRC) became the first country to adopt a comprehensive law on the rights of Indigenous populations, who are distinguished as “populations who are different from the national population by their cultural identity, lifestyle and extreme vulnerability.”<sup>62</sup> Also in the DRC, the Forest Code refers to local communities that have specific rights under the Code. The Code defines “local communities” as “populations traditionally organized on the basis of custom and united by ties of clan or parental solidarity ... they are also characterized by attachment to a specific territory.”<sup>63</sup> These frameworks use cultural criteria exclusively, but gesture at descent through the notion of “tradition.”

The 2010 Constitution of Kenya does not recognize Indigenous peoples *per se*, but recognizes “marginalised communities” in ways that are in accord with international standards on Indigenous rights (IWGIA 2011, 406). These include:

- (a) a community that, because of its relatively small population, or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;
- (b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;
- (c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or
- (d) pastoral persons and communities, whether they are—(i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.<sup>64</sup>

<sup>60</sup> United Nations Human Rights Council (2010b).

<sup>61</sup> Government of Botswana. Chapter 41:01 Bogosi. <http://faolex.fao.org/docs/pdf/bot91578.pdf>.

<sup>62</sup> Act No. 5-2011 of 25 February 2011. On the Promotion and Protection of Indigenous Populations. [http://www.iwgia.org/images/stories/sections/regions/africa/documents/0368\\_congolese\\_legislation\\_on\\_indigenous\\_peoples.pdf](http://www.iwgia.org/images/stories/sections/regions/africa/documents/0368_congolese_legislation_on_indigenous_peoples.pdf).

<sup>63</sup> Cited in ILO Report (2009, 20–21).

<sup>64</sup> Constitution of Kenya (2010, ch. 18, pp 162–63).

*Asia*

According to UN agency estimates, Asia has an estimated 100 million Indigenous persons, many confounding state borders. State practices vary considerably in terms of recognition as well as in the terminology used, revealing a variety of emphases on both continuity/descent as well as cultural difference often understood as isolation. The terms “tribals,” “tribal people,” “hill tribes,” “scheduled tribes,” “natives,” “ethnic minorities,” and “minority nationalities” are common, in addition to country-specific terms such as *Adivasis* (original inhabitants) in India and Bangladesh, *Orang Asli* (original peoples) in Malaysia, or *Janajata* in Nepal (UNHRC 2007, 5).

Numerous countries in the region have explicitly rejected the emergent category of Indigenous peoples. Most notable is China, which avers,

Indigenous issues ... are the result of the colonialist policy carried out in modern history by European countries in other regions of the world, especially on the continents of America and Oceania. As in the case of other Asian countries, the Chinese people of all ethnic groups have lived on our own land for generations. We suffered from invasion and occupation of colonialists and foreign aggressors. Fortunately, after arduous struggles of all ethnic groups, we drove away those colonialists and aggressors. In China, there are no indigenous people and therefore no indigenous issues.<sup>65</sup>

China does, however, recognize “minority nationalities” in its Constitution of 1982 (Article 4) for purposes of social and economic development; some of these “minority nationalities” would meet criteria associated with Indigenous peoples in other countries.

Constitutional provisions for tribal peoples in India date from the early moments of Indian independence, and sought to meet the two goals of tribal protection and development. So-called “Scheduled Tribes” (STs) are one of the two categories of “Backward Classes” in India (the other being Scheduled Castes). Section 342 of the Indian constitution empowers the president to “specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes.”<sup>66</sup> Elsewhere, the constitution provides for the reservation of seats for Scheduled Tribes in India’s House of People (Article 330) and the legislative assemblies of the states (Article 332), as well as containing provisions for “Scheduled Areas,” or lands designated for STs (Schedule Five). The 2001 census showed over 84 million Scheduled Tribes: 8.2 percent of the national population.<sup>67</sup>

According to the Indian Ministry of Tribal Affairs, the key criteria for Scheduled Tribes are “primitive traits, distinctive culture, geographical isolation, shyness of contact with the

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65 Adviser of the Chinese delegation Long Xuequn, April 1, 1997, 53rd session of the United Nations Commission on Human Rights. <http://www.china-embassy.ch/eng/ztnr/rqwt/t138829.htm>.

66 Constitution of India. Section 342(1). [http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%202Pg.Rom8Fsss\(22\).pdf](http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%202Pg.Rom8Fsss(22).pdf).

67 [http://www.censusindia.gov.in/Census\\_Data\\_2001/India\\_at\\_Glance/scst.aspx](http://www.censusindia.gov.in/Census_Data_2001/India_at_Glance/scst.aspx).

community at large, and backwardness ... (this is) not spelt out in the Constitution but has become well established.’ Shortly after Indian independence most STs were promulgated, with eight additional declarations (comprising multiple STs) made since; the most recent in 1989.

India also issues a Scheduled Tribes Certificate to individuals. The guidelines specify that

[w]here a person claims to belong to a Scheduled Tribe by birth it should be verified: (i) That the person and his parents actually belong to the community claimed; (ii) That the community is included in the Presidential Order specifying the Scheduled Tribes in relation to the concerned State. (iii) That the person belongs to that State and to the area within that State in respect of which the community has been scheduled. (iv) He may profess any religion. (v) That he should be permanent resident on the date of notification of the Presidential Order applicable in his case.<sup>68</sup>

Descent in this framework is contained largely within that of cultural difference, rather than descent from some prior and definably distinct population.

Taiwan promulgated its Indigenous Peoples Basic Law in 2005 “for the purposes of protecting the fundamental rights of indigenous peoples, promoting their subsistence and development and building inter-ethnic relations based on co-existence and prosperity.” The official English translation of the legislation includes several key definitions. Indigenous peoples are defined as “the traditional peoples who have inhabited in Taiwan [sic] and are subject to the state’s jurisdiction [12 tribes are listed], and any other tribes who regard themselves as indigenous peoples and obtain the approval of the central indigenous authority upon application.” “Tribe” refers to “a group of indigenous persons who form a community by living together in specific areas of the indigenous peoples’ regions and following the traditional norms with the approval of the central indigenous authority” (Taiwan 2005).

The Basic Law provides a range of rights and protections that deepen the state’s categorization of Indigenous peoples, including: “Hunting wild animals; Collecting wild plants and fungus; Collecting minerals, rocks and soils; Utilizing water resources ... [all of which] can only be conducted for traditional culture, ritual or self-consumption.” A further 2001 law covers other questions of Indigenous status in Taiwan, including inclusive approaches to the extension of status in the case of intermarriage with non-Indigenous persons, children of such couples, and adoption.<sup>69</sup>

These elaborations of cultural difference frame a rights system that is open to those who can show descent from a community that is assumed to be coherent and stable, but that is not explicitly defined as having priority.

68 India. Ministry of Tribal Affairs. Definition—Article 342 Scheduled Tribes. <http://tribal.nic.in/index3.asp?subsublinkid=303&langid=1>.

69 Taiwan. 2001. Council of Indigenous peoples. Executive Yuan. “Status Act for Indigenous Peoples” <http://www.apc.gov.tw/portal/docDetail.html?CID=74DD1F415708044A&DID=3E651750B400646776702AEC7630DD>.

## Discussion

The evidence shown so far in this article demonstrates that all states surveyed in the project incorporate some kinds of cultural criteria in their systems for defining Indigenous peoples, but that the definition of culture and cultural difference hinges on numerous standards, ranging from numerical size to isolation. Cultural standards for communities are also different to those for individuals, who may need to show participation in culturally distinct groups or polities in some way. Many states also use descent, which varies similarly from tightly constrained standards, such as the “base rolls” of the US, to looser notions, such as the role for community recognition to be used as proof of descent in Australia.

Far fewer are the states that acknowledge self-defined Indigenous communities, with those that do so preferring a kind of managed self-definition where Indigenous peoples have control over membership rules, rather than the fact of their recognition vis-à-vis the state.

However, the most significant driver of change in states’ approaches has been the increasingly effective politicization of Indigenous groups. This is a global phenomenon with many strands: the emergence of state-level human rights standards and institutions in the post-war period; the accessibility of courts; increases in social programs for Indigenous peoples; improvements in communications and transportation; urbanization; significant shifts in broader social attitudes to cultural difference; and the intensification of the global economy (de Costa 2006). These forces have fed an unhelpful homogenization of Indigenous peoples that frequently erases the specific identities of Indigenous nations; generic categories of “Aboriginals” remain major institutional and imaginative obstacles for those that would return to pre-colonial identities based in the particular sovereignties of Indigenous nations. The very structure of this article—focused on state definitions that generalize numerous tribes and nations into “Indigenous” or “Aboriginal peoples”—both reveals and reproduces that problem.

Yet there is some evidence that states have come to appreciate the importance of enabling Indigenous peoples to define themselves according to their own values and practices, and which may often mean the devolution of existing definitions. However, as we have observed, racial/genealogical ideas of descent and arbitrary cultural standards—including a perceived lack of sophistication, degree of isolation, and numerical size—remain widespread. The ways in which these approaches interlock in real life are likely to be highly varied. It is somewhat misleading to suggest, as Beach has argued recently, that “states (will) gradually abdicate nationally unique classificatory regulation in favour of indigenous self-ascription with an attempt at global harmonization of principles” (Beach 2007, 1).

Some are worried about the potential and actual injustices that may arise in processes of self-definition (Snipp 1986; Kukutai 2004). After colonialism, Indigenous autonomy over membership rules can produce extraordinary complexity and inequity; this is the case for Indigenous Tasmanians electors, children of a single Native American parent, and Sámi reindeer herders. As Beach asks, “who are the Saami who should decide who is a Saami?” (2007, 1–2). Corporate *Indigenous* institutions, like all collective forms, are



subject to a variety of forces shaping their decision-making about entitlements, including capture by particular sub-communal groups. Furthermore, self-definition or community recognition standards for claimant individuals can put those charged with determinations in an invidious position, given the historic disruptions to Indigenous communities. Forced removals and the destruction of traditional economies set in train dislocating effects that can never be “resolved” simply by the greater empowerment of Indigenous people whose Indigeneity states find least problematic.

Moreover, it may seem to the casual observer that the term “Indigenous peoples” is a basic descriptor, consistent all over the world, but “Indigeneity” is contested in many places, in its boundaries and its basis. Sometimes the contest is between claimants of Indigeneity and state arbiters of that status; other times, the contest is amongst those who hold or claim Indigenous status; and non-Indigenous societies frequently contest the Indigeneity of some claimants.

It is also clear that confidence in coherent communities of “Indigenous” and “other” distinguished by priority is absent in some regions, the distinguishing lines so blurred or contested that seeking an administrative resolution is unwise and undesirable. In much of Asia and Africa, state governments do not use the term.<sup>70</sup> Indigeneity, some argue, is a function of European settler-colonialism: the status that now characterizes the situation of those original inhabitants of the Americas and Oceania (and a few other places) who were overwhelmed by European invaders and settlers from the fifteenth century on. Such peoples are now non-dominant minorities with historical claims. Elsewhere, by implication, Indigeneity would apply to everyone and would therefore be an irrelevant term.

In the African context, for example, some human rights advocates are encouraging a different approach, by moving away from an emphasis on “Aboriginality” as priority demonstrated by descent:

We should put much less emphasis on the early definitions focusing on aboriginality, as indeed it is difficult and not very constructive ... to debate this in the African context. The focus should be on the more recent approaches focusing on self-definition as indigenous and distinctly different from other groups within a state; on a special attachment to and use of their traditional land whereby their ancestral land and territory has a fundamental importance for their collective physical and cultural survival as peoples; on an experience of subjugation, marginalization, dispossession, exclusion or discrimination because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model. (ACHPR Report 2005, 92–93).

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70 For example, Morning argues that “Indigeneity seems to serve as a marker largely in nations that experienced European colonialism, where it distinguishes populations that ostensibly do not have European ancestry (separating them from mestizos, for example, in Mexico) or who inhabited the territory prior to European settlement. The indigenous status formulation was not found on any European or Asian censuses” (2008, 247–48).

Such a shift—from descent based in priority to a notion of descent as a form of cultural continuity—may have the effect of widening, not narrowing eligibility.

Anthropologists appear to have particular concerns about such trends. In Brazil, one scholar notes the “larger, flexible, international context ... made available for theorizing indigeneity by the lack of definition in the United Nations Declaration.” This, she argues, jeopardizes the moral grounding of state action on behalf of marginalized groups: “[i]s it conceptually defensible from both an ethical and legal perspective of justice to include in a single category both people who have a clear claim to ‘difference’ and have struggled for generations to gain even limited political autonomy, and those who have just recently discovered their claim to indigeneity under an expansive view of indigenous peoples?” (French 2011, 242). In India, Karlsson (2003) decries the “abstraction” of the global category, while Ghosh (2006) argues that the global movement appears to create instances of isolated authenticity. Shah (2007) observes the “dark side” that attends these features of Indigeneity, fearing it may provide intellectual cover for Hindu extremism.<sup>71</sup>

Regardless of its precise aegis, the emergence of an international standard for the rights of Indigenous peoples remains an extraordinary development. It creates but does not define two distinct categories of human community and experience in the world: Indigenous peoples, and by default, all others. There are precedents in international law, such as the “minorities” arrangements set out after the First World War (de Costa 2006), although each group was clearly defined using geographic, religious, or linguistic criteria in those cases.<sup>72</sup>

However, there is a piece of text that has been widely used at the international level for some time. The Cobo Report of 1986 spelled out the experiences of Indigenous peoples in general terms:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies ... consider themselves distinct from other sectors of the societies now prevailing in those territories ... They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>73</sup>

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71 It could also here be noted that the extreme right-wing British Nationalist Party adopted a rhetoric of Aboriginal Britons during the 2010 election campaign: see <http://www.youtube.com/watch?v=4iKfrY9l2kY>.

72 The history of international instruments of Indigenous rights is too long to be taken up here, with the ILO a key actor in the development of both standards and definitions. For a narrative of events and further sources, see de Costa (2006).

73 Jose R. Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1986, “Study on the Problem of Discrimination against Indigenous Populations.” UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1-4. Moreover, a set of conventions exists within these institutions such that some policing is possible (as in the refusal of Indigenous delegates to interact with members of the Rehoboth Baster community who sought Indigenous status in an international meeting in the 1990s).

Though it provides no definition, UNDRIP has many ramifications for state policies. Article 3 of the Declaration endorses Indigenous peoples' rights of self-determination, and subsequent articles declare that this encompasses the rights to autonomy and self-governance, to their own political institutions and to a nationality. Article 9 prohibits discrimination against Indigenous persons' right to belong to an Indigenous community, "in accordance with the traditions and customs of the community or nation concerned."

Articles 18–20 entrench a right to Indigenous institutions. Most critically, Article 33 provides that "Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live ... (and that) Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures." In the aspirations set out in UNDRIP and endorsed by most states, there would seem to be little role for the state in *defining* who was or was not an Indigenous person. But, as with other human rights instruments, such rights may cut across each other in practice, with non-Indigenous courts asked to determine outcomes.

However, all this assumes a relatively straightforward adoption of international standards in domestic legislation and policy. That is rarely true in practice and for UNDRIP, a Declaration of the General Assembly rather than a formal convention (with its own institutions for monitoring compliance), its influence will be rather harder to predict. I have taken up this issue in detail elsewhere drawing on developments in states signatory to UNDRIP (de Costa 2011). Since its passage, it would seem that legislation in states with large Indigenous populations, such as Bolivia, is conforming with UNDRIP's prescriptions, though this was the path that Bolivia was on in any case. Elsewhere, the influence has been jurisprudential. Certain jurisdictions have seen rulings draw on UNDRIP as a source of customary international law. No doubt such cases will continue, driven by Indigenous litigants seeking protection and relief from state or corporate intrusions, but the process of "legal transnationalism," by which these international standards come to be operational in municipal settings is, at this moment, far from clear (de Costa 2011, 66–69).

Indigenous activism will likely be crucial to the unfolding of events, and will influence to some extent the principles that emerge most readily from the international domain. However, even a full adoption of UNDRIP as domestic law would not relieve all the pressures welling up around Indigenous status. Whether states collect and administer registers of Indigenous persons or not, or whether Indigenous communities do it themselves, the cumulative effects of colonialism and assimilation, Indigenous mobility, and choice, are unlikely to be resolved easily: proving descent will remain as fraught and fragmented as before, in a dynamic context of population growth and changing benefits, shaped by internal community debates and relations with the wider society. Similarly, strong cultural standards may be equally arbitrary or open to abuse, potentially restricting individual and communal choice. The question of whether and how Indigenous individuals participate in such identities as they evolve is also open, particularly given the changing landscape of benefits accruing to Indigeneity, both perceived and actual.

The idea of “status” originated in attempts by colonizing or modernizing states to manage what were thought of as unchanging Indigenous populations. These colonial definitions were racist, arbitrary, and imposed with little or no input from the people subject to them. In the face of tremendous dynamism within Indigenous communities and through greater interaction with wider populations, these definitions were first changed in ways that suited evolving state purposes.

More recently, several states have devolved aspects of definition to Indigenous peoples themselves, though this is mainly to allow regulation of internal membership requirements; no states enable the free self-definition of all Indigenous communities and persons, which would seem to be the true spirit of Indigenous self-determination. This managed devolution is found largely in the settler states, where Indigenous organizations have greatest access to resources and the legal and political systems. It is not possible to see from this survey the emergence of any global uniformity in state practice. In fact, while international legal standards are likely to bring about changes in domestic Indigenous rights regimes over time, the beneficiaries of those rights will remain largely determined by colonial histories and present state needs.

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