Indigenous Membership and Human Rights: When Self-identification meets Self-constitution.

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Rules and principles governing indigenous membership have a dual aspect. First, a group's capacity to decide its own membership is an essential element of indigenous self-governance. Self-constitution is both an expression of self-governance, and its pre-condition. Second, a person's claim to membership is sometimes supported by human rights, especially the right to enjoy one's culture in community with other members of a minority. Because of this duality, in some instances, the interests of a self-constituting group and the interests of a self-identifying individual are directly opposed. For this reason, membership disputes involving indigenous communities are amongst the most conceptually difficult claims to address using human rights methodologies and institutions. Exclusions are necessary if indigenous communities are to be communities, but not all can be justified in a liberal democracy. In whatever forum they are heard, be it tribal, national or international, indigenous membership disputes raise a fundamental question: what is the optimal inclusivity of an indigenous community, and under what circumstances may a person reasonably be excluded from one?

The difficulty is present in theory as much as it is in law and policy. Processes of group formation have generally been absent from the wide-ranging debates in political theory about the interactions of groups in plural societies. Most models assume the pre-constitution of groups as identifiable communities with stable boundaries. This has the effect of removing indigenous self-constitution from the set of political phenomena subject to theoretical inquiry in settler societies, and diverting attention from the role played by a state in managing (and sometimes engendering) inter-indigenous membership disputes. As a result, debates about

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indigenous membership in political theory have not included a close analysis of what is meant by "membership", even though the concept is capable of bearing an enormous range of social and legal meanings. Despite this indeterminacy, it remains the obligation of a liberal democratic settler state to address the conflicts that arise between holders of rights, including rights to have and to determine membership, and to do so while meeting its human rights obligations in international law. From time to time it falls to international human rights bodies to determine whether a state has succeeded in this task.

In general, international norms and jurisprudence frame minority and indigenous membership by reference to the over-arching principle of "self-identification" (ILO Convention No. 169, art. 1(2); CERD, 2008, p. 274) and to the right of self-identifying minority members to enjoy their culture in community with others (ICCPR, art. 27). These approaches emphasize individual agency and choice, and call on the state to ensure that individuals have reasonable access to the cultural life of the minority to which they "belong". Approaching indigenous membership claims with a methodology that favours inclusivity, however, obscures important normative questions about the place of tribes and tribal jurisdiction in the liberal settler societies. Consequently, the "self-identification" principle tends to downplay the interests of groups, including the various political, economic and cultural interests that are served by restrictive membership rules.

The logic of international law requires that national governments be held accountable for a state's compliance with applicable human rights treaties, even where domestic arrangements empower sub-state actors and governments to make decisions that in substance do not comply with those treaties (VCLT, art. 7(2)). Individual communications heard by international human rights bodies are necessarily claims made against a state, not against indigenous governments and not against other individuals. However, the public and constitutional law of settler states increasingly makes tribes responsible for membership determinations, leaving the legal identification of indigenous peoples in the hands of settler governments. In the case of the CANZUS states (Canada, Australia, New Zealand and

the United States), indigenous membership governance engages bodies of law generated respectively by self-governing tribes, national and regional governments, and international law created by states collectively. This adds to the challenge of developing a coherent rights-based theory of indigenous membership.

In this chapter I argue that international human rights norms, jurisprudence and methodologies have not generated principles that could assist states and tribes in the governance of indigenous membership disputes. In fact, by overemphasizing individual rights to belong to minority groups, these methodologies can undermine the indigenous self-governance and jurisdictional arrangements that increasingly structure settler state constitutionalism. In developing this argument, I draw primarily on examples from the public and tribal law of membership in the CANZUS states and on the jurisprudence of the Human Rights Committee (hereinafter HRC or "the Committee") that oversees the implementation of the International Covenant on Civil and Political Rights (ICCPR). I take a closer look at the interplay of HRC jurisprudence and the domestic law of Canada, by examining the origins and aftermath of *Lovelace v. Canada* (HRC, 1981). I conclude by suggesting that while the structure and ideology of international human rights law is such that the interests of tribes (and tribal members) are almost always subordinated to the interests of aspirant members and the public, CANZUS states have been able to augment domestic human rights law in order to provide normative space for tribal self-constitution. This, I argue, contributes to the development of a distinctive settler-state political theory which is premised on the cardinal importance of indigeneity and tribalism in settler-state constitutionalism, and on the enduring relevance of descent as a source of political and legal status in settler societies.

Backdrop

In the CANZUS states, recognised tribes are historic, territorial polities exercising various inherent and devolved regulatory powers and holding collective assets on behalf of a kinship-based collective. In each state, the recognition and constitution of tribes provides the sub-structure of an intricate and fast-developing

body of law and policy on tribal jurisdiction. In almost every case, a tribe seeking recognition must show that it is the successor of a group that existed at the time sovereignty was acquired over the territory in question, and is obliged to present evidence showing its political, institutional and genealogical continuity with that group. In all four states, measures of descent play an important evidentiary role in establishing this historic connection, and in determining the original membership of the recognised tribal body politic. At the time of writing, the United States was home to 566 federally recognised tribes (Department of the Interior, 2012), Canada had recognised 22 self-governing aboriginal communities (Aboriginal Affairs and Northern Development Canada, 2011) and 615 "Indian Act" First Nations (Aboriginal Affairs and Northern Development Canada, 2012d), and Australia had recognised 84 native title holding communities (Native Title Research Unit, 2012). In New Zealand, 51 tribal groupings have been recognised as beneficiaries of the pan-tribal settlement of commercial fishing claims (Te Ohu Kaimoana, n.d.) and 21 have been recognised through the tribe-specific settlement of historic Treaty of Waitangi claims (Office of Treaty Settlements, 2011, pp. 5-8). Across all four countries then, there are nearly 1500 officially recognised tribal institutions exercising tribal jurisdiction, including jurisdiction over membership.

How do these tribes decide their membership? My 2008 survey of 535 tribal constitutions and membership codes shows that all use descent to identify persons who are members by birth. Most also admit qualifying non-descendants under certain conditions, and at the discretion of the tribal government. The sui generis character of tribes as *descent-based* self-governing polities is an important challenge to liberal democratic governance, in part because the exclusion of non-descendants by a tribe can appear as a form of racial discrimination. These racial distinctions are not wholly corrective in design, and so in principle are not justifiable as temporary "special measures" enacted to alleviate disadvantage, although they may qualify as "permanent rights" in the terms used by the CERD Committee (CERD, 2009, para. 15). Given the apparently "illiberal" character of tribes and their membership criteria, there is something distinctively innovative about the way the liberal settler

states accommodate tribalism and tribal self-constitution. Some exclusions that are discriminatory on their face are nonetheless regarded in the CANZUS states as reasonable limitations on the rights of excluded persons. This conceptual move deserves closer consideration. If certain forms of discrimination are reasonable in settler societies, but others are not, what justificatory principle could support the resulting hierarchy of prohibited grounds? In order to accommodate indigenous jurisdiction, settler states have had to confront the puzzle of democratic self-constitution, namely the seeming impossibility of a demos constituting itself in a way consistent with liberal principles of non-discrimination (see generally Goodin, 2007; Dahl, 1989). Because exclusions make a community, we cannot imagine a tribe that admits all comers (such an entity would not be a tribe at all, and nor would it be a "community"). CANZUS states, I suggest, have come to rely on a normative distinction between constitutive premises (rules that constitute tribal polities) and prospective law and policy (that control entry to that polity once formed). Tribal discrimination on the basis of race is tolerated (and in fact required) in the settler states because racial discrimination is constitutive of tribal polities, and is not merely the expression of tribal policy.

Accordingly, in the public law of the CANZUS states, generally speaking it is accepted that tribes may reasonably exclude non-descendants. They may not, however, legitimately exclude persons on the basis of grounds other than descent, including their gender, sexual orientation, age, or in fact any of the other prohibited grounds in the human rights menu. The emergent principle, then, is that descendants are to be treated alike in the distribution of tribal membership. Accordingly, the most controversial of the exclusory bases used by tribes are those that distinguish *between* descendants on the basis of descent, for instance by reference to the number of a person's qualifying ancestors, or to their blood quantum. Distinctions of this kind appear to be tolerated (so far) in the public law and policy of Canada and the United States, but are not used by tribes in Australia or New Zealand and so have not been tested. In all four countries, the position of persons who are descendants in law but not "by blood", such as adopted children, is

controversial precisely because it seems to confound the general principle that descendants are to be treated equally (see Gover, 2010; 2011; see also *Jacobs v. Mohawk Council of Kahnawake* (1998) 34 CHRR 71). Non-indigenous children adopted by an indigenous person become legally indigenous in Canada and New Zealand, but not in Australia or the United States, and their membership status varies according to tribal adoption law (Gover, 2011, pp. 273-74). The application of non-discrimination law to tribal membership law is a relatively new field of public law in the CANZUS states, although more developed in substance in Canada than elsewhere, for reasons discussed below.

This adaption of human rights principles is more than just a concession to indigenous communities as interest groups. It is an expression of the continuing importance of racial difference in settler state constitutionalism, originating in the colonial encounter of indigenous and non-indigenous populations. International human rights bodies have not attempted to grapple with the concepts of race, indigeneity and discrimination in the tribal context, and neither have they considered the circumstances under which such discrimination might nonetheless be reasonable. Instead they have framed indigenous claims as matters implicating the rights of indigenous individuals to enjoy their culture in community with other members of an ethnic minority. The analysis thus stops short of what is required of settler states, given the centrality of tribal constitutionalism in those countries.

What does international law say about indigenous membership?

International instruments contain no definition of "indigenous peoples" or "indigeneity", and no such definition has been adopted by a United Nations body. (In policy-making, United Nations bodies often refer to the "Martinez Cobo" working definition (Secretariat of the Permanent Forum on Indigenous Issues, 2004, para. 1; Martinez Cobo, 1987)). A large body of scholarship has emerged debating the utility or desirability of a universal, global definition of indigenous peoples, and these questions formed a prominent part of discussions during the 22 year-long negotiation of the United Nations Declaration on the Rights of Indigenous Peoples

2007 (UNDRIP). The aim here is not to revisit definitional debates, which have been very well-traversed elsewhere, but rather to characterize the "state of play" of the methodologies used to give content to "indigeneity" in international law, since these necessarily inform determinations on what constitutes a reasonably inclusive indigenous community. In short, in the absence of a definition, human rights norms and jurisprudence lean heavily on self-identification as the method to be used by states to extend recognition to indigenous individuals and communities (see Secretariat of the Permanent Forum on Indigenous Issues, 2004 for an overview of the indigenous definitional debate). This principle is articulated in the only human rights treaty dedicated to indigenous rights (rights held only by indigenous peoples): the ILO Convention No. 169 (art. 1(2)) and is also the approach taken to date in the draft American Declaration on the Rights of Indigenous Peoples.[2]

The question of how or if to identify indigenous peoples in the UNDRIP was a volatile and difficult issue in the inter-governmental working group tasked with elaborating the text. Some states sought the inclusion of a definition of "indigenous peoples" in order to clarify and limit their obligations (or to avoid them altogether), while other states and most indigenous participants rejected the idea of an definition in favour of a "self-identification" provision, on the grounds that any definition would necessarily be under or over-inclusive (see eg *Statement by the Chinese Delegation*, 1995, p. 3; Commission on Human Rights, 2006, pp. 27-29 (US proposal on Article 8); *Statement of the Australian Delegation on Article 8*, 2002). These competing claims became focused in the later stages of negotiations on attempts by states to amend article 8 of the draft, which specified that "indigenous

[2] Permanent Council of the Organization of American States, 2012, art. I(2): "Self-identification as indigenous peoples will be a fundamental criteria for determining to whom this Declaration applies. The States shall respect the right to such self-identification as indigenous, individually or collectively, in keeping with the practices and institutions of each indigenous people." This wording was agreed upon by consensus on March 25, 2006 (Permanent Council of the Organization of American States, 2006). The CERD Committee has also issued a General Recommendation in 1990 recording its opinion that, in respect to State reports questioning the "ways in which individuals are identified as being members of a particular racial or ethnic groups or groups … such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned" (CERD, 2008).

peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such" (Commission on Human Rights, 1994, art. 8). The article was removed from the text in the very late stages of the adoption process, leaving intact two provisions bearing directly on membership: articles 9 and 33. These require states to protect, respectively, the right of indigenous individuals and peoples to "belong to an indigenous community or nation" (UNDRIP, art. 9) and the rights of indigenous peoples to "determine their own identity or membership in accordance with their customs and traditions" (UNDRIP, art. 33(1)).

Thus the final text of the UNDRIP requires states to protect both an individual's right to belong, and a group's right to exclude. This duality is in keeping with the unique structure of the UNDRIP as a whole. The document contains a range of rights exercisable by indigenous communities as groups, as well as individual rights that position indigenous persons in relation to (and possibly in opposition to) those communities. The Declaration guarantees to indigenous individuals and collectives "all human rights and fundamental freedoms as recognized in … international human rights law" (UNDRIP, art. 1) and contains a general, and very controversial, "reasonable limitations" clause that states in broad terms the conditions under which any of the rights in the UNDRIP may legitimately be limited (UNDRIP, art. 46). The UNDRIP does not provide a method for reconciling conflicts of the rights enumerated in its text .[3] Nonetheless the expression of sub-state group rights alongside individual rights is the UNDRIP's novel contribution to the body of international human rights norms, and the coexistence in one instrument of potentially opposed rights to membership is a feature that may well help to move debates beyond self-identification in the long-term. For the time-being however, the UNDRIP is formally non-binding as a matter of international law, and it remains to

[3] Although Article 46 provides that the exercise of UNDRIP rights shall be subject only to limitations that are "non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."

be seen what influence it may have, if any, on the jurisprudence of the United Nations human rights bodies (but see Permanent Forum on Indigenous Issues, 2009).

The principle of self-identification is viewed by its proponents as a pro-indigenous norm, that shields indigenous communities from the interventions of settler-states (Alfred and Corntassel, 2005, p. 600; Dodson, 1994). In practice, however, because it is a subjective measure that does not distinguish between communities or individuals, self-identification can also provide a vehicle and justification for state interference in indigenous self-governance. Vested in individuals, it is a right that is opposable to indigenous communities, and vested in groups, it can be the source of cross-claims in disputes over scarce resources (including status). For this reason, in the absence of the concept of a reasonably inclusive tribe, the self-identification norm is extraordinarily difficult to operationalize in a principled way. Guidance from human rights bodies is sparse. The most promising is that contained in the jurisprudence of the HRC, elaborating states' obligations under article 27 of the ICCPR, which guarantees to persons belonging to "ethnic, religious or linguistic minorities" the right to enjoy their own culture in community with other members of their group (ICCPR, art. 27). To give effect to this provision, the HRC has from time to time been called on to supplement the subjective self-identification principle with "objective criteria", in order to establish the existence of a minority in a state party and to determine whether a person "belongs to that minority", but also to explain what action a state must take to protect such a person's right to "enjoy their own culture" in "community with the other members of their group" (ICCPR, art. 27). In the performance of this task it has engaged, albeit in a limited way, with the possibility of "reasonable" exclusions in indigenous membership governance (HRC, 1988, paras. 9.3, 9.7, 9.8).

HRC decisions on indigenous membership – do these shed light on an appropriate methodology?

International human rights bodies struggle to adjudicate disputes that

involve decisions made by sub-state groups, especially where those groups are ascriptively constituted (and so are not voluntary associations) or exercise forms of jurisdiction not delegated by a national government. Importantly, in accordance with the logic of international human rights law, if the interests of a self-governing tribe are to be brought to bear in the Committee's reasoning, they must form part of the state's defense.

Significantly, the ICCPR has no general provision prescribing a "reasonable limits test", of the kind that would allow some limitations to be placed on claimed rights in order to protect the public interest or the rights of third parties. Some provisions of the treaty expressly describe permissible restrictions on particular rights, (e.g. ICCPR, art. 19, see also Human Rights Committee, 2011), and the HRC has also developed limited "proportionality" and "necessity" tests in respect to rights not expressly subject to these tests. In its general jurisprudence on article 27, for example, the Committee has acknowledged the interdependence of protections for minorities and protections for the rights for minority members. It has allowed that positive measures for minority groups, designed to protect their autonomy and their property, may be justified to the extent that they correct impediments to the enjoyment of article 27 rights, are based on reasonable and objective criteria, and are compatible with the non-discrimination provisions of the ICCPR (HRC, 1994, para 6.2).

The HRC's decisions on the admissibility of claims under the individual complains mechanisms of the ICCPR Optional Protocol have also limited its ability to engage with the interests of sub-state groups, by removing from its jurisdiction the capacity to hear communications on the right to self-determination protected by the Covenant's article 1 (HRC, 1990, para 6.1; HRC, 1994, para 3.1). As a result, while the right to self-determination informs the interpretation of the other articles of the ICCPR (at least in principle), it cannot itself be the basis of an individual communication (HRC, 1990, para 6.3; HRC 1991, para 6.2; HRC, 1988, para 6.3, HRC, 1984). Indigenous claims premised on article 1 are routinely displaced onto article

27, and heard as cultural claims, rather than as collective claims to property, resources, and political autonomy. To date, in the HRC, article 27 has provided the only plausible basis for indigenous membership claims, brought by excluded individuals, as well as claims brought by members seeking to defend exclusions against state intervention (HRC, 1991). Together these jurisdictional constraints (the lack of a general "reasonable limits provision" and the inability to hear individual self-determination claims) have the effect of obscuring the inter-indigenous elements of membership disputes, along with the interests of tribes in membership governance, and in fact, most of what is most normatively pressing about indigenous boundary problems. One example of the ways that tribal agency in boundary-setting is side-lined in international human rights adjudication can be found in the landmark HRC decision in *Lovelace v Canada* (HRC, 1981).

The HRC at home in Canada: Membership claims and First Nations

Sandra Lovelace is a Canadian Maliseet Indian and a member of the Tobique First Nation of New Brunswick. She acquired Indian status at birth in accordance with the Canadian Indian Act ("the Act"), but was divested of that status, and so also her Band membership, along with her right to live on the Tobique Reserve, when she married a non-Indian in 1970. In her 1977 communication to the HRC, she successfully argued that the denial of her right to live on the reserve, effected by the Act, constituted an infringement of rights protected by article 27 of the ICCPR. In its reasoning, the Committee focused on the parts of the Act that resulted in her loss of status, not on the authority of First Nations to determine the consequences of such a loss, through the exercise of their on-reserve jurisdiction, which permits Band Councils to exclude non-status Indians from the reserve, or, importantly, to allow them to reside there.[4] The decisions actually made by the Tobique First Nation in accordance with the powers conferred by the Indian Act were entirely absent from

[4] This point was raised by Canada in its submissions on s 30 and s 31 of the Act dealing with trespassing persons. (HRC, 1981, paras 9.3 and 9.4)

the Committee's reasoning, as was in fact, any reference to the Nation's interest in Lovelace's claim and the Indian Act regime, let alone the possibility that The Nation (and other First Nations) exercises governance authority not derived from the Act.[5] This is an important elision, because when Lovelace's marriage came to an end, and she returned to the Tobique Reserve to live with her parents, the Band Council did not exclude her from the reserve as it was entitled to do (Indian Act, § 81).[6] The Council did, however, decline Lovelace's request for a house of her own, consistently with its power to pass by-laws allotting reserve land, apparently because it was the Council's policy to give priority to members in the allocation of on-reserve housing (Indian Act, § 81 and 20).[7] The Council's decisions would necessarily have been constrained by the quantity of housing funding made available to First Nations, a resource limited by the federal government's insistence at that time, that Band funding quantums be calculated by reference to the on-reserve population of *status* Indians, regardless of who else was living there (Indian Act, § 62 and 64).[8] In any case, while Lovelace had lost her legislative *right* to live on the reserve along with her membership in the Band, she continued to live there with the acquiescence of

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[5] Kent McNeil suggests, for example, that the Indian Act recognizes that Indian Bands retain some unextinguished customary governance powers beyond the Act's express "declaratory" references of by-law-making power (McNeil, 1996, p 87).

[6] Possibly Lovelace was permitted to stay because (as she submitted) her supporters on the reserve had promised to physically protect her from eviction, but whatever the rationale, it did not feature in the evaluation performed by the HRC. In fact most reserves have a resident non-Indian and non-member population, many of whom can be presumed to enjoy familial, spousal and cultural ties with the First Nations community. As at July 2012, for example, the mainland Tobique Reserve was home ro 880 people, of whom 80 were not status Indians, and of these, 50 were not aboriginal. http://www12.statcan.ca/census-recensement/2006/dp-pd/prof/92-591/details/page.cfm?Lang=E&Geo1=CSD&Code1=1312007&Geo2=PR&Code2=13&Data=Count&SearchText=tobique&SearchType=Begins&SearchPR=01&B1=All&Custom=

[7] See also Laslo v. Gordon Band Council, [1996] C.H.R.D. No. 12 (QL), pp 16 and 17 (discussing the housing policy of the Gordon Band Council, which ranked applicants in accordance with the duration of their residency on the reserve and specified that ""Persons living with a non-Treaty person", were not likely to be given priority in awarding houses on the reserve." Also Desjarlais (Re), [1989] 3 F.C. 605 and Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, paras 77 and 78 (describing the powers of Band Councils to allocate housing).

[8] Since 2001, funding formulas increasingly rely on First Nations' membership, not its status Indian population. See e.g; Band Support Funding Program Policy, 2004, Annex 4 and AFN-INAC, 2008, pp 7 and 25, suggesting that (in 2008), "There are only two federal programs that currently rely exclusively on "status" to determine funding eligibility: Non-Insured Health Benefits, funded by Health Canada; and the Post-Secondary Education Program funded by INAC."

the Band Council, in a Band-funded house allocated to her parents, albeit while being denied a house of her own (HRC, 1981, para 13.1).

Because of the HRC's focus on the Indian Act, the reasonableness of the First Nation's decisions (to allow Lovelace to stay but to deny her federally-funded housing) did not form part of the Committee's reasoning (HRC, 1981, para 9.6 and 9.7).[9] Nor, consequently, did the material constraints operating on First Nations as a group of political actors, including the lack of economic opportunities and housing on reserves, and the restrictive service-provision and funding policies of the federal government.[10] More generally, the Committee did not consider the economic advantages that the Indian Act's restrictive status and Band membership provisions might secure for First Nations under conditions of such scarcity. The Committee concluded rather, that "[w]hatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe" (HRC, 1981, para 17). Thus while some exclusions might be reasonable or necessary, this one was not, and there was consequently no need to "determine in any general manner which restrictions may be justified under the Covenant . . . because the circumstances are special in the present case" (HRC, 1981, para 16). There is no room in this methodology for the Tobique Nation Band Council's view of what might be a "reasonable" compromise in the circumstances of Lovelace's claim.

One further point is relevant. In finding a violation of Lovelace's rights under article 27, the HRC declined to consider whether the Indian Act provisions divesting Lovelace of her Indian status discriminated against her on the basis of her gender,

[9] But see Kitok (HRC, 1998, para 9.8). "In this context, the Committee notes that Mr. Kitok is permitted, albeit not as of right, to graze and farm his reindeer, to hunt and to fish."

[10] See discussion in Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, paras 91 and 62 (per L'Heureux-Dubé, Gonthier, Iacobucci and Binnie JJ), explaining that the lack of housing on the reserve is one reason why many First Nation members cannot or do not to live on reserves. "In addition, because of the lack of opportunities and housing on many reserves, and the fact that the *Indian Act*'s rules formerly removed band membership from various categories of band members, residence off the reserve has often been forced upon them, or constitutes a choice made reluctantly or at high personal cost."

apparently because Canada was not, at the time of Lovelace's marriage and loss of status, a party to the ICCPR (HRC, 1981, paras 13.2 and 18). According to the Committee, the central harm suffered by Lovelace was "the loss of the cultural benefits of living in an Indian community" (HRC, 1981, para 12), and the most salient provision of the ICCPR was therefore Art 27 (HRC, 1981, paras 13.1 and 13.2). Thus an investigation of the on-going effects of the patrilineal status and membership rules of the Indian Act was deemed unnecessary. The decision then, offers no guidance, on the circumstances under which a person found to "belong" to a minority can nonetheless reasonably be excluded from a particular cultural group within that minority. Nor does it address the circumstances in which an otherwise reasonable exclusion may be invalid because it is discriminatory. These tasks were left to Canadian and aboriginal governments to decide amongst themselves, a complex and difficult undertaking which is still in progress. Decision-makers in international human rights bodies can avoid consideration of competing claims of individuals and sub-state groups in their analysis, since their task is to evaluate the decisions made by state parties to the relevant treaty. When these questions arise in domestic judicial for a of settler states, however, decision-makers are challenged to find a principled basis for prioritizing the interests of one claimant over another.

One way to better understand the HRC's analysis, then, is to consider the interplay of international, state and indigenous concepts of membership, and direct attention to the different communities that each jurisdiction seeks to protect. The HRC is concerned with the boundary that identifies minorities, specifically, the "ethnic, religious or linguistic" minorities referenced in article 27, in this case "ethnic Indians". Settler governments are preoccupied with the legal boundary between indigenous and non-indigenous populations. The Canadian government, for example, is concerned to maintain the Indian-non-Indian boundary, but is relatively tolerant of shifts in First Nation human and territorial boundaries within the Indian category so long as the external boundary remains intact (for example by expressly enabling inter-Band transfers, Band amalgamations and Band partitions)

(Indian Act, § 17), Indigenous communities are primarily concerned with the local politics of membership in their particular community, and are likely to be interested in the indigenous-non-indigenous public law boundary and the minority-majority international law boundary only so far as these impact on their ability to choose their own members and protect and allocate their own resources. The inevitable mismatch of ethnic, cultural and legal boundaries gives rise to some of the most complex jurisdictional and policy issues faced by settler states in their dealing with indigenous peoples. It is perhaps not surprising then, that the HRC's analysis on this point is opaque.

The consequences of the HRC ruling: Bill C-31

In principle then, the HRC's findings required the Canadian state to restrain the discretions exercised by the Tobique First Nation, in order to make it impossible for the Band Council to prevent Lovelace from enjoying her culture in community with its members. This is fact what the Canadian government proceeded to do, by amending the Indian Act in 1985 to reinstate all women who, like Lovelace, had lost their Indian status when they married a non-Indian, along with the children of those marriages. The amendments had the effect of increasing the status Indian population by 19% in five years (Furi and Wherrett, p. 7). All of these "reinstated persons" had to be accommodated within existing First Nations, whether or not those nations would otherwise have included them (although many people made eligible by the legislative amendments did not return to the reserves to live) (Furi and Wherrett, p. 7). At the same time, however, the amendments to the Act separated status and membership, so that while reinstated persons acquired a right to live on the reserve, prospectively such a right would not accrue automatically to status Indians, if the First Nation in question had assumed jurisdiction over its membership as permitted by the Act. At the time of writing, approximately one-third of First Nations (called "Section 10 Bands" after the enabling provisions of the Act) had elected to assume control over their membership (Indian Act, § 10).

It is relevant to the way the dispute was presented in the HRC that the federal government had acknowledged the need for legislative reform of this kind since the early 1980s. In its submissions to the HRC, Canada reported that it had hesitated to unilaterally impose amendments, because First Nations held a wide range of views about the appropriateness of the Act's gender-based distinctions, and because of the growing emphasis on self-governance in Indian law and policy, which discourages federal interference in the domestic affairs of First Nations (*McIvor v. Canada* [2009] BCCA 153, para. 27). The HRC's determination, then, provided the federal government with the additional leverage necessary to embark on legislative reform in the face of resistance from some Indian communities and individuals. Some First Nations complain that the reinstatement of disenfranchised women and their children overburdens their under-resourced communities, places unsustainable pressure on land and services on the reserves, and interferes with their capacity to self-govern and to apply customary membership norms. Some have refused to provide services to reinstated women, or have otherwise discriminated against them in reserve governance (see eg; *Scrimbitt v. Sakimay Indian Band Council* [2000] 1 FC 513). In legal challenges these First Nations have argued that the right to govern membership is an aboriginal or treaty right protected by section 35 of the Canadian Constitution Act, or else protected as a right to freedom of association under the Canadian Charter of Human Rights and Freedoms. The most significant legal challenge is the ongoing claim of the Sawridge, Ermineskin and Sarcee First Nations (see *Sawridge Band v. Canada* [1997] 3 FC 580; *Sawridge Band v. Canada* [2003] 4 FC 748). None of these cases have yet been determinatively settled at appeal.

Inter-indigenous disputes about membership also found their way back to the HRC in 1989 via the Optional Protocol, when members of the Whispering Pines Indian Band complained that Bill C-31 infringed their rights under article 27 to enjoy their culture in community with others, by "forc[ing] [them] to share their limited land and resources with persons who acquire Indian status and membership" (HRC, 1991, para. 3.3). The claim was deemed inadmissible because

litigation on C-31 was then (and still is) ongoing. There may be further attempts to engage the HRC on these matters once appellate decisions on C-31 claims have been delivered. For the time-being, the inter-group elements of article 27 membership claims are largely illegible to the HRC, even while its decisions inevitably impact on the distribution of power and resources amongst and between indigenous communities, and between indigenous and settler governments.

The significance of the Indian Act reforms extends far beyond their impacts on women and their families. The amendments engendered a revision of the methodology used to give content to the concept of "Indianness" in Canadian law. The Indian Act has existed as a discreet statute since 1876 and historically, the boundaries of the status Indian category have been relatively porous, containing mechanisms by which a person could gain and lose Indian status over the course of his or her life. Many of these older provisions expressed assimilative and racist policies, for instance by specifying that Indian men could "graduate out" of the Indian category, with their families, by obtaining certain educational qualification, working off the reserve or serving in the Canadian military (e.g; An Act to Amend and Consolidate the Laws Respecting Indians, § 86). Paradoxically, however, this porosity helped to present Indianness as a political attribute, analogous to nationality, rather than a genealogical one, akin to race. In fact the patrilineal structure of the Act replicated the "derivative" or "dependant" citizenship laws deployed by most western states until well into the 1960s, in which a woman's nationality was deemed to "follow" that of her husband (Knop, 2001). Until 1947, for example, Canadian women who married non-Canadians lost their Canadian citizenship (Canadian Citizenship Act SC 1946).

The effect of the 1985 and 2011 amendments has been to more closely align Indianness with biological descent. (Some subscriptive elements remain intact, however, in provisions allowing Indian status to "pass" to adopted children who lack biological descent.) The ideal that emerges from the reforms is that all descendants,

including (for now) descendants by adoption, should be treated equally in the distribution of Indian status. It is a vector that tends towards greater inclusivity of the status-Indian category, at least numerically and at least in the short-term. It does not, however, necessarily accord with the preferences of First Nations themselves, and it cannot be said to be free of discrimination, because it continues to favour descendants who have more Indian ancestors.

Under the Indian Act as it stands, a person with Indian status cannot pass status to their offspring unless they have at least two Indian status grandparents. Historically Indian status was conferred on the spouse of an Indian man, while Indian women lost their status by marrying a non-Indian. Accordingly, until 2011 the grandchildren of Indian women were treated less favourably than those of Indian men. This "residual gender discrimination" was challenged by Sharon McIvor in the British Columbia Supreme Court as a violation of her Charter rights to gender equality, and her claim was upheld by the Court of Appeal in 2009 (*McIvor v. Canada* [2009] BCCA 153). In response the *Gender Equity in Indian Registration Act* was passed in 2011 (see also Aboriginal Affairs and Northern Development Canada, 2010). It is particularly important to note that because the 1985 and 2011 Indian Act reforms have conferred status on some people but have not taken it from anyone, arriving at a "gender-neutral" regime involves an expansion in the size of the status Indian population. This expansion is restrained by ongoing prospective discrimination *between descendants*. No descendant who has only one Indian grandparent can acquire Indian status. This form of discrimination has not (yet) been subject to legal challenge. It may be the case that the exclusion of some ethnically Indian persons on the basis of their *degree of descent* (rather than some other immutable personal characteristic) will survive as a measure "necessary to protect the identity of the group", of the kind alluded to by the HRC in Lovelace. If such a principle is to emerge in Canadian law, it will likely be as a result of a legal challenge to the membership law of a First Nation, under the Charter of Human Rights and Freedoms or the Canadian Human Rights Act (CHRA). The latter has applied in modified form since June 2011 to First Nations, who previously were

exempt from its scope by s 67 of the Act, that "nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act." The exemption was included in the Act when it came into force in 1976 as an "interim measure" designed to protect the Indian Act regime from challenge under the Act. Several attempts were made to pass amending legislation after 2002 before Bill C-21 was enacted in 2008, following consultation with First Nations and Aboriginal organizations and communities (see Canadian Human Rights Commission, 2010). When a claim is brought against a First Nation, the CHRA is to be interpreted in way that does not derogate from the protections provided for "aboriginal or treaty rights" by section 35 of the Constitution Act (An Act to Amend the Canadian Human Rights Act, § 1.1), and "in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality" (An Act to Amend the Canadian Human Rights Act, § 1.2). The application of non-discrimination norms directly to self-governing tribes is an important innovation in Canadian public law, and has created a legal arena within which the principles of liberalism and tribalism can be debated.

Conclusion

The domestic law and policy of settler states has evolved methodologies to manage the human rights implications of tribal self-constitution. These point towards the development of a political theory that modifies liberal principles of human rights and non-discrimination in the light of the particular history of settler-state constitutionalism.

Several components of such a theory can tentatively be outlined. First, the law and policy of the CANZUS states expressly recognise tribes as self-governing polities organized by shared descent. This establishes a new "baseline" for the evaluation of discrimination in tribal membership governance, effectively by justifying discrimination against non-descendants. The justificatory theory may be

that preferences granted by tribes to persons who descend from tribal ancestors are a reasonable limitation on the rights of non-descendants, including non-indigenous persons, justified in a free and democratic *settler* society. This general principle depends for its coherence on express recognition of tribes as the successors of pre-contact communities, whose continuity with those historic communities is demonstrated in large part by their shared descent from common ancestors. The existence and particularity of tribes is thus built into settler statehood because the constitution of settler states is premised on pre-sovereign forms of indigenous self-governance and property. Liberal democratic frameworks consequently must work around the existence of tribes, and so also accommodate descent and race as sources of legal status.

Second, while discrimination against non-descendants can be justified as a concomitant of tribalism, distinctions made *between* tribal descendants are suspect to the extent that they are based on immutable personal characteristics *other than descent*. Accordingly, in principle a descendant should not be treated less favourably than other descendants on the basis of their gender, or the gender of their indigenous ancestors, but distinctions made between descendants or on the basis of the number of their indigenous ancestors or "blood quantum" may be justified if they are otherwise "reasonable". In sum, these principles articulate the basis of a theory that accommodates certain tribal exclusions, by "ranking" types of discrimination by reference to the particular attributes of a settler society and the exigencies of tribal self-governance. International norms and associated jurisprudence have not ruled out the possibility that such principles may form part of a settler-state defense to individual human rights claims based on minority rights or non-discrimination. To accept settler-state particularity in this way would entail the modification of the scope and quality of universalist ideology of international human rights. Whether the evolving body of settler-state human rights law on tribal membership, and the jurisprudence of international human rights bodies will diverge or converge on indigenous membership governance over time remains to be seen. It seems likely, however, that as tribal jurisdiction becomes more embedded

in the constitutional frame of settler states, that efforts to reconcile tribalism and liberalism in settler state political theory will be furthered in the mainstream of human rights law, and not at its margins.

Reference List

Aboriginal Affairs and Northern Development Canada, 2010. *Government of Canada Introduces Proposed Legislation to Bolster Gender Equity in the Registration Provisions of the Indian Act*. [online] Available at: <http://www.aadnc-aandc.gc.ca/eng/1100100015999/1100100016000> [Accessed 16 August 2012].

Aboriginal Affairs and Northern Development Canada, 2011. Self-government and Comprehensive Claims: Completed agreements. On file with the author.

Aboriginal Affairs and Northern Development Canada, 2012a. *Registered Population: Tobique*. [online] Available at: <http://pse5-esd5.ainc-inac.gc.ca/FNP/Main/Search/FNRegPopulation.aspx?BAND_NUMBER=16&lang=eng> [Accessed 16 August 2012].

Aboriginal Affairs and Northern Development Canada, 2012b. *Reserves/Settlements/Villages: Tobique*. [online] Available at: <http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/Search/FNReserves.aspx?BAND_NUMBER=16&lang=eng> [Accessed 16 August 2012].

Aboriginal Affairs and Northern Development Canada, 2012c. *Population Census Statistics: Tobique*. [online] Available at: <http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/Search/FNPopulation.aspx?BAND_NUMBER=16&lang=eng> [Accessed 16 August 2012].

Aboriginal Affairs and Northern Development Canada, 2012d. [online] *First Nations* http://www.aadnc-aandc.gc.ca/eng/1100100013791/1100100013795. [Accessed 4 September 2012].

AFN-INAC Joint Technical Working Group, 2008. *First Nations Registration (status) and Membership Report*. [online] Available at: http://fngovernance.org/resources_docs/First_Nations_Registration_and_Membership_Research_Report.pdf.

Alfred, T. and Corntassel, J., 2005. Being Indigenous: Resurgences against Contemporary Colonialism. *Government & Opposition*, 40(4), p. 597.

An Act to Amend and Consolidate the Laws Respecting Indians, S.C. 1876 (Can.).

An Act to Amend the Canadian Human Rights Act, S.C. 2008, c. 30, (Can.).

Band Support Funding Program Policy, 2004. http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/bsf_1100100013829_eng.pdf

Bredbenner, C. L., 1998. *A Nationality of Her Own: Women, Marriage and the Law of Citizenship*. Berkeley: University of California Press.

Canadian Human Rights Commission, 2012. *Section 1.2 of the Canadian Human Rights Act: Balancing Individual and Collective Rights*.

Canada (Human Rights Commission) v. Gordon Band Council [2001] 1 F.C. 124

CERD (Committee on the Elimination of Racial Discrimination), 2008. *General Recommendation No. 8: Identification with a Particular Racial or Ethnic Group (Aug. 21, 1990)*. U.N Doc. HRI/GEN/1/Rev.9 (Vol. II).

CERD (Committee on the Elimination of Racial Discrimination), 2009. *General Recommendation No. 32: The Meaning and Scope of Special Measures in the*

International Convention on the Elimination of All Forms of Racial Discrimination. U.N. Doc. CERD/C/GC/32.

Commission on Human Rights, 2006. *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on Its Eleventh Session*. UN Doc E/CN.4/2006/79.

Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1994. *Discrimination against Indigenous Peoples: Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples: Addition — Draft Declaration as Agreed Upon by the Members of the Working Group at Its Eleventh Session*. U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1.

Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203.

Dahl, R. A., 1989. *Democracy and Its Critics*.

Desjarlais (Re), [1989] 3 F.C. 605.

Department of the Interior, Bureau of Indian Affairs, 2012. *Indian Entities Recognized and Eligible To Receive Services From the Bureau of Indian Affairs* Federal Register 77(155) , 47868-47873.

Dodson, M., 1994. The Wentworth Lecture: The End in the Beginning: Re(de)finding Aboriginality. *Aboriginal Australian Studies*, 1, p. 2.

Furi, Megan and Wherrett, Jill, 2003. *Indian Status and Band Membership Issues*. [online] Available at: <http://www.parl.gc.ca/Content/LOP/ResearchPublications/bp410-e.htm> [Accessed 16 August 2012].

Goodin, R. E., 2007. Enfranchising All Affected Interests, and Its Alternatives. *Philosophy and Public Affairs*, 35(1), p. 41.

Gover, K., 2010. *Tribal Constitutionalism: States, Tribes and the Governance of Membership*.

Gover, K., 2011. The Politics of Descent: Adoption, Discrimination and Legal Pluralism in the Treaty Claims Settlements Process. *New Zealand Law Review*, 2, p. 261.

Human Rights Committee, 1981. *Sandra Lovelace v. Canada, Communication No. 24/1977 (1) & (2) (Dec. 29, 1977)*. U.N. Doc. CCPR/C/13/D/24/1977.

Human Rights Committee, 1984. *General Comment No. 12: The right to self-determination of peoples (Art. 1)*

Human Rights Committee, 1988. *Kitok v. Sweden, Communication No. 197/1985 (Dec. 2, 1985)*. U.N. Doc. CCPR/C/33/D/197/1985.

Human Rights Committee, 1990. *Chief Bernard Ominayak and Lubicon Lake Band v. Canada, Communication No. 167/1984 (Feb. 14, 1984)*. U.N. Doc. CCPR/C/38/D/167/1984.

Human Rights Committee, 1991. *R. L. et al. v. Canada, Communication No. 358/1989 (Apr. 1, 1989)*. U.N. Doc. CCPR/C/43/D/358/1989.

Human Rights Committee, 1994. *General Comment No. 23; Article* 27*: The Rights of Minorities* U.N. Doc. HRI\GEN\1\Rev.1 at 38 (1994).

Human Rights Committee, 2000. *Apirana Mahuika et al. v. New Zealand,* Communication No. 547/1993. U.N. Doc. CCPR/C/70/D/547/1993 (2000).

Human Rights Committee, 2008. *General Comment No. 12: The Right to Self-Determination of Peoples (1984)*. U.N. Doc. HRI/GEN/1/Rev.9.

Human Rights Committee, 2011. *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* U.N. Doc. CCPR/C/GC/34

ICCPR (International Covenant on Civil and Political Rights), 1966. 999 UNTS 171.

ILO Convention No. 169: Indigenous and Tribal Peoples Convention, 1989.

Indian Act, R.S. 1951, c. I-5 (Can.).

Jacobs v. Mohawk Council of Kahnawake (1998) 34 C.H.R.R. 71 (Canadian Human Rights Tribunal).

Knop, K., 2001. Relational Nationality: On Gender and Nationality in International Law. In: T.A. Aleinikoff and D. Klusmeyer, eds. *Citizenship Today: Global Perspectives and Practices*. Washington DC: Brookings Institution Press. Ch 4.

Laslo v. Gordon Band Council, [1996] C.H.R.D. No. 12 (QL)

Martinez Cobo, Jose R (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), 1987. *Study on the Problem of Discrimination against Indigenous Populations*. U.N. Doc. E/CN.4/Sub.2/1986/7.

McIvor v. Canada (Registrar of Indian and Northern Affairs) [2009] BCCA 153.

McNeil, K., 1996. Aboriginal Governments and the Canadian Charter of Rights and Freedoms 34 *Osgoode Hall L J* 61 at 87,

Native Title Research Unit, 2012. *Registered Native Title Bodies Corporate Summary 1*.

Office of Treaty Settlements (Te Tari Whakatau Take e pā ana ki te Tiriti o Waitangi), 2011. *Quarterly Report: 1 July 2011 – 30 September 2011*.

Palmeter, P. D., 2011. *Beyond Blood: Rethinking Indigenous Identity*. Saskatoon, Purich.

Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs, Working Group to Prepare the Draft American Declaration on

the Rights of Indigenous Peoples, 2012. *Fourteenth Meeting of Negotiations in the Quest for Points of Consensus: Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples*. O.A.S. Doc. OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 7.

Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, 2006. *Seventh Meeting of Negotiations in the Quest for Points of Consensus: Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples*. O.A.S. Doc. OEA/Ser.K/XVI, GT/DADIN/doc.260/06 rev. 1.

Permanent Forum on Indigenous Issues, 2009. *Draft General Comment No 1 (2009) Article 42 of the Declaration on the Rights of Indigenous Peoples.* E/C.19/2009/CRP. 12

Sawridge Band v. Canada [1997] 3 FC 580.

Sawridge Band v. Canada [2003] 4 FC 748.

Scrimbitt v. Sakimay Indian Band Council [2000] 1 FC 513.

Secretariat of the Permanent Forum on Indigenous Issues, 2004. *The Concept of Indigenous Peoples: Background Paper Prepared by the Secretariat of the Permanent Forum on Indigenous Issues*. U.N. Doc. PFII/2004/WS.1/3.

Statement by the Chinese Delegation to the Working Group Established in Accordance with CHR Resolution 1995/32, 1995.

Statement of the Australian Delegation on Article 8, 2002. On file with the author.

Statistics Canada, 2006. *2006 Aboriginal Population Profile: List of Indian Band Areas and the Census Subdivisions They Include*. [online] Available at:

<http://www12.statcan.gc.ca/census-recensement/2006/dp-pd/prof/92-594/help-aide/metadata/BandAreas.cfm?Lang=E> [Accessed 16 August 2012].

Statistics Canada, 2007. *2006 Aboriginal Population Profile: Tobique 20, New Brunswick*. [online] Available at: <http://www12.statcan.gc.ca/census-recensement/2006/dp-pd/prof/92-594/details/page.cfm?Lang=E&Geo1=CSD&Code1=1312007&Geo2=PR&Code2=13&Data=Count&SearchText=Tobique%2020&SearchType=Begins&SearchPR=01&B1=All&GeoLevel=PR&GeoCode=1312007> [Accessed 16 August 2012].

Statistics Canada, 2011. *Table 5: Census Subdivision Types by Province and Territory, 2011 Census*. [online] Available at: <http://www12.statcan.gc.ca/census-recensement/2011/ref/dict/table-tableau/table-tableau-5-eng.cfm> [Accessed 16 August 2012].

Te Ohu Kaimoana (The Maori Fisheries Trust), n.d. *Te Ohu Iwi — Decisions Register*. [online] Available at: <http://teohu.maori.nz/iwiregister/overview> [Accessed 16 August 2012].

UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples), 2007. GA. Res. 61/295, U.N. G.A.O.R., 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295, Annex.

VCLT (Vienna Convention on the Law of Treaties), 1969. 1155 UNTS 331.