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## Indigenous Peoples and the Politics of Founding

### *Ludy tubylcze i polityka założycielska*

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**Abstract:** The article examines the “foundings-beyond-origins” framework as proposed by Angélica Bernal in her 2017 book, *Beyond Origins: Rethinking Founding in a Time of Constitutional Democracy*. While accepting Bernal’s arguments about the prevailing vision of founding a political order, she posits that the realities of power de-authorise political origins. This form of politics proposes a model of engagement between Indigenous Peoples (IPs), nations, tribes and communities and hegemonic political orders based on self-determination, autonomy, self-government and consent. These concepts are the cornerstones of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). At the heart of this politics is the “axiom of indigeneity”, a proposition that bases political origins on populations, customs, territoriality and time. The fact that societies that existed prior to the founding of contemporary political orders have survived the realities of power gives meaning to the idea of indigeneity.

**Keywords:** Indigenous Peoples, political order, UNDRIP, consent, self-determination, autonomy.

**Streszczenie:** Artykuł analizuje podstawy porządku politycznego („założenia-poza-pochodzeniem”) opracowane przez Angélicę Bernal w jej książce z 2017 r., *Beyond Origins: Rethinking Founding in a Time of Constitutional Democracy*. Przyjmując argumenty Bernal dotyczące dominującej wizji podstaw porządku politycznego, zakłada się, że realia władzy unieważniają pochodzenie polityczne. Ta forma polityki proponuje model zaangażowania między ludami tubylczymi, narodami, plemionami i społecznościami a hegemonicznymi porządkami politycznymi na podstawie samostanowienia, autonomii, samorządności i zgody. Koncepcje te są kamieniami węgielnymi Deklaracji Praw Ludów Tubyl-

czych ONZ (DPLT). U podstaw tej polityki leży „aksjomat rdzenności”, propozycja, która opiera polityczne pochodzenie na populacjach, zwyczajach, terytorialności i czasie. Fakt, że społeczeństwa, które istniały przed powstaniem współczesnych porządków politycznych przetrwały realia władzy, nadaje znaczenie idei rdzenności.

**Słowa kluczowe:** Ludy tubylcze, porządek polityczny, UNDRIP, zgoda, samostanowienie, autonomia.

## 1. Introduction

This article attempts to clarify the boundary between myth and history in relation to political origins. In the context of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), it examines the common understanding of founding and the critique developed by Angélica Bernal (2017). A ‘founding’ is the birth of a nation, an original moment of creation from which a regime and its people are said to exist. The problems caused by a ‘dominant vision of founding as an authoritative binding origin’ relate to a political narrative, to historical accounts and to a political practice. Bernal’s analytical framework identifies three problems in this dominant vision: original authority, the lawgiver and the people, and democratic self-constitution. Her framework is grounded on a notion of politics that makes clear that it is a dimension of social life; as such, politics shows the contestable and constantly ongoing character of political origins. Bernal’s approach reveals contestation over unity, incompleteness over consolidation, creative unsettlement over perpetual binding, and ongoing foundation building over singular beginnings. Bernal portrays politics as innate to human societies and therefore dynamic and contentious. This approach emphasizes the progressive, complex (i.e. diverse) and contentious elements that politics brings to communities.

Informed by Bernal’s insights, this paper posits a politics of alterity in which the realities of power – conquest, civil war, revolutions, revolts, protests, social movements, and constitutional conventions – de-authorize political origins. This form of politics proposes not only a counterpoint to the study of the “foundings- beyond origins framework”, but also a model for engagement between indigenous peoples (IPs), nations,

tribes, and communities. This model is based on the concepts of self-determination, autonomy, self-government, and consent as outlined in the UNDRIP. Furthermore, the model assumes a politics of alterity based on concepts that seek to address the inherent inequalities, exclusions and dispossessions of political foundings. The axiom of alterity politics is 'indigeneity': the politics and study of indigenous communities, tribes and nations. This is a political axiom, an issue for contemporary political systems and a challenge to narratives of political origins. Indeed, indigeneity as a political axiom is a universally accepted proposition, a postulate that can be taken as true and, thus serve as a premise for further arguments. In relation to political origins, the axiom of indigeneity is supported by a notion of time. Contingencies emerging from power as a source of inequality, exclusion and dispossession are inherent in the authority, legitimacy and consensual claims of political foundings. However, the fact that societies pre-date political origins gives substance to the term „since time immemorial” and supports the notion of indigeneity. The axiom of indigeneity is the starting point for a politics of alterity that can address the inequality, exclusion and dispossession of collectives with customary institutions, geographical bases and historical and political legacies.

In section 1, this paper provides an overview of how different disciplines have explained the formation of political communities. Section 2 presents the problems and implications of the common view of founding. It is argued that an analysis of founding that relies on 'the people' and 'their institutions' and has only a weak notion of time (i.e., the passing of time) is incomplete and unable to fully capture the contemporary problems of democracy in pluricultural societies. Section 3 explains how IPs can challenge the narrative of founding as an explanation and justification for a political order, and presents the UNDRIP model.

## **2. Approaches to the Study of Political Origins**

Different disciplines have taken different approaches to the question of how IPs can be democratically integrated into nation-states while supporting and empowering them to realise self-government, cultural autonomy and territorial control.

Debates about political origins or foundings stem from constitutionalism and political theory. The “general conception of founding”, originating from the contractual tradition of John Locke and Jean Jacques Rousseau, has been used to legitimise the exercise of state power and the creation of polities. Constitutions, a clear result of foundational invocations in constitutional democracies, have the status of a legal document that not only establishes political authority, but also introduces the rule of law, institutions of governance and fundamental rights. As a concrete manifestation of the social contract, a constitution is an expression of a contract of origin that creates a new political community through a voluntary agreement between equal parties (Bernal, 2017: 31). A constitution appeals to three “foundational invocations” – events, ideals and Founding Fathers – to assert and legitimise political claims, establish consensus and civic unity, and buttress the authority and sovereignty of the state.

Historians have presented founding events as sites of contested politics, identities, and rhetoric (Sanchez and Stuckey, 2000); historians have highlighted some of the problems behind founding events such as exclusion, inequality, contention, conflict, and war. The discipline has confronted political origins and exposed the realities of power in recurrent debates about the meanings of a founding event in the past and in the present.

The study of nation formation identifies founding events and accounts of political origins as constructed phenomena and analyses their role in unifying contemporary citizens. It has been argued that a people or nation “is not born at the moment when a declaration pronounces the independence of a colony, or a constitutional text proclaims a new, legally constituted political order, but rather through the symbols that evoke the imagination and effect of citizens to forge themselves into members of a shared nation”. Similarly, by focusing on the collective that make up a political community, studies of ‘peoplehood’ provide insight into the formation of a people (Smith, 2003). If a ‘people’ is a group that is relatively stable, durable, distinctive, encompassing, self-reproducing, and, at least ideally, self-governing, then the founding defines an extraordinary moment of beginning that constitutes ‘the state’ and ‘its people’ and binds them together in a fundamental way that ensures the day-to-day stability

of a political community (Bernal, 2017; Smith, 2003; 2015). Peoplehood means “the founding of ‘a people’ as a political community” and answers fundamental questions about political origins. The claim to constitute a ‘people’ is a specific kind of political claim that is shaped by the intertwining of 1) understandings of popular sovereignty, 2) understandings of diversity in language, religion, culture, people and nations, and 3) political reorganisation.

The roles of particular cultural norms and ways of life in political liberalism have developed into various approaches. A restrictive approach claims that the likelihood of a liberal society doing justice to diversity lies in drawing a “fairly clear” “line” between what is truly public, that is, the constitutional and legal rules that govern the whole of society, and what is private, in the sense of matters of individual and community conscience and commitment” (Rawls, 1993 in Young, 1998: 497). A less narrow approach (Taylor, 1994) argues that the political recognition and maintenance of particular cultures is incompatible with liberalism, since liberalism demands a universality of rights, i.e. “laws that apply equally to all” (Young, 1998: 496). A more open approach (Kymlicka, 1989) argues that the values of political liberalism are compatible with and require the constitution of cultural rights, which may include special rights for endangered or oppressed cultural minorities. Key to this argument is the recognition of individual rights to cultural membership, and thus „to the maintenance of the culture of which one is a member” (Young, 1998: 496). The extent to which the term culture is appropriate for describing contemporary diversity has been enhanced by debates on interculturalism as “a paradigm for thinking about diversity” (Abdallah-Preteille, 2006: 475; Taylor, 2012; Meer and Modood, 2012) or as a „key concept in the discussions and interventions of specialists and administrators relating to educational, health, legal, and territorial policies for indigenous populations” (Hecht et al., 2016: 231).

Furthermore, postcolonial theory, which builds on debates about the legitimacy of colonial power, is a useful way of approaching political origins. Like multiculturalism, postcolonialism addresses alterity by focusing on issues such as recognition, reparation and sovereignty (Gilroy,

2008). Studies of the „coloniality of power” have emphasised the founding in terms of both a historical transatlantic rule and a form of constitutional republic (i.e., „internal colonialism”). Internal colonialism suggests that certain populations (i.e. IPs) remain in a situation of vulnerability and domination by the manifold logics of subjugating power. The fact that the identity of IPs is a result of coloniality forms the basis for the assertion that indigeneity is a political axiom of the political order. In the twentieth century, the problems arising from the establishment of constitutional republics were addressed through policies of acculturation, assimilation and multiculturalism.

Finally, as global corporations have sought to accommodate IPs within states, supporting and enabling them to realise self-government, cultural autonomy, and control over their territories, the concept of political origins has received an infusion of ideas from international and human rights law (Charters and Stavenhagen, 2009; Allen and Xanthaki, 2011; Pulitano, 2012; IJHR, 2019). In IP research, ‘founding’, as the initial moment in which a political community is created, takes place in already inhabited territories. The protagonists of these pre-founding moments are ‘peoples’ with their own identities, institutions, and cultural understandings of origins. As Champagne noted, indigenous communities are “a different kind of social system from the multicultural, market-based nation-state, where culture and religion would be largely removed from the political process” (2013: 19), and indigenous history “does not start with recognition at the beginning of the nation-state” (2013: 11). Research within indigenous peoples studies has shown that the founding is a contentious and dynamic point of origin. Within these studies, there are several approaches to the identification of IPs (Corntassel, 2003; Schulte-Tenckhoff, 2012) and determining their status in relation to sovereignty, settler colonialism and biopolitics (Rifkin, 2009; Morgensen, 2011; Calleros Rodríguez, 2015). For instance, settler colonialism is an example of the processes of biopower as theorised by Giorgio Agamben, who “explains IPs’ seemingly contradictory incorporation within and excision from

the body of white settler nations” (Morgensen, 2011: 52). In applying Agamben’s concepts to the experiences of IPs (Rifkin, 2009: 90), sovereignty is confronted with the status of Native Peoples in North America.

### **3. Founding and Political Order**

#### **The common view of founding**

A founding is 'the birth of a nation, an original moment of creation after which a regime and its people are said to exist' (Bernal, 2017: 1). It is this “common vision” of the foundation of the political order that informs politics and constitutional law. This conception refers to “the original event at which a constitution is drafted and a democracy attains legal identity and political authority”. The function of the founding is to be a “point of consensus, agreement and civic unity” as much as a “source of universally binding commitments, beyond and above ordinary politics”.

Founding defines the birth of a political community, an event from which a community is no longer a colony or a loose amalgamation of individuals in ‘a 'state of nature’. It is the most definitive and supreme moment of a constitutional democracy, through which it attains the foundations of political order: the founding establishes the rules of the game, establishes political authority and legitimacy, and forges a political ‘we’ that binds and unites a people for an eternal future (Bernal, 2017: 2). This authoritative beginning presents the founding as a singular, paramount moment of origin and creation that establishes the foundations of democracy: laws, institutions, rights, legitimacy, and authority. The result of this ‘authoritative beginning’ is the projection of the founding event as the anchor of a foundationalist authority and legitimacy.

The foundationalism that stems from this authoritative beginning establishes the grounds for politics and laws based on a truth that as it is self-evident, it omits argumentative demonstration (Bernal, 2017: 4). First consequence of this idea of foundationalism is the depoliticization of questions of constitutional authority. The immunity of original founding events from critical examination, from claims of persistence injustice, and from exclusions and injustices make original political arrangements rather con-

tentious in character. Second consequence is the uncritical legitimization of potentially undemocratic politics, in which contemporary political actions and demands are authorised on the basis of the unquestioned authority and legitimacy of the original founding events and actors. Thus, the common view of founding “renders flat contingency and power struggle in the making of political orders”, and “masks the disagreements, conflicts, injustices, violences, and exclusions present in the original founding events of constitutional democracies” (Bernal, 2017: 2). On this basis, Bernal claims that ‘foundings’ are inappropriate as authoritative beginning for a constitutional democracy simply because it offers a distorted and mythologized view of the origins of a political order (2017: 4; also Dahl, 2001). Finally, it is important to note that the features of foundationalism above mentioned centre the discussion on two elements of a political community: ‘a people’ and their ‘institutions’.

### **Founding Beyond Origins: The Politics of Underauthorized Authorization**

Bernal has developed a critique centred on a political conception of founding that defines founding action “as constitutive action that transforms and reshapes the foundations or constitution of a political order” (2017). This notion assumes that the political order is far from authoritatively settled or grounded; rather, it is “underauthorized”, and prompts us to reconsider the relationships between foundings, authority, and politics”, as seemingly established authority may have “many cracks at its base”. The source of these cracks is politics, as any attempt to declare the authority of a political order as neatly established at its origin is belied by “messy, conflictual, real-world politics” (Bernal, 2017: 10). Furthermore, because they take place in the media of politics, foundings are underauthorized. The “politics of underauthorized authorizations” is a mode of addressing the problems and politics of founding in constitutional democracies, that addresses the fact that “the foundations of political orders, especially their sense of authority and legitimacy, are necessarily incomplete and open to disagreement” (Bernal, 2017: 11).



### **Underauthorized Political Order**

Founding beyond origins defines political origins as underauthorized: incomplete, uncertain, and unstable. In this perspective, it is politics that underauthorizes political foundations (Bernal, 2017: 12) due to the passing of time, conflict, disagreement, and the people.

Firstly, the passing of time means that no constitutional design 'will deliver an institutional and political system that at its origins can completely and fully accommodate what might be necessary for its continued functioning and acceptance by its members'. Politics takes place within time bringing changes in political and legal arrangements. In the necessary reconstruction and interpretation of the original founding events, the old institutions may no longer be fit for purpose, and new values and interpretations of the original principles will emerge that better express the commitments of citizens (Bernal, 2017: 12).

Secondly, conflict and disagreement, as features of founding politics, resist political settlements and constitutional agreements, contributing to the underauthorized nature of political origins. As politically constituted phenomena, foundings create political order, collective action, and organization, but also conflict and disagreement.

Thirdly, 'the people' is a notion that is intended to unify, yet at the same time it evades unification. Indeterminate, uncertain and unstable, it resists closure and thus testifies to the openness of democracy. Although it is a figure of self-authorization, it is also a figure of underauthorization (Bernal, 2017: 12).

### **The Dual Function of The People**

'The people' has a dual character: a quality as a political category of consensus-building, but also one of fracture and dissent. 'The people' is not only the supreme source of authority and a universalist category representing the collective, but also a category of opposition. Indeed, 'the people' is a figure of fracture, dissent and exclusion; it is a verification of those who stand outside an existing political order and are excluded from it. After all, 'the people' are those whose needs remain unfulfilled (Bernal, 2017: 13; Dussel, 2008). Bernal suggests rethinking founding politics as

a “politics of underauthorization” through “claims and political actions that challenge the unstable and incomplete authority of an existing political order, often from a precarious or insufficiently authoritative place within it”. Underauthorized authorizations thus define an alternate politics of founding centred on a reconceptualization of the relationship between authority and constituent actors. As an analytical framework, the political conception of founding and the politics of underauthorized authorizations focuses on people and the constituted political order.

### **Recasting the Problems of Founding**

Three political problems arise from this alternative vision of the founding: authority (the problem of original authority), legitimacy (the problem of the lawgiver and the people), and dissent (the problem of democratic self-constitution).

The problem of disputed authority (i.e. original authority) refers to the status of a historical event as a moment of founding grounded on the original authority of a founding event, text and actor(s). Authority is necessarily incomplete due to an inherent element of any society: politics as the basis of political authority, is constantly confronted with competing political accounts and forces that emphasize its relative character and question its universal appeal. One group’s exalted constitutional founding may be a moment of capitulation, imposition, or illegitimate democratic debacle for another (Bernal, 2017: 11). This calls into question the paramount status granted to political and legal origins and the legitimacy of that status in a constitutional democracy (Bernal, 2017: 14). Authority is thus politicized by the persistence of injustices and exclusions from equal participation and decision-making.

Another underauthorizing element of a political order is legitimacy, which touches on the unstable and uneasy relationship between the founders and the constituent publics (problem of the lawgiver and the people). For Bernal, founding processes often reveal a dichotomy between those who propose, formulate and enact foundational change (i.e. the founders) and those who stand behind, support and accept or reject these changes (i.e. the people). This dichotomy permeates the relationship

between leaders and constituent publics (2017: 15). The problem of legitimacy is one of incomplete consolidation, which centres on the 'uncritical legitimization of political order and the potentially undemocratic politics done on the basis of the incontrovertible authority and legitimacy of original founding events and actors'. Legitimacy is a perennial problem for the political order and a springboard for resistance to political settlements and constitutional agreements. Moreover, politically constituted foundings create new forms and moments of collective action and organisation based on conflict and disagreement, leading to the delegitimization of a given political order. A third underauthorizing element of a political order is dissent. The issue of democratic self-constitution raises the question of the legitimate authority of the people. Thus, when it is claimed that the founding of a constitutional democracy is the greatest moment and the shared point of origin, "there are competing political accounts and forces that underscore its relative nature". At issue is the construction of the people's constituent power and the persistence of exclusion long after a founding event. Alongside the images of constituent assemblies in which victorious, decisive actors claim to represent the 'will of the people', there are a diversity of voices "that beg to differ" (Bernal, 2017: 15).

These dilemmas of authority, legitimacy and dissent mark the underauthorized features of the political order. Any attempt to declare that a political order is neatly established at its origin is at odds with real-world politics. The founding-beyond-origins framework politicizes the question of constitutional authority to address long-standing injustices, inequality, and exclusion from participation and decision-making. Although this framework "expands the analysis to include a broader set of actors, sites, and dynamics implicated in founding and refounding processes" (Bernal, 2017: 227), it is centred on people, their institutions, and an implicit notion of the passing of time. This implicit notion is that an "authoritative beginning" implies that founding is a matter of the past, not the present or future; that a political order is a house built by others, a house in which we are only tenants and residents, not builders.

#### 4. Undrip's Approach to Political Origins

Since the founding marks a political origin, it is commonly seen as a “point of consensus, agreement and civic unity” and a “source of universally binding commitments that transcend ordinary politics”. As an authoritative moment, it establishes something supreme in the life of a constitutional democracy, its supreme law and a set of political principles, rights and values that anchor its continued life. The foundings-beyond-origins framework shifts the focus from an analysis of foundings as constitutional settlements, to the emergence of unsettlements and thus to the incompleteness of founding processes (Bernal, 2017: 227). This alternative view focuses on politics and therefore privileges contestation over unity, incompleteness over consolidation, and creative unsettlement over perpetual binding. However, this framework is mainly concerned with a general understanding of ‘the people’ and “the rise of new institutions, laws, norms and political values” (Bernal, 2017: 227). Furthermore, a notion of time explained through politics is understood as the unsettling factor. The analytical possibility of understanding the “underauthorized character of preexisting politics and emergent constituent ones” is offered by the UNDRIP, which attempts to give a new “home” to “a people”, their institutions, their physical environment and, of course, their notions of time, and reformulates the problems of unsettled and incomplete political origins.

#### UNDRIP

UNDRIP represents an internationally agreed understanding of the minimum content of the rights of IPs, based on international human rights law. It contains a set of principles and norms that recognise and establish the fundamental rights of IPs within the international normative system, affirms the long legacy of IPs in international law, and places IPs within international arenas to promote their interests and support their physical and cultural survival. The UNDRIP was approved by the United Nations General Assembly. As an outcome of international diplomacy, it emerged from “negotiations between indigenous peoples and states, bet-

ween states and also between indigenous peoples” (Charters and Stavenhagen, 2009: 12). Moreover, because the Declaration aims to recognise, protect and promote the rights of indigenous and tribal peoples, it contradicts the assumption that IPs have no place in international law or in the international community (see Eide, 2009). Building on international human rights law, it recognises IPs’ rights as inherent and comprehensively covers civil, political, economic, social, cultural, and environmental rights (Charters and Stavenhagen, 2009: 13). Elaborating on these rights enables open participation in international forums and imposes obligations on states, international organisations and intergovernmental bodies (Diaz, 2009; Picq, 2018). Furthermore, as a norm-setting instrument (Trask, 2012), it expands the human rights paradigm by explicitly referring to the right to self-determination, incorporating collective rights and expressing an understanding of the interrelationship between rights to heritage, land and development (Engle, 2011: 142). Similarly, the UNDRIP places IPs in an international context within the international human rights system (Gómez Isa, 2019), recognising their legal and political existence as subjects of international law, with specific rights and obligations, in particular the right to self-determination (UNDRIP Article 3; also ICCPR, ICESCR). Although the UNDRIP is not binding, compliance with its provisions is an essential prerequisite for ensuring its implementation at international, regional and national level (Gómez Isa, 2019) and for ensuring compliance by states (Burger, 2019; Lenzerini, 2019; Phillips, 2015).

## **5. UNDRIP and a critique of the foundings-beyond-origins framework**

Bernal’s framework presents authority, legitimacy, and dissent as problems of an underauthorized political order. However, her focus is limited to the people, their institutions, and a tenuous notion of time passing. As it addresses long standing injustices, exclusion, and inequalities, UNDRIP attempts to democratically accommodate IPs, and, in so doing, provides an analytical standpoint from which to examine the problems of founding. More specifically, it refers to time as a way of clarifying and unmasking past and present undemocratic politics, and asserting the

existence of a multiplicity of founding actions and actors. Thus, Bernal's "underauthorized authorizations" fails to highlight the complexities of the people and their institutions (alterity, collective rights), and the relevance of time (in terms of perpetuity or continuity), the ecosystem (land, territory, and natural resources), and the relevance of the international order. In Bernal's "underauthorized authorizations", the people and their institutions are at the centre of the problems of authority, legitimacy and dissent. Although membership of a political community is contested in the foundings-beyond-origins framework, the diversity of 'the people' (i.e. ethnicity, religion, or language, for instance) requires explanation in terms of alterity and collective rights.

### **The People: Alterity, Collective Rights, and Equality**

Alterity recognises the past experiences of particular groups who may have varying degrees of confidence in a governing political order. Above all, alterity is not fictional, anecdotal or accidental. Indigeneity is the result of conquest and colonisation between the fifteenth and nineteenth centuries. The rise of constitutional republics in the Americas in the nineteenth century shows how "states were established over IPs and communities without their consent and without even considering that such consent was required" (Clavero, 2009). Secondly, alterity is a feature of political communities. The 'people' is rarely a homogeneous mass, but a collection of individuals whose characteristics bring them together in different and even contradictory ways. Thirdly, since the integration of specific groups into a broader society is not only a matter of national politics, this issue has also received international attention. The International Labour Organisation (ILO) conventions on Indigenous Populations and the United Nations have addressed the obstacles to the integration of IPs (Eide 2009). A politics of alterity is the basis for a new relationship between IPs and states, in which indigenous and state legal and political systems coexist respectfully against a background of colonialism, oppression and imposition (Eide, 2009). A politics of alterity is based on "harmonious and cooperative relations" between IPs and states and on the principles of justice, democracy, respect for human rights, non-discrimination, and good

faith. Through a politics of alterity, the UNDRIP has sought to strengthen the distinctiveness of indigenous societies within the institutional framework of existing states.

The recognition of collective rights is a recognition of the fact that the IPs' rights and identities are exercised collectively as peoples: these rights and identities are based on relationships to land and cultural practices that include rituals and languages as much as economic and political systems (Henriksen, 2009). The recognition of these rights also implies the realization of plurality within 'the people'. The UNDRIP affirms that the IPs' rights and identity are exercised and realized collectively, as 'peoples' (Montes and Torres Cisneros, 2009; Henriksen, 2009). This shows that collective rights are compatible with the contemporary international understanding of human rights, thus challenging the individual-centered perspective that dominates constitutionalism and political theory. The concept of collective rights introduced by the UNDRIP is the first international standard that does not focus primarily on the individual. This ensures that the rights recognized under international standards and laws are accepted and applied to IPs without qualification or exception (Eide, 2009; Henriksen, 2009; Montes and Torres Cisneros, 2009). In this way, IPs can enjoy the human rights and freedoms that are common to all, while also gaining recognition of indigenous historical and specific rights (Diaz, 2009). Nevertheless, the UNDRIP attempts to reconcile group and individual rights (Montes and Torres Cisneros, 2009: 159) by prioritizing human rights. Thus, while IPs have the right to preserve, promote and develop their distinctive customs, spirituality, traditions, procedures and practices, these must be in accordance with international human rights standards (Eide, 2009: 43). Both alterity and group rights are understood in terms of legacies that value the role of time in understanding political origins as historical experience.

Furthermore, equality refers to the extent to which the rights recognized for all peoples under international laws and principles are also recognized and applied to all members of a people without restriction or exception. Alterity implies equal rights on the basis of respect for differences and compliance with human rights (Diaz, 2009). Equality demon-

trates its most important aspects through self-determination (SD): the rights of IPs to preserve their cultural identity, to have collective authority over decisions regarding the land and territory in which they live, and to determine the nature and scope of development activities within that territory (Eiden, 2009: 45). All other rights in the Declaration operate on the principle of SD (Henriksen, 2009).

### **The Ecosystem**

A discussion of political origins cannot ignore the importance of the territorial basis of a political community. By drawing attention to the territorial basis of a political community, the UNDRIP contributes to the analysis of political origins. Physical elements such as land, territory and natural resources have been the locus of IPs' struggles. Indigeneity challenges the authority, legitimacy and consensual aspects of a territorial base, thus leading to a debate on territorial integrity vs. indigenous territory and/or historical restitution and compensation.

There are a number of elements to consider here. Firstly, the UNDRIP interprets "territorial integrity" in relation to the territory of states and efforts to guarantee and protect the IPs' territorial integrity; it defines territory (Article 25) and recognises the concept of "indigenous territory" (Article 26).

Secondly, the UNDRIP considers a people's traditional physical environment as an ecosystem in which they develop a communal life. This environment – the lands, territories and natural resources – has been defined by dispossession and the threat of dispossession (Montes and Torres Cisneros, 2009: 163). The core of indigenous peoples' struggle is the assertion of their rights over traditional lands, territories and resources that the states in which they live deny the existence of, or do not legally recognise (Henriksen, 2009: 83; Rapporteur). A number of provisions in the UNDRIP address the issue of lands, territories and natural resources: articles 25, 26, 28, 32 and 46.1.

Thirdly, the term „from time immemorial” is relevant in regard to the relationship of IPs to the lands, territories and natural resources that “they have traditionally owned, occupied or otherwise used or acquired”.



With its strong reference to time, this term raises the issue of the states' obligation to provide restitution for lands, territories and resources that IPs have 'lost' in the distant past.

Fourthly, the UNDRIP recognises IPs' right to reparation through restitution or compensation for the land, territories and resources that they have traditionally owned or otherwise occupied or used and that have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent (Article 28). This right raises two problems that the UNDRIP has sought to prevent: the problem of the territorial integrity of states or the political unity of existing states (Article 46.1) and the 'breadth of indigenous demands' or the scope of the category 'territories'. Finally, this recognition of rights and procedures for the redress and resolution of third party interests also includes issues of strategic resources located on historical and/or traditional indigenous territories (Montes and Torres Cisneros, 2009: 159).

Land, territories and natural resources are therefore central to understanding political origins, which impact on issues such as territory (territorial integrity of existing states vs. indigenous territory) and redress (restitution and compensation). Since consent (free, prior and informed) and autonomy are mechanisms through which these issues can be addressed, the ecosystem is a constitutive part of political origins.

The ecosystem, as a space for IP-State relations with the state requires Free, Prior and Informed Consent (FPIC) to assert indigenous rights over lands, territories and resources (Article 32). The requirement for FPIC in relation to natural resources, whether for conservation or development (Article 32), is recognised in the UNDRIP as a right for IPs and an obligation for states (Carmen, 2009). This expectation of FPIC states that IPs have the right to veto projects they deem harmful and to challenge the public policies of states (Montes and Torres Cisneros, 2009; Eiden, 2009). While autonomy confirms the centrality of consent in matters affecting the ecosystem, the degree of autonomy that states are willing to recognise and the degree to which they are likely to retain authority over specific regions varies.

### **Time: Contingency, Continuity, and Perpetuity**

Politics takes place within time, bringing changes to political and legal settlements, and to reconstructions and interpretations of original founding events (Bernal, 2017: 12). Time has different dimensions in political origins: no established political order can entirely accommodate what may become necessary for continued functioning and acceptance. As new needs arise, old institutions may no longer be appropriate and new values and interpretations emerge that better express the realities of citizens.

The contingency of time means that a constituted political order faces new needs. This is the notion of “the passing of time” that reveals how the founding has distorted the past, masked “undemocratic politics in the present”, and privileged some founding actions and actors at the expense of others. Contingency reveals a crucial problem with political origins: “No amount of careful design will deliver an institutional and political system that at its origins can completely and fully accommodate what might be necessary for its continued functioning and acceptance by its members.” The passing of time reveals the contingent nature of founding, and thus calls into question the assumption of perpetual binding to a constituted polity. Contingency raises the issue of political change, and refutes claims of the End of History.

Furthermore, the notion of “time immemorial” refers to customs, plurality, ancestry, indigeneity and territoriality. The notion of IPs as collective peoples who have inhabited geographical areas since time immemorial, predating the foundation of constitutional republics, complicates founding narratives. This notion of time which appeals to an ancient past, materialises in the present in the form of indigenous traditions and ways of life as much as in the legacies of violent conquest and colonisation. Time immemorial exhibits the limits of Bernal’s critique in three respects. Firstly, in regard to the plurality of a ‘people’ who is distinct from other sections of a national community: time immemorial acknowledges this plurality recognising IPs as collectives with distinct social, economic, cultural customs, traditions, as well as political institutions. Secondly, time immemorial honours a collective descent of peoples that predate political origins. Thirdly, time immemorial refers to the legacies of violence expe-

rienced by populations subjected to forms of political conquest or colonisation. Finally, the notion of time immemorial further exhibits the limitations of Bernal's critique, as it recognises the geohistorical characteristics of 'peoples' who are descendants of societies that experienced conquest or colonisation in the past. Peoples are regarded as indigenous because they are descended from populations that inhabited a country or geographical region at the time present state boundaries were established. Thus, historical continuity challenges the founding narrative.

### **'The People' and the International Order**

Questioning a founding narrative implicitly acknowledges that political communities exist within an international order. The UNDRIP established a basis to internationally guarantee and protect the rights of indigenous peoples through a politics of alterity and to address obstacles to the integration of indigenous peoples into the broader society alongside the ILO conventions on IPs and the UN (Eide, 2009). International recognition of plurality expands the right to SD. The scope and content of the right to SD for certain members of 'the people' assumes that SD can help preserve their cultural identity and assume collective authority over decisions relating to land and territory. According to the UNDRIP, equal rights and sustainable development should be ensured through respect for differences and compliance with human rights legislation (Diaz, 2009). Article 3 explicitly recognises IPs as fully entitled to SD. The key aspects of SD are collective authority over the nature and scope of development activities in relation to the land and territory in which they live and the right to preserve cultural identity (Eide, 2009: 45).

### **Contradiction and Limitations**

By examining and internationally recognising the complexity of 'the concept of 'people'', the UNDRIP provides a thorough counterpoint from which to analyse not only the problems with the common view of founding, but also the limitations of the alternative approach proposed by Bernal (2017). The Declaration recognises that the territorial basis of the people politicises the entire ecosystem. Instead of a tenuous notion of 'the

passing of time', historical continuity (of communities, institutions, and territorial presence) informs a notion of founding that acknowledges the pre-existence of IPs. Although the UNDRIP goes beyond other international legal instruments in terms of recognising the rights of indigenous peoples, and despite its analytical and political strength, a limitation of the UNDRIP is that it "adds no new rights but rather is simply a statement of what already exists in customary international law" (Engle, 2011: 163). Furthermore, it "does not address indigenous political, cultural, and territorial claims on a government-to-government or culture-to-culture basis" (Champagne, 2013). An even more significant limitation is the significant discrepancy between formal proclamations and their enforcement (Gómez Isa, 2019: 16). Critics have also pointed to contradictions in the UNDRIP's approach (Gómez Isa, 2019; Champagne, 2013; Glenn, 2011; Engle, 2011), such as its basis in international law and the fact that it expresses indigenous rights within a non-indigenous framework (Glenn, 2011). Another reported contradiction is the "uneasy compromise between irreconcilable principles of social action" (Engle, 2011: 163): while UNDRIP has expanded collective rights to culture and self-determination, it has also been accused of limiting SD and collective rights (Engle, 2011: 144-148). For instance, although it is anchored on the principle of SD, it does not recognise the IPs right to independent statehood (Cambou, 2019: 45). Therefore, "the rights of indigenous peoples to SD, under the UNDRIP, must be implemented in accordance with the principle of territorial integrity and political unity of sovereign states" (Cambou, 2019: 45). Despite these contradictions and limitations, the UNDRIP does provide an analytical framework within which the struggles of indigenous peoples can be analysed.

## 6. Alterity and Undrip's Model of Engagement

As relations between IPs and states reflects ongoing, contestational, unsettled, and incomplete political origins, the notion of indigeneity grounded in the UNDRIP can address these problems analytically. A politics of alterity, based on international human rights law, appeals to culturally-distinct peoples with their own customary institutions and tradi-

tional territorial bases and conceptualizes them as collective groups who participate equally in the governing institutions under which they live. It is thus a politics based on plurality in terms of peoples (i.e. different collectives) and territory (i.e. a territorial base), as well as on the recognition of historical continuity (i.e. from time immemorial). A politics of alterity, grounded in the UNDRIP and anchored in particular in the concept of SD, offers a model for engagement between IPs and states.

### **Self Determination**

This model of engagement refers to a people, territory, state/society, and the international order, acknowledging “diverse collective units with different identities” that can participate equally in the governing institutions under which they live (Cambou, 2019: 45). The cornerstone of this model is the SD’s contention that human beings (individuals and groups) are equally entitled to be in control of their own destiny and live within the institutional orders that are designed accordingly. Moreover, the UNDRIP assumes that IPs have the right to freely determine their political status and pursue their economic, social and cultural development (UNDRIP Annex, 2007), as they have the possibility to exercise SD (Montes and Torres Cisneros, 2009: 157). SD connects with debates on founding: the UNDRIP has recognised IPs’ right to freely determine their political status and pursue their economic, social and cultural development (UNDRIP Annex, 2007), in the context of their coexistence with states (Montes and Torres Cisneros, 2009: 156).

However, the principles of territorial integrity and political unity of sovereign states mark two limits. First, „all peoples” have the right to freely determine their political status and pursue their economic, social and cultural development (UNDRIP Annex, 2007), as SD refers to the people and thus implies sovereignty. However, as the UNDRIP opposes colonialism, the affirmation of the sovereignty of indigenous peoples excludes secession from existing states. The recognition of IPs as fully entitled to SD is a way to prevent discrimination and oppression and to correct historical injustices. Recognising the right to SD for particular groups within ‘the „people”’ does not entail a secession of ‘the „people”’ but ensu-

res “forms of guaranteed autonomies” with a certain international guarantee that these will be respected (Eide, 2009: 41). The integrity of the „people” raises two issues: First, the scope and content of the right to SD to particular members of ‘the people’ so they can preserve their cultural identity to have collective authority over decisions related to their lands, territories and resources. Secondly, the effects of the recognition of rights of SD to particular groups within ‘the people’. Neither implies the right to secession. The concept of SD in the UNDRIP is “in accordance with the principle of territorial integrity and political unity of sovereign states” (Cambou, 2019: 45), from which it follows that the right to independent statehood of IPs is not recognised.

In a politics of alterity, SD engages IPs with the international order. The coexistence of IPs and states in the UNDRIP is approached in terms of SD within international law. Distinct peoples within a state should be recognised and incorporated on agreed terms, with consultation, cooperation and relationship building based on SD. The right to SD for IPs within the international human rights framework refers to the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Charter of the United Nations. This places IPs on an equal footing in the exercise and enjoyment of their rights. Prior to 2007, ILO Convention 169 was the only international instrument that specifically provided for the recognition of the rights of indigenous peoples.

### **Autonomy**

In this model of engagement, autonomy refers to an agent's capacity to act with “the degree of independence and control over its own internal affairs that an autonomous entity generally enjoys” (Hannum and Lillich, 1980). Autonomy is therefore a way of endowing a group with “actual powers and resources to govern itself within a state” (see Sanders, 1986). Political science has identified two dimensions of autonomy. The institutional dimension applies to deeply divided societies that include autonomy into their constitutions through power-sharing. Autonomy is an example of consociational democracy (Lijphart, 2004), which is understood as a collective feature that states that groups in societies with deep

ethnic and other divisions have the power to govern their own internal affairs. The second dimension is territorial: federalism or decentralisation is a solution for “divided societies with geographically concentrated communal groups” (Lijphart, 2004: 104). Thus, autonomy can be a mechanism for resolving tensions and redistributive issues between a central government and spatially concentrated, culturally diverse groups. However, in “divided societies in which communal groups are not geographically concentrated”, such as societies with religious divisions, autonomy is not territorially conditioned (Lijphart, 2004). In indigenous studies, autonomy is based on ‘a people’, their institutions, and their territorial base. Autonomy implies either the defence or reconstitution of indigenous identities, traditional ways of life and traditional territories within existing state institutions (see González, Burguete, Ortiz, 2010; García Aguilar, 2009; Bartolomé, 2009; Díaz Polanco, 2006). In this model of engagement, autonomy is addressed through the recognition of distinct cultures (i.e. institutions rooted in time immemorial) and territories. Therefore, autonomy involves institutions or “spheres of governmental or administrative authority appropriate to their circumstances” (Anaya, 2004). Autonomy, like self-government (SG), refers to communal management and internal decision-making (Hannum and Lillich, 1980). Indeed, autonomy recognises the IPs' right to retain – de facto or de jure – autonomous institutions of governance and endows a group with “actual powers and resources for self-governance within a state”. Moreover, autonomy refers to territory by recognising diversity and alterity in geography (land and resource use). Indigenous movements striving to gain autonomy have demanded full recognition of their rights over traditional territories and natural resources. Therefore, autonomy is a “form of internal self-determination” that provides a group with “actual powers and resources for self-governance within a state” (Siroky and Cuffe, 2015: 4).

### **Self-Government**

In this model of engagement, SG is crucial for the achievement of SD. The core premise of SG is that government must function according to the will of the people being governed (Steinberg, 1978). The ideal be-

hind the founding of modern representative institutions has been the “self-government of the people” (Przeworski, 2009). There is thus a theoretical link between SG and consent (Przeworski, 2009; Steinberg, 1978): SG is achieved through political institutions that reflect “specific cultural patterns” and that allow the governed to be “genuinely associated with all decisions affecting them on an ongoing basis” (Anaya, 2004: 112). Both SG and autonomy refer to autonomous decision-making and the communal management of internal affairs (Hannum and Lillich, 1980). As “ways and means for financing their autonomous functions”, communal internal affairs also refer to SG (UNDRIP Article 4). In this model, SG refers to a ‘people’, a population with a cultural identity, and therefore implies a right to culture (Anaya, 2004), while acknowledging internal conflicts and diversity within communities (see Bartolomé, 2009; Lisbona, 2005; Medina Hernández, 2009). This model also touches on territory: a population with a cultural identity implies a territorial base. Since the protection of a culture often requires the protection of a land base (Sanders, 1986: 20), a right to SG implies a right to land as much as to culture. This model also touches on institutions. IPs are not only peoples with ‘a cultural identity’ who have a right to institutions rooted in traditional customs and practices, but their SG also implies a ‘double thrust’: a coexistence of their institutions with national institutions. This coexistence requires a balance between the need for the development of indigenous institutions (autonomy) and the development of the community within a larger society. Finally, it also means supporting the development of autonomous indigenous institutions by affirming their participation in the larger political order and enabling them to “achieve a meaningful SG”.

### Consent

This model of engagement promotes the recognition and practice of FPIC. In political theory, what is accomplished by the giving of consent is the right and duty of the consenting party to permit the exercise of those rights. The granting of consent is an intentional permission freely given by an autonomous, rational agent: it means “nothing more than granting another the right to act in a certain way” (Plamenatz, 1968: 18). In res-



response to fears of exploitation, development and use of territories and/or resources by extractive industries, conservation and/or development projects, the UNDRIP uses consent to enable IPs to have a say over the potential social and environmental impacts of a project. Consent highlights three communal aspects of IPs: 1) their existence as collective entities, 2) their collective rights over traditional lands, territories and natural resources, and 3) their collective cultural heritage and forms of internal organization. In relation to land and territory, FPIC also points to three aspects: 1) the possibilities of exploration, development, and use of territories and/or resources for extractive industries, conservation and/or development projects (PFII, 2005). 2) IPs have the right to have a say in all potential social and environmental impacts of a project. 3) IPs have the right to approve or reject projects that may affect them, their lands, territories or ecosystems. Consent is defined in the UNDRIP as a process of consultation in relation to indigenous lands, territories and resources: a process of gathering information, views and opinions for consideration in consultation and decision-making processes. A collective decision to grant or withhold consent is achieved through community consultation and participation (PFII, 2005). For peoples with a territorial base and a relationship with their physical environment from „time immemorial”, FPIC is therefore a potentially useful tool for collective survival in terms of cultural heritage and forms of internal organization, as well as for redressing legacies of continued exploitation, discrimination, oppression and violation of rights to traditional lands, territories and natural resources. The right of IPs to FPIC is concretized in Article 32(2). Although consent has an international dimension that highlights rights over traditional lands, territories, and natural resources in relation to external actors (i.e. public or private), some states resent the recognition and exercise of FPIC, arguing that “to recognise this right would be to give indigenous peoples a right of veto over state decisions” (Montes and Torres Cisneros, 2009: 158). While the granting of consent for an indigenous community is a collective (communal) decision made without interference from external actors, it is often a response to external proposals for the protection or use of territories and natural resources. The result of consent is often the collective decision to

grant or deny it (PFII, 2005). The recognition and practice of FPIC has been promoted in international law by ILO Convention 169 and the Convention on Biological Diversity (CBD). Finally, the right to FPIC touches on forced displacement and relocation in Article 10, the right to reparation, including restitution, and respect for cultural, intellectual, religious and spiritual expressions in Article 11, the right to consultation on legislative measures in Article 19, the right to compensation and/or restitution of lands in Article 28, and finally the right to environmental protection in Article 29.

## 7. Conclusions

This article contends that indigenous peoples offer both an analytical and an empirical perspective from which to analyze the contemporary problems of founding a political community. Indeed, 'founding' is an idea that defines the formation of a political community as an event from which a group of people, a community, ceases to be a loose association of individuals in "a state of nature". In the prevailing views of founding, unity, consolidation, and perpetual bindings appear to be innate to a political community. In contemporary political systems, dominant views on "founding" are not just historical accounts, but narratives and practices that define the birth of a nation or state and the identification of a political entity.

However, the founding is a problematic idea. Indeed, the projection of the founding event as the anchor of a political community's authority and source of its legitimacy is rarely a settled matter. Instead, contested accounts, narratives and practices undermine the founding moment, the political origin of that community.

The 'founding beyond origins' framework (Bernal, 2017) provides an effective critique to dominant views of the founding. In this framework, politics is seen as innate to human societies – societies are thus dynamic and contentious. By focusing on the 'political', the framework exhibits the contestable and continuously ongoing character of political origins. In this framework, the idea of 'founding' is challenged by problems of authority, legitimacy and dissent. As an alternative vision,

founding beyond origins privileges contestation over unity (authority), incompleteness over consolidation (legitimacy), and creative unsettlement over perpetual binding (dissent). For these are the problems of an underauthorized political order when faced with prolonged injustice, inequality, and exclusion from the life of a political community.

To interrogate the findings beyond origins framework, this article draws on the experiences of indigenous peoples in constitutional democracies as set out in international human rights law (UNDRIP). The conclusion is that Bernal's framework is limited in explaining the ways in which particular groups de-authorize the foundation of a political community. This framework only accounts for problems of authority, legitimacy and dissent. As these are problems related to 'a people' and its 'institutions', the complexity of the people and its institutions (alterity, collective rights), the importance of time (in the sense of permanence or continuity), the ecosystem (land, territory and natural resources) and the importance of the international order are not considered. The article also points out that the authorization of a political community can be achieved through a model of engagement between indigenous peoples and states based on the concepts of self-determination, autonomy, self-government and consent as set out in the UNDRIP.

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