The Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH) and the Control of Indigenous Culture: A Critical Comment on Power and Indigenous Rights

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THE CONVENTION FOR THE SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE (CSICH) AND THE CONTROL OF INDIGENOUS CULTURE: A CRITICAL COMMENT ON POWER AND INDIGENOUS RIGHTS

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ABSTRACT

The Preamble of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH) recognizes the connection between indigenous peoples and intangible cultural heritage. The convention indicates that part of its mission is to protect the intangible cultural heritage of indigenous peoples against the processes of globalization and social transformation. The convention, however, has been critiqued for the manner in which it attempts to manage intangible cultural heritage, with critics charging that the convention fosters a power structure that favors states and thereby threatens to marginalize indigenous peoples from control over their own cultures. Such criticism raises a question as to what changes should be made to rectify the power inequalities of the CSICH to aid indigenous peoples. This Article responds to this question, and follows the convention's critiques by using the theories of Michel Foucault to evaluate the power structure created by the CSICH and identify what types of changes to the convention would benefit indigenous peoples.

INTRODUCTION

The preamble of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH) recognizes the connection between indigenous peoples and intangible cultural heritage.[1] The convention stresses "that communities, in particular indigenous

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   1. Convention for the Safeguarding of the Intangible Cultural Heritage pmbl., Oct. 17, 2003, 2368 U.N.T.S. 3 [hereinafter CSICH].

communities . . . play an important role in the production, safeguarding, maintenance and re-creation of the intangible culture heritage."[2] In doing so, the CSICH orients itself as an international legal instrument intended to assist indigenous peoples in the preservation of their respective cultures. As part of its mission, the CSICH seeks to protect the intangible cultural heritage of indigenous peoples against "the processes of globalization and social transformation."[3] The convention identifies globalization as giving rise to the "deterioration, disappearance and destruction of the intangible cultural heritage."[4]

Ostensibly, the CSICH sees the protection of intangible cultural heritage as having significance not for indigenous cultures alone but also for the world as a whole, with its text noting that there is a "universal will and [a] common concern to safeguard the intangible cultural heritage of humanity."[5] The convention, however, has been criticized for the manner in which it attempts to manage intangible cultural heritage. In particular, with respect to indigenous peoples, critics charge that the convention fosters a power structure that favors states and thereby threatens to marginalize indigenous peoples from control over their own cultures.[6]

Such criticism raises the issue of what changes, if any, should be made to rectify the power inequalities of the CSICH to help indigenous peoples exercise control of their own respective cultures. The analysis in the following sections seeks to address such a topic, and addresses the convention's critiques by appropriating the theories of Michel Foucault to evaluate the power structure created by the CSICH and identify what types of changes to the convention would benefit indigenous peoples. The discussion begins with a brief summary of the CSICH and the critiques against it, proceeds with a framing of the CSICH within Foucault's theories, and then applies Foucault to identify the dangers posed by the convention's power structure in regards to indigenous peoples, and from such insights, recognizes the types of changes that are more favorable to indigenous control over their own intangible cultural heritage.

I. The CSICH and Its Critiques

The Convention for the Safeguarding of the Intangible Cultural Heritage was a product of the thirty-second session of the United

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2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Paul Kuruk, *Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage*, 1 Macquarie J. Int'l & Comp. Envtl. L. 111, 128 (2004); Federico Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples*, 22 Eur. J. Int'l L. 101, 111–12 (2011).

Nations Educational, Scientific, and Cultural Organization (UNESCO) held in 2003.[7] The convention seeks to recognize and protect intangible cultural heritage at local, national, and international levels.[8] It defines "intangible cultural heritage" as "practices, representations, expressions, knowledge, skills" and associated physical objects used by "communities, groups, and . . . individuals" as a part of their cultural identity.[9] The convention notes that intangible cultural heritage is transient in that it "is constantly recreated by communities and groups."[10] The convention places indigenous peoples at the center of its concern, expressly stating "that communities, *in particular indigenous communities* . . . play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage."[11]

For the present analysis, discussion will be streamlined by having the term "practice" used as a collective reference to the intangible cultural heritage covered by CSICH Article 2's "practices, representations, expressions, knowledge, skills" and associated physical objects.[12] In addition, when discussing indigenous peoples, the analysis will use "communities" and "groups" interchangeably to reference the Article 2's "communities and groups," such that "indigenous community" and "indigenous group" share the same meaning of a collective of indigenous people who self-identify as sharing a common identity and culture.[13] Furthermore, in discussing the intangible cultural heritage of indigenous peoples, the discussion follows Article 2 in interpreting intangible cultural heritage as a practice done by either groups or individuals, with indigenous individuals having the same capacity as indigenous groups to create and express indigenous culture.[14]

While it may appear comprehensive, the CSICH circumscribes itself in two ways. First, it constrains itself under the international human rights system, stressing that it covers intangible cultural heritage only to the extent that it "is compatible with existing international human rights instruments."[15] Second, while the convention seeks the protection of intangible cultural heritage to serve a "general interest to humanity,"[16] it does not claim humanity in

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7. CSICH, *supra* note 1, pmbl.
8. *Id.* art. 1.
9. *Id.* art. 2, ¶ 1.
10. *Id.*
11. *Id.* pmbl. (emphasis added).
12. *Id.* art. 2, ¶ 1.
13. CSICH, *supra* note 1, art. 2, ¶ 1.
14. *Id.*
15. *Id.*; Lucas Lixinski, *Selecting Heritage: The Interplay of Art, Politics and Identity*, 22 Eur. J. Int'l L. 81, 84 (2011).
16. CSICH, *supra* note 1, art. 19, ¶ 2.

general has an interest in a particular culture's heritage.[17] Rather, it asserts that humanity's interest is in the protection of all local— including indigenous—cultures and the collective forms of heritage associated with each one,[18] with the understanding that both a culture and its cultural practices are worthy of protection.[19] Attendant with such understanding is a recognition that a particular expression of culture constituting indigenous heritage still belongs to the indigenous group responsible for it.[20] The valuation of cultural heritage under the CSICH does not follow an "objective" standard in terms of being evaluated by all humanity but instead follows a "subjective" standard in terms of being evaluated by the indigenous group that creates and practices such heritage.[21]

In terms of implementation, the convention requests performance by parties at both international and national levels.[22] At the international level, it charges parties with international cooperation in the form of "the exchange of information and experience, joint initiatives" and a financial mechanism to help parties safeguard intangible cultural heritage.[23] The convention also calls upon state parties to maintain a "Representative List of the Intangible Cultural Heritage of Humanity" and a "List of Intangible Cultural Heritage in Need of Urgent Safeguarding."[24]

At the national level, implementation calls upon each state party to "take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory."[25] This includes promoting, protecting, studying, and enabling access to intangible cultural heritage;[26] educating the general public and local communities about the content and conditions of intangible cultural heritage;[27] and mirroring the international lists of intangible cultural heritage by compiling "inventories," with each state party maintaining a list of intangible cultural heritage within its borders.[28]

Ostensibly, the CSICH asserts that state parties "shall endeavor to ensure the widest possible participation of communities, groups

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17. Lixinski, *supra* note 15, at 95.

18. *See id.*

19. *See* Michael F. Brown, *Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property*, 12 INT'L J. CULTURAL PROP. 40, 47 (2005).

20. JANET BLAKE, COMMENTARY ON THE UNESCO 2003 CONVENTION ON THE SAFE-GUARDING OF THE INTANGIBLE CULTURAL HERITAGE 35 (2006).

21. Lenzerini, *supra* note 6, at 108.

22. CSICH, *supra* note 1, pmbl.

23. *Id.* arts. 19, ¶ 1, 25.

24. *Id.* arts. 16, ¶ 1, 17, ¶ 1.

25. *Id.* art. 11.

26. *Id.* art. 13.

27. *Id.* art. 14.

28. CSICH, *supra* note 1, arts. 12, 16–17.

and . . . individuals" in fulfilling their functions.[29] The involvement of local cultures is emphasized in a supporting resolution issued by the convention's state parties in 2010 calling for greater community outreach in awareness, education, and commercial activities.[30] The resolution also declares that states "shall endeavor to ensure . . . that the rights of the communities, groups and individuals" in relation to their "cultural heritage are duly protected."[31] Such language suggests an inclusive spirit welcoming indigenous groups within the CSICH's structure.

Such a reading, however, is superficial and a deeper reading of the convention's language shows it to be a largely state-centric instrument, organizationally and textually. Organizationally, it employs a structure comprised of a General Assembly and an Intergovernmental Committee, both of which are comprised solely of states.[32] Textually, with the wording of "shall endeavor" in Article 15, and its supporting 2010 resolution, the CSICH does not create a legal duty for state parties to include communities, groups, or individuals but instead only a duty to try to do so.[33] Because oversight over state parties under the convention are held by the General Assembly and the Intergovernmental Committee, states are essentially only accountable to other states.[34] In addition, under the language of the CSICH, communities, groups, and individuals—indigenous or otherwise—cannot by themselves initiate safeguarding of intangible cultural heritage with the state nor oppose state decisions regarding intangible cultural heritage.[35] While the 2010 resolution asks that state parties obtain "free, prior and informed consent" from communities, groups, and individuals, such a call applies only for awareness-raising activities and creates no legal duties to do so by using wording stating only that "all parties are encouraged" rather than required.[36] Moreover, the convention specifies that state parties are the only entities with the power to create and maintain the convention's national inventories and international lists of intangible cultural

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29. *Id.* art. 15.

30. *See* UNESCO, *General Assembly of the State Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage on its Third Session*, ¶¶ 100–07, 116–17, U.N. Doc. ITH/10/3.GA/CONF.201/Resolutions Rev. (June 22–24, 2010) [hereinafter *G.A. of CSICH*].

31. *Id.* ¶ 104.

32. CSICH, *supra* note 1, arts. 4–5.

33. *Id.* art. 15; Lenzerini, *supra* note 6, at 111–12.

34. Francesco Bandarin, *International Trade in Indigenous Cultural Heritage: Comments From UNESCO in Light of Its International Standard-Setting Instruments in the Field of Culture*, *in* INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES 316 (Christopher B. Graber et al. eds., 2012).

35. Kuruk, *supra* note 6, at 128.

36. *G.A. of CSICH*, *supra* note 30, ¶ 101.

heritage.[37] The effective sum of such textual wording is that each state party retains authority over intangible cultural heritage within its borders and that all state parties collectively maintain dominance over the international cultural heritage mechanisms of the convention, leaving local—including indigenous—cultures subordinate to the power of states within the CSICH.[38]

Even when local cultures are included, their roles are limited under the safeguarding mechanisms of the CSICH that asks states to use "competent bodies," "studies," "legal, technical, administrative, and financial measures," and "institutions" in conjunction with experts and representatives.[39] Under the CSICH, a state party has the power to choose which experts and representatives it will work with to fulfill such activities, essentially granting a state control over which local perspectives are included in safeguarding activities, and thereby allowing a state to select only those experts and representatives who conform to the preferences of the state's political elites.[40] While the 2010 resolution grants consent and control to communities over state awareness-raising activities, states still retain control over national inventories, international lists, and safeguarding of intangible cultural heritage.[41]

Such a state-centric hierarchy of power creates several issues that threaten its goals. First, the use of state-controlled national inventories and international lists of intangible cultural heritage opens threats in terms of the potential marginalization of indigenous interests, in that the state can choose and classify cultural practices for the inventories and lists in accordance with state preferences.[42] Second, inventories and lists imply a desire to "preserve" culture, with labels placed on the list taken to represent definable cultural practices.[43] But this means fixing a cultural practice and tying its manifestation to a particular incarnation expressed at a specific moment in time, and locking that incarnation to a particular phrase on an inventory or list, something which scholars like Lucas Lixinski analogize to "mummification," and Edward Bruner equates to archiving, with the attendant implication of cultural heritage as being "disappearing" practices known only to previous times.[44] This is

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37. CSICH, *supra* note 1, arts. 11–12; Kuruk, *supra* note 6, at 128; Lixinski, *supra* note 15, at 82.

38. *See* Kuruk, *supra* note 6, at 128; Lixinski, *supra* note 15, at 82, 94.

39. *See* CSICH, *supra* note 1, art. 13; Kuruk, *supra* note 6, at 126–28.

40. *See* Lenzerini, *supra* note 6, at 112.

41. *See G.A. of CSICH*, *supra* note 30, ¶ 101; Lixinski, *supra* note 15, at 97–98.

42. *See* Lixinski, *supra* note 15, at 98–100.

43. *See id.* at 87–89.

44. *See* Edward M. Bruner, *The Maasai and the Lion King: Authenticity, Nationalism,*

particularly problematic for indigenous peoples, who have historically been subjected to representation as an exotic "other" or "primitive" reflective of a less civilized past[45] and dependent on non-indigenous support for survival.[46] Such connotations of "mummification," archiving, practices lost to the past, and non-indigenous patronage contradict the CSICH's own assertions of intangible cultural heritage as being transient and "constantly recreated by communities and groups" in the present, independent of the non-indigenous world.[47]

The above problems lead to a third issue, in that because states control what forms of intangible cultural heritage are placed on the CSICH's national inventories and international lists, it makes cultural practice subject to state perceptions of indigenous peoples.[48] For indigenous peoples, the placement of indigenous culture under state interpretations of indigenous culture poses two specific problems: (a) under the history of colonialism, states all too often employed images that satisfied colonial perceptions of "authentic" expressions of "primitive" societies and a subsequent normative association of "primitive" societies being somehow inferior;[49] and (b) during the post-colonial era, states exploited indigenous culture to comply with a nationalist narrative, adapting and modifying indigenous culture to fulfill the state's attempts to legitimize itself.[50] As a result, state control over indigenous culture under the CSICH echoes the historical experiences of indigenous peoples, which is rife with colonial oppression, and the resulting legacies of imperialism that subordinated indigenous peoples to non-indigenous interests.[51] Such issues have analogues in the modern era in that states can often operate to serve the interests of elites,[52] and thus, threaten to perpetuate

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and Globalization in African Tourism, 28 AM. ETHNOLOGIST 881, 887, 898 (2001); Lixinski, *supra* note 15, at 98.

45. *See* MELANIE K. SMITH, ISSUES IN CULTURAL TOURISM STUDIES 3 (2003); Siegrid Deutschlander & Leslie J. Miller, *Politicizing Aboriginal Cultural Tourism: The Discourse of Primitivism in the Tourist Encounter*, 40 CANADIAN REV. SOC. & ANTHROPOLOGY 27, 30 (2003).

46. *See* Bruner, *supra* note 44, at 895.

47. CSICH, *supra* note 1, art. 2, ¶ 1; *see also* Bruner, *supra* note 44, at 898; Lixinski, *supra* note 15, at 98.

48. Lixinski, *supra* note 15, at 82.

49. *See* Deutschlander & Miller, *supra* note 45, at 30, 39.

50. *See* Lorraine V. Aragon, *Copyrighting Culture for the Nation? Intangible Property Nationalism and the Regional Arts of Indonesia*, 19 INT'L J. CULTURAL PROP. 269, 277, 300, 304 (2012).

51. *See* KEN S. COATES, A GLOBAL HISTORY OF INDIGENOUS PEOPLES: STRUGGLE AND SURVIVAL 18–19 (2004); LAW, HISTORY, COLONIALISM: THE REACH OF EMPIRE 1–2 (Diane Kirkby & Catharine Coleborne eds., 2001); RECLAIMING INDIGENOUS VOICE AND VISION xvi–xvii (Marie Battiste ed. 2000).

52. *See* Lenzerini, *supra* note 6, at 113.

the imperialist past by continuing the historical subjugation of indigenous culture by non-indigenous elites.

Fourth, the act of having inventories and lists of intangible cultural heritage risks creating a normative distinction, with practices that are listed being perceived as having greater value than those that are not listed.[53] This is problematic because the content and meaning of inventories and lists are subject to the perceptions and judgments of the state parties, and hence make evaluation of indigenous cultures subject to the perspectives of non-indigenous entities rather than the indigenous peoples responsible for creating them.[54] This contradicts the mission of the CSICH, which asserts that state parties to the convention hold only an interest in the *safeguarding* of intangible cultural heritage, while communities, groups, and individuals hold the actual interest in the substance of their own culture.[55]

II. FRAMING THE CSICH WITHIN FOUCAULT[56]

The following discussion appropriates Foucault's notions of discourse to provide a descriptive analysis of the CSICH and its critiques as a reflection of asymmetric power relations hosted by the CSICH that skew power over cultural heritage in favor of states and away from indigenous peoples.[57] A Foucauldian analysis commences with a recognition of the CSICH as a "discourse."[58] Foucault saw "discourse[] . . . as practices that systematically form the objects of which they speak."[59] Discourse can be speech, writing, acts, or symbols that generate frameworks within which people interact.[60] Within a

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53. *Id.* at 110.

54. *See id.* at 111–13.

55. *See* BLAKE, *supra* note 20, at 35; Lixinski, *supra* note 15, at 95.

56. The following section draws heavily from the author's previous works, entitled "Human Safaris: A Foucauldian Alternative to the Law's Treatment of the Indigenous Andaman Jarawa" and "Using Foucault to Construct Normative Guidelines for an Ethics of Tourist-Indigenous Encounters." *See* Jonathan Liljeblad, *Human Safaris: A Foucauldian Alternative to the Law's Treatment of the Indigenous Andaman Jarawa*, 18 AUST. INDIGENOUS L. REV. 6 (2014/2015) [hereinafter Liljeblad, *Human Safaris*]; Jonathan Liljeblad, *Using Foucault to Construct Normative Guidelines for an Ethics of Tourist-Indigenous Encounters*, 15 TOURIST STUD. 65 (2015) [hereinafter Liljeblad, *Using Foucault*].

57. *See generally* MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE: AND THE DISCOURSE ON LANGUAGE (Alan M. Sheridan trans., 1972).

58. *See id.* at 49; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 10; Liljeblad, *Using Foucault*, *supra* note 56, at 69.

59. FOUCAULT, *supra* note 57, at 49; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 10.

60. ALAN HUNT & GARY WICKHAM, FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF

discourse, Foucault sees "discursive formation[s]," which are the stable elements at the center of discourse[61] that reflect an "episteme," which is a world-view comprised of postulates and modes of reason.[62] Through these components, a discourse forms a structure controlling the flow of information and meanings between people.[63]

From such a perspective, the CSICH can be seen as a Foucauldian discourse in that it creates an international legal and policy framework for a systematic practice of verbal, written, physical, and symbolic actions between people regarding intangible cultural heritage.[64] It provides discursive formations, since it asserts a collection of stable elements by setting a common understanding of concepts that are to be shared between state parties, such as "inventories," "lists," "safeguarding" activities, "local" communities, "experts," and "intangible cultural heritage" itself.[65] These elements reflect an episteme in that they imply a world-view that sees "intangible cultural heritage" as "practices, representations, expressions, knowledge, skills" that can be identified, listed, and sustained through the actions of nation-states.[66] As a result, the CSICH acts to structure a way of thinking and discussing intangible cultural heritage on a global scale, with the nature of information and meanings about intangible cultural heritage being directed through the vocabulary and mechanisms specified by the convention to all of its state parties.[67]

For Foucault, understanding a discourse is important because its structure is a means of inclusion and exclusion towards actors and ideas and thereby is determinative in the distribution of power.[68] Hence, the control of knowledge reflects power relations, such "that power and knowledge directly imply one another."[69] By controlling

LAW AS GOVERNANCE 8 (1994); *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 10; Liljeblad, *Using Foucault*, *supra* note 56, at 69.

61. FOUCAULT, *supra* note 57, at 38; HUNT & WICKHAM, *supra* note 60, at 9; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 10.

62. FOUCAULT, *supra* note 57, at 191; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 10.

63. *See* HUNT & WICKHAM, *supra* note 60, at 8; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 10.

64. *See* HUNT & WICKHAM, *supra* note 60, at 8; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 10; Liljeblad, *Using Foucault*, *supra* note 56, at 69.

65. *See* HUNT & WICKHAM, *supra* note 60, at 9; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 10. *See generally* CSICH, *supra* note 1.

66. *See* CSICH, *supra* note 1, art. 2, ¶ 1; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 10.

67. *See also* Liljeblad, *Human Safaris*, *supra* note 56, at 10.

68. *See* HUNT & WICKHAM, *supra* note 60, at 8–9. *See also* Liljeblad, *Human Safaris*, *supra* note 56, at 10; Liljeblad, *Using Foucault*, *supra* note 56, at 69.

69. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 27 (Alan Sheridan trans., 1977); HUNT & WICKHAM, *supra* note 60, at 12–13.

who and what is involved in the communication of information and meaning, a discourse circumscribes the potential outcomes and so directs the resulting actions a discourse may produce.[70] In this way, a discourse connects power, knowledge, and reality.

Foucault's concerns regarding discourse, exclusion, power, knowledge, and reality lie at the core of the critiques leveled against the CSICH. The charges of critics largely focus on the CSICH's state-centric structure, which they see as granting state parties with a hegemonic share of power over the local communities who actually create their own intangible cultural heritage.[71] In the decision-making mechanisms of the General Assembly and the Intergovernmental Committee, state parties are included but non-state actors are excluded.[72] In the safeguarding duties of the convention, state parties control the national inventories, international lists, competent bodies, studies, and institutions, while the role of local communities—including indigenous groups—as creators and bearers of intangible cultural heritage is subordinated and marginalized.[73] The result is that states hold a position of primacy in a hierarchy of power over indigenous peoples in determining what is identified as intangible cultural property and how it is treated under the convention.[74]

For indigenous peoples, this situation does little to address the historical power inequalities that subordinated them to colonial imperialism.[75] If anything, it maintains the substance of colonial domination, in that it continues to make control over their own cultural heritage subject to the authority of non-indigenous sovereigns.[76] In Foucauldian terms, under the CSICH, they are subordinated within a discourse over their own cultural heritage.[77] While the CSICH calls for their inclusion, its language is discretionary for state parties and hence still endows states with the authority to determine the fate of practices, ideas, and meanings about cultural heritage under the convention.[78] This effectively excludes indigenous peoples from decisions about their own culture, and thus makes the present fate of indigenous culture a continuation of their experiences under the asymmetric power structures of the colonial past.

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70. *See* HUNT & WICKHAM, *supra* note 60, at 8–9; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 10; Liljeblad, *Using Foucault*, *supra* note 56, at 69.

71. Kuruk, *supra* note 6, at 128.

72. *See* CSICH, *supra* note 1, arts. 4–5.

73. *See id.* arts. 12–13, 16–17.

74. *See* Lenzerini, *supra* note 6, at 112.

75. COATES, *supra* note 51, at 18–19.

76. Kuruk, *supra* note 6, at 128.

77. HUNT & WICKHAM, *supra* note 60, at 8–9.

78. CSICH, *supra* note 1, art. 15; Lenzerini, *supra* note 6, at 111–12.

Foucault, however, provides ways to address these issues with a number of additional concepts that allow several options to mitigate the power imbalances under the CSICH. In particular, for this analysis, Foucault's concepts of "archaeology," "genealogy," "technologies of power," "technologies of the self," and "micropolitics" of discourse in power relations are relevant.[79] Foucault describes power as composed of interactions that occur within networks of relationships between actors exercising technologies of power and technologies of the self.[80] Dominant actors maintain their hegemonic status through technologies of power, which are processes of measurement and categorization that define the identities of other actors as objects subject to power.[81] Against technologies of power, subordinate actors use technologies of the self to control their own identities and thereby counter domination.[82] Foucault refers to the interactions between technologies of power and technologies of the self as the micropolitics that characterize the power relations in a discourse.[83] To the extent that there can be multiple actors, multiple technologies of power, and multiple technologies of the self, the idea of micropolitics encompasses pluralist forms of power.[84] To understand micropolitics, Foucault applies the terms of archeology and genealogy.[85] Archaeology refers to the production of knowledge via structure and rules of discourse that set "the prohibitions, exclusions, limitations, values, fiefdoms, and transgressions" of discursive practice.[86] For Foucault, practices of exclusion and limitation control the sources and expressions of concepts and theories that form knowledge.[87] Genealogy works alongside archaeology by exploring how

79. STEVEN BEST & DOUGLAS KELLNER, POSTMODERN THEORY: CRITICAL INTERROGATIONS 54–56 (1991); Michel Foucault, *Technologies of the Self*, *in* TECHNOLOGIES OF THE SELF: A SEMINAR WITH MICHEL FOUCAULT 18 (Luther H. Martin et al. eds., 1988); *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 10; Liljeblad, *Using Foucault*, *supra* note 56, at 70.

80. Foucault, *supra* note 79, at 18; *see a*lso Liljeblad, *Human Safaris*, *supra* note 56, at 10; Liljeblad, *Using Foucault*, *supra* note 56, at 70.

81. *See* Foucault, *supra* note 79, at 18; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 10; Liljeblad, *Using Foucault*, *supra* note 56, at 70.

82. *See* Foucault, *supra* note 79, at 18; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 10; Liljeblad, *Using Foucault*, *supra* note 56, at 70.

83. *See* BEST & KELLNER, *supra* note 79, at 56; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 10; Liljeblad, *Using Foucault*, *supra* note 56, at 70.

84. *See* BEST & KELLNER, *supra* note 79, at 56; *see also* Liljeblad, *Using Foucault*, *supra* note 56, at 70.

85. *See* BEST & KELLNER, *supra* note 79, at 54–56; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 10; Liljeblad, *Using Foucault*, *supra* note 56, at 70.

86. FOUCAULT, *supra* note 57, at 193; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 10; Liljeblad, *Using Foucault*, *supra* note 56, at 70.

87. FOUCAULT, *supra* note 57, at 193, 195; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 10–11; Liljeblad, *Using Foucault*, *supra* note 56, at 70.

discourse uses knowledge to define norms and identities, and thereby serving to turn knowledge into power over actors whose conduct is determined by noms and identities.[88]

Under these concepts, the discourse over intangible cultural heritage in regards to the CSICH can be seen as being constituted by interactions within a network of state parties, with interactions occurring among state parties, as well as between each state party and the local communities, groups, and individuals within its territory.[89] State parties to the CSICH hold technologies of power in that they are given authority over processes of measurement in terms of the convention asking them to employ "studies" and "legal, technical, administrative and financial measures,"[90] as well as categorization in terms of the convention granting them discretionary control to decide what cultural expressions are to be placed on national inventories and international lists of intangible cultural heritage.[91] In contrast, indigenous groups under the CSICH hold technologies of the self in the form of their disparate expressions of their respective identities—that is, each indigenous group holds technologies of the self through its status as the creator and bearer of its own unique intangible cultural heritage lived through the group's "practices, representations, expressions, knowledge, skills," and associated physical objects.[92]

The micropolitics between these technologies of power and technologies of the self are structured by the articles of the CSICH.[93] Under the CSICH, the archaeology of discourse encompasses objects in the form of state parties, local communities, groups, and individuals that are the sources of ideas and meanings regarding intangible cultural heritage.[94] The dominant position of state parties gives them the capacity to limit and exclude indigenous peoples, with the former holding more power relative to the latter in controlling and administering what constitutes "intangible cultural heritage."[95] This

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88. *See* BEST & KELLNER, *supra* note 79, at 57–58; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 11; Liljeblad, *Using Foucault*, *supra* note 56, at 70–71.

89. *See supra* notes 54–78 and accompanying text; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 11; Liljeblad, *Using Foucault*, *supra* note 56, at 71 (applying similar Foucauldian concepts to other indigenous rights issues).

90. *See* CSICH, *supra* note 1, art. 13.

91. *See id.* arts. 12, 16.

92. *See id.* art. 2, ¶¶ 1–2.

93. *See id.* arts. 2, 11–13, 15–16; *supra* notes 70–80 and accompanying text; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 11; Liljeblad, *Using Foucault*, *supra* note 56, at 71.

94. *See supra* notes 70–80 and accompanying text; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 11; Liljeblad, *Using Foucault*, *supra* note 56, at 71.

95. *See supra* notes 62–72 and accompanying text; *compare* CSICH, *supra* note 1, art. 11, *with* CSICH, *supra* note 1, art. 15.

creates a genealogy of discourse wherein state parties hold a hege-
monic status in a discourse politics that makes a normative determi-
nation about which cultures and which manifestations of culture are
entitled to receive state "safeguarding" measures and status on a
national inventory or international list—and which ones are not.[96]

III. USING FOUCAULT TO IDENTIFY INDIGENOUS STRATEGIES FOR THE CSICH[97]

The previous section conducted a descriptive analysis that used
Foucault to frame the CSICH and its critiques within Foucault's
concepts of discourse and power, focusing on the asymmetric power
relations under the CSICH that skew power over cultural heritage
in favor of states and away from indigenous peoples. The present
section performs a prescriptive analysis that uses Foucault to high-
light the elements driving the power inequalities of the CSICH and,
from such insights, identifies the types of strategies that are appro-
priate to alter the convention in ways that are more favorable to
indigenous control over indigenous cultural heritage.

Foucault does not see the relations between power, knowledge,
and reality as being inevitable, in that they are a product of history
that "can be unmade, as long as we know how it was that they were
made."[98] Further, Foucault does not see discourse as always predis-
posed to hegemonic power, with discourse also providing a "point of
resistance and a starting point for an opposing strategy," allowing
for counter-discourses by marginal actors against dominant ones.[99]
Marginal actors can work through technologies of self "to effect by
their own means or with the help of others a certain number of
operations on their own bodies and souls, thoughts, conduct, and
way of being, so as to transform themselves" in ways contrary to the
efforts of technologies of power wielded by dominant actors.[100]

96. *See* Liljeblad, *Human Safaris*, *supra* note 56, at 11; Liljeblad, *Using Foucault*, *supra* note 56, at 71.

97. The following section again draws heavily from the author's previous works, entitled "Human Safaris: A Foucauldian Alternative to the Law's Treatment of the Indigenous Andaman Jarawa," and "Using Foucault to Construct Normative Guidelines for an Ethics of Tourist-Indigenous Encounters." *See* Liljeblad, *Human Safaris*, *supra* note 56; Liljeblad, *Using Foucault*, *supra* note 56.

98. MICHEL FOUCAULT, *Critical Theory/Intellectual History*, *in* POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITING: 1977–1984 17, 37 (Lawrence D. Kritzman ed., 1988); *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 11; Liljeblad, *Using Foucault*, *supra* note 56, at 71.

99. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 101 (Robert Hurley trans., 1990); *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 11; Liljeblad, *Using Foucault*, *supra* note 56, at 71.

100. Foucault, *supra* note 79, at 18; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 11; Liljeblad, *Using Foucault*, *supra* note 56, at 71–72.

Expectations for resistance and counter-discourses, however, rely on an assumption that there are technologies of the self that are able to operate against technologies of power.[101] With respect to the CSICH, this means that there must be mechanisms through which indigenous peoples are able to influence the discourse over their intangible cultural heritage against states. Under the CSICH, however, such mechanisms are limited. While the convention asks that states "shall endeavour to ensure the widest possible participation of [local] communities, groups and . . . individuals" and hence appears to provide for a technology of the self, this is only a cursory concession of power because the language does not require states to guarantee participation.[102] Instead, it only requires that they "endeavour" to do so, and thus in reality, it operates as a technology of power that maintains the hegemony of states.[103]

It is possible that, as the creators and bearers of their own culture, indigenous peoples by definition hold technologies of the self, in that they already perform the "operations on their own bodies and souls, thoughts, conduct, and way of being" that constitute their own intangible cultural heritage.[104] Unfortunately, under the state-centric power structure created by the CSICH, such technologies of the self offer little power since it's the states who hold authority over the categorization of indigenous "operations," "thoughts," "conduct," or "way of being" on the national inventories, international lists, and safeguarding mechanisms contained within the CSICH.[105]

It is important, however, to focus on the relative capabilities of technologies of the self vis-à-vis technologies of power. Specifically, it is not enough that there are technologies of the self.[106] In order to generate resistance sufficient to promote counter-discourses against hegemonic actors, it is necessary to have "(1) technologies of the self that are *effective* in terms of being *sufficient* to counter technologies of power; and (2) technologies of the self counter technologies of power with respect to both *creation* and *use* of Indigenous culture."[107] Mere presence in a discourse or simple options to express concerns is insufficient to counter technologies of power over creation or use of culture, and constitutes instead a form of token participation that

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101. *See also* Liljeblad, *Human Safaris*, *supra* note 56, at 11.
102. CSICH, *supra* note 1, art. 15.
103. *See id.*
104. FOUCAULT, *supra* note 57, at 18; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 12.
105. CSICH, *supra* note 1, Parts III–IV; Foucault, *supra* note 79, at 18.
106. *See also* Liljeblad, *Human Safaris*, *supra* note 56, at 12; Liljeblad, *Using Foucault*, *supra* note 56, at 72.
107. *See* Liljeblad, *Human Safaris*, *supra* note 56, at 12.

limits marginalized voices to representation rather than participation.[108] Without the empowerment of agency to control the presentation of their own culture, indigenous people will continue to be vulnerable to neocolonial patterns of marginalization wherein non-indigenous interests hold ultimate authority over the treatment of indigenous identities.[109]

To the extent that cultural heritage is a component of identity, this means a call to move the CSICH away from a state-centric power structure through alteration of the convention text that will explicitly grant creators and bearers of intangible cultural heritage the power to decide what aspects of themselves fall under the CSICH and what actions should be taken towards those aspects.[110] This suggests the granting of power equal to, if not greater than, state parties for indigenous peoples with respect to decisions related to their own intangible cultural heritage. This means going beyond conceptualization of the convention as recognizing that each indigenous group holds an interest in its own culture; and instead altering the convention to allow each indigenous group enough power to counter the actions of states in decisions regarding the group's culture.[111] Within the decision-making structure created by the CSICH, this suggests that each indigenous group should have representation in the General Assembly and Intergovernmental Committee that is of comparable status to state parties, as well as participation in safeguarding mechanisms that is of comparable status to state parties—at least for decisions affecting the group's own intangible cultural heritage.[112]

Such changes would effectively mean greater self-determination within a nation-state system. Such changes would also be consistent with scholars like John Paquette, Bruce Robbins, and Elsa Stamatopoulou, who argue that indigenous rights to culture are a component of the struggle for indigenous self-determination.[113] Calls for indigenous self-determination, however, should not necessarily be interpreted as a challenge to state sovereignty, in that it is possible to enable indigenous self-determination without threatening the territorial integrity of state parties.[114] Here, for example, the scope

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108. *See also id.*

109. *See also id.*

110. Elena Franchi, *What is Cultural Heritage?*, SMARTHISTORY (Aug. 8, 2015), https://smarthistory.org/what-is-cultural-heritage [http://perma.cc/S8UM-HXHH].

111. *See* BLAKE, *supra* note 20, at 34–36.

112. *See* CSICH, *supra* note 1, arts. 4–5, 11.

113. *See* Jonathan Paquette, *From Decolonization to Postcolonial Management: Challenging Heritage Administration and Governance in New Zealand*, 12 PUB. ORG. REV. 127, 128 (2012); Bruce Robbins & Elsa Stamatopoulou, *Reflections on Culture and Cultural Rights*, 103 S. ATLANTIC Q. 419, 426–27 (2004).

114. *See* Robbins & Stamatopoulou, *supra* note 113, at 426, 428–30.

of proposed changes is limited, in that they are narrowly targeted to the issue of intangible cultural heritage within the confines of the CSICH and so do not relate to the power of nation-states for issues outside of indigenous culture within their respective borders. In addition, the impact of these changes are mitigated by their confined focus on empowering an indigenous group with power sufficient to counter the hegemonic status of states on decisions related to the group's own intangible cultural heritage, and so do not call for either the complete evisceration of state power under the convention or the integration of all indigenous peoples into all decisions regarding cultural heritage within the convention.[115]

It should be noted that because Foucault saw discourses as fluid and malleable he also saw the identities at the center of discourses as being fluid and malleable.[116] This suggests that reflections of identity like cultural heritage are transient. While this makes Foucault consistent with the CSICH's recognition that "intangible cultural heritage . . . is constantly recreated," it also leads to an additional call for adjustments to the convention: the nature of the convention's inventories and lists need to change.[117] The CSICH's inventories and lists operate as mechanisms of "mummification" and "archiving" that "fix" culture to specific manifestations in time, making them inconsistent with Foucauldian notions of transient identities.[118] As a result, to fully conform to Foucault, the CSICH's conception of inventories and lists must be altered to allow greater dynamism in the intangible cultural heritage identified within them—and in a way that observes the above call to grant greater power to the creators and bearers of intangible cultural heritage.[119]

An example of how this could be achieved would be to allow intangible cultural expressions to be added and removed from the inventories and lists as their practices and meanings change in importance to the people and places of their origin. This would be consistent with Foucault so long as indigenous peoples made decisions about which of their own cultural practices were important enough to warrant inclusion and which ones had lost enough importance to warrant removal.[120] An alternative example, suggested by Federico Lenzerini, would be to treat each manifestation of culture on the CSICH's inventories and lists as fluid and subject to change as their

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115. *See generally* CSICH, *supra* note 1.
116. *See* FOUCAULT, *supra* note 57, at 48–49, 208–09.
117. *See* CSICH, *supra* note 1, art. 2, ¶ 1.
118. *Compare supra* notes 40–46 and accompanying text, *with* BLAKE, *supra* note 20, at 35.
119. *See* CSICH, *supra* note 1, arts. 12, 16–17.
120. *See supra* notes 62–84 and accompanying text.

cultures of origin changed.[121] This would suggest that while the name of some specific intangible cultural heritage on the CSICH's inventories and lists would stay constant, the manifestation of culture represented by that name would evolve in accordance with the changes in the communities, groups, and individuals comprising that culture.[122] The challenge with this is that it would raise questions as to the function of the CSICH's inventories and lists—specifically, whether they are meant to be catalogs of names that represent particular permutations of culture at specific moments and places in time, or if they are meant to be catalogs of names that represent spaces for culture to live and change.

There is an additional area of concern regarding the CSICH associated with its treatment of non-state entities: the convention ostensibly encompasses "communities," "groups," and "individuals", but, in doing so, it seems to miss recognizing that collectives like "communities" or "groups" are themselves composed of individuals.[123] This is an issue because the CSICH ties itself to the international human rights system,[124] and the international human rights system sees tensions between group rights and individual rights.[125] This means that the issues regarding the power structure of the CSICH go beyond questions about the power relations between state parties and communities or groups but also include questions about the power relations between communities or groups and the individuals that comprise their collectives. This calls for an extension of Foucauldian analysis to address the power relations within indigenous groups, particularly in terms of the relations between a particular indigenous group and its individual members.

Foucault, in focusing on the interactions comprising social networks between people, conceives of power and discourses of power as being defined by the relations between individuals.[126] Foucault would see a micropolitics of discourse within each indigenous group, with archeology identifying the objects of discourse as being each of

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121. Lenzerini, *supra* note 6, at 108–09.

122. *See id.*

123. *See* CSICH, *supra* note 1, pmbl.

124. *Id.* art. 2, ¶ 1.

125. *See* JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 218 (2d ed. 2003); MICHAEL FREEMAN, HUMAN RIGHTS 68–71 (Polity Press ed., 2002); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 34–35 (1995); Richard A. Wilson, *Human Rights, Culture and Context: An Introduction, in* HUMAN RIGHTS, CULTURE AND CONTEXT 1, 1–4, 6 (1997); Michael K. Addo, *Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights*, 32 HUM. RTS. Q. 601, 601 (2010); Lynn Meskell, *Human Rights and Heritage Ethics*, 83 ANTHROPOLOGICAL Q. 839, 839–40 (2010).

126. Michel Foucault, *The Subject and Power, in* MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 208, 217 (2d ed. 1983).

the group's members, where each person is a source of practices, ideas, and meanings regarding intangible cultural heritage.[127] Foucault would see a resulting genealogy with some fraction members holding technologies of power that allowed them to maintain a position of dominance over others in their group.[128]

The CSICH's ties to the international human rights system would lead Foucault to look upon such power disparities between individuals with some concern.[129] While there have been steps by the United Nations to recognize group culture,[130] one of the core elements of the international human rights system,[131] the International Covenant on Civil and Political Rights (ICCPR), phrases group rights as a function of rights held by individuals, stating that "persons . . . shall not be denied the right, in community with the other members of their group, to enjoy their own culture."[132] While the Human Rights Committee of the ICCPR has commented that this should be implemented with the understanding that individual rights "turn on the ability of the . . . group to maintain its culture,"[133] it has also stated that "States parties have . . . undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States . . . to enable individuals to enjoy their rights."[134] Under the ICCPR, such rights include a "right to freedom of thought, conscience and religion" and a "right to hold opinions without interference," which would imply inclusion of thoughts and opinions about culture and hence intangible cultural heritage expressing such culture.[135] As a result, the CSICH would be required by the international human rights system to be concerned with the rights of all individuals within each indigenous group in its discourse over intangible cultural heritage.

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127. *See* BEST & KELLNER, *supra* note 79, at 54–59; *see also supra* notes 73–78 and accompanying text.

128. *See* BEST & KELLNER, *supra* note 79, at 57; Foucault, *supra* note 79, at 18; *see also* Liljeblad, *Human Safaris*, *supra* note 56, at 13–14.

129. *See* CSICH, *supra* note 1, arts. 2–3.

130. Elsa Stamatopoulou, *Monitoring Cultural Human Rights: The Claims of Culture on Human Rights and the Response of Cultural Rights*, 34 HUM. RTS. Q. 1170, 1170–71, 1176–79 (2012).

131. *Human Rights Bodies—Complaints Procedures*, OHCHR (2013), http://www.oh chr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx [http://perma.cc/7N8G -GYYF] [hereinafter *Complaint Procedures*]; *Monitoring the Core International Human Rights Treaties*, OHCHR (2013), http://www.ohchr.org/EN/HRBodies/Pages/Overview .aspx [http://perma.cc/NHF3-QY DK].

132. International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976; adopted by the United States, September 8, 1992) [hereinafter ICCPR].

133. *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 40, U.N. DOC. HRI/GEN/1/Rev.1 (July 29, 1994).

134. *Id.* at 4.

135. *See* ICCPR, *supra* note 132, arts. 18, ¶ 1, 19, ¶ 1.

Foucault would interpret this as a call to address the power inequalities in discourse via a search for technologies of the self that would enable each of the individuals within an indigenous group to participate in their collective discourse over culture to the extent that it influences their respective individual identities.[136] This directs attention away from strategies that seek state intervention in the group to ensure individual rights[137] since doing so would effectively be an expansion of state technologies of power within the power structure of the CSICH.[138] Rather, it directs attention towards strategies that favor individual self-empowerment over state power.[139] Extending the logic of previous discussion that took Foucault's technologies of the self as a pointer to solutions involving greater integration of indigenous groups into the decision-making bodies of the CSICH,[140] this means that some form of representation within the convention's General Assembly, Intergovernmental Committee, and safeguarding mechanisms must be allowed for indigenous individuals in a manner that empowers them to express their own personal views even if they run contrary to the preferences of those in power—whether that power be held by states or others in their own indigenous group.

While practical considerations may make it difficult to open the institutions and mechanisms of the CSICH to all individuals claiming to be creators and bearers of intangible cultural heritage, it may be possible to amend the CSICH to become more accessible to individuals marginalized from their own intangible cultural heritage. For example, the CSICH could be supplemented with a complaint mechanism for individuals enabling them with a means of pursuing relief for actions taken by the General Assembly, Intergovernmental Committee, or safeguarding mechanisms that excluded them from decisions regarding their own intangible cultural heritage. The structure of the CSICH places communities, groups, and individuals at the same common status relative to state parties, suggesting that whatever changes to the convention grant more power to communities and groups should similarly be extended to do so for individuals. This is not out of the realm of possibility, because a precedent exists for individual complaint mechanisms within the international human rights system, with several of the human rights treaties that

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136. *See, e.g.*, BEST & KELLNER, *supra* note 79, at 54–68.
137. BRIAN BARRY, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 146–54 (Polity Press ed., 2001).
138. *See supra* notes 79–80 and accompanying text.
139. *See generally* KYMLICKA, *supra* note 125.
140. *See supra* notes 85–97 and accompanying text.

comprise the international human rights system—including the International Covenant on Civil and Political Rights—providing treaty bodies that can receive communications from individuals.[141] Such a change to the CSICH is possible, because the CSICH has a provision specifying amendment procedures to the convention.[142]

CONCLUSION

The findings of this analysis regarding discourse and power within the CSICH revolve around the tensions within the CSICH between state parties and indigenous peoples. The theme that results can be described as one of structure versus agency: the CSICH can be described as supporting a power structure that provides state parties with dominant authority over indigenous peoples with respect to indigenous intangible cultural heritage.[143] Foucault highlights the reason for this by detailing how something like the CSICH provides indigenous peoples with insufficient technologies of the self to counter the hegemonic position of state parties.[144] Foucault would point to this as driving the suppression of agency by indigenous peoples within the decision-making structure created by the convention, and the factor that allows them to be marginalized in the discourse over their own heritage.

The relation of Foucault's ideas to the description of the CSICH provide prescriptive value, because they direct anyone concerned with the power inequalities of the convention to look for solutions in the form of technologies of the self that are sufficient to enable marginalized entities to control their own identities.[145] Under Foucault, it is through technologies of the self that subordinated voices will be able to alter the power relations in discourse from one of domination to one of dialectic, with marginalized actors being able to use them to become active agents operating autonomously against hegemonic power.[146]

This analysis follows such reasoning to call for the installation of technologies of the self within the CSICH—specifically, calling for providing each indigenous group with effective technologies of the self that are sufficient to counter the technologies of power held by state parties with respect to the creation and use of that group's own intangible cultural heritage.[147] Such technologies take the form of

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141. *See Complaint Procedures, supra* note 131.
142. CSICH, *supra* note 1, art. 38.
143. CSICH, *supra* note 1, arts. 11, 15.
144. *See supra* notes 92–99 and accompanying text.
145. *See* BEST & KELLNER, *supra* note 79, at 64–65.
146. *See id.*
147. *See supra* notes 92–99 and accompanying text.

changes to the CSICH that integrate indigenous peoples more fully into the decision-making structure of the convention, such that they are given greater agency in the discourse over the treatment of their own intangible cultural heritage. In doing so, this Article parallels the works of scholars like John Paquette, Bruce Robbins, and Elsa Stamatopoulou, who see indigenous rights to culture as a component of indigenous self-determination.[148] By calling for changes to the CSICH that allow indigenous peoples authority comparable to the convention's state parties, this analysis effectively seeks to foster greater indigenous self-determination with respect to indigenous culture.

The need for greater agency is one shared with indigenous scholars such as Alexis Bunten, Doreen Martinez, and, to an extent, Amanda Stronza, who in their studies of indigenous tourism highlight the need for greater agency by indigenous peoples within the structure of their relations with a non-indigenous world.[149] The distinction, however, between this study and other indigenous scholars is that this study finds the idea of agency under the CSICH should not just be associated with indigenous groups as monolithic entities but should also be extended to cover individual members within the indigenous groups themselves.[150] As a result, this discussion follows Foucault to a logical extension involving a more expansive, deeper call regarding agency relative to other indigenous scholarship.

Doing so is consistent with the CSICH, both in terms of its language and its connection to the international human rights system.[151] Its language is inclusive of communities, groups, and individuals, and so by intent and design encompasses indigenous groups and their individual members.[152] In addition, by constraining itself under the international human rights system, the convention places itself under a requirement to observe the human rights of both groups and individuals with respect to intangible cultural heritage.

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148. Paquette, *supra* note 113, at 128; Robbins & Stamatopoulou, *supra* note 113, at 426–27.

149. Alexis C. Bunten, *More Like Ourselves: Indigenous Capitalism Through Tourism*, 34 AM. INDIAN Q. 285, 304–06 (2010); Doreen Martinez, *Wrong Directions and New Maps of Voice, Representation, and Engagement: Theorizing Cultural Tourism, Indigenous Commodities, and the Intelligence of Participation*, 36 AM. INDIAN Q. 545, 546–47 (2012); Amanda Stronza, *Anthropology of Tourism: Forging New Ground for EcoTourism and Other Alternatives*, 30 ANN. REV. ANTHROPOLOGY 261, 268, 277–78 (2001).

150. *See supra* notes 10–13 and accompanying text.

151. *See* CSICH, *supra* note 1, pmbl., arts. 2–3.

152. *See id.* pmbl., arts. 1, 15.