Self-Determination and State Definitions of Indigenous Peoples

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This article takes up several themes of the volume through a consideration of the ways that states define Indigenous peoples in law and administrative practice. It is based on an unfolding project that seeks to provide a comprehensive survey of state practice. Currently, it draws on a study of over 20 states in all regions of the world. These definitions are highly variable, while at the same time they reveal certain consistencies that are driven by both historical choices and persistent cultural assumptions.

Of course, the core of this volume is Indigenous self-determination. The continuation of colonial and often arbitrary systems of state definition is irreconcilable with any serious understanding of self-determination; this is even more relevant since the passage of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (UN General Assembly 2008). Systems of definition create regimes in which states both apportion entitlements to Indigenous persons and communities – including specific welfare and social policy measures, land rights, and distinct political or electoral status – as well as subject them to specific rules. The specific histories of these regimes originate in the administrative needs of colonial powers, not those of Indigenous communities themselves. As such, these are now institutions that simultaneously promote and constrain Indigenous self-determination (Povinelli 2002; Merlan 2009). A paradox of late colonialism is that many of these rules have been devolved to Indigenous communities themselves, such that decisions over *membership*, if not *definition*, are, in some places, now in their own hands.

At a high level of generalization, we can see three broad characteristics with which state definition practices and regimes might be explained. These are: the use of varied notions of *culture*, including a range of environmental and economic practices; the idea of *descent* from a population clearly identified and recorded at an earlier time; and the already mentioned recent shift to systems where communities have control over membership. Often community control over membership reinforces earlier systems of definition based on descent or cultural attributes. The following examples of these characteristics are drawn from a much longer work, in which the context of each state is more fully provided, with some states employing multiple and overlapping approaches (de Costa 2014).

The use of "culture" as a defining characteristic of sub-state populations is not a straightforward matter. In the contemporary world, the effects of human mobility and inter-marriage, as well as socio-cultural change, make many strict criteria seem archaic at best, racist and absurd at worst. In many cases, they attempt to offer simple and static

categorizations for complex and dynamic social realities. This is the case in the Scandinavian countries, where Sámi status is partly determined by the use of Sámi language in the home; other entitlements in Norway and Sweden are reserved for those whose livelihoods rely in part on reindeer herding (Norway 1987; Sweden 1992).

Several other states use economic criteria, such as Kenya, where an Indigenous community "has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy" (Kenya 2010: 162-3). Taiwan's Indigenous Peoples Basic Law envisages communities

[h]unting wild animals; Collecting wild plants and fungus; Collecting minerals, rocks and soils; Utilising water resources… [all of which] can only be conducted for traditional culture, ritual or self-consumption (Taiwan 2001).

Latin American countries have adopted definitions that appear more attentive to the particularity of Indigenous identities and are more at ease with the concept of "pluri-national" states. Bolivia's constitution, for example, describes the shared "world vision" of the "Indigenous peasant nation"; in Guatemala, as part of the conclusion to the country's conflict in May 1995, an agreement was reached between the Government of Guatemala and the guerrillas of the Unidad Revolucionaria Nacional Guatemalteca that set out the Mayan peoples' "world vision… based in the harmonious relations of all elements in the universe" (Guatemala 1995; Sieder 2011: 252-4). Numerous Latin American states – like Mexico, Peru, Colombia, Bolivia, and Ecuador – draw into their definitions of Indigenous peoples' rights and identities a recognition of existing or traditional Indigenous political orders and authorities that have governed specific territories.

Some states maintain unreconstructed views of Indigenous peoples as isolated anachronisms. Russia's defining law speaks of "numerically-small indigenous peoples" and creates an arbitrary upper population limit of 50,000 people (Shapovalov 2005). India's definition of "scheduled tribes" places them in a broader category of "backward classes," and its Ministry of Tribal Affairs uses administrative criteria that include "primitive traits, distinctive culture, geographical isolation, shyness of contact with the community at large, and backwardness" (India n.d.).

However, numerous states use relative criteria, defining Indigenous peoples based on some certain differences from a putative mainstream population. Indigenous peoples in the United States seeking recognition as "federally recognized Indian tribes" need to establish a continuity of distinctiveness and autonomy (Quinn 1990). Brazil's agency for Indigenous peoples, the Fundação Nacional do Índio, draws its idea of indigeneity partly using a relation to non-indigenous communities, such that an Indigenous person is "any individual Indian recognised as a member for a pre-Columbian community who identifies and is considered so by the Brazilian (i.e., non-Indian) population with whom they are in contact" (Brazil n.d.).

Possibly the most common feature of state definitions is the relational quality of priority: that a given Indigenous community will be able to trace its history to the time before the arrival of a colonial power and a settler society. Of course, this is not a definition based in culture, but in descent.

States that rely on descent include the United States, which has a highly bureaucratized system that uses "base rolls," enumerations of Indigenous populations done in the 19th and early 20th centuries, from which contemporary adjudications of status are determined (Thornton 1997; Gover 2011). These were contentious at the time and now give rise to elaborate and sometimes divisive regimes which measure "blood quantum" to determine membership (Garroutte 2003). Canada is quite similar to this model, having begun to enumerate Indigenous people from the 1850s; in place now is a regime defining "registered" or "status Indians" (Canada 2013). This system has been revised significantly as social norms evolved. Litigation since the 1980s has sought to remove gender discrimination, by which an Indigenous woman and her children were discriminated against if she "married out," though this remains a source of controversy (Grammond 2009).

Some states have dabbled with even more scientific approaches to descent. For example, the states of Vermont, in the United States, and Tasmania, in Australia, both proposed genetic testing of Indigenous peoples (Gardiner-Garden 2003). Such approaches are highly resisted and there is strong global opposition to the documenting of Indigenous peoples' DNA for purposes such as the documenting of the history of human evolution (Harry 2013).

The devolution of definition systems is also now established in numerous states. Quite often this is the result of comprehensive negotiations between states and specific Indigenous communities at different historical periods, resulting in treaties and final agreements (Gover 2011). This is true in parts of the "settler states" of the United States, New Zealand, Australia, and Canada. Such negotiations, by bracketing lands and resources for specific Indigenous communities, appear to have created incentives for those communities to delimit their populations in ways that reproduce strong or exclusionary notions of descent and/or culture.

Numerous states incorporate the need for Indigenous individuals to self-identify as well as to be recognized by an Indigenous community. This is the case in Australia, though such communities themselves are understood primarily in terms of descent (Australia 1986). Indeed the interaction of the categories of cultural difference and descent in states' determination of who is entitled to resources or services is a recurrent part of Indigenous life today.

A key question for both states and Indigenous peoples is how to respond to the dynamism of contemporary Indigenous life, given the sedimentary effects of centuries of colonial population management. In many settler states, histories of child removal and community dislocation have resulted in recent efforts to reconnect individuals to their communities and identities with concomitant effects on population numbers; birth rates in many Indigenous communities are frequently much higher than amongst the neighbouring or dominant societies. In an era of global austerity and neoliberal approach to social policy, these phenomena create incentives for states to continue devolving membership rules while maintaining or reducing resources per capita; it places communities under great pressure to exclude and more vigorously police their own borders.

A persistent question about globalization is its assumed tendency to homogenize, erasing local variety and difference. One scholar has suggested that there is an inevitable trajectory which will see the growth of self-definition and thereby variety (Beach 2007); this is an expectation of numerous articles in UNDRIP, which, though it provides no definition, has much to say about the power of definition (UN General Assembly 2008).

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 peoples' 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… 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 is or is not an Indigenous person.

In another work, I have examined early signs of states' adoption of UNDRIP principles (de Costa 2011). However, what this ongoing survey of states across all inhabited continents and regions is revealing is a patchwork of practices that are shaped by the specific local histories in each territory, colony, and state, as well as the relative political power of the Indigenous communities in each territory. States use both criteria of descent and cultural difference, with some giving greater weight to communities themselves in regulating their own memberships. It is, though, far from evident that there is an emerging and inevitable trend for states to completely devolve the power to define Indigenous peoples to those peoples affected. Autonomy over legal and political identities for Indigenous peoples is likely to come as part of a complete reconstruction of Indigenous-state relations, and not prior to such an occurrence.

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