ARTICLE

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The Equivocal Definition of Indigeneity and Ambivalent Government Policy toward Self-Determination in New Zealand's Health and Foreign Policy Apparatus

INTRODUCTION

Defining indigeneity can serve as the first step in crafting a productive challenge to existing norms of governance and control in New Zealand. In addition, indigeneity can meaningfully inform liberal-egalitarian philosophy, largely through an exposition of collective rights.

In the New Zealand case, a nascent domestic policy of encouraging self-determination and autonomy for indigenes in certain contexts (especially health services) occasionally comes into conflict with the country's international policy regarding sovereignty. This conflict serves as a microcosm of international debates surrounding the indigeneity construct. At present, while there is no official international definition of indigeneity, there have been attempts which have resulted in "working definitions." These attempts invariably combine two distinct characteristics of indigeneity which introduce ambiguity: subaltern status and first occupancy.[1, 2] These disparate elements create an iteration of Said's "hybridity," and reflect the sometimes uncomfortable marriage between multiple nations within a larger state. In turn, by exploring the efforts at defining indigeneity, we can gain insight into the internal conflict which affects current government relations with indigenes.

In this essay, we argue that a definition of indigeneity is of fundamental importance for indigenous/government relations. This is expanded upon via a discussion of links between definitional considerations regarding indigeneity and conflicts between domestic and international policy in New Zealand. These conflicts are most strikingly demonstrated by New Zealand's "no" vote on the 2007 UN Declaration on the Rights of Indigenous Peoples (DRIP). Domestic health policy concerning Māori and international policy concerning indigenes are, perhaps, irreconcilably different. This difference represents a difficult conundrum of control: domestic health efficacy may require devolution of power, while international sovereignty may require greater centralisation.

THE DEFINITION OF INDIGENEITY

> "Man is unjust – and he invented justice." (Ferreira Gullar)[3]

No official definition of indigeneity has ever been agreed upon at the international, intergovernmental level. This situation arises in part because of the controversial nature of the indigeneity construct. Important aspects which have become associated with "indigeneity" are occasionally interpreted as illiberal or retrograde. This is especially true in the case of group membership serving as a determinant of rights. Involuntary and unalterable group membership (e.g. ethnicity) is a more difficult basis for rights in liberal thought, especially when compared to basic rights like free speech or free association which are predicated on plastic, individual choice.

Indigeneity rests on the recognition of "collective" or "group" rights, which can be interpreted as conflicting with individual rights in important ways. Indigenous rights challenge assumptions of the Westphalian emphasis on the primacy of the nation-state, particularly (in the New Zealand case) the attempt to share state sovereignty among domestic nations.

As with other rights constructs (e.g. protections against "torture," and determining rights for "refugees") a definition of the entity in question is a necessary precondition for substantive recognition of any other portion of the construct. This is especially true in the case of indigeneity. As such, we will begin by examining the etymological and historical roots of the major current conceptions of indigeneity.

Native American Studies professor Jace Weaver notes that "Indigeneity is one of the most contentiously debated concepts in postcolonial studies … Even the term itself is disputed."[4] This debate about definition is both heated and novel. Legal scholar Benedict Kingsbury notes that:

> Over a very short period, the few decades since the early 1970s, 'indigenous peoples' has been transformed from a prosaic description without much significance in international law and politics into a concept with considerable power as a basis for group mobilization, international standard-setting, transnational networks, and programmatic activity of intergovernmental and nongovernmental organizations.[5]

This transformation has heralded a significant evolution in international rights conventions, and calls into question core assumptions about the nature of human rights (particularly the primacy of individual rights vis-à-vis group rights).

Creating a definition of indigeneity is both philosophically and legally an important step in the attainment of justice. Foucault suggests that "political practices resemble scientific ones: it's not 'reason in general' that is implemented, but always a very specific type of rationality. The striking thing is that the rationality of state power was reflective and perfectly aware of its specificity."[6] The specificity of the nation is fundamental to its power.

From the indigenous perspective, if peoples are located within a language and a justice system that does not recognise their worldviews, injustice will be the result. This is particularly relevant to the definition of indigeneity within international bodies, influenced by Western individualist legal philosophy. Derrida argues in his treatise on law and authority:

> It is unjust to judge someone who does not understand the language in which the law is inscribed or the judgment pronounced, etc. We could give multiple dramatic examples of violent situations in which a person or group of persons is judged in an idiom they do not understand very well or at all. And however slight or subtle the difference of competence in the mastery of the idiom is here, the violence of an injustice has begun when all the members of a community do not share the same idiom throughout.[7]

At the international level, a conception such as indigeneity, dependent as it is on collectives and group assent to a particular definition, requires similar care in ensuring a common idiom. Care must be taken for a definition not to amount to an imposition by the powerful on subaltern groups. The involvement of "indigenes" in the creation of such a definition will obviate this concern. The involvement of "indigenes" implies not merely group self-definition (as with local/tribal membership requirements), but also involvement of indigenous peoples in any UN definition enterprise. Notably, the Declaration on the Rights of Indigenous Peoples (DRIP) "has the distinction of being the only Declaration in the UN which was drafted with the rights-holders, themselves."[8]

The effort to define indigeneity in a way that is legally meaningful and philosophically agreeable has vitally important consequences. Indigeneity is the most recent iteration of a host of roughly synonymous concepts including "autochthonous," "native," "aboriginal," "first nations" and others. Both the UN and the International Labour Organisation (ILO) have officially synonymised "indigenes" with "tribal peoples" within the past two decades. [9, 10] While the profusion of terms reflects the diversity of the indigenous circumstance, the number only adds to a growing matrix of definitional complexity. One study which examined 700 pieces of Australian legislation found 67 different definitions of indigeneity.[11] In some legal jurisdictions, "finding an acceptable conception of tribe is not merely an academic requirement but ... also a constitutional and legal one."[12] The definitional exactitude required only increases as international conventions gain credence and gravity.

Furthermore, legal rights frequently colour what are seen as ethical, moral, or fundamental rights. "That which is legal becomes that which is moral ...The law is normative."[13] If nation-states – and the international community with which they are aligned – are to do justice to the conception of indigeneity (and to "indigenes" themselves), arriving at a workable international definition is a necessary precondition. A workable definition, in turn, cannot be achieved without recognition of the etymological origins of the modern indigenous construct.

ETYMOLOGICAL ORIGINS OF THE MODERN INDIGENOUS CONSTRUCT

During the colonial period, British officials used the term "native" as synonymous with "subject to colonisation" and as an antonym for "settled by free Europeans" in order to gain moral sanction for the formal appropriation of land. The term initially carried no connotation of original occupancy of lands.[14] Those who received the native label were singled out for colonisation/settlement. The term simultaneously marginalised indentured labourers and non-Europeans, and gave moral cover for the motivations of empire. Upon colonisation, the "native" label served as a clear badge of otherness and separation.

The native construct has a peculiar and significant etymology that throws important light on modern conceptions of indigeneity. The earliest usages of the word "native" date back at least to the 1400s, predating entry of the word "indigenous" into the English corpus by more than 200 years:[15] "The firste peticion was that he scholde make alle men fre thro Ynglonde and quiete, so that there scholde not be eny native man after that time."[16] These earliest uses unambiguously equate "native" with "serf." This use is reproduced continuously through the colonial era, and to the exclusion of other usages. Eighteenth-century dictionaries define the word "native" thus: "In ancient Deeds, he that is born a servant."[17] The residue of this usage persisted in reference works through the end of the nineteenth century: "In feudal times, one born a serf. After the Conquest, the natives were the serfs of the Normans."[18]

It was probably only through interaction with other colonising empires – especially the Spanish and French – that the English construct of "nativeness" began to include attributes related to original occupancy or aboriginality. The Spanish used the term *indígena* to describe people who are "*Originario[s] del país de que se trata*,"[19] while the French used the term *indigène* to mean "*personne qui est originaire du pays où elle vit, et où ses ascendants ont vécu depuis des temps immémoriaux*."[20] The Spanish and French constructions are probably closest in meaning to the English word "aboriginal," and it wasn't until greater linguistic interrelationship between Europeans occurred in the sixteenth and seventeenth centuries that the aboriginal sense of "indigenous" was incorporated into the English corpus. This process has tangibly informed English-language philosophy related to indigeneity.

Final adoption of the word "indigenous" into the English language, used in the modern sense, probably did not occur until the mid-twentieth century. "The specific use of the adjective 'indigenous,' modifying 'populations' or 'peoples,' to denote what would otherwise be 'Indian,' 'native,' 'primitive,' or 'aboriginal,' would appear to have originated in the 1940s and 1950s as an English translation in official documents of the Spanish *indígena* and the French *indigène*."[21]

Thus, the conflation of the "aboriginal" and "native" meanings of the indigenous construct took place well after Europe's colonising enterprises had begun.[22] The first combination of usages begins to be apparent in English dictionaries of the later colonial period, wherein both meanings are observable as definitions for a single word: "an idiot, a fool; original inhabitant."[23] This ambivalence in definition is reflected in modern usage. Modern international definitions generally require both aspects for recognition as "indigenes", that is, both colonisation/subjugation as well as aboriginality or first occupancy. The union of these two distinct elements within a single construct leads to discomfort on the part of nation-states involved with the drafting of rights compacts.

> Numerous international conventions [on indigeneity] have been propounded, but the refusal on the part of the United States and other nations to sign many of these conventions is less a hypocritical stance toward the principle of such accords than a manifestation of the deeply equivocal responses such undertakings elicit.[24]

In modern English, the definition of indigenes as *simultaneously* freed serfs (ex-"natives") and descendents from original occupants of specific lands gives rise to problems in legal

determinations. The conceptual intermixture within a single nomenclature is problematic because, ideologically, the dispersion of rights to these two historically classified groups varies markedly. This contradiction has several important consequences.

In the New Zealand context, the importance of the "native" construct is observable in the Treaty of Waitangi. The Crown's representatives felt that they were dealing with Māori as part of a larger class of indigenes, and clearly did so in a manner influenced more by a European Zeitgeist than by New Zealand-specific or local Māori considerations: "The British record of dealings with native peoples in British settlements had been the subject of a parliamentary committee report in 1837: ill-treatment and disease were shown to be common, both leading to the near-extinction of indigenous peoples. The British government did not want this new expansion of empire to have a detrimental impact on Māori."[25] Thus, Crown representatives dealt with Māori in a manner which was a reflection of a wider, nascent conception of indigeneity.

The Crown's conception of indigeneity is reflected in the Treaty. Notably, the word "Māori" appears not once in the English version of the Treaty. Instead, the terms "Native Chiefs and Tribes," "Natives," and "Aborigines" are used.[26] This holds significance, because it implies that to some degree, Crown representatives conceptualised Māori *qua* indigene, rather than *qua* Māori. Treating Māori as uniform exemplars of a broader "native" category, as opposed to unique nations, presaged modern New Zealand policy relating to sovereignty of the state.

As suggested earlier in this essay, the term "native" is loaded with colonial significance, and is redolent with connotations of serfdom and subaltern status. Concurrently, the Treaty refers to "aborigines," with the attendant importance placed on original occupancy or last residency at the time of colonisation. The confluence of the terms "native" and "aborigine" into the eventual indigenous construct informs a major portion of the modern New Zealand government's policy toward indigenes. This confluence is represented by a dual emphasis on subaltern status (i.e., nativeness in this construction) and original occupancy (i.e., aboriginality). This dual emphasis reflects the equivocality of the New Zealand government's approach to indigeneity. The New Zealand approach is informed by the international indigenous definition enterprise.

CONSEQUENCES OF THE ETYMOLOGY OF "INDIGENOUS"

Most visibly, during modern decolonisation efforts – e.g., in post-Statute of Westminster 1931 former dominions like New Zealand – the European-derived view was that natives-*cum*-serfs should be treated in a manner equivalent to newly-freed ex-serf Europeans. In other words, preferential treatment for freed natives was not mandated; instead, their treatment was akin to the freeing of the serfs. Russia, perhaps most famous among European nations for the persistence of serfdom, is noteworthy for its illustrative struggles between the "native" and "aboriginal" arms of the indigenous construction. Final reform of the serfdom apparatus in Russia did not occur until the early twentieth century. Shortly thereafter, the Soviet Union came into existence and expanded its empire to include several large Central Asian nations. Freed serfs, who happened to be ethnic Russians, and their descendants (matching the serf connotation of "natives") were "anger[ed]... over affirmative action programs favouring the Uzbeks ["indigenes" of Uzbekistan]."[27] This conflict between "natives" and "indigenes" has

been reproduced in modern arguments over definitions, and leads to unease on the part of governments asked to mediate between interests of collectives. "Liberal nation states … can hardly find a convincing argument for why favouring the indigenous culture justifies denying non-indigenous inhabitants the same privileges."[28]

Thus, the narrow interpretation of the liberal-egalitarian viewpoint might consider the debt to natives-*cum*-serfs to be paid upon manumission. At the same time, treatment as freed serfs is not what "indigenes" are arguing for; independence from colonising governments altogether is a frequent refrain. Indeed, indigenous people have made treatment as freed serfs one of the primary criticisms of decolonisation. Elizabeth Cook-Lynn, founder of the *Wicazo Sa Review* of Native American studies laments the fact that

> for the indigenes everywhere in the world, postcolonial studies has little to do with independence, nor does it have much to do with the actual deconstruction of oppressive colonial systems. It is not like the end of slavery in 1865, for example, when owning other human beings for economic reasons became illegal … Postcolonial thought in indigenous history, as a result of the prevailing definition, has emerged as a subversion rather than a revolution. This fact has been a huge disappointment to those scholars whose interest has been in Native-nation status and independence.[29]

The fact that decolonisation didn't immediately lead to "Native-nation status and independence" in the post-colonial world suggests that the locus of control still resides with nation-states, colonised or not.

For groups which fit existing definitions of indigeneity, independence or autonomy at the level of nation-states may come with unintended consequences. Nations comprised solely of indigenes would cease to fit current International Labour Organisation (ILO) or United Nations conceptions of indigeneity. Tellingly, post-Gandhi (i.e. "decolonial") India has sought a definition of indigeneity "which would make it clear that the populations they refer to as 'tribals' or 'minority nationalities' are not 'indigenous peoples'."[30] The tension between the connotations of "serf" and "aborigine" represents an important point of disconnection between "indigenous" conceptions of the rights that should be afforded to "indigenes" and the position of nation-states which is not nearly as expansive.

There is a second important consequence of the tension between "native-*cum*-serf" and "indigene:" Indigeneity, as it is primarily a reflection of Western language and thinking, is defined in largely Western terms. Thus, even those "who are working from a genuine position of good will towards indigenous … citizens [nevertheless] create colonial, coercive or paternalistic forms of policy as they have unknowingly absorbed colonial descriptions of indigeneity as 'fact'."[31] In the words of American Indian scholar Vine Deloria, "'academia and its by-products' continue to make American Indians victims of a 'conceptual prison' which categorises indigenous peoples, their worldviews and cultural practices only in Western imperialist terms."[32] In other words, aboriginal/indigenous groups are saddled with a Western colonial history, and the residue of subaltern/serf status; while this status is the result of some current policies, these policies are strongly influenced by the etymological and philosophical origins of the indigenous construct.

As a result, indigenous groups

> have learned over the past years that to be 'indigenous' it is necessary to emphasize traditionalism and kinship according to the international minority rights standards ...[T]he out-dated, oft-repeated essentialist notions of the minority law that define what an 'authentic' minority is gives minority activists little choice but to homogenize and nationalize their identity politics. Only minorities that manage to conform with the expectations of the minority law are taken seriously as real minorities in national and international arenas.[33]

It is clear that treatment as simple minorities, underpinned by international minority law (as might befit former "serfs"), does not provide the autonomy that indigenes feel they should be afforded, as one indigenous description of sovereignty makes clear: "[T]he sovereignty sought by Native Nations can be described as the supreme inherent power that originates from *an agreement among a people, in this case, a tribal people,* who believe that their histories have shown them a truth, that is, it is not a global international empire that will bring peace and harmony to mankind."[34] The residue of treatment as colonised natives-*cum*-serfs in some ways has resulted in the default international position of considering indigenes as simple minorities; many indigenous people do not see themselves in such terms.

There is a third major consequence of the dual nature of the indigenous construct. In the modern English canon, "indigenous" is antonymous with terms such as foreigner, alien, interloper, tramontane, etc. However, the "native"-*cum*-"serf" portion of the indigenous construction is not addressed by this antonym set. This implies an interpretation problem. Opponents of the indigenous construct frequently seize upon discomfort with the "aboriginal" subset of the definition. Examples of these objections include Ian McIntosh, editor of *Cultural Survival Quarterly*, who argues that "the existence of an indigenous group implies the existence of the opposite, the non-indigenous or exogenous – an even more problematic category."[35] New Zealand law professor Bernard Kingsbury makes a similar point: "In effect, if some people are 'indigenous' to a place, others are vulnerable to being targeted as non-indigenous, and groups deemed to be migrants or otherwise subject to social stigma may bear the brunt of a nativist 'indigenist' policy."[36]

One commonly quoted figure, produced by the IWGIA (International Work Group for Indigenous Affairs), suggests that "Indigenous peoples number over 350 million in more than 70 countries."[37] Taken in the inverse, however, the logical extension of such a view is that 120+ countries in the world are wholly inhabited by aliens, and 6.3 billion people on the planet are foreigners. Western discomfort with a solely aboriginal indigeneity construct is one possible explanation for requirements in current definitions of indigeneity that only subaltern peoples can be considered indigenes. I argue that the potential stigmatisation of non-indigeneity is an important rationale behind the mandatory inclusion of subaltern status in current conceptions of indigeneity. If people cannot be fully indigenous without continuing to manifest the conditions of oppression, this would safeguard against violations of the rights of non-indigenes. However, while this is a practical solution to the concerns of the "non-indigenous," it reifies and perpetuates the subjugated native-*cum*-serf conception within the indigeneity construct.

The etymology and philosophy of indigeneity are clearly interrelated. The dualistic, equivocal nature of the indigeneity construct is visible in the search for an international definition. As international conventions are largely an outgrowth of relations between European-derived nation-states, the evolution of European philosophy regarding indigenes illuminates modern international constructions of indigeneity.

The residuum of pre-colonial language regarding subaltern groups ("natives") is visible throughout the colonial enterprise of European powers, especially in the case of the United Kingdom and the English language. After colonial powers began to interact with non-European cultures, the "other"/subaltern portion of the construct remained, and was joined with ideas about nativity. This mixture of meanings is recapitulated in the modern era and is observable in the dualistic construct of indigeneity.

DEFINITIONAL CONSIDERATIONS OF INDIGENEITY AND NATION-STATES

The philosophy of indigenous rights depends on positive conceptions of justice. These conceptions must be carefully defined in order to prevent nation-states from ignoring duties to subaltern groups, and to prevent dispersal of rights to undeserving or false collectives. Legal archivist Steven Perkins notes that "[o]utside control and internal disunity have been forced on indigenous people through several devices. One of the most effective is the use of language to deny the unique status of various groups. This can be illustrated by the problem of defining indigenous status."[38]

The relation between definitions and rights is especially important in the emerging field of indigenous rights, for two reasons. First, the rights that are promulgated by the indigeneity construct are novel: collective rights are not well established in national or international law, that is, at least not to the satisfaction of modern governments. During debates at the UN, major nations "expressed reservations about collective rights generally, arguing that they 'cannot be found in international instruments' and would constitute an entirely 'new category of rights.'"[39] Hoping to establish such rights would require a dramatic reconceptualisation of the Western human rights construct, as well as the most stringent efforts towards definition:

> The contemporary practical and social importance of collective rights has been the result of historical transformations beginning only from the twentieth century onward. A very significant revamping of existing social structure would be required … Such progress would require departure from classical legal remedies that have focused upon redress for offences to individual rights and appurtenant liberties, tied to the notion of subjective law, and the breaking of many extant legal constructs before the new rights could arise.[40]

Inaugurating a new category of rights would be a disruptive and difficult process. If it is warranted, it will require great stringency and meticulous parsing of definitions to ensure that the outcomes of such rights are positive and equitable.

The former United States ambassador to the United Nations expresses one nation-centric objection to this construct of rights:

> Such declarations of human 'rights' take on the character of 'a letter to Santa Claus' ... They can multiply indefinitely because 'no clear standard informs them, and no great reflection produced them.' For every goal toward which human beings have worked, there is in our time a 'right.' Neither nature, experience, nor probability informs these lists of 'entitlements,' which are subject to no constraints except those of the mind and appetite of their authors.[41]

In the eyes of nation-states, indigenous rights are potentially illiberal at root, insofar as they are apportioned out to closed collectives on the basis of *jus sanguinis* (literally "right of blood"; used in this case to refer to nations which apportion citizenship solely by descent from existing citizens). Notably, (and in contrast) all four countries which voted "No" on the DRIP apportion citizenship on a *jus soli* basis (literally "right of soil"; used in this case to refer to nations which apportion citizenship by birth within national boundaries or naturalisation).[42] All four countries were approvingly singled out by political scientist Andrew Vincent as multicultural and multinational states which do not subscribe to the fallacy that "states – historically and sociologically – automatically coincid[e] with nations."[43]

Liberal-egalitarians have equated *jus sanguinis* with racism and eugenics,[44] and *jus soli* with "expansive liberal egalitarian positions."[45] This contrasts with the indigenous view, which holds that exclusive control of territories on the basis of inherited *jus sanguinis* rights is warranted. This represents another iteration of the aboriginal/native conflict (in the form of *sanguinis* vs. *soli*) that cannot be easily resolved. If nation-states were to allow certain domestic nations the liberty to be autonomous on the basis of *jus sanguinis*, whilst determining citizenship within the larger state on the basis of *jus soli*, this would represent a clearly inequitable situation for those citizens with recourse only to *jus soli* rights. At the same time, indigenous groups feel that recognition as autonomous collectives is imperative for other human rights (e.g. a right to culture).

Put in the simplest terms: broad, general, or abstract rights-related discourses – especially in the case of a novel set of rights – run the risk of being dismissed by nation-states as unenforceable, or disputed by public policy and human rights philosophers as overreaching, illiberal, or undue.

The majority of objections to the DRIP by Oceania nation-states, if accepted at face value, were due in large measure to the imprecision of the rights proposed or conflicts with the imperatives of multinational/multicultural modern nation-states. For example, Rosemary Banks, New Zealand's permanent representative to the UN, expressed the official objections to the DRIP thus:

> The text was clearly unable to be implemented by many States, including most of those voting in favour. The Declaration was explained by its supporters as being an aspirational document, intended to inspire rather than to have legal effect. New Zealand did not, however, accept that a State could responsibly take such a stance towards a document that purported to declare on the contents of the rights of indigenous people.[46]

The permanent representative went on to say that the current principles of the DRIP would not "be recognized as general principles of law" insofar as they are indeterminate and undefined (*ibidem*). This is another variety of objection along the lines of "no clear standard" (cf. above). The Australian ambassador expressed nearly identical objections, which are worth quoting at length. Australia was desirous for a declaration which

> could become a tangible and ongoing standard of achievement that would be universally accepted, observed and upheld. The text of the Declaration failed to reach that high standard … [I]t was the clear intention of all States that it be an aspirational Declaration with political and moral force but not legal force. The text contained recommendations regarding how States could promote the welfare of indigenous peoples, but was not in itself legally binding nor reflective of international law. As the Declaration did not describe current State practice or actions that States considered themselves obliged to take as a matter of law, it could not be cited as evidence of the evolution of customary international law. The Declaration did not provide a proper basis for legal actions complaints, or other claims in any international, domestic or other proceedings.[47]

Nation-states in Oceania took cues from Europeans who argued that if standards in the DRIP were "impractical or 'idealistic'… the contemplated UN Declaration would simply be deposited in government archives like many other international documents."[48] Finally, a joint statement to the UN by the Australian, United States, and New Zealand governments argued that the lack of a definition would allow too much autonomy for groups which are not entitled to it, and would render the other elements of the Declaration irrelevant:

> We cannot accept the argument some are making, disingenuously, that this declaration will only apply to countries that have significant or obvious indigenous populations. There is no definition of 'indigenous peoples' in the text. The lack of definition or scope of application within the Chair's text means that separatist or minority groups, with traditional connections to the territory where they live – in all regions of the globe – could seek to exploit this declaration to claim the right to self-determination, including exclusive control of their territorial resources. And this text would allow them wrongly to claim international endorsement for exercising such rights … The flaws in this text, Mr Chairman, run through all of its most significant provisions. Because these provisions are fundamental to interpreting all of the provisions in [the] text, the text as a whole is rendered unacceptable.[49]

These criticisms of the DRIP are grounded in appeals to precision, formality, and feasibility of its precepts, as well as a philosophical dispute with the *jus sanguinis* connotations of indigeneity.

Such objections are reproduced in other interactions between the nation-states of Oceania and UN efforts on behalf of indigenes. New Zealand ignored a finding of the United Nations Committee on the Elimination of Rational Discrimination relating to treatment of Māori on the grounds that it stemmed "from a United Nations sidebar, lacking any rigorous process."[50] Whatever is to be said about how *bona fide* such objections are, it is clear that within the

current international human rights regimes, the major explicit nation-state concerns relate to clarity in definition, consistency with existing international law, and rigorousness of process (including evaluative measures).

This has special importance for the DRIP, as it is held that the DRIP is not at all meant as the culmination of the process, nor the high-water mark for rights-expansion relating to indigenous people. Rather, the Declaration is ultimately intended to evolve into a binding Convention. Discussions within the WGIA (Workshop on Greenhouse Gas Inventories Asia) held that the Declaration had to be drafted explicitly and conservatively as the Declaration was intended to "eventually *become* binding, through state practice, as customary international law."[51] Other experts also reference the implicit and explicit plans for the DRIP to "eventually lead to a convention"[52] or even serve as a *de facto* convention insofar as "a declaration alone, if well crafted and supported by governments, could achieve as much as a binding instrument."[53]

As early as 1983, Cobo recommended that "specific principles should be formulated for use as guidelines by Governments of all States in their activities concerning indigenous populations." Cobo recommended that these principles and guidelines should be used "to prepare a declaration of the rights and freedoms of indigenous populations [and] as a possible basis for a convention on that question."[54] Clearly, the DRIP is not meant as an end in and of itself.

Nation-states are intensely aware of the transience of state power, and the potential to legislate oneself out of power or even out of existence. At the most basic level, "independence legislation is irreversible."[55] In the New Zealand case, after the country declared independence from the United Kingdom, no legislation subsequently passed by either country's parliament could reverse this independence. If retrenchment of some rights is impossible, a nation-state must be perpetually wary of granting such rights – especially autonomy or independence – to its citizens because it cannot ever retrench; this wariness is magnified many times in the case of positive rights.

In legal theory, there is a scrupulous separation between decisions which confer rights and those that do not: "This divide is essential; it is much more difficult to revoke or modify decisions conferring rights than decisions which do not have that effect."[56] Thus, it is in the interest of nation-states to devolve rights parsimoniously, for every right granted is a permanent loss of a portion of the state's own sovereignty. In the case of positive rights, not only are rights irretrievable, every right granted is a permanent liability. Put more concisely, "if freedom once conferred cannot be revoked, that is a reason not to confer it, or to do so in as disaggregated and fragile way as possible."[57] With the spectre of rights being cumulative, permanent, and the embodiment of the reduction of state sovereignty and power, it should not be surprising to find a tension between the guardians of state power and those who argue for the devolvement of new rights to the citizenry.

The trepidation of nation-states to further such an enterprise in the indigenous context is recurrently couched in discomfort with the indeterminacy of such newly-established rights. Lindroth phrases these objections thus: States are met with arguments

> that there is a need for collective rights for certain groups and states have to take special measures to protect these groups and their rights. That means

> special rights for special groups, in this case indigenous peoples. States see this as destabilising their unity. They seem to be threatened by not knowing how far these rights will eventually go and if this development can be stopped once it has started.[58]

Eleanor Roosevelt made a similar point in an essay on self-determination: "Just as the concept of individual human liberty carried to its logical extreme would mean anarchy, so the principle of self-determination given unrestricted application could result in chaos."[59]

NEW ZEALAND AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The DRIP, with final negotiations occurring in 2006 and 2007, is the most important recent element of explicit nationwide government policy regarding indigenes. As the DRIP went through two decades of negotiation before it was eventually passed,[60] there exists a large body of official government commentary on the issue. New Zealand's international policy has been remarkably consistent when examined on its own, but there are marked contrasts with its internal/domestic policies.

New Zealand's stance on the DRIP follows the individualist, narrow interpretation of rights from within the liberal viewpoint. A statement by New Zealand representative Tim Caughley to the UN Commission on Human Rights illuminates this position: "[T]he government's imperative is to recognise the rights and needs of all citizens and to govern in the interests of all New Zealanders."[61] A similar philosophy is observable in Ambassador Banks's explanation, which took exception to "provisions in the Declaration [which] are fundamentally incompatible with New Zealand's constitutional and legal arrangements ... and the principle of governing for the good of all our citizens."[62]

Additionally, an explanatory note by the Ministry of Foreign Affairs and Trade on New Zealand's proposal regarding self-determination under the DRIP rejects the argument "that the right in Article 3 [of the DRIP] may include secession or independence, or self-government, or free association, for example."[63] Clearly the MFAT worries that allowing collective rights to self-determination may be parlayed into rights of secession or independence. The MFAT is following the imperative to parsimoniously confer rights referred to earlier in this essay. MFAT's position is difficult to reconcile with concurrent statements from domestic ministries.

New Zealand's public international policy asserts that individual rights are damaged by collective rights, and that the individualist approach is "essential," "imperative," "constitutional" and "legal." However, domestic policy frequently speaks of the importance of collective rights. The Health Research Council (HRC), a Crown agency in charge of funding public health research, speaks frequently about the acceptability, or even necessity, of collective rights. For example, in one Research Portfolio Strategy, the HRC "supports a rights-based approach to health research. It recognises tangata whenua rights to collective well-being and to a self-defined, independent analysis of Māori needs, solutions and visions."[64]

In guidelines for dealing with Pacific populations, the HRC notes that "deeper historical collective relationships ... have structural and political implications for cultural and ethnic groups."[65] These guidelines go on to express a view which places an "emphasis on collective

rights, relationships and ethical interaction" and stress that such rights do not impinge upon individual rights.[66]

The Ministry of Health details minimum ethical standards which include "working together with iwi, hapu, whānau and Māori communities to ensure Māori individual *and collective* rights are respected and protected, in order to achieve health gain" [emphasis mine].[67] In dealing with research ethics, the Ministry avers that "recognition of both individuals and collectives was needed"[68] and acknowledges the need for collective consultation in the case of "research that involved investigation of matters sensitive to Māori culture or tikanga."[69] The ministry went on to suggest that consideration of cultural matters needed to occur at a wider level than the individual (*ibidem*).

The Ministry of Justice takes a similar position, when it calls for "special measures ... to enable Pacific Island people to develop and deliver appropriate social services using traditional cultural approaches."[70]

The New Zealand Bill of Rights Act ensures that "[a] person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority."[71] The explicit reference to the exercising of rights "in community" clearly suggests recourse to collectivity and group rights. These paeans to group rights on the domestic front represent a conflict with New Zealand's international policy which argues against collective rights and self-determination.

The conflict between group rights and collective rights is rendered most clearly against a backdrop created by a statement from the Ministry of Foreign Affairs and Trade relating to domestic policy: "The strongest commitment a State can make to the protection of the human rights of its citizens is by embedding them in a Constitution and creating a statutory regime by which international standards are enforced."[72] Thus, the MFAT at once acknowledges the power of a prescriptive human rights regime domestically, while hesitating to act as a signatory to such policies internationally.

CONCLUSION

In short, New Zealand's international policy denies the possibility of collective rights, while its domestic policy can be construed to be in its favour. It may be that New Zealand is locked in a variant of Slovenian sociologist Slavoj Žižek's description of a struggle between the maximalist interpretation of rights and the nation-state: "[T]oday's liberal-democratic state and the dream of an 'infinitely demanding' anarchic politics exist in a relationship of mutual parasitism: anarchic agents do the ethical thinking, and the state does the work of running and regulating society."[73] Domestic ministries, inasmuch as they support collective rights, are acting as activists against the backdrop of larger government, which narrows the realm of rights by appealing to pragmatism.

The internal logic of the field of domestic government bases success on the ability to "maximize the [utility] of the population served, and to reduce inequalities." [74] The internal logic of governance is arguably the maintenance of the state: "[T]he state has no right to let its moral

disapprobation of the infringement of liberty get in the way of successful political action, itself inspired by the moral principle of national survival. There can be no political morality without prudence; that is, without consideration of the political consequences of seemingly moral action."[75] This is a seemingly irreconcilable tension, made Gordian by the fact that the state is the entity responsible for international sovereignty on the one hand, and safeguarding of domestic rights (including self-determination for sub-national groups) on the other.

By examining the etymological and philosophical underpinnings of the indigeneity construct, we are better able to understand indigenous/government relations. By highlighting the potential inconsistencies embodied by New Zealand's health and foreign policy apparatus, we can realise something approaching a homeostasis of tensions: indigenous actors with infinite demands to collective rights serve as a constant pressure to widen the realm of ethicality; regulatory regimes which execute the requirements of the state serve to moderate such demands and refocus the energies of the nation-state to regulation and control.

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of Linguistic Terms, s.v. 'noun'). The absolute adjective "native" is derived from the noun form, and is antedated by the noun by at least two centuries. In this paragraph, I am referring to the noun form. The adjective is addressed on the following pages.

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