Self-Determination in Practice:

The Divergent Rights of Indigenous Peoples and National Minorities

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Introduction

With the growing acceptance and expression of diverse identities it is becoming increasingly more untenable to apply a single set of rights to all inhabitants of a state. Emphasis was placed on an authentic identity in the 1960s, when the Civil Rights movement spawned demands for differentiated treatment on the grounds that "difference-blind" policies and institutions were inherently biased and relying on them to eliminate discrimination would be ineffective. Instead, groups should be treated differently on the grounds that they are different, not because of some innate inferiority, but because they have been structurally separated and stigmatized to be different.

> Government decisions on languages, internal boundaries, public holidays, and state symbols unavoidably involve recognizing, accommodating, and supporting the needs and identities of particular ethnic and national groups. The state unavoidably promotes certain cultural identities, and thereby disadvantages others [...] Group-differentiated rights- such as territorial autonomy, veto powers, guaranteed representation in central institutions, land claims, and language rights- can help rectify this disadvantage, by alleviating the vulnerability of minority cultures to majority decisions. These external protections ensure that members of the minority have the same opportunity to live and work in their own culture as members of the majority.[1]

Of all the collective claims for recognition that have been made, and of all the group-differentiated rights that have been adopted, only two groups have been granted provisional autonomy: national minorities and indigenous peoples.[2]

In the wake of the Cold War and the dissolution of several multinational former Communist states, concern for national minorities in Central and Eastern Europe prompted a profusion of protections in international and national law. While the provisions were not identical from document to document, they generally provided national minorities internal

[1] Will Kymlicka, *Multicultural Citizenship: a Liberal Theory of Minority Rights*. (Oxford: Clarendon, 1995), 46.

[2] While there are instances where religious, linguistic, or racial groups are permitted a greater degree of autonomy than other, similarly categorized groups, it is always in exceptional cases.

self-determination.[3] Post-World War II Indigenous rights primarily aimed at integrating indigenous populations, but by the end of the century indigenous peoples had a recognized right to external self-determination.[4] The difference between these two forms of autonomy is in fact very significant, as external self-determination establishes a group as a legitimate legal actor while internal self-determination treats a group as a cultural minority with no legal force. Why are only certain groups granted external self-determination rights, and why have some claims to external self-determination been more successfully recognized and implemented in international law than others?

One of the most basic explanations for this variation in rights is the fact that indigenous communities constitute a "people" in international law, and thus are eligible for self-determination as it was outlined in the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960). This paper will demonstrate that labeling groups in such a way is arbitrary and artificial, as it does not reflect the particular circumstances wherein a group seeks rights. The primary subject of analysis will be international legal documents, as legal structures constitute identities and enduring categories that determine rights and entitlements based on classification. More specifically, international legal norms influence the development of state policies worldwide by creating political pressure to cooperate, even when there are no sanctions for non-compliance. Furthermore, an overview of contemporary minority rights theory reveals that philosophers no longer contemplate the morality or practical utility of various rights formations, they simply accept legal norms as legitimate. Without an independently conceived theory to evaluate the effectiveness of group-differentiated rights

[3] Internal self-determination is autonomy in regulating internal group affairs, including, but not limited to, overseeing cultural events, promoting and preserving their religion and language, and determining the criteria for group membership. A more extensive discussion of self-determination will follow in section three of this chapter.

[4] External self-determination includes all of the internal autonomy provided by internal self-determination, but establishes the group as a legal entity with the same legitimacy as a state. External self-determination is not synonymous with sovereign statehood, however, and does not guarantee independence to externally self-determined groups. See below, section three.

in practice, legal norms will not evolve and respond to changing circumstances that could effect which groups may claim autonomy.

Nevertheless, there has to be some way to distinguish between those groups that have a legitimate claim to self-determination, and those that could be satisfied without provisions for autonomy. Rather than differentiating groups based on an artificial, homogenous category, I argue for a model that focuses on the particular needs of a community. Joshua Castellino has provided a basic rights hierarchy to extend certain aspects of self-determination to non-territorially contiguous communities. Ultimately he proposes four levels: political (external) self-determination, non-political (internal) self determination, positive rights that do not include autonomy, and guarantees of equality and non-discrimination.[5] I believe these four categories should become the basis for determining rights for minorities and peoples alike, but the criteria for each level should be re-considered to evaluate which types of structural inequalities each level would best address. Outlining the conditions for a certain level of rights to succeed can accommodate changing identities and circumstances while eliminating the need for well-defined group categories.

1.1 Justifying Collective Rights

While there is a historical precedent for collective rights, and they have been present in international law for over twenty years now, the debate over collective and individual rights continues to influence group-differentiated rights. Will Kymlicka characterizes this debate as primarily a balance between internal restrictions and external protections. Advocates of collective rights claim vulnerable groups require protection from the dominant forces in society in order to fulfill their universal human rights. This can legitimize intrusions in individual human rights, however, if violations are couched in the language of cultural difference. Opponents of collective rights claim they will give more powerful members of a minority the

[5] Joshua Castellino, "Territorial integrity and the 'Right' to Self-Determination: an Examination fo the Conceptual Tools," *Brooklyn Journal of International Law* vol. 33 (2008): 561.

opportunity to oppress more vulnerable members of an already vulnerable minority; Kymlicka labels this predicament a problem of internal restrictions.[6] While instances of internal restrictions have and may continue to arise, the problem of external protections is a permanent concern for many groups. Additionally, collective rights are often contingent on respect for individual human rights first and foremost. Rogers Brubaker further problematizes the existence of group-differentiated rights, as the identification and selection of groups is inherently misleading and troublesome.[7] While I agree with Brubaker's skepticism of relying too heavily on artificial groups, I will address the problems in defining groups with regard to national minorities and indigenous peoples in the first section of chapter two. For this reason, this paper will take the stance that collective, group-differentiated rights are appropriate and in many cases necessary to the fulfillment of individual human rights.

1.2 Theories of Autonomy

Autonomy is a contentious topic in legal and political theory, and while it is essential to discuss some relevant approaches to autonomy and self-determination, the ensuing discussion is in no way a comprehensive overview of the entire body of literature discussing autonomy and self-determination. Many scholars propose a bifurcated understanding of autonomy that reconciles nicely with models of self-determination. In her overview of autonomy as it relates to national minorities, Tove H. Malloy proposes a distinction between collective political autonomy and international relations, where "the first prong refers to the constitution of a state or a people as an ideological/political/national group, and the second prong to the external relations of that state or people."[8] This model provides legal recognition for collectives, capable of interacting with other recognized collectives.

[6] Will Kymlicka (1995), 35-48.
[7] Rogers Brubaker, *Ethnicity Without Groups* (Cambridge: Harvard UP, 2004).
[8] Tove H. Malloy, 2005, 137-8.

Another approach to autonomy considers territorial factors in the recognition of collective or individual autonomy. Taken as the pinnacle of a rights hierarchy, Georg Brunner and Herbert Kupper focus exclusively on autonomy as a source of minority protection in proposing their dichotomous model.[9] Characterizing autonomy by the source of the minority, the authors differentiate between territorial autonomy, where a public body is granted discretion in regions where the minority constitutes a numerical majority, and personal autonomy, which primarily influences the cultural life of individual members of a minority.[10] As provisions for personal autonomy are typically granted to an individual member of a minority, the definition of a qualifying minority must be developed that is sufficiently subjective to avoid discrimination, but objective enough that members of the majority do not pose as minority members to employ or even sabotage their rights.[11] With territorial autonomy, problems regarding members of the majority in a minority-dominated region or another minority should be addressed through representative democratic institutions, and thus Brunner and Kupper argue regional authorities should be instilled with authority over more than minority cultural affairs.[12]

1.2.i Self-Determination

The concept of self-determination first emerged during the Enlightenment era, but the subject of self-determination has always been a group or collective, rather than an individual. As first conceived by English and French Enlightenment philosophers (Locke, Rousseau, de Tocqueville), self-determination was derived from popular sovereignty and representative

[9] Georg Brunner and Herbert Kupper, "European Options of Autonomy: A Typology of Autonomy Models of Minority Self-Governance," In *Minority Governance in Europe*, Ed. Kinga Gal (Budapest: Open Society Institute); 11-36.
[10] ibid. 19-27.
[11] ibid. 28-30.
[12] ibid.22-25.

government, and entitled a people to freely determine their political status.[13] Martti Koskenniemi provides a practical and general definition of self-determination as "a legal-constitutional principle that claims to offer a principal (if not the only) basis on which political entities can be constituted, and among which international relations can again be conducted 'normally.'"[14] As a normative principle, self-determination has been fundamental to developing a cohesive political identity based on citizenship and gaining independence, and thus supports a state-centered ordering of international relations. At the same time, self-determination can manifest against the state by fostering political identities that are often stronger than state patriotism and may promote secession as a way of achieving togetherness.[15]

In keeping with the Enlightenment origins of self-determination, Koskenniemi elaborates on these pro- and anti- statist manifestations in developing a historical typology of self-determination. From Hobbes, classical self-determination equates nation and state, characterizing the nation as an "imagined community" that's only shared trait is the governance of the state.[16] Romantic self-determination, on the other hand, identifies the nation as something united by more than the decision making of states, typically the free will of individuals to belong to the group.[17] Whereas classical self-determination considers states the only legitimate representatives of individual will, romantic (or rousseauesque) self-determination only values the state if it reflects the individual will and collective identity of the people. In practice, self-determination has been a balance of these two forms, but each form dominated during different periods. Classical self-determination characterized the period form the French Revolution

[13] Thomas D. Musgrave, *Self Determination and National Minorities* (Oxford: Oxford UP, 2000), 2-4.
[14] Martti Koskenniemi, "National Self-Determination today: Problems of Legal Theory and Practice," *International and Comparative Law Quarterly* vol. 43 (1994): 246.
[15] ibid.
[16] ibid. 249.
[17] ibid. 250.

to the late 19th century and again since World War II, while the influence of romantic self-determination peaked at the conclusion of World War I, faded away during the Interwar Period, and has reemerged at the end of the 20th century.[18] Modern self-determination continues to be a balance, between the potentially destabilizing effects of the purely romantic and the "legitimizing veil" covering corruption and crime of the purely classical.[19]

Joshua Castellino has criticized the historical model proposed by Koskenniemi as too idealized and impractical, and instead presents a territorially based approach that reinvigorates self-determination in the post-decolonization era of international law.[20] In characterizing self-determination as either state-centered or counter-state, Koskenniemi inadvertently demonizes romantic self-determination based on collective will in the international arena. If only one form of self-determination justifies the current organization of international relations, it follows that international law would deny the form of self-determination that challenges its fundamental legitimacy and order. The restricted application of self-determination since the return of classical self-determination after World War II is evidence of this stigma. Self-determination was legally recognized in the case of decolonization, but only within the existing borders of the colonial territories, and has only recently been insinuated as a right of communities within independent, sovereign states.[21]

Rather than denying self-determination to a community out of fear of secession, Castellino recommends a more practical distinction based on democratic processes and human rights that devolves the preeminence of the state and allows groups that would otherwise be excluded to assert self-determination. In this model, political self-determination is available for territorially concentrated communities who identify themselves collectively; this concep-

[18] ibid. 251.
[19] ibid. 256.
[20] Joshua Castellino (2008), 513.
[21] Siegfried Wiessner, "Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples," *Vanderbilt Journal of Transitional Law* vol. 41 (2008): 1149-1150.

tion is relatively similar to earlier state-centered conceptions of self-determination.[22] Where people have a shared, collective identity but are not territorially concentrated, non-political self-determination would address human rights concerns of self-determination.[23] "Rather than subjecting all group claims to this standard of territorial basis and denying the territorial element of many genuine self-determination claims, the nuanced approach above will help give meaning to the right to self-determination in the post-colonial context."[24] Koskenniemi's classical interpretation remains relevant where a community of willing individuals are territorially concentrated, but territorially dispersed communities actually have a chance at exercising non-political autonomy within an existing state based on Castellino's human rights centered understanding self-determination.

While there are numerous interpretations of self-determination in contemporary international law, it is interesting to note the two-pronged approach they generally follow. This dichotomy lends itself to a very general categorization of theories of self-determination based on external and internal traits. Internal self-determination provides autonomy in all group operations that do not impinge on the sovereignty of the state or the rights of individuals or other groups.[25] External self-determination, on the other hand, establishes the group as a legal actor that can negotiate with states and other autonomous entities.[26] This understanding of self-determination is very similar to the dual interpretation of autonomy Malloy proposed above, with collective political autonomy corresponding to internal self-determination and international relations the main sphere of external self-determination. Malloy goes on to discuss some of the pertinent concerns and debates surrounding the internal and external self-

[22] Joshua Castellino (2008), 561.
[23] ibid.
[24] ibid. 562.
[25] Joshua Castellino, "Conceptual Difficulties and the Right to Indigenous Self-Determination," in *Minorities, Peoples, and Self-Determination*, edited by Nazila Ghanea and Alexandra Xanthaki (Leiden: Koninklijke Brill NV, 2005), 63-5.
[26] ibid.

determination dichotomy. Internal self-determination typically appears in municipal law but is not codified in international law whereas external self-determination is rarely granted, but rather claimed and asserted by seceding territories or sovereign, independent states.[27]

Although granting external self-determination will not necessarily result in secession, many states still consider this degree of autonomy a threat to state sovereignty.[28] Nevertheless, both prongs may result in a threat or devolution of state sovereignty, as internal self-determination in practice often leads to power sharing in government, which the majority will view as a threat to state sovereignty.[29] Finally, Koskenniemi notes that "a generalized acceptance of self-determination stems from a relativist world-view that is alien to many political movements that seek to overturn the States system."[30] Self-determination takes many different forms in theory and in practice that are not anti-statist, and there are a variety of challenges to the state-based international system that do not rely on principles of autonomy at all, for this reason a dual system of autonomy a la Castellino or Malloy that does not delegitimize one interpretation in international law will be utilized in this paper.

1.3 Limitations

Given the parameters of this thesis, there are inevitable limitations to the conclusions that may be drawn. Simple spatial restrictions prohibit a thorough enough discussion of many of the concepts introduced herein, including self-determination, defining minorities and indigenous peoples, the evolution of minority rights, and a detailed account of all international legal documents concerning minority and indigenous rights. This last point has several implications. Obviously the selection of legal documents will heavily impact the conclusions that may be drawn. As this paper is primarily concerned with international norms, domestic

[27] Tove H. Malloy, (2005), 138.
[28] Paul Keal, "Indigenous Self-Determination and the Legitimacy of Sovereign States," *International Politics* vol. 44 no. 2-3 (Mar., 2007): 288-9.
[29] Malloy, Tove H. 2005; 138.
[30] Martti Koskenniemi (1994), 255.

documents were excluded upfront. There are numerous supranational organizations setting standards and sanctions for non-compliance, but not all are equally effective or respected. For this reason, the documents used will have a discernable European bias.[31] While much of the literature on group-differentiated rights is systematically Euro-centric, the West has led the push for national minority rights and indigenous rights throughout history. While there are profound problems with simply exporting legal norms developed in one environment around the world, this concern would be better reserved for another paper.

Legal documents are really just empty words and promises, they only take shape and have meaning when they are implemented, challenged, and tested. Even with the pared down selection of legal documents to consider, there are still too many examples of each document in practice to discuss them all. Documents like the Framework Convention for the Protection of National Minorities and the International Labor Organization Conventions must be adopted into domestic law to be binding. As states may or remove sections or propose their own interpretations of certain articles, a comprehensive analysis of these documents would require looking at how they were ratified in each participating state.[32] The use of Declarations that are, by nature, non-binding and thus not enforceable is also problematic. Nevertheless, these documents are useful for understanding what general principles and types of rights are internationally accepted, even if the precise application cannot be ascertained. This paper is concerned with international legal norms and trends in minority and indigenous rights, thus a

[31] The African Union, for example, has very generous protections for individuals and peoples codified in the African Charter on Human and Peoples' Rights (1982), but these norms are rarely implemented at the state level, and the AU does not have enough supervisory strength to ensure compliance. The Organization of American States has also provided group-differentiated rights for minorities and is currently working on a Draft American Declaration on the Rights of Indigenous Peoples.

[32] This also applies for state reports and recommendations issued by the Advisory Committee for the Framework Convention, as well as court cases that reference international documents in the decision.

general understanding of what legal documents propose and how they might be interpreted are sufficient for the scope of this paper.

A final set of limitations concerns group identity and representation. An in-depth discussion of attempts at defining national minorities and indigenous peoples follows in the first section of Chapter 2, but it suffices to say that definitions are rarely consistent. It is inherently difficult to compare rights of two groups who are indefinable. If a group cannot be defined, it follows that the group cannot be recognized as a legal entity and thus cannot receive special representation rights. As one of the primary justifications for external self-determination rests on a group's exclusion from the international order, the inability to explain and demonstrate the lack of representation would prevent national minorities and indigenous peoples from claiming external self-determination. Furthermore, part of the argument of this paper calls for a more particular consideration of group aspirations which is nearly impossible to do without real-life examples. Thus this paper must be considered at a purely theoretical level, discussing groups and concepts that are given purpose and structure only in practice. This will obviously limit the utility of any contribution, but is absolutely necessary in order to break out of the system and explicate the need for a restructuring of the legal system of rights.

Chapter 2: Theoretical Framework

This chapter will outline national minority rights and indigenous rights in an historical context. Before tracing the evolution of minority and indigenous rights, however, it is necessary to define the subjects of these rights. The terms "national minority" and "indigenous" are far from straightforward, as the groups included under this title are very diverse, and the usage has varied greatly over time. This is partly due to the fact that you must take a stance on the validity and shape of group differentiated rights in order to define a national minority or indigenous peoples.[33] Despite the difficulty in defining these terms, it is necessary to propose a definition to provide consistency and clarity throughout this paper. Critical liberalism, a predominantly subjective view towards political identities will provide a flexible definition that relies almost entirely on self-definition by minority or indigenous individuals.

Having discussed the difficulty in defining national minorities and indigenous peoples, the rest of the chapter will be devoted to mapping out trends in the minority rights discourse. It should come as no surprise that widely held convictions on the type of rights a group may claim vary over time with shifting international priorities. Thus national minorities have had extensive provisions for autonomy guaranteed, revoked, and reinstated again throughout the twentieth century. Indigenous peoples, on the other hand, were denied group-differentiated rights until the second half of the century, and initial rights aimed at integrating indigenous persons were replaced with the highest form of autonomy by the new millennium. One of the most problematic developments in minority rights theories was that academics seem to have stopped innovating and creating new theories and simply reiterate legal norms as somehow legitimate. This last point will become more obvious in light of the next chapter on legal provisions for national minority rights and indigenous rights.

[33] Patrick Macklem, "Indigenous Recognition in International Law: Theoretical Observations," *Michigan Journal of International Law* vol. 30 (Fall 2008): 207.

2.1 Definitions

2.1.i. National Minorities

Generally speaking, there are two approaches to defining national minorities. One approach focuses on the 'national' part of the phrase and contemplates various theories of nationalism for a suitable definition of a nation. The other method emphasizes the 'minority' aspect and focuses on a practical, often legal, definition. Theories of nationalism and nation-building can generally be split into two camps: the primordialists, who believe there is something fundamental and inherent in a nation, and the constructivists, who consider a nation to be an artificial construct to suit various needs. One of the earliest definitions of a nation was provided by German philosophers Johann Gottlieb Fichte and Johann Gottfried Herder and focused on shared language as the core of the nation.[34] This definition is inherently flawed as there are many languages that are spoken by multiple nations. A modern primordialist, Edward Shils adds race, ethnicity, and religion as essential elements of a nation, which he considers a fundamental unit of social organization.[35] This definition appears excessively splintering, and ignores the overlapping and often competing quality of many of these traits. Anthony D. Smith tries to bridge the gap between primordialists and constructivists, recognizing that many aspects of national identities are created, but claims there is a basic core he calls the "ethnie."[36] This ethno-symbolist approach may provide a comforting blend of objective and subjective criteria, but it is unclear what combination of primordial and constructed elements constitute a nation.

Moving towards the constructivist approach, Eric Hobsbawm focuses on the elite invention of national traditions and symbols which are then distributed to the masses through

[34] Martii Koskenniemi (1994), 261.
[35] Edward Shils, "Nation, Nationality, Nationalism and Civil Society." *Nations and Nationalism* vol. 1 no. 1 (1995): 93-118.
[36] Anthony D. Smith, *The Ethnic Origins of Nations* (Oxford: Blackwell Publishers, 1986).

centralized state education.[37] A frequent critique of Hobsbawm, this description of a nation fails to explain the fact that people are willing to die for their nation. As a modernist, Ernst Gellner posits that the need for a unified national identity and culture developed after industrialization and modernization created a need for an educated populace who would nonetheless follow the state government.[38] This model is limited, however, as it cannot explain the process of nation-building in pre-industrial societies, nor can it accommodate the persistence of nationalism in post-industrial societies. Finally, Benedict Anderson proposes a nation is an imagined community of individuals who will never know most other members of the community, but still consider themselves inherently limited and sovereign.[39] This objective definition is broad enough to apply to societies around the world, but fails to provide any subjective criteria that can be practically applied to identifying a nation. There are clearly a variety of opinions on what constitutes a nation, and while there are strengths and weaknesses to each, none are adequate when attempting to identify national minorities.

In contrast to the philosophical definitions proposed in the nationalism literature, theorists of specifically national minorities tend to adopt more pragmatic definitions based on contemporary, observable realities. Arnold Suppan and Valeria Heuberger provide a basic and yet popular definition of national minority as "a community of people... conscious of itself as a political community and desiring to have a common state."[40] By this definition, a national minority is characterized by its membership in a state separate from the nation-state to which it belongs. This definition is somewhat troublesome, however, as it relies too heavily on the idealized notion of the nation-state, and as a result only nations with kin-states would be recognized, denying the existence of Scottish, Kurdish, Palestinian, Roma, Catalan,

[37] Eric Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality* (Cambridge: Cambridge UP, 1990).
[38] Ernst Gellner, *Nations and Nationalism* (Ithaca: Cornell University Press, 1983).
[39] Benedict Anderson, *Imagined Communities* (London: Verso, 1983).
[40] Miriam J. Aukerman, "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context," *Human Rights Quarterly*, vol. 22 no. 4 (Nov., 2000): 1027.

and Basque national minorities, as well as many others. Tove H. Malloy focuses on multinational states rather than the elusive, idealized nation-state in developing her theory of co-nation rights.[41] Focusing on the *Montevideo Convention on the Rights and Duties of States* (1933), the requirements of a permanent population and defined territory are problematic for national minorities, as they do not have control over these two categories and thus cannot achieve statehood.[42] This is a problematic derivation, however, as Malloy assumes uses a document outlining requirements for statehood to discuss the constitution of a nation, essentially reverting to the Westphalian ideal she hoped to replace with her model for co-nation statehood. Also focusing on multinational states, Kymlicka defines a national minority as "a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture."[43] Individuals who have partially integrated into the majority culture by learning the state language, moving to a different part of the country, or celebrating state holidays would be excluded from the national minority. Furthermore, Kymlicka's characterization would perpetuate separation and stigmatization rather than facilitating peaceful coexistence, and could even prevent a minority culture from developing and evolving with the times. Clearly, there is no single definition of a national minority that balances subjective and objective criteria, a feeling that is reflected in international legal norms that typically leave minority recognition to the discretion of states.

2.1.ii. Indigenous Peoples

It is understandably difficult to come up with a definition for indigeneity that would remain broad enough to encompass all of the indigenous peoples throughout the world, but sufficiently narrow to guarantee the indigenous status and attendant rights may only be claimed by indigenous people. Informally, many people identify indigenous peoples by

[41] Tove H. Malloy (2005), Chapter 1.
[42] ibid. 15; 20-1.
[43] Will Kymlicka (1995), 11.

stereotypes of being "predominantly subsistence-based, non-urbanized, sometimes [with a] nomadic lifestyle."[44] Within an academic realm, Hurst Hannum provides a general definition that covers many of the points addressed in other philosophical definitions of indigeneity, defining indigenous peoples as "societies that have remained relatively separate from the dominant society that surrounds them, living in a more or less traditional manner and governed by traditional political structures."[45] Recognizing the inherent danger in creating a strict definition of indigeneity, Benedict Kingsbury nevertheless proposed the following criteria for identifying indigenous peoples: self-identification, historical discrimination and subjugation, ties to a historic homeland, and the desire to maintain a distinct identity.[46] Kingsbury's definition has two important elements lacking from Hannum's proposal: self-identification and the desire to maintain a separate indigenous identity. Many indigenous scholars discourage the use of standardized legal definitions, as rigid historical definitions were employed to deny indigenous peoples their rights by making the subjective criteria too restrictive.[47] As a result, the literature on indigenous rights has generally moved away from any attempt to define indigeneity, often relying on legal recognition to determine indigenous status.

While the precise definitions of indigenous peoples that appear in legal documents will be discussed in a later section, it is important to trace the similar path legal conceptions of indigeneity have taken to the more theoretical, philosophical understandings. In the United

[44] Siegfried Wiessner (2008), 1151-2.
[45] Hurst Hannum, "Self-Determination in the Twenty-First Century," in *Negotiating Self-Determination*. Hurst Hannum and Eileen Babbitt (Eds.) (Lanham: Lexington, 2006), 74.
[46] Benedict Kingsbury, "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law," *NYU Journal of International Law and Politics* vol. 34 (2001): 428-36. A similar definition was proposed by Siegfried Wiessner (2008), 1163: "Indigenous communities are best conceived of as peoples traditionally regarded, and self-defined, as descendants of the original inhabitants of lands with which they share a strong, often spiritual bond. These peoples are, and desire to be, culturally, socially and/or economically distinct from the dominant groups in society, at the hands of which they have suffered, in past or present, a pervasive pattern of subjugation, marginalization, dispossession, exclusion and discrimination."
[47] Miriam J. Aukerman (2000), 1016.

States of America, indigenous peoples were first recognized as legal actors in the contemporary legal order in 1973.[48] This initial recognition quickly escalated with the founding of the World Council on Indigenous Peoples in 1975, and the publishing of the *Study on the Problem of Discrimination against Indigenous Populations* in 1981, although research for this study began much earlier. Known colloquially as the Cobo Report, after the primary author Jose R. Martinez Cobo, a preliminary definition was proposed, along with a recommendation that the dominant discourse of indigenous integration be abandoned in favor of self-determination, and a call for the creation of a UN Declaration for indigenous peoples.

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. 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 system.[49]

The Cobo Definition emphasizes historical continuity and the desire to maintain a separate indigenous identity, but it also implies self-identification and special ties to the land, all elements of the Kingsbury definition discussed above. Another definition of indigeneity that appears in the International Labor Organization *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries* includes provisions for tribal and semi-tribal peoples, as they often suffer the same discrimination and disadvantaged status as other indigenous peoples but do not have pre-colonial territorial ties.[50] Historical continuity is inherently difficult to prove, hence the shift towards subjugation by a foreign power and a distinct indigenous culture characterized by spiritual ties to historical territories. Despite these at-

[48] Siegfried Wiessner (2008), 1152.
[49] United Nations, Department of Economic and Social Affairs, Division for Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues; Workshop on Data Collection and Disaggregation for Indigenous Peoples, UN Doc PFII/2004/WS.1/3 (2004): 1-2.
[50] International Labor Organization, Convention Concerning Indigenous and tribal Peoples in Independent Countries, ILO c. 169 (1989).

tempts at broad definitions, the World Bank maintains that it is impossible to cover all indigenous peoples in a single definition, and the United Nations decided not to include a definition in the *United Nations Declaration on the Rights of Indigenous Peoples*.[51]

Aside from the logistical difficulties in constructing a definition of indigeneity, there are principled moral arguments against doing so. In order to be identified as a "people," indigenous peoples must conform to international legal norms that caused their subjugation and colonization in the first place.[52] This places indigenous peoples in an awkward limbo where they must partially integrate to claim their rights as peoples, but doing so erodes the basis for claiming such rights and threatens the authenticity of indigenous identity.[53] Reflecting on the shift in the settler-native discourse following decolonization in Africa, Mahmood Mamdani highlights a similar disturbing phenomenon. During colonialism, natives were identified by different ethnic groups and differentiated horizontally, whereas non-natives were considered racial groups and stratified vertically with the lighter skinned races higher in the power hierarchy.[54] Following decolonization, indigeneity became a litmus test for rights in the post-colonial framework as well as entitlement and legitimacy.[55] Rather than create a new system for social organization, the newly independent states in Africa maintained the colonial social hierarchy but reversed the power relations, essentially justifying the new privileging of indigenous peoples by the false legitimacy of the colonial system. Thus Mamdani argues the most damaging impact of colonialism was "to politicize indigeneity, first as a settler libel against the native, and then as a native self-assertion."[56] Noting the constitutive importance of

[51] Miriam J. Aukerman (2000), 1015.
[52] Elena Cirkovic, "Self-Determination and Indigenous Peoples in International Law," *American Indian Law Review* vol. 31 no. 2 (2007): 388.
[53] ibid.
[54] Mahmood Mamdani, "Beyond Settler and Native as Political identities: Overcoming the Political Legacy of Colonialism," *Comparative Studies in Society and History* vol. 43 no. 4 (2001): 654.
[55] ibid. 657.
[56] ibid. 664.

the organization of the international legal system, Patrick Macklem proposes an understanding of indigenous peoples that is entirely reliant on the legal system. "What constitutes indigenous peoples as international legal actors, in other words, is the structure and operation of international law itself."[57] The legal system has proposed ill-fitting definitions of indigenous peoples throughout history to suit their political needs, thus an attempt to define indigeneity is not only impossible, it threatens indigenous survival and reinforces immoral legal principles.

2.1.iii Critical Liberalism for group identification

Defining categories such as national minorities and indigenous peoples may be a daunting, nearly impossible task, but in order to discuss group-differentiated rights, it is necessary to present some way of identifying these groups. The problem of shifting and competing identities in politics is addressed in an approach Courtney Jung calls critical liberalism. Self-definition may be a fundamental basis for identity, but as mentioned above, states also play a major role in constituting political identities in allocating resources and shaping power relations.[58] Critical liberalism considers these channels, whether they are gender, ethnicity, race, or class, the political identities that should be mobilized when making claims to group-differentiated rights. This approach considers structural injustice, rather than cultural difference, the fundamental problem facing disadvantaged minorities, and thus values particular understandings of group rights related to the unique minority-state relations in each situation more than universally applicable conceptions of group entitlements.[59] For the purposes of discussing indigenous peoples and national minorities in this paper, self-identification will be considered the most important defining feature, complemented by evidence of institutionally reinforced political identities.

[57] Patrick Macklem (2008), 179.
[58] Courtney Jung, *Moral Force of Indigenous Politics: Critical Liberalism and the Zapatistas.* (Cambridge: Cambridge UP, 2008).
[59] ibid.

2.2 A History of National Minorities and Fluctuating Rights

Shortly after the emergence of self-determination, nationalism became a dominant force in the French and American Revolutions. In the early 19th century the concept of self-determination spread to Central and Eastern Europe, where it became incorporated with emerging nationalism and thus came to imply self-government for all nations or ethnic groups, as many would-be nations were still incorporated into the great empires of the time.[60] Due to the conditions under which self-determination became a relevant philosophy in these two regions, Western conceptions of self-determination emphasized a liberal individual, whereas further east the fundamental unit was a group, the nation. Although some scholars of nationalism genuinely abide a civic - ethnic or western - eastern divide, many contemporary authors argue this is a false dichotomy employed to stigmatize certain groups. Nevertheless, this characterization is closely related to the classical - romantic dichotomy in self-determination described above.[61] In most situations, independent statehood was not the result of a rise in nationalist sentiment, rather national self-determination replaced the former dynastic rule providing a new justification and legitimacy for the state.[62] With the eastward spread of nationalism and the waning power of Empires, a romantic interpretation of self-determination came to dominate minority nationalisms at the end of the 19th century.

National separatism within the Empires was a major factor in the outbreak of World War I in Central and Eastern Europe, and self-determination came to be one of the dominant philosophies in the conclusion of the war. While both Woodrow Wilson and Vladimir Lenin invoked national self-determination at the conclusion of World War I, they had very different ideas regarding the subjects to whom it applied. Wilson gained widespread support for his promotion of national self-determination, but he had only envisioned this for the national mi-

[60] Thomas D. Musgrave (1997), 4-6.
[61] Martti Koskenniemi (1994).
[62] ibid. 252.

norities in the former Austro-Hungarian, Russian, and Ottoman Empires.[63] Lenin, on the other hand, extended self-determination to all nations, including colonies, and demonstrated his support for national self-determination by creating Federally Autonomous Republics following the October Revolution and the withdrawal of the Russian Empire from the war.[64] The characterization of colonial self-determination as anti-statist and threatening the balance of power among the victors is clearly a fear of romantic self-determination, whereas Lenin encouraged the proliferation of states to normalize international relations and establish the conditions for the spread of Marxism-Leninism worldwide. While it is possible that Lenin lost influence in shaping the peace process after the amnesty, it is more likely that the Central powers were apprehensive about his claims for colonial self-determination, as it would threaten their imperial holdings. Thus Wilson's *14 Points* recommendation of extending self-determination to all nationalities in the former Empires was adopted by the Central powers during the peace negotiations.

As the Austro-Hungarian, German, and Russian Empires were dismantled and new nations were granted sovereign statehood, new problems arose due to ethnically mixed borderlands and the difficulty in creating homogenous states. Large portions of a cultural "nation" often ended up occupying territory that was incorporated into the state of a different "nation." While initially it was believed that the interest of kin state governments in protecting the members of their imagined "nation" living abroad would be enough to guarantee mutual respect for national minorities, it was eventually decided by the newly formed League of Nations that new laws governing the protection of national minorities would be necessary. Defeated states adopted minority rights provisions through peace agreements and the independence of new nation-states was made conditional on the adoption of minority rights trea-

[63] Woodrow Wilson, *Fourteen Points* (January 8, 1918.)
[64] Vladimir Ilych Lenin, "The Right of Nations to Self Determination (1914)," in *Lenin's Collected Works*, vol. 20 (Moscow: Progress Publishers, 1972), 393-454.

ties, but winning states were not required to enact any new minority rights. These unequal expectations of minority protection were exacerbated by the fact that national minorities were not considered eligible for self-determination, even if the purpose of national minority rights and self-determination were the same. These logistical difficulties were compounded by a rather conservative and restricted interpretation of self-determination by the League of Nations that took shape shortly after its inception with the Aaland Islands dispute in Finland, where cultural protections and internal self-determination were recognized but the Islands were not recognized as legitimate legal actors in the international sphere.[65] Ultimately, neither states nor minorities were content with the minority rights treaty regime, and as the League had no authority to coerce compliance, the system failed.

Following World War II, a distinctive turn away from minority rights in the legal discourse shaped the next 45 years despite the emergence of identity politics and demands for recognition of difference from representatives of civil society and academia. Having contributed to the outbreak of World War II, minority rights treaties were considered dubious and ineffective in the post-WWII reconstruction and democratization. Instead of group-based minority rights, a return to Western liberalism brought the emphasis back to the individual, a shift solidified with the enactment of the *Universal Declaration of Human Rights* (1948). Universal human rights emphasized the basic equality of every individual person, an assumption based on the inherent dignity of each human being.[66] Beginning in the 1960s, however, many individuals claimed universal rights had a negative, homogenizing effect and that true human rights could only be achieved through the recognition of difference.[67] Charles Taylor argues that the basis of universal human dignity as a justification for rights should be replaced with concern for authenticity of identity, a shift that permits and even requires group-

[65] Martti Koskenniemi (1994) 254.
[66] Louis Henkin, *The Age of Rights* (New York: Columbia UP, 1996).
[67] Charles Taylor, *Multiculturalism and the "Politics of Recognition,"* (Princeton: Princeton UP, 1992).

specific rights.[68] Universal human rights have come under critique from a variety of groups, some more reasonable than others, but they all agree that universal rights deny and suppress the variety of identities currently expressed in the world.[69] Liberal pluralists acknowledge the need for specific provisions for minorities create greater equality of opportunity and consider this essential to realizing an individual's full potential. Although difference-blind liberalism came under criticism by the Civil Rights, Women's Rights, and Indigenous movements, national minority critiques did not emerge until after the end of the Cold War.[70]

With the dissolution of the Soviet Union, Yugoslavia, and Czechoslovakia, renewed emphasis was placed on national self-determination in its romantic sense for all freely formed communities. Despite similarities to the spread of national self-determination in the Empires leading up to World War I, most newly independent states in the post-Cold War period were simply regaining the sovereign (or partially autonomous, in the case of the Former Soviet Republics) status they lost following WWII, and thus were reinforcing the statist system characteristic of classical self-determination. Given the aforementioned problems with this historical dichotomy as well as its failure to explain the return of national self-determination, contemporary national self-determination must not be understood as ideologically for or against the state and should rather be viewed in terms of the reasonable rights it may accord.

> I would argue that the right of national self-determination in modern international law has in a sense cleansed the concept of self-determination of its philosophical content through the process of co-optation of the practical content. The philosophical content represents the autonomy of the collective *self*, and the practical content represents the possibility of applying *determination* as to who belongs and who does not. By separating the two concepts, the self and determination, modern international law has created a basis for bad law.[71]

[68] ibid.
[69] Critiques by linguistic, ethnic, and sexual minorities are typically more accepted than critiques by authoritarian regimes that shroud severe oppression in claims of cultural difference, for example.
[70] Will Kymlicka (2007), chapter 2.
[71] Tove H. Malloy (2005), 298.

While this statement by Tove Malloy is quite true about the current legal use of self-determination, a consistent application of self-determination in practice would require a stable and enduring definition of a nation; an inherently problematic proposition.[72] In one of the fundamental texts on national minority rights in the post-Cold War era, Will Kymlicka argues for differentiated citizenship on account of the constitutive role that groups have on individual identities.[73] In contrast to ethnic groups, who voluntarily immigrated to a state and thus only have access to limited cultural rights, national minorities are entitled to special representation and self-government rights, which stop short of full, external self-determination. Despite the current emphasis on self-determination by national minorities, the principle itself offers very little; instead, national self-determination should be viewed as an agent of change to reach a desired end, be it cultural preservation, self-government, regional autonomy, or even secession.

2.3 Postwar Development of Indigenous Rights

Following decolonization in Africa in the 1960s, indigenous identities were mobilized as grounds for recognition along the same route as race, gender, and sexuality. Unlike other forms of identity politics, which were perceived as biological and innate, indigeneity was a man-made designation based on the subjugation of one group of people to another group of people. This created strong ties between the burgeoning indigenous rights movement and the decolonization movements of the previous decade, as both were subject to imperial colonization in ones homeland by a foreign power. The colonizers weren't just any foreign power, either, but the developed Western leaders who also shaped international legal norms and the liberal human rights regime in the post-war period. Thus, international indigenous rights are a result of the international organization that vests sovereignty in communities selectively, al-

[72] Martti Koskenniemi (1994), 260.
[73] Will Kymlicka (1995).

lowing sovereign states to subjugate non-sovereign communities like indigenous peoples.[74] Given the constitutive power of colonial institutions to persecute and subjugate indigenous peoples, it is a particularly poignant approach to empowering indigenous peoples of pursuing legal recognition and entitlements as well as institutional autonomy.

To better understand how indigenous rights have reversed institutions used for their subjugation to claim rights and autonomy, it is necessary to analyze the legal justifications used to colonize indigenous peoples. Utilizing the principle of terra nullius to claim the land was unoccupied and free for domination, the imperial powers maintained their hold on the land even after colonization became an unpopular principle in international law through the principle of uti possidetis juris, which guaranteed land rights to the present, legally recognized occupants.[75] The logic of this domination was inherently flawed, however, as treaties between Europeans and indigenous peoples were established from the earliest moment of contact.[76] According to Patrick Macklem, "international law stipulates that only an agreement between 'two independent powers' constitutes a treaty binding on the parties to its terms"[77] Furthermore, some contemporary indigenous activists claim the settlers were never recognized as legitimate by indigenous peoples, and their treaties and claims to land were only recognized by fellow European imperialists caught up in the land-grab game.[78] Over time, the treaties were violated and then abandoned and indigenous people were denied independence and subject to internal colonization, resulting in widespread assimilation and genocide. "The criteria by which indigenous peoples can be said to exist in international law relate to their

[74] Patrick Macklem (2008), 208.
[75] Joshua Castellino (2008), 507-510.
[76] Taiaiake Alfred, "Sovereignty," in *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination*, Ed. Joanne Barker (Lincoln: University of Nebraska Press, 2005), 34.
[77] Patrick Macklem (2008), 185.
[78] Taiaiake Alfred (2005), 34.

historic exclusion from the distribution of sovereignty initiated by colonization that lies at the heart of the international legal order."[79]

Inspired by the rhetoric of self-determination during African decolonization, the Indigenous rights movement employed this same language to connect the two movements, asserting internal colonization should be recognized as a legitimate form of colonization in international law.[80] Many states felt threatened by the invocation of self-determination, especially considering the direct ties to decolonization, and reiterated the exclusion of indigenous peoples from the developing human rights norms.[81] At that time, the term 'peoples' only applied to the context of twentieth century decolonization, and thus excluded earlier periods of colonization from the right of all peoples to self-determination.[82] To challenge this designation, indigenous peoples throughout the United States of America protested, climaxing in a seventy-one day stand-off at Wounded Knee, the site of a historical battle between indigenous peoples and the westward-bound colonizers.[83] Indigenous peoples were involved in creating "subaltern counterpublics" by creating a counter-discourse for the historical defeat the Amerindians suffered at Wounded Knee, which in 1973 resulted in the acquiesce of the United States Government and the recognition of indigenous peoples as 'peoples' in international law.[84] As a result, the World Council of Indigenous Peoples was founded in 1975 to bring indigenous peoples together in the quest for autonomy and created a consultancy seat at

[79] Patrick Macklem (2008), 209.
[80] Joshua Castellino (2008), 556. Internal colonization is a historical and political process whereby institutions were designed by a foreign-settler government to permanently disenfranchise indigenous peoples.
[81] Elena Cirkovic (2007), 392. At that time, the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights were still being drafted.
[82] Joshua Castellino (2008), 557.
[83] Siegfried Wiessner, 1152.
[84] Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," In *Habermas and the Public Sphere*, Craig Calhoun (Ed.) (Cambridge: MIT Press, 1992), 124.

the UN.[85] While this marks a substantial improvement from the status of indigenous peoples in international politics before, recognition and representation vis-à-vis a single seat in the UN is hardly sufficient to reverse centuries of domination against the descendants of colonial powers in an institution designed by them and based on the same legal principles that justified indigenous subjugation in the first place. There is a home-court advantage that indigenous activists will have to work tirelessly to overcome.

Many indigenous scholars have proposed justifications for indigenous autonomy, often surpassing self-determination and focusing squarely on indigenous sovereignty. June McCue outlined the difference between mainstream legal definitions and indigenous understandings of sovereignty and self-determination

> Indigenous sovereignty is interconnected with self-determination. Non-indigenous formulations of sovereignty treat states as artificial entities that hold sovereign rights such as territorial integrity or sovereign equality. Self-determination is severed as a right possessed by peoples which can limit state powers. Finally, Indigenous sovereignty is sacred and renewed with ceremonies that are rooted in the land.[86]

Claiming that sovereignty cannot be earned, granted, or won, Kirke Kickingbird offers a similar view of indigenous sovereignty.[87] If sovereignty is inherent in a group of people, indigenous sovereignty is inseparable from indigenous culture and thus should be recognized and respected wherever indigenous peoples exercise their sovereignty through individual or collective acts of cultural expression. Vine Deloria Jr. also proposes a culturalist argument that indigenous culture is a more important indicator of indigenous sovereignty than the political power of indigenous peoples. Seeking to remove indigenous peoples from the power relations among independent states, Deloria uses a nationalist rhetoric to negotiate more autonomy from states. Settler-indigenous negotiations have rarely ended well for indigenous

[85] Siegfried Wiessner (2008) 1153.
[86] June McCue, "New Modalities of Sovereignty: An Indigenous Perspective," *Intercultural Human Rights Law Review* vol. 2 (2007): 25-6.
[87] Kirke Kickingbird et. al., "Indian Sovereignty," In *Native American Sovereignty*; Ed. John R. Wunder (New York: Garland Publishing, 1999),10-60.

peoples, and while national conflicts have certainly resulted in historical catastrophes, there have been successful assertions of autonomy and secession in interactions with national minorities. With the nationalist discourse in place, Deloria asserts that external self-determination is more appropriate for national minorities, while internal self-determination is more appropriate for other types of minorities.[88] In this way, indigenous peoples could achieve a level of autonomy that would reflect their cultural and spiritual foundations without using the vocabulary of sovereignty and the legitimacy for the imperial societies it spawned.

One of the most outspoken critic of sovereignty as a solution to the threats on indigenous culture, Taiaiake Alfred urges scholars to 'de-think' sovereignty to understand how alternative conceptions of autonomy are better suited to indigenous peoples. Aside from the well-documented history of repression and the retrospectively illegitimate grounds for colonization, the principle of uti possidetis in combination with the domination of the post-WWII international organization by former colonies has vested States with the power to recognize peoples as legitimate legal actors or not. In this way, "the colonizers... continued to rule the colonized from their graves" by restricting the application of self-determination to peoples who were not located in sovereign, independent states, primarily indigenous peoples.[89] Following the recognition of indigenous peoples in international law, States offered limited funds and autonomy to indigenous peoples contingent upon their willing integration into the sovereignty framework and the agreement not to challenge sovereign state authority.[90] This compromise may have successfully garnered indigenous peoples a degree of autonomy, but it comes at the price of adopting the language of nations and accepting sovereignty framework as the only legitimate organization of the international system. Thus "aboriginal rights' and 'tribal sovereignty' are in fact the benefits accrued by indigenous peoples who have agreed to

[88] Taiaiake Alfred (2005), 42.
[89] Siegfried Wiessner (2008), 1149-1150.
[90] Taiaiake Alfred (2005), 44.

abandon autonomy to enter the state's legal and political framework."[91] Alfred goes on to argue:

> Sovereignty, then, is a social creation. It is not an objective or natural phenomenon but the result of choices made by men and women, indicative of a mindset located in, rather than a natural force creative of, a social and political order. The reification of sovereignty in politics today is the result of a triumph of a particular set of ideas over others- no more natural to the world than any other man-made object. Indigenous perspectives offer alternatives, beginning with the restoration of a regime of respect... True indigenous formulations are non-intrusive and build frameworks of respectful coexistence by acknowledging the integrity and autonomy of the various constituent elements of the relationship... explicitly allow for difference while mandating the construction of sound relationships among autonomously powered elements. For people committed to transcending the imperialism of state sovereignty, the challenge is to de-think the concept of sovereignty and replace it with a notion of power that has at its root a more appropriate premise.[92]

The solution for Alfred is to reject the statist understanding of the world in favor of legal pluralism that can accommodate the immense diversity of peoples, cultures, and governing systems in the world. Unfortunately, he does not propose a single, practical alternative, but his critique of indigenous sovereignty is a valid contribution, one that may ironically please the States it aims to challenge.

Many non-indigenous scholars also argue for a unique approach to indigenous autonomy, often taking a more practical, less theoretical approach to indigenous rights. James Tully claims sovereignty still needs to be re-conceptualized in a post-imperial context, focusing on principles of mutual consent and recognition and respect for cultural difference.[93] David Wilkins argues against sovereignty in any manifestation, citing the limited success of tribal sovereignty in the United States and its frequent manipulation by state governments to suit their needs.[94] Recognizing the importance of international legal representation, Hurst

[91] ibid. 39.
[92] ibid. 46.
[93] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge UP, 1995).
[94] David Wilkins, *American Indian Sovereignty and the United States Supreme Court* (Austin: U of Texas Press, 1997).

Hannum considers indigenous self-determination a necessary step to mobilizing indigenous peoples collectively and locating a suitable spokesperson to represent indigenous concerns in supranational governing bodies.[95] Many other academics consider the established legal norm of indigenous self-determination evidence that this is an appropriate form for indigenous rights to take.

Will Kymlicka originally characterized indigenous peoples as a sub-category of national minorities in his dichotomous approach to liberal multicultural. With this characterization, indigenous peoples as national minorities would be entitled to self-government and special representation rights, while voluntary immigrants as ethnic minorities could only claim poly-ethnic and special representation rights.[96] Based on the international legal norms that emerged in the post-Cold War period, Kymlicka revised his rights dichotomy to treat indigenous peoples as a separate entity from minorities.[97] Arguing that the right of indigenous peoples to internal self-determination has been codified in numerous international documents, Kymlicka considers these applied normative rights sufficient to justify a separate theoretical category for indigenous peoples. This uncritical reliance on legal norms to shape new theories is incredibly problematic, as it does not consider whether the existing policies are effective in promoting indigenous cultures. In fact, this logic is ironically similar to the uti possidetis juris concept in law that justified colonization. Just as the occupant became the legitimate sovereign power over a territory, the existence of a legal norm is considered justification in theory.

Recognizing that national interpretations of positive law for indigenous peoples vary greatly, Siegfried Wiessner argues for an "appropriate legal framework" to address indigenous concerns. While many of these principles are present in legal documents to some degree, Wiessner proposes six fundamental rights that must be protected: indigenous peoples

[95] Hurst Hannum (2006), 75.
[96] Will Kymlicka (1995), Chapter 2.
[97] Will Kymlicka (2007), 31.

must have autonomous control over land that emphasizes the traditional relationship binding indigenous peoples to the land; indigenous peoples should administer internal and local indigenous affairs; governments must consult with indigenous peoples when the results may effect them; indigenous peoples should govern themselves and see to the preservation of their culture as they see fit; treaties with indigenous peoples should be recognized; and positive measures should be taken to promote and protect indigenous languages and cultures.[98]

Moving away from the practical implementation of indigenous autonomy, Iris Marion Young recognizes that many indigenous communities are too intertwined with the general population to have complete autonomy in determining indigenous issues. Young proposes simple principles that should structure all interactions between indigenous peoples and the State: relational autonomy and non-domination.[99] Respecting these concepts will allow indigenous peoples internal autonomy, but provide enough protection and security that they do not feel the need to assert more separation from the State; at the same time, states would no longer fear indigenous secession. This awareness of the codependency of indigenous peoples and the general population is often overlooked by proponents of indigenous autonomy, but relying on general good-will and promises instead of binding legal rights and principles will probably not prove convincing or popular enough among indigenous peoples.

The most reasonable model for indigenous autonomy must consider the practical limitations while emphasizing a legal solution. Joshua Castellino promotes indigenous self-determination, and proposes a model that would bring legal force while still remaining sensitive to the interconnectedness of indigenous peoples and non-indigenous communities. This model differentiates between territories where indigenous peoples form the majority, and re-

[98] Siegfried Wiessner (2008), 1174-5.
[99] Young, Iris Marion, "Two Concepts of Self-Determination," in *Ethnicity, Nationalism, and Minority Rights*. Ed. Stephen May, et al. (Cambridge: Cambridge UP, 2004).

gions where indigenous peoples live integrated with the majority throughout the state.[100] Where indigenous peoples are territorially concentrated, they should be granted political self-determination, with special representation for any non-indigenous people in the same territory. Indigenous peoples living dispersed in a given region cannot dispossess the non-indigenous majority of their right to freedom and democracy, but they should have access to non-political self-determination to protect their culture, language, and religion. It is an enduring shortcoming that indigenous and non-indigenous scholars alike have ignored the high degree of variability in the lifestyles of indigenous peoples throughout the world. This concern may have been addressed in the general acceptance that defining indigenous peoples is an impossible task, but it should follow that devising a uniform set of rights that will be universally applicable to all indigenous peoples is equally misleading. Castellino's proposal is the most practical and effective method for determining what form indigenous autonomy should take given the immense variation in indigenous realities.

[100] Joshua Castellino (2008), 560.

Chapter 3: Legal Framework

This chapter will trace the development of minority rights and indigenous rights in the current legal regime since the conclusion of World War II. Group specific rights were the subject of substantial scorn following the disintegration of romanticized national minority rights in the interwar period. After trying universal, individual rights in place of differentiated rights, minority rights returned towards the end of the century, but in a significantly altered shape. Indigenous rights, on the other hand, were first recognized when the discourse of human rights reigned supreme. Thus collective rights for indigenous peoples and national minorities were not codified in international law until the last decade of the twentieth century. Despite the similar timing of these developments, this chapter will demonstrate that the content of these new group-differentiated rights, although both providing some degree of autonomy, are markedly different. The reason for this will be discussed in the following chapter.

3.1 International Documents Concerning National Minorities and Self-Determination

Popular opinion may have turned away from group-based minority rights following the failure of the interwar minority treaties regime, but there were still some protections for national minorities before the return of national minority rights in the post-Cold War era. Although there were no specific provisions for the protection of minority rights included in the United Nations Charter, the organization did express an interest in preserving minorities.[101] The *Universal Declaration of Human Rights* (1948) made no mention of minorities, but the *International Covenant on Civil and Political Rights* (1966) expanded on the UDHR as a binding, legal document, which did address minorities. Article 27 of the *Covenant* states:

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with

[101] Thomas D. Musgrave (1997), 129-30.

> the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[102]

The *Covenant* uses the term ethnic in place of the national and racial descriptions that characterized the interwar minority provisions, but the application of the two terms are nearly identical.[103] This was ultimately the most controversial of the Articles, as many viewed the right to exercise this right 'in community with other[s]' as a group-based right, which was directly opposed to the dominant liberal individualistic norm at the time. Most acts of cultural expression are committed in the company of others, nevertheless the General Assembly clarified that this did not make Article 27 a group-based right. Thus the earliest post-WWII minority protections did not cover self-determination rights and only protected the rights of individuals to cultural expression in private spheres.

While the provisions allow for a degree of autonomy in expressing cultural difference, Article 27 does not address the administration, protection, or promotion of minority cultures, and practicing these rights is only permissible when it does not come into conflict with existing state laws. This was clear in the decision of the Human Rights Committee regarding reindeer husbandry by the Sami peoples in northern Finland. The case of Lansman v. Finland concerned whether logging and road construction through an ancient forest would prevent members of the Muotkatunturi Herdsmen's Committee from practicing their Sami culture.[104] While the Human Rights Committee determined reindeer husbandry did in fact constitute a central part of Sami culture, they determined the planned construction did not prevent the Muotkatunturi Herdsmen from practicing this tradition in another setting.[105] Sami reindeer herders in other parts of Finland had transitioned to fenced-in regions where reindeer were

[102] United Nations, International Covenant on Civil and Political Rights; General Assembly Resolution 2200A, Session 21. (16 December 1966).
[103] Thomas D. Musgrave (1997), 137.
[104] United Nations, The Human Rights Committee, Views on Jouni E. Lansman et al. v. Finland regarding the Optional Protocol to the International Covenant on Civil and Political Rights; UN Doc CCPR/C/58/D/671/1995 (1996)
[105] ibid. sec. 11.

fed hay instead of old-growth lichen with limited negative impact to their Sami identity. At issue here was whether loosing "nature-based traditional Sami methods" of reindeer herding would result in a derogation of authentic Sami culture.[106] The Human Rights Committee to allow the construction to continue indicates that, while Article 27 may allow minorities to express their culture, it does not require states to promote or protect minority cultures. From this decision, we can deduce that Article 27 was primarily concerned with equality and non-discrimination, and required no positive rights on the part of the state.

There were several developments in international law following the adoption of the Covenant, but many of these encompassed negative rights, protecting minorities from discrimination and state coercion, and neglected any positive provisions for autonomy. The end of the Cold War brought renewed attention to the problem of national minorities in Central and Eastern Europe, precipitating a return to group-based minority rights in international law. Following the collapse of the Soviet Union and Yugoslavia, 25 million ethnic Russians became national minorities in newly independent states, and smaller quantities of Serbs, Croats, Slovenes, and Bosnians became minorities in the Balkan nations.[107] At the time, there were very few rights in international law that could be invoked for the protection of these new minorities, but several supra-governmental organizations attempted to quickly fill this void.

The Commission on Security and Cooperation in Europe (CSCE) adopted the Copenhagen Document in 1990 that addressed a variety of concerns in post-Cold War international relations, including minority rights. Establishing the protection of national minority rights as an integral part of human rights, the Copenhagen Document guarantees equality and non-discrimination while ensuring state support for maintaining and developing minority cul-

[106] ibid. sec. 2.5
[107] ibid. 141.

ture.[108] Along with provisions for developing cultural associations and educational institutions, the Copenhagen Document calls for the creation of "appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities."[109] Clearly, this elevates the autonomous rights claims national minorities may make to include provisions for internal self-determination. An important improvement in the field of minority rights, the Copenhagen Document was drafted without a governing authority or affiliated court that could guarantee the implementation of these rights. Nevertheless, it has been considered "politically binding" in light of intense pressure by member states to conform, and thus does represent an increase in national minority rights in normative international law.[110]

As the commitments outlined in the Copenhagen Document were only applicable to a select group of States, the United Nations deemed it necessary to develop new legislation to institutionalize the normative changes throughout the rest of the world. The *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (1992), henceforth referred to as the Declaration, was also created as a non-binding document in international law, but it does outline a commitment to certain principles and practices, without sacrificing or watering down the provisions due to conflicting States' interests. Rather than just providing a list of negative rights, the *Declaration* also outlines positive rights or entitlements minorities may demand from the state.[111] Nevertheless, the *Declaration* stops short of permitting national minorities full external self-determination, and it makes ex-

[108] Commission on Security and Cooperation in Europe; Copenhagen Document. (29 June 1990). Article 30
[109] ibid. Article 32, 35.
[110] Uhl, Robert-Jan. and Bernhard Knoll, "The OSCE: A Commitment to Human Rights," In *60 Years of the Universal Declaration of Human Rights in Europe*; Vinodh Jaichand and Markku Suksi (Eds.) (Antwerp: Intersentia, 2009), 434.
[111] United Nations, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; General Assembly Resolution 47/135 (18 December 1992).

pressly clear that nothing in the document would permit minorities to undermine state sovereignty.[112]

The language of the *Declaration* may not have been subject to interpretation by an international court or oversight committee, but the limitations on self-determination are clearly evident in the wording of the *Declaration*. The introduction to the *Declaration* establishes the state-centered nature of the document, as minority rights are important to "the political and social stability of States in which they live."[113] Articles 2 and 4 establish the equality of national or ethnic, linguistic and religious minorities and requires states to actively protect ensure these minorities are not discriminated against. Freedom of association and the right to be consulted in the development of policies that effect minorities are guaranteed in Articles 2, 5, and 6, and although paragraph 5 of Article 2 ensures minorities free association with fellow minority members across borders, this should not be misconstrued as promoting minorities to the status of an international legal actor. This is due to the restriction of the provisions of the *Declaration* to individual members of a minority, rather than the minority group itself, as outlined in Article 3. Even the title of the *Declaration* is cautions, defining the subjects of these rights as persons belonging to minorities rather than the minority itself. Thus the *Declaration* may provide much needed protections and entitlements to national minorities, but it stops far short of recognizing minority groups as legal actors. The *Declaration* protects internal self-determination for national minorities, but in denying them equal status to states as legal actors the *Declaration* denies their right to external self-determination.

Not to be left out of the post-Cold War deluge of legal documents concerning national minorities, the Council of Europe developed the *Framework Convention for the Protection of National Minorities* (1995) as a legally binding instrument to protect national minorities in Europe. As with the *Declaration*, the *Framework Convention* outlines both positive and nega-

[112] ibid. Article 8 para 4.
[113] ibid. para 5

tive rights for national minorities to exercise "individually as well as in community with others."[114] The *Framework Convention* calls for more autonomy than earlier provisions for national minorities, especially regarding collective rights. Although the *Framework Convention* is fundamentally concerned with individual rights, certain provisions for the use of minority languages where they are territorially concentrated border on a recommendation of federalism that would recognize national minorities in state level institutions.[115] The *Framework Convention* provides more autonomy in developing minority media and education, but it stops short of appointing any sort of minority government to regulate internal affairs. While the *Framework Convention* expressly denounces any challenges to the territorial state sovereignty,[116] it permits national minorities to maintain contacts with fellow nationals in neighboring states and encourages states to cooperate with neighboring states whose kin comprise a national minority in the given state.[117] This type of international contact protection appears in earlier documents, but in combination with the permissible collective application of these rights, begins to identify national minorities as legitimate international actors. Probably the greatest flaw of the *Framework Convention* is the failure to define national minorities, choosing instead to make states responsible for identifying the national minorities who will receive special rights.[118] This is an integral part of international law, both in recognizing state sovereignty and allowing states to consider the unique and particular features of national minority protection in their states. In fact, many aspects of the *Framework Convention* are left to the sole discretion of states, including the development and implementation of policies to protect the rights of national minorities. Nevertheless, allowing states to develop

[114] Council of Europe, Framework Convention for the Protection of National Minorities; CETS No. 157 (1 February 1995), Article 3.
[115] ibid. Articles 10, 11, 14.
[116] ibid. Article 21.
[117] ibid. Articles 17, 18.
[118] Thomas D. Musgrave (1997), 144-5.

their own approaches and definitions prevents the *Framework Convention* from developing a truly universal set of rights that can serve as a normative model in international law.

One of the most valuable contributions of the Framework Convention to the regulation of national minorities in international law is the establishment of an Advisory Committee (AC) to review reports produced by States and provide recommendations to improve their compliance with the established rights. While the recommendations are not binding and states cannot be sanctioned for non-compliance, statements issued by the AC carry political weight and are carefully considered. The dialogue between Denmark and the AC demonstrates the basic problem of allowing States to determine their national minorities, both for minority protection as well as for creating a universally applicable normative application. At the time of ratification, the German minority in South Jutland were identified as the only recognized national minority subject to the Framework Convention. In keeping with the monitoring requirements, the AC issued their first opinion in 2000, urging the Danish government to reconsider the scope of application of the Framework Convention, as Far-Oese and Greenlanders, as well as Roma residing throughout the Kingdom of Denmark were a priori excluded due to a limited territorial application of the Framework Convention.[119] This issue persisted in the subsequent AC opinion of 2004, however the report asserted that there were no attempts by Far-Oese, Greenlanders, nor Danish to extend the protection of the Framework Convention to these excluded groups.[120] The overwhelming victory in Greenland of a 2008 referendum on self-government indicates that new voices in favor of a wider application of the Framework Convention are emerging.[121]

[119] Advisory Committee on the Framework Convention for the Protection of National Minorities, 2000; 2.
[120] Advisory Committee on the Framework Convention for the Protection of National Minorities, 2004; 6.
[121] Andy McSmith, "The Big Question: Is Greenland ready for independence, and what would it mean for its people?" *The Independent*, 27 November 2008, accessed online 21 May 2010.

With the submission of Denmark's third state report in March of this year, it will be interesting to observe how the AC addresses the continued refusal to extend coverage of the Framework Convention to Roma, Greenlanders, and Far-Oese in light of a burgeoning desire for increased autonomy amongst at least one of these national minorities. What is clear, however, is that however strongly worded the recommendation may be, the Danish government cannot be coerced into compliance and the AC cannot introduce a uniform definition or application of the Framework Convention. If simply defining the subject of the rights is outside the scope of the Framework Convention, developing a normative application of the various provisions seems nearly impossible. For this reason, the minor steps towards establishing external self-determination for national minorities in the *Framework Convention* can not be seen as representing a sea change in the minority rights literature; internal self-determination remains the norm in international law for national minorities.

3.2 Indigenous Self-Determination: An Established Norm

After the emergence of liberal human rights in the post-WWII era, only two documents addressing indigenous rights were developed during the rest of the twentieth century. The International Labor Organization developed some protections for indigenous individuals during the interwar period, but these largely focused on workers rights. Furthermore, these rights were designed in such a way as to deny indigenous peoples the status of a "people" in international law, and were made conditional on the legal status of the territory- only non-sovereign colonies were required to protect all natives under the indigenous protections.[122] The 1957 *Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (Convention 107) was the first international legal document to promote group-differentiated rights and protec-

[122] Patrick Macklem (2008), 189.

tions for indigenous and tribal people.[123] The primary protection the Convention 107 sought to implement was the elimination of discrimination, as the treatment of indigenous people by non-indigenous members of society was seen as the gravest problem prohibiting integration and development.

In fact, all of the aims of the *Convention 107* were couched in a larger goal of integration into the majority society, although this was differentiated from coerced assimilation, which was expressly forbidden in Article 2.[124] Thus the provisions outlined in the Convention 107 were intended to be temporary, applicable only until the indigenous populations had been completely absorbed into the majority society.[125] Nevertheless, there are some provisions protecting political and territorial access and maintenance of culture vis-à-vis language promotion and traditional occupations.[126] Although several provisions appear to provide collective rights to indigenous groups, the scope of the Convention 107 is limited to members of tribal and semi-tribal populations rather than the group itself. The language of the *Convention 107* is appallingly paternalistic and the aim of integration can be considered dubious at best. Thus, although the *Convention 107* provided some new rights to protect and promote indigenous cultures, these provisions should hardly be considered a sufficient expression of indigenous autonomy, but they do provide a solid foundation for the continued development of indigenous rights.

Recognizing that integration was not an appropriate goal for indigenous peoples, the 1957 Convention was replaced in 1989 by the *Convention (No. 169) Concerning Indigenous*

[123] International Labor Organization, Convention Concerning the Protection and Integration of Indigenous and Other tribal and Semi-Tribal Populations in Independent Countries, ILO c. 107 (1957).
[124] Macklem, Patrick. 2008; 193-4.
[125] International Labor Organization 1957; Article 3 (2b)
[126] ibid. Articles 5 (representation and consultation), 11 (collective land rights), 17 and 18 (traditional occupations), 23 (language)

and Tribal Peoples in Independent Countries.[127] Along with the removal of any sections insinuating integration, the *Convention 169* used stronger language and eliminated loopholes while making many temporary provisions permanent.[128] This resulted in a richer, stronger document that authorized positive rights for the protection of indigenous cultures. Traditional indigenous occupations including hunting, fishing, gathering, trapping, and producing rural handicrafts were recognized as integral elements of indigenous culture and should be protected and promoted by states as a means of developing indigenous societies.[129] Indigenous access to lands they currently or historically occupied as well as the use of the land for subsistence and cultural activities was also protected as both an individual and group-right.[130] States are required to consult with indigenous peoples in matters that effect them, should allow indigenous people to develop their own development plan, and should respect the laws, institutions, and methods of penalizing criminal and other practices for indigenous affairs.[131] Finally, states should "facilitate contacts and co-operation between indigenous and tribal peoples across borders," despite traditional fears that this might threaten or undermine state sovereignty.[132] Taken together, these provisions establish the fundamental equality of indigenous peoples, promote indigenous social, cultural, and economic development, and privilege indigenous norms and institutions constituting internal self-determination. Although cross-border contact may be moving in the direction of external self-determination, these interactions are limited to indigenous relations and do not establish indigenous peoples as the legal equivalent of a state. In fact, Article 1(3) expressly limits the implication of the term "peoples" by denying any "rights which may attach to the term under international law" such as

[127] International Labor Organization, Convention Concerning Indigenous and tribal Peoples in Independent Countries, ILO c. 169 (1989).
[128] Patrick Macklem (2008), 195.
[129] International Labor Organization (1989), Article 23.
[130] ibid. Articles 13-19.
[131] ibid. Articles 6-9.
[132] ibid. Article 32.

self-determination or collective rights where they are not expressly permitted. As such, the Convention 169 provides some autonomy to indigenous peoples, but does not exactly fulfill the requirements of internal self-determination.

Many of the provisions of Convention 169 are considered controversial and highly debatable, so it is essential to consider the interpretation of the document in a legal setting. Convention 169 is a legally binding document in the countries that have ratified it, and although the document does not delimit the creation of a supranational oversight body to monitor state compliance, violations of Convention 169 have been addressed in the courts of many state judiciaries. Colombia ratified the Convention 169 in 1991 and equated the document, along with other international human rights documents, with the same legitimacy and force as the state constitution.[133] Thus when the Organization of Indigenous Peoples of the Colombian Amazon (OPIAC) brought a case against multiple governmental bodies, including the President's Office, they were able to cite violations of Convention 169 along with violations of the Constitution of Colombia, on an equal footing.[134] The case concerned aerial crop eradication to control the production of illicit crops, namely coca, in the Amazon regions occupied by indigenous peoples. OPIAC claimed the crop eradication was inhibiting indigenous peoples right to survive, as the glyophosphate was harmful to individuals and destroyed crops indigenous communities relied upon for sustenance and income. Furthermore, coca had been an important crop cultivated by indigenous peoples since "time immemorial" and the prohibition of this product constituted an infringement on the preservation and practice of indigenous culture.[135] The accused governmental bodies also failed to consult indigenous peoples or their representatives before implementing fumigations, a violation of Article 6 of the Convention 169. In their defense, representatives for the government claimed the glyophosphate was not

[133] International Labor Organization, *Application of Convention No. 169 by Domestic and International Courts in Latin America*; 2009; 11.
[134] ibid; 89.
[135] ibid. 88.

harmful to individuals and prior consultation was not necessary, as the crop eradication did not constitute exploitation of natural resources because an environmental impact study was not necessary. The Constitutional Court sided with OPIAC, deeming the charge by the defendants that glyophosphate was not harmful irrelevant because the negative impact to the community vis-à-vis degradation of culture and denial of subsistence agriculture, was sufficient to justify prior consultation.[136] There have been hundreds of cases documenting violations of Convention 169 in state courts, but this example from Columbia demonstrates that Convention 169 can serve as a strong legal framework for guaranteeing cultural preservation and self-government rights for indigenous peoples. Convention 169 provides internal self-determination for indigenous peoples, but in practice this degree of autonomy is dependent on the implementation of the provisions by states.

The most recent international document providing rights for indigenous peoples may be a non-binding declaration, but the commitment to external self-determination by nearly every state in the world is a remarkable expansion of the rights of indigenous peoples. The *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*) was the culmination of thirty-six years of research, two drafts, and two Working Groups on Indigenous Populations.[137] Finally ratified on 13 September 2007 with an overwhelming 144 in support and only 4 against, the UNDRIP was almost stalled by a delegation of African nations worried about potential secessionist movements among indigenous communities, which were appeased by a commitment to preserving existing territorial borders.[138] Although the *UNDRIP* is non-binding, it establishes a minimum set of rights for indigenous peoples and demonstrates the commitment of the UN to improving the status of 370 million indigenous people

[136] ibid. 90.
[137] Patrick Macklem (2008), 198-9.
[138] Siegfried Wiessner (2008), 1160-2.

throughout the world.[139] The *UNDRIP* takes another step up the hierarchy of autonomy and espouses the right to self-determination as the overarching theme. The use of "indigenous individual" or "indigenous peoples" varies with the provisions, but Articles 3 and 4 concerning self-determination can be seen as a major victory for the indigenous rights movement.[140]

> **Article 3**. Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.
> **Article 4**. Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.[141]

This conception of self-determination is oriented internally, but considered in the wider context of the UNDRIP, where states are required to consult with indigenous representatives regarding all legislation that may impact indigenous communities, indigenous people have a right to external self-determination akin to Iris Marion-Young's characterization.[142]

The UNDRIP explicitly recognizes the right of indigenous people to internal self-determination, but there are many additional Articles that elevate this right to external self-determination. Recognizing collective as well as individual rights are fundamental to self-determination, and the UNDRIP warrants indigenous peoples to enjoy their freedoms and fundamental human rights outlined in earlier UN documents collectively and individually.[143] As mentioned in the documents above, facilitating cross-border contact between indigenous peoples is a small step towards according them the same status as states in international relations.[144] The UNDRIP takes this next step towards external self-determination by requiring states to respect and recognize historical treaties with indigenous peoples, establishing them

[139] ibid. 1151-2.
[140] United Nations, Declaration on the Rights of Indigenous Peoples; General Assembly Resolution 61/295**,** Session 62. (13 September 2007).
[141] ibid. 3.
[142] Iris Marion Young (2004), 186.
[143] United Nations (2007), Articles 1, 7.
[144] ibid. Article 36.

as equally legitimate legal actors.[145] This equality is reinforced with requirements that disputes between indigenous peoples and states or other peoples are resolved quickly and with "due consideration to the customs, traditions, rules and legal systems of the indigenous peoples."[146] While many groups may interact and negotiate collectively with the state, they are bound by the same laws and institutions as the state has created. The UNDRIP, however, elevates the institutions and traditions of indigenous peoples to the level of state institutions, instilling them with legal legitimacy in interactions with the state. States are rarely perfectly balanced in power, and although indigenous norms are likely not vested with the same degree of authority as state laws, their recognition in a practical legal sphere establishes indigenous peoples as legitimate legal actors. External self-determination cannot become the justification for independent statehood, however, as "nothing in this Declaration may be... construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states."[147] Although non-binding, the UNDRIP provides the highest degree of autonomy indigenous peoples may achieve short of independent statehood, an impressive improvement in international legal norms of indigenous autonomy.

[145] ibid. Article 37.
[146] ibid. Article 40.
[147] ibid. Article 46 (1)

Chapter 4: Analysis and Discussion

Up to this point, theoretical, legal, and practical approaches to national minority rights and indigenous rights have been discussed. Focusing on the degree of autonomy available to these two categories, it is difficult to identify consistent norms framing the theoretical or legal discourse. Presently, indigenous peoples right to external self-determination has been generally codified in international law. This coincides closely with the theory on indigenous rights, which posits that indigenous peoples should claim self-determination, but also develop an alternative approach to autonomy that does not rely on sovereignty for principled reasons. The right to indigenous self-determination has not always been recognized, however, as indigenous peoples were not extended any form of group-differentiated rights at the peak of romantic self-determination during and immediately following WWI. Indigenous peoples were first recognized as a legal entity in Convention 107, which outlined provisions for equality and non-discrimination aiming at integrating indigenous peoples into the majority society. Based in part on a recommendation by Martinez Cobo that the rhetoric of integration should be replaced with a concern for indigenous self-determination, the rights of indigenous peoples were quickly expanded to include external self-determination. Both the Convention 169 and UNDRIP firmly establish indigenous peoples as having a right to external self-determination in international law.

National minorities, on the other hand, have a much longer and more varied experience in claiming rights to autonomy. The greatest degree of autonomy for national minorities was undoubtedly bestowed during World War I, where both Wilson and Lenin sought independence in the form of sovereign nation-states for national minorities. Following the break-up of the Russian, Austro-Hungarian, and Ottoman Empires, the framers of the post-war legal order found it difficult to create new states that coincided precisely with national communities, and thus developed a national minority rights regime. In practice, these rights were limited to internal self-determination, as the framers of the League of Nations had difficulty de-

fining minorities in such a way that non-dominant racial, ethnic, linguistic, and religious groups in their states would be excluded, but these groups in CEE would be protected. The failure to define minorities as well as the imbalance in minority rights between the victors and losers of WWI contributed to the success of national fascism that lead to WWII. The postwar period saw the enactment of individual rights guaranteeing equality and non-discrimination which were eventually expanded to include some positive rights to protect and promote minority cultures after demands for group-differentiated rights entered the discourse. After the Cold war ended and multinational states were once again dismantled into constitutive nation-states in Yugoslavia, the Former USSR, and Czechoslovakia, concern for national minorities rapidly increased. Just as concern for peace and security dictated the reliance on internal self-determination in the Interwar period, the two decades following the Cold war have been characterized by a similar return to internal self-determination, as exemplified in the Framework Convention and Declaration.

To return to the initial question of why certain groups are given more extensive rights to autonomy than others, there are several ways of approaching an answer. Attempts at reconciliation vis-à-vis transitional justice would consider the horror of colonization, subjugation, forced assimilation and annihilation deserving of more extensive rights as a form of compensation or reparations. While this may be true, many national minorities have been similarly persecuted and may also legitimately claim reparations for the wrongs committed against them. Goal-oriented approaches would posit that indigenous peoples and national minorities want separate things, but is clear that cultural preservation and survival is the crux of any group claim. A culturalist approach would consider diversity a noble enough goal to provide special rights, but as a justification for giving some groups more rights to cultural autonomy than others, this approach would have to evaluate which cultures are more valuable and worthy of special rights. A more nuanced culturalist argument would consider spiritual

ties to land a unique feature of indigenous peoples that thus necessitates external self-determination to structure the relationship between the group and the land. This popular, seemingly sensitive justification ignores the intense connection many national minorities feel to their homelands, as evidenced by strong resistance to population transfers and a strong desire to return to ones homeland following such practices in the Former Soviet Union.

The fundamental problem with all of these approaches lies in the assumption that indigenous peoples and national minorities are somehow different and distinct people in a practical, experiential sense. I propose a different explanation that focuses on statist concerns of sovereignty and territorial contiguity by existing states. This approach is related to the theory of shifting state- and national- sovereignty as proposed by Barkin and Cronin.[148] According to their model, policies outlining state sovereignty typically arise from wars that disrupt the former system; whichever form of sovereignty was considered more dangerous during the conflict will be the basis for sovereignty in the subsequent peace agreements.[149] Thus provisions for national minority autonomy fluctuate with concern for national minority protection and fear of national minority secession. As indigenous peoples have never seriously threatened state sovereignty through secession, the right to external self-determination is fairly uniformly recognized. A pragmatic approach to variations in national minority rights and indigenous autonomy emphasizes the role of sovereign states in shaping international legal institutions.

To date, there are no independent indigenous states. Indigenous peoples who have established territorial autonomy have never seceded, and while this is not to say it is impossible, there is no precedent in international law. This also does not seem to be a legitimate aim

[148] Barkin and Cronin (1994). State sovereignty gains its legitimacy from the inhabitants of a territory, whereas national sovereignty derives the power from the national population. This characterization has been derived from the requirements of the *Montevideo Convention on the Rights and Duties of States* of a defined territory and a permanent, identifiable population.
[149] ibid., 115.

of indigenous peoples. As the literature pointed out, many indigenous peoples consider sovereignty an illegitimate concept based on the same principles used to justify colonization and their subjugation in the first place. Although achieving independent statehood could theoretically allow indigenous peoples to live completely freely with their customs, it would involve integrating into the international system based on the concept of state sovereignty. Furthermore, most indigenous peoples are far too integrated socially, economically, territorially, and politically with non-indigenous populations for independence to be a reasonable aim. Indigenous activists and scholars alike recognize that independent, sovereign statehood is an inappropriate solution to the question of the survival of indigenous cultures, regardless of how much autonomy they would have.

Throughout the twentieth century, national minorities acquired autonomy, seceded, and formed independent states causing a redrawing of borders and a redistribution of power in international relations. The most obvious case of this was in the dissolution of the Ottoman, Russian, and Austro-Hungarian Empires after WWI. Although the new system of nation-states with national minority rights proved untenable at the time, many states still associate national self-determination with secession and independent statehood. The process of decolonization reinforced this connection between self-determination and independence. Decolonization was a much more complex process, however, as there was arguably no national consciousness to instigate secession. Rather, the dominant settler-native discourse at the time proved sufficient to overthrow foreign rule, and the process of national consolidation came later.[150] National self-determination was also a factor in the bloody wars and secession of Bangladesh from Pakistan and Eritrea from Ethiopia. Finally, the dissolution of the Soviet Union, Czechoslovakia, and Yugoslavia has re-awakened nationalist sentiments in Central

[150] By many accounts, the process of national consolidation is still occurring. Others claim that nationalism is an inherently European construct and thus not applicable to Africa and other parts of the "developing" world. This, however, is not relevant to the purview of this paper.

and Eastern Europe to the alarm of multinational states throughout the world. There is clearly a palpable fear of nationalist secession in independent states that would undermine state sovereignty and reconfigure international borders.

Another problem contributing to the misconception that all national minorities desire independent statehood or incorporation with their kin-state is the framing of national minorities within the discourse of the nation-state. As discussed above, the romanticized Westphalian ideal of the nation-state has pervaded attempts at defining national minorities, construing any attempts at autonomy as secessionist or irredentist. This problem is especially poignant for stateless nations.[151] Having no representation at the international level and forced to rely on state governments for the preservation of their culture, stateless nations are profoundly vulnerable to assimilation, subjugation, and persecution. The situation of stateless nations is, in fact, remarkably similar to indigenous peoples. While national minorities may be represented at the international level by their kin-state or the state in which they reside, stateless nations and indigenous peoples must rely on special consultation at the state or international level that has no coercive force.[152] The unique language, culture, religion, and traditions of a national minority may be guarded and preserved by the kin state. Stateless nations and indigenous peoples are reliant upon sovereign states for the autonomy and resources to practice and preserve their culture.

Recent relations between Denmark and the autonomous territory of Greenland exemplify this predicament. As discussed in above, Greenlanders were not considered a national

[151] Stateless nations in this context simply refer to national minorities who do not have a kin-state.

[152] The actual situation of national minorities is not this simple, as the question of who speaks for a group or people is always a contentious issue. Very often, the views and concerns of national minorities differ substantially from the kin-state, and where some form of dual-citizenship or special representation rights for members of the nation living abroad do not apply, the concerns of national minorities will not always be heard by their national government. Nevertheless, the right to survive and the protection of their culture are concerns addressed by their kin-state in the international sphere.

minority when Denmark ratified the Framework Convention for National Minorities with a list of recognized minorities. Despite the continued reluctance to recognize Greenlanders as a national minority, the Danish government did acknowledge and comply with the 2008 referendum in Greenland creating provisions for internal self-determination. As Greenland is predominantly Inuit, it seems strange that the rhetoric surrounding Greenlander autonomy has adopted the discourse of a national minority rather than working within the framework of indigenous peoples. This may be attributable to the international context during the birth of Greenlandic autonomy.

A movement for Greenlandic autonomy emerged in the 1970s, when decolonization shaped the discourse on self-determination as native opposition to prolonged settler rule. Although Greenland ceased to be a Danish colony in 1953, the period between 1950 and 1970 was subject to increased migration of Danes to Greenland and increased Danish investment in Greenland's economy.[153] Greenland's export-oriented growth reshaped the population, with Danes comprising one-fifth of the total population and mass urbanization leading to the "proletarianization of hunting and fishing families."[154] Nearly all supervisors and authorities in Greenland during that time were ethnically Danes, creating a native-settler hierarchy very similar to the discourse shaping African colonies at the time. Although technically no longer a colony, Greenlandic autonomy was not institutionalized until the late-1970s, when 73% of the Greenlandic population voted in favor of Greenlandic Home Rule in 1979.[155] The native-settler framework, combined with the ascription of a new class-based identity, would have dominated Greenlandic attempts at independence, obscuring the possibility of claiming autonomy as indigenous peoples.

[153] Jens Dahl "Greenland: Political Structure and Self-Government," *Arctic Anthropology* vol. 23 no. 1-2 (1986): 316-7.
[154] ibid. 316.
[155] Jens Dahl (1986), 315.

Problems regarding the way political identities are constructed by institutions have been addressed above, but let me reiterate some of the more relevant points now. Mahmood Mamdani traced the native label in Africa from its use as a tool by colonizers to deny rights and equality, to its revaluation as a label of privilege in the post-colonial era. While the failure to overthrow and reject the settler-native discourse represents a major shortcoming of decolonization, the greater offense was to politicize native identity in the first place. "Once the law makes cultural identity the basis for political identity, it inevitably turns ethnicity into a political identity."[156] Courtney Jung presents a practical approach to countering the negative effects of institutionalized classifications and identities. Jung traces the shift from class struggle to indigenous movement among the Zapatistas in Mexico to highlight how legal and institutional inclusion and exclusion have made different traits politically significant at different times.[157] "Legal distinctions are different from all others in that they are enforced by the state , and then are in turn reproduced by institutions that structure citizen participation within the state."[158] Legal documents create political identities, often for purposes of discrimination or denial of equal rights, which are then institutionalized and perpetuated despite possible shifts in group identities or goals.

In discussing the similarities between national minorities in Central and Eastern Europe (CEE) and indigenous peoples, Miriam J. Aukerman proposes a poignant critique of the discriminatory power of artificial political identities.[159] A uniform concept of national minorities cannot accommodate all of the varying circumstances and situations across the

[156] Mahmood Mamdani (2001), 661.
[157] Courtney Jung (2008), 69-73.
[158] Mahmood Mamdani (2001), 653-4.
[159] Miriam J. Aukerman (2000). The author speaks of a CEE approach, and although this term is qualified as being "necessarily simplistic" and inadequate to express the true diversity in the region, the author continues to use it. While I find this generalization counter productive in creating a false dichotomy in state provisions for minority rights, here justifications of minority rights for the region are also relevant for national minorities in the West, albeit in qualitatively different ways.

globe. Even in Europe, CEE national minority rights are primarily concerned with cultural preservation and thus vary greatly from the norm of non-discrimination for national minorities in the West.[160] The justifications for minority rights in CEE and indigenous rights are fundamentally related, focusing on self-determination of peoples, equality, cultural diversity, and a history of subjugation leading to continued vulnerability.[161] In light of the politics of recognition, many states recognize that differentiated rights are necessary for equality, as well as the inherent value of cultural diversity. The history of colonization and persecution is often considered a unique phenomenon in indigenous pasts, but many national minorities were subject to internal colonization quite similar to what occurred to indigenous peoples. The comparable vulnerability of national minorities to indigenous peoples has already been discussed, especially for stateless nations. Thus it seems the only way national minorities in CEE and indigenous peoples truly differ in their rights claims is on the issue of self-determination. "[I]f the substantive content of rights guaranteed to minorities versus indigenous peoples is different, this must be explained by the fact that the differences between minorities and indigenous peoples justify different rights. This implies that one must be able to define what makes indigenous people different from minorities."[162]

The nearly identical status of indigenous peoples to many national minorities in CEE clearly demonstrates how definitions are employed to limit and exclude certain groups. External self-determination, the greatest degree of autonomy a group may have outside of independent statehood, has only been recognized for indigenous peoples in international law. This characterization is incredibly problematic, as it ignores the variability within the category of indigenous peoples and excludes groups who at some point in history were labeled a national minority, although their current situation is more similar to that of an indigenous group. It is

[160]Miriam J. Aukerman (2000) 1022.
[161] ibid. 1033-45.
[162] ibid. 1045.

inherently difficult to make these comparisons without objective criteria, but the point is not so much resemblance as it is justification: the same problems and solutions to the protection of these groups are solved in drastically different ways.

> "We should look to the underlying justifications for group-differentiated rights, instead of fixating on an "indigenous" or "minority" label, to explain why particular groups need special protections. In doing this, we should draw on the normative power of inclusive international standards- developed and interpreted by indigenous peoples, minorities, and international institutions, not just states."[163]

This approach would call for a decentralized definition and a more pragmatic approach to developing policies for minorities and indigenous peoples.

I believe the most effective way to accommodate shifting status and identities over time is to provide a skeletal framework of rights whose objective and subjective criteria can be developed to reflect the current concerns and group realities. Combining Herbert and Kruper's 3-tiered hierarchy with Castellino's differentiation between territorial self-determination and non-political self-determination, I propose a four-level pyramid of increasingly exclusive, enhanced rights claims. The most basic rights of equality and survival may be claimed by individuals or collectives and will primarily provide assurances of non-discrimination. Positive rights requiring financial (or otherwise) resources from the state are more difficult to assert, although they are also distributed on an individual and collective level. These rights should be guaranteed to any vulnerable group facing subjugation, institutional discrimination, or cultural degradation. Cultures naturally change and fluctuate, thus positive rights should not force members of a group benefiting from affirmative action to identify as a member of the group; rights should only be applicable where the individual identifies as a member of a collective and seeks differential treatment.

Descriptions for the two most exclusive rights to autonomy are more difficult to formulate. Autonomy limited to administering internal group affairs, including self-government,

[163] Miriam J. Aukerman (2000) 1014.

cultural celebrations, language programs, religious rites, and other expressions of group solidarity, should represent the third level of rights groups may claim. Groups with a stronger collective identity who are particularly vulnerable to culture-loss but for some reason cannot operate as a cohesive legal entity in the international sphere should be eligible for internal self-determination. Finally, external self-determination giving a group legitimacy and authority in interactions with other externally self-determined groups and sovereign states should be reserved for a small subset of groups. This final level could likely be reserved for peoples who have no representation at the international level and thus are considered the most vulnerable. The proposed group characteristics that would match these levels are loosely assembled and arbitrary conceived. Rather than identify categories or groups that may claim a specific right, it would be more appropriate to define a hierarchy based on the types of problems each level can address. This would allow states to consider the specific circumstances surrounding a people's claim to differentiated rights and adopt a set of rights targeted to address the specific concerns of the people. Of course, there would be fine-tuning of the policies to comply with national laws and reflect local norms, but the framework would provide a minimum set of rights to address various situations. This approach takes the emphasis away from some arbitrary definition or classification and places it squarely on the particular context of a people.

Conclusion

This paper sought to answer the question of why certain groups are given autonomous rights when others are not. The comparison of national minorities and indigenous peoples may seem bizarre, but they are the only two groups whose right to autonomy has been recognized and codified in international law. Unlike religious or linguistic minorities, where the borders of the group are relatively obvious, definitions of indigenous peoples and national minorities have varied greatly over time and are loosely construed at best. Most efforts at defining these groups have sought to exclude them from special rights or equal status, and thus rigid definitions are generally frowned upon. Furthermore, the groups who are currently classified as indigenous peoples or national minorities are dispersed throughout the world and experience drastically different lifestyles; a single definition, no matter how subjective, could be sufficient to accommodate the high degree of variation. If the various groups classified as national minorities or indigenous peoples respectfully vary so greatly, it follows that a uniform, standardized set of rights for the whole category would be incapable of addressing the particular needs of the groups. The current legal order, where group-differentiated rights are distributed on the basis of sweeping categorizations, cannot address shifting identities or newly emergent concerns.

Instead of a system that maintains outdated classifications as the basis for special rights, I propose a system that first outlines the types of problems and concerns that different rights are best suited to address and then evaluates particular claims for group-differentiated rights to determine what set of rights could best address the structural injustices facing disadvantaged groups. I refer to structural injustices as the basis for unequal status because of the constitutive power of inequitable institutions. Institutions were the primary tool of internal colonization and forced assimilation that disenfranchised national minorities and indigenous peoples in the first place. Even under the liberal, individual rights that shaped the immediate post-war period, government decisions concerning national holidays and the language of offi-

cial business promoted the culture and identities of the most powerful while perpetuating the second-class status of non-dominant groups. Once a group was recognized in domestic or international law and placed in a certain category, their group identity became synonymous with their political identity. Although definitions of these political identities varied over time, the composition remained the same. Thus groups were prevented from changing or naturally evolving and were forced to conform to their rigid, synthetic political identity. Not only were institutionalized political identities a means of denying groups rights, they also stifled growth and perpetuated artificial identities.

The prominent role of legal institutions in creating enduring categories of second-class citizens requires a legal approach in return to remedy these stigmatizing legacies. By taking an existing rights hierarchy and stripping away the normative categories that are associated with it, group-differentiated rights are freed of their restrictive group identities and may be applied more selectively and, I believe, more effectively. While it was not within the scope of this paper to match group concerns with the rights that would best address such problems, there is a need for further research to determine the effectiveness of different provisions. Once these questions have been solved and the new content applied to the hierarchy, the application of rights would be determined on a particular basis. While seemingly untenable to make self-identification the sole grounds for political identities, critical liberalism does have the advantage of recognizing the institutional injustices of the past and allowing groups to choose their political identity and revalue their previously oppressive identities through a process of creating subaltern counterpublics. There is clearly a need for further research, but it must take place outside of the existing minority rights - indigenous peoples dichotomy if it is to overcome these legacies of injustice.

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