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Conceptualizing the Authority of the Sovereign State over Indigenous Peoples

STEVEN WHEATLEY*

Abstract

The objective of this article is to evaluate whether the distinctive nature of the international law on indigenous peoples reflected in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) can be explained by reference to the service conception of authority developed by Joseph Raz. The article rejects arguments that the distinctive character of UNDRIP can be justified by ideas of 'Indigenous Sovereignty', not least because 'sovereignty' was developed in Western political thought in contradistinction to a constructed and imagined dystopian state of nature endured by the indigenous populations of the Americas. Instead, the work seeks to understand the UNDRIP regime in the light of Raz's conceptualization of legitimate political authority, concluding that the inchoate and under-theorized international law on the rights of indigenous peoples becomes comprehensible within this framework.

Key words

indigenous peoples; UNDRIP; Indigenous Sovereignty; Joseph Raz; legitimate political authority

1. Introduction

The objective of this article is to evaluate whether the distinctive nature of the international law on indigenous peoples reflected in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) can be explained by reference to Joseph Raz's service conception of authority, and, consequently, to establish a coherent foundation for the exercise of political power by states in relation to indigenous peoples.[1] This objective may perplex some, as international-law instruments such as the Declaration on Indigenous Peoples are not required to articulate a coherent moral or philosophical argument.[2] They are the result of deliberation, debate, negotiation, and compromise. Once adopted, however, such instruments provide an under-theorized and inchoate

* Professor of International Law, Lancaster University, and member of the International Law Association International Research Committee on Rights of Indigenous Peoples [s.wheatley@lancaster.ac.uk]. Thanks to Wojciech Sadurski and Siegfried Wiessner for comments on an earlier draft, also to the reviewer for the journal. The usual caveats apply.

1 The analysis does not address the world views of indigenous peoples or their narratives of conquest and dispossession, of broken promises and agreements; nor does it evaluate constitutionalist arguments on the accommodation of indigenous populations, or the role of the constructed identities of indigenous peoples in developing counterhegemonic discourses in world society. That is not to suggest that these issues are not important, nor to claim that the perspective of the discipline of international law should be privileged over others.

2 Jacques Maritain famously quipped during the process leading to the adoption of the Universal Declaration on Human Rights: 'We agree about the rights but on the condition that no one asks us why'. Quoted in S. Moyn, *The Last Utopia: Human Rights in History* (2010), at 67.

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account of the necessary conditions of global justice, and further structure, at least in part, domestic political arguments about the nature of justice. The requirement for a coherent exposition of the theoretical underpinnings of UNDRIP follows the inclusion of a number of provisions that sit uneasily with most contemporary accounts of political authority concerning the recognition of the laws of indigenous peoples; right of self-governance; and principle of free, prior, and informed consent.[3] Raz's understanding suggests a different approach to the dominant liberal or social-democratic models (reflected in large part in the Universal Declaration on Human Rights and other international human rights law instruments), one that is more suited to an analysis of the existence and scope of political authority, rather than an analysis of the conditions of, and limits on, state power.

The article proceeds as follows. It first examines arguments that the distinctive elements in the regime on indigenous peoples should be explained by reference to some idea of 'Indigenous Sovereignty'. The difficulties are threefold: these approaches fail to take into account the extent to which 'sovereignty' was constructed in European political thought against the imagined dystopia endured by the indigenous populations of the Americas at the moment of colonization; construct 'indigenous peoples' through the act of colonization; and focus on sovereign authority to establish a regime of political justice concerning indigenous peoples. Instead the work draws on the idea of practical authority developed by Raz to develop an analytical framework in which to consider the authority of the state over indigenous peoples. After outlining Raz's service conception, this article evaluates the way in which the law on indigenous peoples becomes comprehensible in light of the framework. This is not to claim that the service conception provided the conceptual foundations for the UN Declaration on the Rights of Indigenous Peoples, which represents an exercise in practical reasoning by states, indigenous peoples, academics, non-governmental organizations, and other interested parties – only that the distinctive nature of UNDRIP becomes explicable and justifiable by reference to these ideas which then underpin the exercise of politics and accommodation of indigenous peoples in domestic constitutional settings.

2. Political participation, autonomy and self-governance for indigenous peoples

According to the United Nations Permanent Forum on Indigenous Peoples, there are an estimated 370 million indigenous people in 90 states in all parts of the world and on most indicators of well-being they suffer disproportionately compared to non-indigenous peoples. A primary focus of the efforts by indigenous peoples to improve their situation has been the international-law system, which has recently been regarded as more sympathetic to their claims than domestic law. The relevant international law can be divided into three:[4] international human rights law

3 Cf W. Kymlicka, 'Theorizing Indigenous Rights', (1999) 49 *University of Toronto Law Journal* 281.
4 See generally on the international law on indigenous peoples: J. Anaya, *Indigenous Peoples in International Law* (2004; and P. Thornberry, *Indigenous Peoples and Human Rights* (2002).

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that protects the rights of indigenous peoples to their cultural integrity and to a distinctive way of life;[5] treaties that specifically address the position of indigenous peoples, notably ILO Convention 169, concerning Indigenous and Tribal Peoples;[6] and a customary or general international law on indigenous peoples, given form in the UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly on 13 September 2007.[7] Reference may also be made to the regional human rights regimes, in particular the African Charter on Human and Peoples Rights[8] and American Convention on Human Rights[9] – less so to the European Convention on Human Rights.[10]

In addition to recognizing a number of substantive rights concerning, for example, the control, use and ownership of land,[11] the UN Declaration on the Rights of Indigenous Peoples affirms that indigenous peoples have the right to the full enjoyment of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights, and international human rights law.[12] In common with the Universal Declaration, the Declaration on Indigenous Peoples considers that domestic political communities should be 'democratic' in nature.[13] UNDRIP does not, however, apply the democratic procedural

5 Art. 27, International Covenant on Civil and Political Rights, adopted by GA Res. 2200A (XXI), 16 December 1966. See also Human Rights Committee, General Comment No. 23, 'Rights of minorities (Art. 27)', para. 7.

6 1989 Indigenous and Tribal Peoples Convention (No. 169), adopted by the General Conference of the International Labour Organisation, 27 June 1989 (hereafter ILO Convention 169).

7 GA Res. 61/296 'United Nations declaration on the rights of indigenous peoples', adopted 13 September 2007, by 143 votes in favour to four against (Australia, Canada, New Zealand, and the United States). There were 11 abstentions. The dissenting states have subsequently expressed support for the Declaration: United States Endorses UN Indigenous Declaration', 105 *American Journal of International Law* (2011) 354. The International Law Association's International Research Committee on Rights of Indigenous Peoples concluded that, whilst UNDRIP as a whole cannot be considered as a statement of customary international law, the provisions on political participation, autonomy, and self-government reflect existing customary obligations: International Law Association Resolution No. 5/2012, 'Rights Of Indigenous Peoples' Conclusions and Recommendations of the Committee on the Rights of Indigenous Peoples, adopted 75th Conference of the International Law Association held in Sofia, Bulgaria, 26 to 30 August 2012, para. 5. Available www.ila-hq.org/en/committees/index.cfm/cid/1024 (last visited 19 June 2013).

8 See W. v. Genugten, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems', (2010) 104 *American Journal of International Law* 29.

9 See J. Pasqualucci, 'The Evolution of International Indigenous Rights in the Inter-American Human Rights System', (2006) 6 *Human Rights Law Review* 281; also J. Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples', (2009) 27 *Wisconsin International Law Journal* 51.

10 Cf. *Handolsdalen Sami Village and Others v. Sweden*, App. No. 39013/04, Judgment, 30 March 2010; also *Hingitaq 53 and Others v. Denmark*, Reports of Judgments and Decisions 2006–I. Also Framework Convention for the Protection of National Minorities, CETS No. 157. See generally M. Barelli, 'The Interplay between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime', (2010) 32 *Human Rights Quarterly* 951, at 967–70.

11 See Arts. 25, 26, 27, 28, 29, 30, and 32, UNDRIP.

12 Art. 1, UNDRIP.

13 See, for example, GA Res. 217(III)A, adopted 10 December 1948, 'Universal Declaration of Human Rights', which contains a limited number of absolute prohibitions, whilst elaborating a system of rights which may be subject to such limitations as required for the general welfare in a democratic society (Art. 29(2)). The model is one of democratic proceduralism, a point emphasized in Art. 21(3), which provides that the will of the people, expressed in periodic and genuine elections, shall be the basis of the authority of government. Art. 46(2), UNDRIP provides that the rights in the Declaration on Indigenous Peoples may only be subject to limitations as are determined by law 'for meeting the just and most compelling requirements of a democratic society'. Art. 46(3) further provides: 'The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.'

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model to the relationships between the state and indigenous peoples. The distinctive elements in the UN Declaration on the Rights of Indigenous Peoples are the extensive rights of political participation,[14] specifically the rights to direct participation in political and constitutional debates[15] and to a veto on laws and policies that might have a deleterious impact on the ways of lives of indigenous peoples;[16] a right of autonomy and self-government,[17] including a right to territorial autonomy;[18] and the recognition of the laws, traditions, and customs of indigenous peoples as

14 See Arts. 3, 5, and 18, UNDRIP. On the right of political participation generally, see J. Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources', (2005) 22 *Arizona Journal of International and Comparative Law* 7, at 7; also World Bank Legal Department, 'Legal Note on Indigenous Peoples' (8 April 2005), para. 28; Arts. 6 and 7, ILO Convention 169; Vienna Declaration and Programme of Action, para. I (20); and Principle 22, Rio Declaration on Environment and Development, adopted 14 June 1992, UN Doc. A/CONF.151/5/Rev.1, (1992) 31 ILM 874.

15 Arts. 5 and 18, UNDRIP. In the 1993 Explanatory note to the draft declaration, Erica-Irene Daes observed that the internal aspect of self-determination requires the state and indigenous peoples to enter into good-faith negotiations to establish the 'mutually-agreed and just terms' of political accommodation in a process of 'belated state-building' which was inclusive of indigenous peoples after many years of exclusion: Discrimination against Indigenous Peoples, Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples' (prepared by Erica-Irene A. Daes), UN Doc. E/CN.4/Sub.2/1993/26/Add.1, 19 July 1993, para. 26.

16 Art. 19, UNDRIP provides that states are required to consult with indigenous peoples, 'in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'. On an issue of central importance to the distinctive cultural identity of indigenous peoples, Art. 19 requires that the state obtain the consent of the community before adopting or implementing legislative or administrative measures. In other circumstances, the state authorities are required to seek the consent of indigenous peoples, but there is no requirement to obtain their consent. This interpretation is supported by other provisions in UNDRIP (Arts. 10, 29(2), and 32(2)) and wider international practice: Art. 16(2) of ILO Convention 169; Art. 16, Nordic Saami Convention; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya*, African Commission on Human and Peoples' Rights, Communication 276/2003 (4 February 2010), paras. 281 and 291; Committee on the Elimination of Racial Discrimination, 'General Recommendation XXIII on the Rights of Indigenous Peoples', adopted 18 August 1997, para. 4 (d); Art. 15(5), Convention on Biological Diversity, 1760 UNTS 79 and CBD COP 7, Decision VII/16; World Commission on Dams, *Dams and Development: A New Framework for Decision-Making* (2000), Strategic Priority 1.4 (Gaining Public Acceptance). See further International Law Association, Conference Final Report Sofia 2012, at 3–7, www.ila-hq.org/en/committees/index.cfm/cid/1024 (last visited 19 June 2013). See generally T. Ward, 'The Right to Free, Prior and Informed Consent: Indigenous Peoples Participation Rights within International Law', (2011–12) 10 *Northwestern Journal of International Human Rights* 54.

17 Art. 4, UNDRIP provides that indigenous peoples 'have the right to autonomy or self-government in matters relating to their internal and local affairs'. The object and purpose of autonomy or self-government is to enable indigenous peoples to exercise their right to self-determination. A number of writers argue that there is a right to autonomy or self-government for indigenous peoples in international law: F. Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples', (2006) 42 *Texas International Law Journal* 155, at 186–7; also N. Wenzel, *Das Spannungsverhältnis zwischen Gruppenschutz und Individualschutz im Völkerrecht* (2008), 508, cited in S. Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples', (2008) 41 *Vanderbilt Journal of Transnational Law* 1141, fn 105; also S. Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Perspective', (1999) 12 *Harvard Human Rights Law Journal* 57, at 127. Cf. Christina Binder, 'Autonomy as Means to Accommodate Cultural Diversity? The Case of Indigenous Peoples', (2012) 6 *Vienna Journal on International Constitutional Law* 248, at 250.

18 Given the extent to which the ways of lives of indigenous peoples are connected to land, it appears improbable that the effective guarantee of the right could be achieved without some recognition of control by indigenous peoples of the lands and territories they have traditionally owned, occupied, or otherwise used or acquired. The conclusion is affirmed in *Endorois Welfare Council v. Kenya, supra* note 16, para. 157. See, on the importance of territorial autonomy for indigenous peoples, E.I. Daes, 'The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples', (2001) 14 *Saint Thomas Law Review* 259, at 264–5.

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valid normative systems of 'law' (properly so called).[19] Taken together these rights support the principal objective and purpose of UNDRIP: to establish the necessary conditions to give effect to the right of self-determination for indigenous peoples within the territorial boundaries of the state.[20]

2.1. The concept of 'indigenous peoples' in international law

The rights of political participation and self-governance in the UN Declaration on the Rights of Indigenous Peoples are (self-evidently) not available to other groups or to other citizens in the state. Will Kymlicka has observed that the inclusion of extensive rights to autonomy and self-governance in the Declaration on Indigenous Peoples has led a number of minorities to debate whether to adopt the label of indigenous peoples: 'After all, what homeland minority would not want the same rights – as currently formulated –that are accorded indigenous peoples?'[21] On this issue, there is no agreed definition of the term 'indigenous peoples' in international law, principally as a result of the difficulty in establishing common criteria for the 5,000 distinct indigenous peoples of the world and refusal of indigenous peoples to accept the imposition of any definition by international lawyers. The UN Declaration on the Rights of Indigenous Peoples does not contain a definition, reflecting the complexities of the issue and resistance of representatives of indigenous peoples to such an inclusion. There is no reference to aboriginality,[22] or to first or prior occupancy, although the preamble observes that indigenous peoples 'have suffered from historic injustices as a result of, *inter alia*, their colonization and dispossession of their lands, territories and resources'. An evaluation of UNDRIP and the wider international-law doctrine and literature suggests that the following indicia are relevant in evaluating claims by groups and communities to be 'indigenous peoples'.[23] First,

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19 Art. 34, UNDRIP provides that indigenous peoples 'have the right to promote, develop and maintain their institutional structures ... and, in the cases where they exist, juridical systems or customs'. Art. 35, UNDRIP provides that indigenous peoples 'have the right to determine the responsibilities of individuals to their communities'. There has been limited recognition of the existence of indigenous law in other international-law instruments. The exception is Art. 8, ILO Convention 169. See also Art. 9, Nordic Saami Convention. See generally on the Nordic Saami Convention: M. Åhrén et al., 'The Nordic Sami Convention: International Human Rights, Self-Determination and Other Central Provisions', (2007) 3 *Journal of Indigenous Peoples Rights*.

20 Art. 46(1), UNDRIP. The idea of self-determination evolved in four distinct phases: the recognition of a political right of national self-determination for certain populations in Europe following the First World War; a legal right to independence and the establishment of a sovereign state for the populations of non-self-governing and international trust territories, which benefited few indigenous peoples given the 'salt-water' test for the identification of 'colonized' peoples (although the Pacific islands states are an exception to this) and application of the principles of *uti possidetis* (decolonization in accordance with the boundaries established by the colonial power); a remedial right to secession where a territorially concentrated people is systematically excluded from public life and subject to serious human rights abuses; and recognition of a right of all peoples to self-determination (including indigenous peoples).

21 W. Kymlicka, 'The Internationalization of Minority Rights', (2008) 6 *International Journal of Constitutional Law* 1, at 17.

22 The idea of aboriginality is central to much political discourse around indigenous peoples. See, for example, R. Maaka and A. Fleras, 'Engaging with Indigeneity: Tino Rangatatiratanga in Aotearoa', in D. Ivison et al. (eds.), *Political Theory and the Rights of Indigenous Peoples* (2000), 89, 91. For a critical view, see J. Waldron, 'Indigeneity? First Peoples and Last Occupancy', (2003) 1 *New Zealand Journal of Public and International Law* 55.

23 The most widely cited definition in the literature is provided by UN Special Rapporteur J. Martínez-Cobo, Study of the Problem of Discrimination against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1986/7/Add.4,

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prior and continued occupancy of the territory, or claim to dispossessed territory – divided further into arguments around being first; the dispossession of territory through colonization,[24] or equivalent process; and historical continuity. Second, self-identification as an indigenous people.[25] Third, cultural difference, often expressed in terms of a relationship with land, which gives expression to the collective identity of the group.[26] Fourth, the idea that indigenous peoples are somehow in a 'non-dominant' position.[27] Fifth, a communal dimension to the identity of indigenous peoples, as 'peoples'.[28] Finally, the existence of indigenous self-governance institutions and regulation of at least some aspects of the social, economic, and political life of the community through indigenous laws, traditions, and customs.[29]

3. 'Indigenous Sovereignty'

The inclusion of extensive rights to political participation and self-governance in the UN Declaration on the Rights of Indigenous Peoples led a number of liberal democratic states to express concerns about the regime, in particular around the idea of free, prior, and informed consent. Australia concluded it could not accept a right which allowed a particular subgroup of the population to veto the legitimate decisions of a democratic and representative government;[30] Canada stated the establishment of a veto power over legislative acts for a particular group would be fundamentally incompatible with its parliamentary system;[31] whilst New Zealand asserted that recognizing indigenous peoples had a right of veto over the democratic

para. 379. The central elements are the dispossession of territory through colonization or conquest; historical continuity with pre-invasion and pre-colonial societies; self-identification; cultural distinctiveness, in part defined by the relationship to land and existence of indigenous institutions; and the group being in a non-dominant position.

24 The criterion of colonization or conquest by European powers has proved influential in understanding the concept of indigenous peoples. See, for example, Anaya, *supra* note 4, at 3; also *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 28, 2007 Series C No. 172, para. 86.

25 See, for example, Art. 1(2), ILO Convention 169.

26 See, for example, *Report of the African Commission's Working Group of Experts on Indigenous Populations/ Communities*, submitted in accordance with the 'Resolution on the Rights of Indigenous Populations/ Communities in Africa. Adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2005), at 92–3; also *Endorois Welfare Council v. Kenya*, *supra* note 16, para. 162; and I/A Court H.R., *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations and Costs, Judgment of 31 August 2001, Series C No. 79, para. 149, and IACHR, *Xákmok Kásek Indigenous Community v. Paraguay*, Series C No. 214, Judgment of 24 August 2010, para. 174.

27 See, for example, E.I. Daes, On the Concept of "Indigenous People", UN Doc. E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996, para. 69; B. Kingsbury, '"Indigenous Peoples" in International Law: A Constructivist Approach to the Controversy', (1998) 92 *American Journal of International Law* 414, at 455; and M. Scheinin, 'The Right of a People to Enjoy Its Culture: Towards a Nordic Sami Rights Convention', in F. Francioni and M. Scheinin (eds.), *Cultural Human Rights* (2008), 151, at 155–6.

28 See, for example, Thornberry, *supra* note 4, at 55; also Anaya, *supra* note 4, at 103.

29 See Anaya, *supra* note 4, at 151–2; and Wiessner, 'Rights and Status of Indigenous Peoples', *supra* note 17, at 121. See, also, World Bank OP 4.10, 'Indigenous Peoples' (July, 2005), para. 4; Inter-American Development Bank, Operational Policy on Indigenous Peoples, 22 February 2006, para. 1(1); and Daes, *supra* note 15, para. 43.

30 UN Doc. A/61/PV.107, at 11.

31 UN Doc. A/61/PV.107, at 13.

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legislature would establish different classes of citizenship, providing indigenous peoples with a right others in the state did not have.[32]

An influential academic literature seeks to explain the recognition of extensive international-law rights for indigenous peoples by reference to some idea of Indigenous Sovereignty.[33] Siegfried Wiessner, for example, refers to 'Authentic Indigenous Sovereignty', drawing on concepts used by indigenous peoples themselves.[34] He understands the idea in terms of creating 'safe spaces' for indigenous peoples; providing a right to a distinctive way of life; recognizing the principle of free, prior, and informed consent; establishing a right to self-governance; establishing the right to have treaties and other agreements honoured; and imposing an obligation on the state to introduce positive measures to protect, promote, and revitalize indigenous languages and cultures.[35] In a subsequent article with Lorie Graham, Wiessner argues that indigenous concepts of sovereignty are not limited solely to Western ideas of 'original power over people and territory'.[36] Indigenous Sovereignty is understood in terms of the objective of preserving the ways of lives of indigenous peoples through the maintenance and establishment of indigenous decision-making structures and 'the recognition of law-making and -applying powers by traditional leaders in their various spheres of authority – peace chiefs, shamans, elders, clan mothers, and so on'.[37]

Federico Lenzerini goes further, arguing that a right to the recognition of Indigenous Sovereignty can be found in customary international law.[38] It includes the rights to control and ownership of traditional lands; to maintenance of identity and culture; to self-government under customary law; and to effective participation in relevant decision-making processes. Indigenous Sovereignty is 'parallel' to the sovereignty of the state,[39] and 'is to be exercised within the realm of the supreme sovereignty of the territorial state'. Lenzerini concludes that the exercise of sovereignty by indigenous peoples 'actually produces the result of shifting some aspects of state sovereignty, providing indigenous peoples with some significant sovereign prerogatives that previously belonged to the state'. [40]

None of the arguments equate Indigenous Sovereignty with state sovereignty, understood as an autonomous system of normative power not subject to the normative power of another sovereign. Indigenous Sovereignty appears to be a synonym for such diverse (albeit related) concepts as cultural integrity, self-governance, or self-determination,[41] or equivalent political ideas such as the freedom of an indigenous

32 UN Doc. A/61/PV.107, at 14.

33 For a related development in international relations, see J. Shadian, 'From States to Polities: Reconceptualizing Sovereignty through Inuit Governance', (2010) 16 *European Journal of International Relations* 485.

34 Wiessner, 'Indigenous Sovereignty', *supra* note 17, at 1170 ff.

35 Ibid., at 1174–5.

36 L. Graham and S. Wiessner, 'Indigenous Sovereignty, Culture, and International Human Rights Law', (2011) 110 *South Atlantic Quarterly* 403, at 408.

37 Ibid., at 410.

38 F. Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples', (2006–7) 42 *Texas International Law Journal* 155, at 187.

39 Ibid., at 188.

40 Ibid., at 189.

41 J. Corntassel and T. Primeau, 'Indigenous Sovereignty and International Law: Revised Strategies for Pursuing Self-Determination', (1995) 17 *Human Rights Quarterly* 343, at 361.

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people 'to choose what their future will be',[42] or the international law regime on the rights of indigenous peoples taken as a whole. There are, though, fundamental difficulties in seeking to ground the moral and political claims of indigenous peoples in any idea of 'sovereignty' – unless we conclude that Indigenous Sovereignty does not share any family resemblance with state sovereignty, which seems implausible given its etymology. Consider, for example, the argument developed by Patrick Macklem, who has written persuasively on this subject. Macklem argues that the moral claims of indigenous peoples are based on the fact that they were 'prior sovereigns',[43] observing that international law validated the colonization of North America through the recognition of the sovereignty claims of colonial powers and non-recognition of the sovereignty of indigenous populations.[44] The concept of 'indigenous peoples', he contends, is directly related to the historical exclusion of indigenous populations from the distribution of sovereignty initiated by colonization. Macklem's distributional account concludes that the objective of the law on indigenous peoples is to 'mitigate some of the adverse consequences of how the international legal order continues to validate what were morally suspect colonization projects by imperial powers'.[45] The recognition of European nation-states as sovereigns and non-recognition of the sovereignty of indigenous populations resulted from an application of principles of international law, including the denial of the status of formal sovereign equality to the indigenous populations of the Americas and other places. Macklem argues that the recognition of the rights of indigenous peoples 'speak[s] to injustices produced by the way in which the international legal order conceives of sovereignty as a legal entitlement that it distributes among collectivities that it recognizes as states'. The international law on indigenous peoples is a recognition of the requirement for states to 'adopt appropriate *domestic measures* to vest contemporary claims of sovereign authority with a modicum of normative legitimacy'.[46] Self-determination for indigenous peoples means autonomy and self-government, not sovereignty and independence.[47]

Macklem's analysis presents important insights for understanding the international law on indigenous peoples: the idea is conceptually related to, if not defined by, the validation of the colonization of the Americas and the object and purpose of the international-law regime on indigenous peoples can (at least in part) be seen in terms of the legitimating of sovereign authority. The implied assumption is that political legitimacy (at least in domestic settings) is justified by reference to the rule of (sovereign) law.[48] The difficulties are twofold. First, the argument constructs the identity of indigenous peoples through the act of colonization: indigenous peoples

42 R. Porter, 'The Meaning of Indigenous Nation Sovereignty', (2002) 34 *Arizona State Law Journal* 75, at 75.

43 P. Macklem, 'Distributional Sovereignty: Indian Nations and Equality of Peoples', (1993) 45 *Stanford Law Review* 1311, at 1333.

44 Ibid., at 1358.

45 P. Macklem, 'Indigenous Recognition in International Law: Theoretical Observations', (2008) 30 *Michigan Journal of International Law* 177, at 179.

46 Ibid., at 209 (emphasis added).

47 Ibid., at 202.

48 Albert Venn Dicey observes that the rule of law is 'a trait common to every civilised and orderly *state*': A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (1887), at 180 (emphasis added). Brian Tamanaha also understands the idea of the rule of law exclusively in relation to the state-law system: B. Tamanaha,

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do not define themselves; they are defined by their subjugation to the sovereign authority of European powers through colonization. Second, the objective is to legitimize the exercise of political power by states through a partial restoration of sovereignty to indigenous peoples, understood in terms of autonomy and self-governance. A focus on sovereign authority suggests, however, solutions based on the devolution of self-governance rights and that ultimate decision-making power rests with the state, with the sovereign political community offering 'concessions', or establishing 'exceptions' to the normal functioning of the democratic system, or 'delegating' law-making powers to indigenous political communities. It is, at best, an example of the weak form of legal pluralism identified by John Griffiths, whereby the state-law system recognizes the laws of indigenous peoples and allows for different legal regimes to apply to different groups.[49]

4. The problem of sovereign 'authority'

The argument that the moral and political claims of indigenous peoples should be grounded in a re-evaluation of the meaning and impact of 'sovereignty' proves particularly problematic following a rereading of the key texts that developed the idea of sovereign authority (legitimate political power) in Western political thought. The works of Thomas Hobbes and John Locke on the justification for sovereign power within the state (escaping from a 'state nature' to a 'state-of-civilization') and Emmerich de Vattel on the extension of sovereign authority through 'colonization' make clear that the indigenous populations of the Americas were excluded from recognition as 'sovereigns' because the idea of sovereignty was developed against their imagined and constructed identities.[50]

The justification for the recognition of a sovereign political community (the basis of the authority of 'law') was the need for the establishment of government in the interests of subjects. In the pre-political condition, Freemen (in John Locke's term) inhabited a 'state nature' in which they enjoyed certain inherent rights – to life and physical integrity, for example. Individuals accepted that their rational self-interest required the establishment of a political community and transfer of regulatory power to a 'sovereign' to establish the conditions of justice. The analytical concept of sovereignty was subsequently relied upon when determining the relationships between European powers, and between European powers and the indigenous populations of the Americas, and elsewhere. Hobbes links the idea of the state of nature directly to the indigenous populations of North America: 'the savage people in many places of America ... live at this day in that brutish manner'.[51] John Locke concurs. Whilst he accepts that 'the *Kings* of the *Indians* in *America* ...

On the Rule of Law: History, Politics, Theory (2004), especially at 114–15. This is significant, as Tamanaha has persuasively argued elsewhere that we should not understand the concept of 'law' exclusively in terms of 'state law': B Tamanaha, *A General Jurisprudence of Law and Society* (2001), at 193.

49 J. Griffiths, 'What Is Legal Pluralism?', (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1.

50 Earlier writers had not understood the political communities in the Americas as being fundamentally different from those in Europe. See, for example, F. de Victoria, *De Indis; et, De Ivre Belli: Relectiones*, edited by E. Nys (1917), at 131.

51 T. Hobbes, *Leviathan*, ed., with an introduction, by C.B. Macpherson (1968), at 187.

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command absolutely in war[;] in time of Peace they exercise very little Dominion, and have but a very moderate Sovereignty'.[52]

Vattel (focusing on the external aspect of sovereign authority) takes the same approach. A narrative of progress is developed in which the 'wandering tribes' possessing the land in common determined to 'fix themselves somewhere, and appropriate to themselves portions of land, in order ... to render those lands fertile'. The population, which had previously been scattered, 'formed themselves into a political society, that country ... is the settlement of the nation, and it has a peculiar and exclusive right to it'.[53] Where a nation takes possession of territory that is not owned by another, it acquires sovereignty: 'The whole space over which a nation extends its government becomes the seal of its jurisdiction, and is called its territory.'[54] The principle of *terra nullius* applies also in relation to the extension of territorial sovereignty: '[where] a nation finds a country uninhabited, and without an owner, it may lawfully take possession of it'.[55] Vattel concludes that the 'unsettled' lands of the Americas could not be regarded as the 'true and legal possession' of the indigenous populations. The people of Europe, 'too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies'.[56] He refers to the conquest of the 'civilized empires of Peru and Mexico' as a 'notorious usurpation'; by contrast, the establishment of colonies in North America 'might[,] within just bounds, be extremely lawful'.[57]

By the end of the nineteenth century, the law of nations (the focus of this article) was resolutely positivist, drawing on the traditions of European political thought to understand the world of law in terms of the 'sovereign' will of a political community with the capacity for effective self-government through formal institutions organized in accordance with an autonomous legal system.[58] Sovereignty was a question of fact, depending on the establishment of a political community in which subjects accepted the authority of a sovereign power that was not subject to the formal authority of any other sovereign power.[59] Sovereign political communities

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52 J. Locke, *Two Treatises of Government*, ed., with an introduction, by P. Laslett (1960), Bk II, at §108.

53 E. de Vattel, *Le droit des gens, ou, principes de la loi naturelle: Appliqués à la conduite et aux affaires des nations et des souverains*, with an introduction by A. de Lapradelle (1916), Bk. I. Ch. XVIII, at §203.

54 Ibid., at §205.

55 Ibid., at §207.

56 Ibid., at §208.

57 Ibid., Bk. I. Ch. VII, at §81.

58 John Austin, for example, defines a sovereign political community in opposition to natural societies in which the members 'are connected by mutual intercourse, but are not members, sovereign or subject, of any society political': J. Austin, *Lectures on Jurisprudence, or, The Philosophy of Positive Law*, revised and edited by R. Campbell (1885), at 225. Examples of sovereign political societies include 'England, and every independent society somewhat advanced in civilization'; examples of natural societies in a state of nature include '[those] savage societies which subsist by hunting or fishing in the woods or on the coast of New Holland [i.e. Australia]': ibid., at 227–8.

59 John Westlake concludes that '[a] group of men is fully sovereign when it has no constitutional relations making it in any degree dependent on any other group': J. Westlake, *The Collected Papers of John Westlake on Public International Law*, edited by L. Oppenheim (1914), at 87. The distinguishing feature of 'civilized' peoples is government. The sovereign state has the capacity to protect the citizens of other civilized states through the executive and judicial organs of government. Where 'a people of European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former

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were distinguished from non-sovereign political communities by the existence of institutions of government and coercive systems for the enforcement of law norms. European political thought proceeded to construct the idea of sovereign authority from a state of nature in which each individual was a judge in their own cause on questions relating to the scope and application of the laws of nature.[60] The dystopian idea of the 'state of nature' was developed in line with the constructed identities of the indigenous populations of the 'New World', with John Locke observing: 'in the beginning all the World was *America*'.[61] A concern was the ways in which the state of nature failed to support the necessary conditions to establish European conceptions of the good life, understood in terms of internal and external peace and security, agricultural productivity, economic development and the protection of private property rights. In the state of nature, individuals would – by a decision of a majority – agree to subject themselves to the authority of the sovereign power that would rule through law. Where formal institutions of government were established and the legal order not subject to the authority of another political community, the political society was sovereign.

The failure of European political thought to recognize the indigenous populations of the Americas as sovereigns did not result from an application of an autonomous concept of 'sovereignty': the idea of sovereign authority developed in opposition to the constructed identity of indigenous populations. The indigenous populations of North America were not recognized as sovereigns for the very reason that sovereign authority was developed against an imagined dystopian 'state of nature' endured by the populations as constructed in relevant European texts. Any argument for a recognition of Indigenous Sovereignty or reallocation of sovereign powers reflects, if only implicitly, an acceptance of the superior character of sovereign political communities. Not only is this morally and politically suspect, it also conflicts with the object and purpose of the international law on indigenous peoples, which is to give effect to the right of indigenous peoples to self-determination. It is difficult, then, to conclude that sovereign authority, Indigenous Sovereignty, or any conception of sovereignty, should have a central place in the discourses and deliberations around indigenous self-determination, political participation, autonomy, or self-governance.[62] The required conceptual shift concerns the removal of sovereignty

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may carry on the complex life to which they have been accustomed': ibid., at 143. Wherever the 'native inhabitants' are incapable of furnishing such a government, 'the first necessity is that such a government should be furnished'. The absence of effective government is evidenced by the inability of the indigenous populations to exclude European settlers from the territory: ibid., at 145.

60 First published in 1836 and updated in the early part of the twentieth century, *Wheaton's Elements of International Law* concludes that the state is distinguished 'from an unsettled horde of wandering savages not yet formed into a civil society. The legal idea of a state necessarily implies that of the habitual obedience of its members to those persons in whom the superiority is vested . . . [and a] definite territory belonging to the people by whom it is occupied': H. Wheaton, *Wheaton's Elements of International Law*, rev. throughout, considerably enl. and rewritten by C. Phillipson, with an introduction by the Rt Hon. Sir F. Pollock (1916), at 33. Wheaton observes that whilst the various European powers made different claims as to the basis of the acquisition of the territory in North America, 'there was one thing in which they all agreed, that of almost entirely disregarding the right of the native inhabitants of these regions': ibid., at 270-–1.

61 Locke, *supra* note 52, Book II, at §49.

62 There might be one exception given the conceptual framework in which treaty obligations are understood. Sovereignty may be a useful rhetorical tool for understanding agreements ('treaties') between states and

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from its central and exalted position in discourses around legitimate political power and the examination afresh of the idea of political authority.

5. Raz's service conception of authority

The dominant understanding in the political theory that underpinned the rule of sovereign law (Hobbes, Locke, Vattel) was that the sovereign state legitimizes its own rule by reference to a mythological social contract in which authority is transferred to the sovereign in the transition from a 'state of nature' to a 'state of government'. The government of the state is then established in accordance with a legal system that establishes the normative position of subjects through directives framed in terms of norms, standards, and principles, and determines the applicability of any exception to a norm and resolves conflicts between legal norms within the system. Following the positivist concept of the rule of sovereign law, a rule is binding because it is a rule of the legal system. The idea that legal norms should be determined by reference to their provenance cannot, however, be explained without reference to some idea of practical authority, which is concerned with the exercise of normative power by one actor, institution, or regime over another. A legal norm might be binding because it is a norm of the legal system, but this cannot explain why the norms of a legal system are binding.

The most influential account of practical authority is provided by Joseph Raz's service conception, which establishes that an actor or institution has legitimate authority where a subject would better conform to the reasons that already apply to her by following the directives of the actor or institution than by acting independently. The only reasons that an authority may take into account in determining the content of authority directives are those that already apply to subjects (what others reasons could legitimate authorities take into account?), including the requirement for co-operation on a wide range of social, economic, and political issues. Once established, the directives of an authority are binding on those subjects within its jurisdiction.

Raz's service conception is an ideal-type theory, establishing how authorities are supposed to function. The argument constructs the exercise of authority in relation to subjects capable of autonomous reasoning, i.e. capable of deciding whether it would better to follow the directives of the authority or to act autonomously, and capable of evaluating the justification advanced by the authority, i.e. the claim of the right to rule. The approach can be contrasted with sociological concepts of legitimacy, concerned with the identification of those actors and institutions which are, in fact, recognized as having the right to rule, for whatever reason. On closer inspection, the service conception contains both normative and sociological elements: legitimate authority depends on an actor or institution regulating in

indigenous peoples, given that 'treaties' are understood to involve the conclusion of contractual bargains between equals with the obligation of the parties to keep to their agreements (*pacta sunt servanda*). See, for example, S. Brennan et al., '"Sovereignty" and Its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments', (2004) 26 *Sydney Law Review* 307.

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accordance with the interests and preferences of subjects (normative), with the evaluation as to whether or not this is the case made by subjects (sociological). The argument applies equally to the scope of authority accepted by subjects. Actors might accept the authority of an institution on certain issues, but not others. Consequently, whilst an institution might be an authority in relation to subject matter 'X', it might not be in relation to subject matter 'Y'.

Raz's conception of authority relies on four interrelated theses: the dependence thesis, which provides that authority is legitimate where undertaken in accordance with the reasons that already apply to subjects; pre-emption thesis, which provides that the directives of legitimate authorities establish content-independent reasons for action; normal justification thesis, which establishes that the exercise of regulatory power is only legitimate where the authority is better placed than subjects to establish regulatory directives; and independence thesis, which provides that on some issues it will be more important for individuals to decide for themselves than to decide correctly.

First, the dependence thesis. This concludes that the exercise of authority is legitimate where undertaken in accordance with the reasons that already apply to subjects and are relevant in their action in the circumstances covered by the authority directive.[63] These reasons are dependent reasons. Raz explains that dependent reasons 'range from the humblest to the sublime, from the need to have some fresh air to the desirability of having a rich and fulfilling life, from concern with one's hairdo to concern for the victims of mass starvation'.[64] The idea of legitimate authority, he argues, implies the exercise of the regulatory function in accordance with the reasons that already apply to the subjects of directives. This does not require that authority directives should always advance the interests of subjects: a primary function of practical authorities is to identify co-ordination problems and establish norms for social conduct, even where those norms do not reflect the preferences of subjects. The standard example concerns road-traffic laws: it is less important whether we would prefer to drive on the left- or the right-hand side of the road, than that there is a rule on the issue. Nor does the service conception invalidate authority directives that do not reflect dependent reasons: all directives, even mistaken directives, establish content-independent reasons for compliance.[65]

Whilst errors in the identification of the reasons that apply to subjects do not invalidate authority directives, mistakes that authorities make 'about factors which determine the limits of their jurisdiction render their decisions void'.[66] The idea of jurisdiction then delimits the scope of legitimate political authority and the

63 J. Raz, *The Morality of Freedom* (1986), at 47.
64 J. Raz, 'Facing Up: A Reply', (1988–9) 62 *Southern California Law Review* 1153, at 1180.
65 Raz, *supra* note 63, at 62. The same conclusion does not, however, apply in the case of directives that violate fundamental rights: 'some immoralities may be of a kind that no government has authority to commit': ibid., at 79. Raz accepts that fundamental rights establish a ground for challenging authority directives, and in doing so determine the conditions of legitimacy of the authority and the limits of its power: ibid., at 46. Given that the directives of legitimate authorities provide content-independent reasons for compliance, it must be the case that certain laws do not bind the subjects of authority directives even when adopted by a legitimate authority, although the implications of this conclusion are beyond the scope of this article.
66 Ibid., at 62.

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'boundaries' of the authority regime: an actor or institution has authority where the subjects of its authority directives would better conform to the reasons that apply to them by following the authority directive on the issue under consideration than by acting independently.[67] The exercise of legitimate political authority depends (i) on the recognition of an actor or institution or regime as an 'authority' with the capacity to determine the normative situation of subjects, and (ii) that the scope of authority extends to the subject matter under consideration. The determination as to whether an actor, institution, or regime is an authority on a particular issue is made by subjects. Raz does not construct a hypothetical third party to determine when a person should be subjected to the authority of another: it is for the putative subjects of an authority regime to decide whether an actor or institution is an authority for them. In Raz's own words 'it is one's own judgment which directs one to recognize the authority'.[68]

Second, the pre-emption thesis, which proceeds from the dependence thesis. The authority directive must express a view about what ought to be done and it should be possible for the subject to comply without recourse to the reasons or considerations on which the directive purports to adjudicate. The pre-emption thesis provides that the directives of legitimate authorities establish content-independent reasons for action: they exclude and take the place of the relevant reasons for action that apply to the individual.[69] My reason for following the directives of the legal system is that I recognize 'the law' as an authority, not because I agree with the substantive content of particular law norms. The directives of legitimate authorities establish content-independent reasons for action, or inaction, on the part of the subjects, who are expected to follow the authority directive regardless of their view on the underlying merits.

Third, the normal justification thesis (NJT). Raz argues the normal way to establish a person has authority over another

> involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.[70]

The NJT provides that an actor should accept the authority of another where they are more likely to act for the right reasons that apply to them by subjecting themselves to the authority than by acting autonomously. The exercise of authority is not justified because it serves the public interest, only 'if it is more likely than its subjects to act correctly for the right reasons'.[71] If an authority directive is to be binding on an individual, it must be justified by considerations that bind them. The need to co-ordinate the actions of the members of a society may be a necessary condition of political legitimacy, but it is not a sufficient condition. The reasons for

67 H. Hurd, 'Challenging Authority', (1991) 100 *Yale Law Journal* 1611, at 1634.
68 J. Raz, 'The Problem of Authority: Revisiting the Service Conception', (2006) 90 *Minnesota Law Review* 1003, at 1018.
69 Raz, *supra* note 63, at 59.
70 Ibid., at 53.
71 Ibid., at 61.

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accepting the authority of another include that the authority is more knowledgeable, that the authority is more likely to make a correct decision, and that accepting the authority of another allows for effective co-ordination.

Samantha Besson observes that before an actor or institution can satisfy the normal justification criterion (NJC), it has to be recognized as an authority that others will regard as such.[72] Jeremy Waldron concludes that, in addition to the individual application of the NJC, a large number of people must actually accept that an actor or institution satisfies the criterion in cases of co-ordination over matters of common concern.[73] Raz himself notes that practical authorities 'need more than the capacity to function well. They need to be made authorities, not necessarily by being appointed to the job, but something like an appointment has to be there'. The position is contrasted with that of theoretical authorities, whose expert knowledge establishes them as an 'authority', i.e. a reason for holding certain beliefs and discarding others on those matters by virtue of that knowledge of the subject: 'Nothing more is needed.'[74] In the practice of authority, the most plausible account would observe an assertion of authority (in the form of an authority directive) that was accepted and relied on by subjects, rather than the prior recognition by subjects that an actor or institution was better placed and the acceptance of responsibility by the 'authority' (although this is also possible). Whatever the scheduling of the assertion and acceptance of authority (which is somewhat chicken-and-egg and not relevant in the case of already existing authorities), the exercise of authority and its jurisdictional boundaries are established in accordance with the normal justification criterion: where subjects are more likely to comply with the reasons that already apply to them on the particular issue under consideration by relying on another actor or institution, then that actor or institution is an authority for them.

The normal justification thesis establishes a significant break with the social-contract tradition that has dominated the discourse around legitimate political power: authority is not established at some hypothetical foundational moment of agreement that binds subsequent generations. The exercise of normative power is legitimate where the authority is more likely than the individual to establish a social norm or convention that regulates the behaviour of the individual and others in accordance with the background reasons that already apply to the subjects of authority directives taken individually. The exercise of practical authority by the state (or any other actor) must be established in relation to each putative subject of the authority regime: 'For every person the question has to be asked afresh, and for every one it has to be asked in a manner which admits of various qualifications.'[75] The practical authority of a legal system is established through the acceptance of the system of law as an authority. The authority of 'the law' is not evaluated by subjects

72 S. Besson, 'The Authority of International Law: Lifting the State Veil', (2009) 31 *Sydney Law Review* 343, at 355–6.

73 J. Waldron, 'Authority for Officials, in L. Meyer et al. (eds.) *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (2003), 45, at 66, referred to in Besson, *supra* note 72, at 356.

74 Raz, *supra* note 68, 1035.

75 Raz, *supra* note 63, at 74.

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on a case-by-case basis. Where subjects accept the authority of a legal system, the legal system is an authority for them.[76]

Fourth, the independence thesis. The normal justification thesis has been subject to the criticism that it validates the exercise of authority at the expense of private autonomy. Kenneth Einar Himma concludes that the NJT imposes no limits on the idea of legitimate authority beyond the need to establish correctly the reasons that apply to subjects – a position at odds with many substantive accounts of legitimacy that presume it would be wrong, for example, for the state 'to prohibit political speech or "French kissing" between consenting adults'.[77] The criticism is, however, difficult to reconcile with the independence thesis. In *The Morality of Freedom*, the idea is expressed in terms of the rationality of acting in compliance with authority directives, '[s]o long as this is done where improving the outcome is more important than deciding for oneself'.[78] In later work, Raz elevates the exception into a principle.[79] Authority is justified when two conditions are met: the subject would better conform to reasons that apply to him anyway if he intends to be guided by the authority's directives than if he does not (the normal justification thesis); and the matters regarding which the first condition is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority (the independence condition).[80] The independence thesis confirms that in many areas it is more important to decide correctly than to decide for oneself (hence the reliance on authorities). But there are other areas where it is more important to decide for oneself than to decide correctly. Raz gives the examples of the need to exercise judgement in order to become self-reliant and the requirement that certain matters are, by the 'social forms of various cultures', to be decided by oneself.[81] In yet other areas, 'it is an optional good for a person to decide for himself. In such matters consent serves to establish authority'.[82]

Raz notes that the service conception is premised on the idea that it is important that people decide for themselves how to conduct their lives and that in some important areas they should do so free from the commands of others. There are, though, he argues, many issues in the political arena where we have reason to secure a good for ourselves and for others and that this can be 'best secured by yielding to a coordinating authority'. The fact of reliance poses 'no threat to the authenticity of one's life, or to one's ability to lead a self-reliant and self-fulfilling life'.[83] Elsewhere, whilst accepting that the protection of personal autonomy is essential to the promotion of individual well-being in 'modern pluralistic societies',

76 In the case of political authorities, Raz argues that the requirement to solve co-ordination problems means that they should be in a position of 'real power', i.e. de jure political authorities should also be de facto authorities, and in the case of the state, this will require the use of coercive force to ensure compliance with its authority directives: Raz, *supra* note 68, at 1036.

77 K. Himma, 'Just' Cause You're Smarter than Me Doesn't Give You a Right to Tell Me What to Do: Legitimate Authority and the Normal Justification Thesis', (2007) 27 *Oxford Journal of Legal Studies* 121, at 144.

78 Raz, *supra* note 63, at 69.

79 See A. Tucker, 'The Limits of Razian Authority', (2012) 18 *Res Publica* 225, at 232.

80 Raz, *supra* note 68, at 1014.

81 Ibid., at 1015–6.

82 Raz, *supra* note 64, at 1183.

83 Raz, *supra* note 68, at 1016.

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Raz argues against the recognition of autonomy as a universal value, concluding that autonomy is not necessarily required for 'a completely good life', which is also possible in 'non-repressive societies' where the pursuits and options open to people are not subject to individual choice.[84] There is, then, a question whether the independence thesis can be regarded as integral to the service conception, or whether it is only relevant when applied to modern pluralistic societies. It seems, though, implausible to conclude that some idea of personal autonomy (independence), even if not the extant extensive conception that dominates modern pluralistic societies (in Raz's expression), is not integral to the idea of the good life in all societies. The issue is not whether the independence thesis is part of the service conception (it is), but the scope of the protected 'personal' space accorded by the criterion, which is contested within each social culture – including the cultures of modern pluralistic societies and those of indigenous peoples.

5.1. The nature of legitimate political authority

In outlining a conception of authority that does not necessarily rely on even a minimal understanding of procedural rights, Raz's thesis has been subject to criticism.[85] The problem, as David Rondel explains, is that the service conception does not seemingly differentiate between '(a) sound political decisions reached democratically, and (b) perfectly identical decisions reached by any other non-democratic procedure'.[86] Whilst the normal justification thesis does not establish a democratic conception of legitimate political authority, it can be read as requiring the introduction of democratic procedures and mechanisms for the exercise of legitimate political authority *for democratic societies* – those in which the culture is not sympathetic to any claim to know better on issues of political controversy and subjects are likely to conclude that the only way in which the government can establish the reasons that already apply to them is by engaging with them through democratic procedural mechanisms.[87] The relevant question is not whether the democratic procedural model establishes the basis for the legitimate exercise of political authority by the state today, but whether one or other concept of democracy defines the idea of legitimate authority

84 Raz, *supra* note 64, at 1227.

85 See, for example, R. Dworkin, 'Thirty Years On (Book Review: The Practice of Principle, by Jules Coleman)', (2002) 115 *Harvard Law Review* 1655, at 1672; also T. Christiano, 'The Authority of Democracy', (2004) 12 *Journal of Political Philosophy* 266, at 279.

86 D. Rondel, 'Raz on Authority and Democracy', 51 *Dialogue* 211, at 218. Scott Hershovitz concludes that the service conception is inadequate for understanding important features of democratic societies in which law is the mechanism through which people make collective decisions that (in ideal circumstances) are the result of participatory procedures. The fact of engagement and participation is, according to most procedural understandings, more important that getting the 'right' answer. S. Hershovitz, 'Legitimacy, Democracy, and Razian Authority', (2003) 9 *Legal Theory* 201, at 218. There are, of course, other conceptions of democratic legitimacy that emphasize the epistemic qualities of democracy – an idea closely associated with Jürgen Habermas's deliberative democracy, which establishes that, in conditions of disagreement, (political) 'truth' equates to the consensus that would be arrived at through dialogue in an ideal speech situation, where positions are accepted as legitimate only where agreed through uncoerced discussions by those affected by the outcomes of the process: J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. W. Rehg (1996).

87 See, for example, W. Sadurski, 'Law's Legitimacy and "Democracy-Plus"', (2006) 26 *Oxford Journal of Legal Studies* 377, at 387.

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for all people, in all places, at all points in time. Raz's service conception concludes (correctly) that this is not the case.

The normal justification criterion establishes that A has (legitimate) authority over B, if B would better conform to the reasons that (already) apply to B by following the directives of A than by acting independently. The determination as to whether this is (or is not) the case is made by the subjects of, i.e. those targeted by, authority directives. The reasons for subjects accepting the 'authority' of an actor or institution will depend in large part on the conceptualization of the idea of authority in the particular community. Citizens in modern pluralistic democracies recognize the importance of political and personal autonomy for the reason that (in Raz's terms) '*socialization* introduces people ... to the value of choice, and of self-determination'.[88] For other political communities different bases for political authority will exist, determined, in part, by the prevailing political culture in the society. Raz's position is that no particular form of government is required by the normal justification thesis: 'someone may believe that people, members of a certain group, have a duty, perhaps a religious duty or a duty of loyalty arising from some historical circumstances, to obey some person or institution. In that case the normal justification thesis is easily satisfied'.[89] The same argument applies to democratic forms of government: 'Some people believe that one has a duty to obey anyone who is elected by the majority. Again, that is no problem for the service conception.'[90] Raz accepts that democratic governments have, 'in many countries, unique claims to enjoy some qualified or limited authority'. The NJT does not, though, establish a democratic conception of legitimacy. Raz is clear on this point (albeit in a footnote): 'I do not believe that democracy is the only regime that can be legitimate'.[91] The idea of legitimate authority is a constant over time and place: A has authority over B, if B would better conform to the reasons that already apply to B by following the directives of A than by acting independently. The requirements and conditions for the acceptance of authority by subjects will differ from time to time and place to place, depending on the political culture of the community, and it is not possible to identify universal criteria for the exercise of legitimate authority – a conclusion that allows for the recognition of the authority of indigenous laws and self-governance institutions where the members of the community accept they would better conform to the reasons that already apply to them on a particular issue by following the directives of the indigenous authorities than by acting independently.

5.2. Conflicts of legitimate authorities

The idea of sovereign authority establishes that the legal system of an independent political community with a coercive system of government power legitimates its own rule: the rule of sovereign law. There might be limits on sovereign power (prohibition on torture, for example) or requirements for the way in which power is

88 Raz, *supra* note 64, at 1229 (emphasis added).
89 Raz, *supra* note 68, at 1030.
90 Ibid., at 1031.
91 Ibid., at footnote 20.

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exercised (democratic proceduralism), but the right of the sovereign to rule is taken for granted. Raz's service conception addresses the issue from a different perspective, asking whether on a particular issue an actor or institution has authority, i.e. whether the assertion of authority is recognized by subjects. It does not regard the state as the only source of legitimate political authority, or exclude the possibility of other actors or institutions being recognized as authorities in a given social space: legitimate political authority is not defined by any idea of sovereign authority. Nor does the service conception exclude the possibility that an individual can, and will, recognize different institutions and actors as authorities on different issues and on the same issue. Consider, for example, members of indigenous peoples who recognize both the authority of the state and indigenous self-governance systems. Where the members of an indigenous community recognize that the state authorities are better placed to regulate aspects of social, economic, and political life, they accept the state as an authority – on those issues; likewise, where the members of the group recognize that the institutions, laws, traditions, and customs of the community are better placed to regulate them in accordance with the political culture of their society, the indigenous laws and institutions are an authority for the members of the group in question (i.e. the subjects of the indigenous authority regime).

The question then arises how any conflicts between state law and the laws, traditions, and customs of indigenous peoples are to be resolved, and by which actors.[92] The first possibility would be to allow the subjects of authority directives to resolve the conflict. It is the case that 'subjects' can reject the assertion of normative authority by an actor or institution. In these circumstances, the institution or actor is not an authority for the 'subjects' of the relevant directives. There is no conflict of laws (or legal systems), for the reason that the regulatory norms of the 'authority' are not binding on those targeted by the regulations. The conflict of normative systems is resolved by the non-recognition of one of the competing 'authorities' by 'subjects'. That is not to conclude that the actor or institution is not an authority. The actor, institution, or normative regime may be recognized as an authority by other subjects, but not all those targeted by the authority directive. The state might, for example, be recognized as an authority by a majority of the population, but not by an indigenous people – generally, or on particular issues. The normative boundaries (or jurisdictional scope) of the state are defined by the normal justification criterion: the state has legitimate authority over a person, if that person would better conform to the reasons that already apply to her by following the laws of the state than by acting independently on the subject matter under consideration. On issues concerning, for example, the control or use of land indigenous peoples occupy or have traditionally used, the state is unlikely to be accepted as an authority by them.

What, though, of conditions in which a subject recognizes both authorities on the same issue; where, for example, indigenous peoples recognize the authority of the state and the authority of indigenous laws, traditions, and customs? Raz

92 Where religious, cultural, or other social norms conflict with a state-law norm, the dominant understanding is that state law operates in a 'jurispathic' manner, killing off the other norm, or refusing to apply it in the particular case: R. Cover, 'Nomos and Narrative', (1983) 97 *Harvard Law Review Association* 4, at 40.

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concludes that when several authorities pronounce on the same matter and their directives conflict, 'we must decide, to the best of our ability, which is more reliable as a guide',[93] relying on the normal justification thesis and evaluating 'whether we would conform better to reason by trying to follow its directives than if we do not'.[94] The conclusion is, though, problematic. An authority directive is a reason for action on the part of the subject without the need to examine the underlying reasons that supported the adoption of the directive. The idea is central to Raz's concept of authority: a binding authoritative directive excludes reliance on those reasons 'that the lawmaker was meant to consider before issuing the directive'.[95] The adoption of a directive by a legitimate authority provides a content-independent reason for compliance. In cases where the subjects of authority directives recognize two or more institutions or actors as legitimate authorities, it is not possible for the subjects of the authority directives to resolve the conflict. Nor is there any meta-perspective from which to judge the various assertions of authority and conclude which should apply. The only possibility is for the conflict to be resolved (if it is resolved) by the modification of one or more of the directives by the respective authorities in light of the conflict. It is for subjects to determine which authorities are recognized as possessing the right to rule, in respect of which issues; it is for the legitimate authorities to resolve conflicts between normative systems. An authority directive can only be modified by an authority following reflection on the fact of the competing regulatory directive, which itself constitutes the legitimate exercise of political authority in the interest of subjects.

6. Conceptualizing UNDRIP within the framework of the service conception

The UN Declaration on the Rights of Indigenous Peoples contains extensive rights of political participation for indigenous peoples that differ from the regime elaborated in the Universal Declaration on Human Rights and the dominant conception of political justice that emphasizes the equality of individuals within the sovereign state. The rights to autonomy and self-governance for indigenous peoples and extensive rights of political participation (including the principle of free, prior, and informed consent) are difficult to reconcile with the democratic procedural model of political justice aligned with attempts to justify and legitimize the rule of sovereign law in the present day. The same cannot be said in relation to Raz's service conception of authority, which provides that legitimate political authority is established where the authority is better placed than subjects to adopt regulatory directives that guide the actions of subjects in accordance with their interests and preferences, whilst maintaining a space for individual self-determination. Three conclusions, inter alia, follow from a reliance on the service conception. First, the authority of the state is not established in relation to all those under its control. Second, legitimate political

93 Raz, *supra* note 68, at 1020.
94 Ibid., at 1021.
95 Ibid., at 1022.

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authority depends on the acceptance of the normative authority by each subject on the policy issue under consideration. Third, we can understand the laws, traditions, and customs of indigenous peoples as valid systems of governance without subjecting them to the 'taken-for-granted' authority of the state-law system. These conclusions provide the basis for a revised conceptual understanding of the 'authority' of the state in relation to indigenous peoples.

First, the service conception does not understand legitimate political authority as sovereign authority. There is, then, no difficulty in the UN Declaration on the Rights of Indigenous Peoples recognizing the laws of indigenous peoples as valid normative systems of governance in the same way as the democratic state-law system. In this context, UNDRIP refers variously to the 'laws, traditions and customs' of indigenous peoples,[96] their 'customs, traditions, rules and legal systems',[97] and the 'juridical systems or customs' of indigenous peoples.[98] The term 'juridical' is coterminous with the term 'legal' and the idea of indigenous customs includes the customary laws of indigenous peoples.[99] UNDRIP provides that indigenous peoples have the right to 'maintain and strengthen their distinct political, *legal*, economic, social and cultural institutions'.[100] The idea of an institution includes the regulation of social, economic, and political life through the laws, traditions, and customs adopted or recognized by the political and legal institutions of indigenous peoples.[101] The emphasis is on the collective regulation of the life of the community through indigenous self-governance regimes.[102] Where indigenous peoples recognize the authority of the state, it is an authority; equally where indigenous peoples accept the authority of an indigenous self-governance system, it is an authority for them.

Second, it is possible for indigenous peoples to recognize the authority of indigenous governance systems and the authority of the state, and for the authority of the state not to extend to all matters of social, economic, and political life over which it claims jurisdiction. The service conception explains the ability of indigenous peoples to accept or reject the assertion of normative authority ('jurisdiction') by the state – generally, and in relation to certain policy issues. This is a right of all putative subjects, but the distinctive identities of indigenous peoples suggest this is

96 Arts. 11(2) and 27, UNDRIP.

97 Art. 40, UNDRIP.

98 Art. 34, UNDRIP.

99 The Conference of the Parties of the Convention on Biological Diversity defined customary law as 'law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws'. Adopted by CBD COP 7, Decision VII/16, para. I (6) (c).

100 Art. 5, UNDRIP (emphasis added). The provision must be read in light of Arts. 18, 20, and 34 of UNDRIP. There is no express right to 'create' institutions, although the right of indigenous peoples to self-determination provides a right to 'determine their political status' (Art. 3, UNDRIP). Once established, indigenous peoples have the right to 'maintain and strengthen' relevant political and legal institutions.

101 The UN Declaration on the Rights of Indigenous Peoples further provides that indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures: Art. 33(2), UNDRIP.

102 See Arts. 34 and 35. Art. 34, UNDRIP establishes that 'Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.' Art. 35, UNDRIP establishes that 'Indigenous peoples have the right to determine the responsibilities of individuals to their communities.'

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more likely in areas relating, for example, to the cultural practices of the group, as well as issues around the use of land. UNDRIP accepts that indigenous peoples can recognize the authority of the state and the authority of indigenous self-governance regimes, with the subjects of the authority regimes (i.e. indigenous peoples) delimiting their respective competences of the normative systems.[103] UNDRIP provisions on autonomy and self-governance combine to allow indigenous peoples the ability to delimit the scope and boundaries of authority of the state.[104] The judgement as to whether indigenous peoples accept the authority of the state is not undertaken on a case-by-case basis: where indigenous peoples recognize the authority of the state on a particular issue, the state is an authority.

Third, where indigenous peoples recognize the authority of the state, there might be additional conditions required for the exercise of political authority for the state to be recognized as a legitimate authority, given the historical marginalization of indigenous peoples from political life and significant differences in their world view, interests, preferences, and perspectives – and without which, indigenous peoples will not regard the state as an authority. The UN Declaration on the Rights of Indigenous Peoples follows the democratic procedural model of legitimacy in relation to the political authority of the state. In the language of the service conception, citizens (including indigenous citizens) accept the political authority of the state providing that certain democratic institutions and practices are in place (at least this is the understanding of UNDRIP and other international human rights law instruments). The Declaration on Indigenous Peoples recognizes a right for indigenous peoples to participate fully, if they so choose, in the political, economic, social, and cultural life of the state,[105] including on matters that affect their rights, through representatives chosen by themselves in accordance with their own procedures.[106] The Declaration emphasizes the epistemic qualities of democracy and requires that the state obtain the consent of indigenous peoples before adopting or implementing legislative or administrative measures that will affect the subjects of those directives. In the practice of democracy, given that a right of political participation *simpliciter* will not protect indigenous peoples from the threats posed by laws and policies that reflect the economic, social, and cultural norms of the dominant majority group, UNDRIP establishes that indigenous peoples have a right of veto on the adoption of policies *they* regard as deleterious to their ways of life. Consequently, whilst indigenous peoples might recognize the qualities of a political system based on principles of equality, deliberation, and consensus, they will not accept any principle

103 See Arts. 3, 4, and 5, UNDRIP.

104 Art. 3, UNDRIP establishes that indigenous peoples have the right to self-determination. Art. 4 establishes that, in exercising their right to self-determination, indigenous peoples have 'the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions'.

105 Art. 5, UNDRIP: 'Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.'

106 Art. 18, UNDRIP: 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.'

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of majority rule on issues around, for example, the regulation of the cultural life of the group, the use of traditional territories, and indigenous self-governance practices. In the language of the service conception, the state-law system must recognize the principle of free, prior, and informed consent, before indigenous peoples will accept the authority of the state on issues important to them.

Fourth, in cases of normative conflict between *recognized* authorities on an issue within their jurisdictions, the conflict cannot be removed by subjects, and there is no reason to recognize any a priori hierarchy between normative systems, in particular no reason to conclude that the sovereign authority of the state should prevail over indigenous laws. The conflict can only be removed through internal reflection within each normative system as to whether it has regulated in accordance with the reasons that apply to subjects or by external engagement with other normative systems in order to remove the conflict. Where there is a conflict between the laws of the state and the laws of indigenous peoples, the conflict can be removed by one or other of the regimes changing its authority directives in light of the conflict, accepting it has failed to regulate in accordance with the reasons that apply to subjects, or by agreement through bilateral deliberations to a modification of one or more of the competing directives. This understanding perhaps explains the focus on the collective aspect of political participation in UNDRIP.[107]

A final complexity is introduced when the international human rights law regime is taken into consideration. Consider, for example, Article 34 of UNDRIP: indigenous peoples have the right to promote, develop, and maintain their juridical systems or customs, 'in accordance with international human rights standards'. The provision suggests that indigenous peoples are subject to the authority of human rights in the same way the state is subject to the international human rights law regime. We might explain this by concluding that 'human rights' are implied by the service conception, which establishes that normative power is only legitimate where exercised in accordance with the interests of subjects. Raz accepts that fundamental human rights are a basis for challenging authority directives.[108] The concept of fundamental rights is not, however, defined by Raz, and this argument appears to be focused on the domestic political cultures of liberal and democratic states, and not on legitimate political authority more generally, with Raz outlining a different function for 'human rights' in the international community in subsequent writings.[109]

The authority of international human rights law is provided (at least in part) by the authority of international law (following the service conception).[110] Whilst the

107 Art. 18, UNDRIP.

108 Raz, *supra* note 63, at 46. See also footnote 64 of this article.

109 According to Raz's interventionist account, human rights delimit the circumstances in which it is appropriate for those outside the state to take an interest in the internal affairs of the state, disabling any claim that sovereignty should cloak those with political power from external interest and intervention: J. Raz, 'Human Rights without Foundations', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010), 321 at 331. Human rights are, according to the interventionist account, sovereignty-limiting measures, and we should not confuse legitimate political authority with state sovereignty, which limits the permissibility of outsiders interfering in the affairs of a state, even when the state is wrong: ibid., at 328. See also J. Raz, 'Human Rights in the Emerging World Order', (2010) 1 *Transnational Legal Theory* 31.

110 States recognize the importance of maintaining inter-state contractual bargains (*pacta sunt servanda*); the value of developing norms through the collective experience of legal actors in the absence of a centralized

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exact content of the human rights obligations of states remains the subject of doctrinal and theoretical debate, there is no question that states recognize at least some minimum human rights obligations under international law. The same cannot be said in relation to indigenous peoples. Even if we could establish that the system of positive international law (on its own self-understanding) imposed human rights obligations on indigenous peoples, this article has demonstrated the difficulties in asserting a right to regulate the position of indigenous peoples (and others) by reference to sovereign authority. Further, the service conception establishes that indigenous peoples can only be subject to the authority of the international human rights law regime where they recognize that the human rights regime is better placed to identify the culturally determined reasons that apply to indigenous peoples than the indigenous peoples themselves. The participation of indigenous peoples in the agreement of the text of the UN Declaration on the Rights of Indigenous Peoples (if not in its formal adoption by the General Assembly) may be significant, particularly as the same formulation concerning the limitation of indigenous self-governance by reference to international human rights appears in the draft Declaration, which was not subject to formal approval by states.[111] The question as to the authority of human rights over indigenous peoples must, though, be asked in relation to each community and, in the absence of the acceptance of human rights by indigenous peoples, international human rights law instruments cannot impose limits on the self-governance regimes of indigenous peoples.[112] That is not to suggest that individuals subject to the authority of indigenous self-governance regimes will not seek to rely on human rights in internal political and legal arguments or that indigenous regimes will not be influenced by human rights norms – simply that international human rights law does not establish normative limits on the self-governance regimes of indigenous peoples. In this context, UNDRIP must be seen as conceptualizing an understanding between states and indigenous peoples that 'international human rights' constitute an inherent limit on exercise of political authority.

7. Conclusion

The emergence of an international law on indigenous peoples and adoption of a UN Declaration on the Rights of Indigenous Peoples confirm that indigenous peoples

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authority (customary international law); and the importance of a coherent system of general international law, reflected in the acceptance of the authority of international law and the norms and principles of general international law. See J. Tasioulas, 'The Legitimacy of International Law', in Besson and Tasioulas, *supra* note 109, at 97.

111 Cf. Art. 33, United Nations Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities: Draft United Nations Declaration on the Rights of Indigenous Peoples, adopted 26 August 1994, 34 ILM (1995) 541.

112 Where a self-governance regime is established under the constitution of the state, the regime is subject to international human rights law (as a matter of international law). The state is not responsible under international law for the autonomous legal systems of indigenous peoples, although it is responsible for any failure to regulate activities within its jurisdiction that result in a violation of human rights. See Commentary on Article 5, Articles on Responsibility of States for Internationally Wrongful Acts (with commentaries), in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), reprinted in J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002).

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are subjects of international law and that states and international organizations and institutions have correlative obligations in relation to indigenous peoples, including in relation to the rights of political participation and self-governance. The philosophical and jurisprudential reasoning for these developments is not clear, however – consider, for example, arguments that the legitimacy of the moral claims of indigenous peoples are grounded in the facts of the historical injustice of colonization and dispossession of territories; of 'being first'; of cultural difference, understood in terms of an association with land; and/or the existence of indigenous self-governance institutions with social, economic, and political life regulated in accordance with indigenous laws, traditions, and customs. One response might be to observe that positive international law creates its own legitimacy – legitimacy as legality. It would, though, be problematic, even allowing for the participation of indigenous peoples in the drafting of UNDRIP,[113] to conclude that an expression of global political justice in relation to indigenous peoples could emerge only through an exercise of 'sovereign authority' (membership in the United Nations is reserved for states, and it was the UN General Assembly that adopted UNDRIP), given that the idea of 'sovereignty' was constructed in contradistinction to the imagined identities of the indigenous populations of the Americas. Moreover (and for the same reason), whilst many of the rights in UNDRIP establish correlative duties on the part of states, the concept of 'indigenous peoples' cannot be defined exclusively by reference to the (prior) existence of the state; nor can the exercise of normative power over indigenous peoples be grounded in some idea of 'sovereign authority'.

The objective of this article was to evaluate the extent to which Raz's service conception of authority could provide a conceptual framework within which to make sense of the international-law regime on indigenous peoples. The service conception makes clear that there are no universal criteria for establishing authority, and the nature of legitimate authority will vary from place to place, and from time to time, depending of the political culture of the community in question (understood in its broadest senses). Further, there is no difficulty in recognizing the existence of multiple and overlapping authority regimes – indeed the adoption of UNDRIP can be seen as a recognition of a need to address the complexities that confront indigenous peoples in their everyday lives, whereby persons belonging to indigenous communities accept the authority of the state but are reluctant to defer to majoritarian practices and affirm the salience and importance of self-governance for indigenous groups. The normal justification thesis explains the conditions for recognizing the validity and limits of the respective regimes and the ways in which normative conflict (including conflict with human rights norms) can be addressed, if not resolved.

113 See, generally, L. Miranda, 'Indigenous Peoples as International Lawmakers', (2010) 32 *University of Pennsylvania Journal of International Law* 203; also K. Knop, *Diversity and Self-Determination in International Law* (2002), at 260–5; and C. Charters, 'A Self-Determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy Making', (2010) 17 *International Journal on Minority and Group Rights* 215.

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There is no doubt that the UN Declaration on the Rights of Indigenous Peoples is a significant instrument for indigenous peoples.[114] This article has shown that it is also significant for legal and political theory and for understanding such concepts as legitimate political authority, including sovereign authority. UNDRIP makes clear that international lawyers – as with their domestic counterparts – can no longer understand the idea of (global) political justice – if they ever could – in terms of a limited democratic procedural model applied exclusively to the 'sovereign' state. Sovereign authority does not establish legitimate political authority, nor does it exclude other claims of authority. The scope of authority (or boundaries of jurisdiction) of the state are not defined by an assertion of sovereign authority but by the acceptance of the right of the state to rule on the particular subject issue under consideration (understood in terms of the general recognition of authority, and not acceptance on a case-by-case basis).

The analysis developed in this article, drawing on Raz's service conception, not only allows us to make sense of the UN Declaration on the Rights of Indigenous Peoples in terms of a coherent model of political theory, in contrast with, for example, the 'liberal democratic' approach (above),[115] but also in terms of the way UNDRIP limits the normative power of the state over indigenous peoples. It also allows us to recognize the authority of indigenous self-governance systems without reference to the sovereign authority of the state. Perhaps the central insight concerns the perspective from which we evaluate authority. Whilst conflicts of normative systems must be resolved by recognized authorities, the establishment (and maintenance) of authority is constituted by the recognition of authority by subjects. From this we can make sense of the overlapping legal and normative regimes that structure the social existence of human persons, including indigenous peoples, without the requirement for recourse to some hypothetical social-contract model to justify the use of coercive power by the governmental institutions of the state (and if there is one lesson from history, it is that the capacity to commit violence cannot justify the use of violence). In other words, we have a good starting point for constructing a concept of global justice without the need to frame the idea in terms of the taken-for-granted authority of the state and its right to rule those under its power.

114 The UN Special Rapporteur on Indigenous peoples, James Anaya, has asserted that UNDRIP 'represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law': Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Human Rights Council, UN Doc. A/HRC/9/9, 11 August 2008, para. 85.

115 See *supra* notes 30–2 (and accompanying text).

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