Individual Rights in Collective Contexts: 
The Challenge of Reconciling Individual Rights with Collective Claims in Indigenous Community Participation 

Jessika Eichler

Abstract 
The interplay of individual and collective rights becomes particularly challenging in indigenous community participation. Participatory community mechanisms generally ignore internal differences. However, individual rights in indigenous collective settings are even less considered due to the strong nature of collective rights and respect for indigenous customs, traditions and practices. Yet, non-discrimination provisions and references to international human rights law allow for a more nuanced analysis. This paper presents a socio-political discussion about conflicting views on the reconciliation of both sets of rights. Similarly, an analysis of current international and regional jurisprudence reveals the legal dilemma in balancing individual and collective rights in indigenous contexts. Based on theoretical insights into community participation and an international human rights perspective, the author identifies common positions that could contribute to the resolution of such rights conflicts.

Keywords: indigenous peoples, collective rights, individual rights, community participation

1. Introduction

Participatory rights form the basis of influencing decision-making processes. Alongside ordinary voting mechanisms, community participation allows for direct influence on decisions that affect specific communities. However, direct participation entails significant obstacles and genuine decision-making is jeopardised by various factors: namely, non-representative groups with commercial interests and non-accountable actors take advantage of direct forms of decision-making. Additionally, community members participate as formal members of decision-making bodies without real control over the outcomes and influence on all phases of decision-making. Representation and power are thus understood as fundamental aspects of genuine community participation. The latter aspects are used as yardsticks to evaluate one of the strongest and most frequently overlooked weaknesses of community participation, the significance of including community subgroups in decision-making. The article sheds light on the complexities of conflicting intersectionalities and affiliations in direct participation in decisions that affect respective communities. Based on an initial theoretical discussion on community participation and its downsides, it subsequently develops a practical example of direct participation in the case of indigenous peoples. Direct participation through

Jessika Eichler is a PhD student at the Human Rights Centre, University of Essex. She holds a B.A. in Liberal Arts and Sciences from University College Maastricht (NL) and Sciences Po, Toulouse (FR), and an LL.M. from Maastricht University (NL) and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (SE). She has gained diverse experience in the field of human rights at the German Ministry of Foreign Affairs, GIZ Peru and the NGO sector.

The author would like to acknowledge Dr Julian Burger and Geneviève Paul for their feedback and useful comments on this article.
consultation mechanisms in indigenous communities serves as a particularly challenging example due to the strong nature of collective claims. Two main views on the compatibility of individual and collective participatory rights in indigenous contexts are presented, namely proponents of an irreconcilable approach regarding both sets of rights and advocates of co-existential frameworks. Groups within indigenous communities, such as indigenous women, serve as an example in this context. The discussion is further enhanced by a legal analysis of current international and regional standards as well as jurisprudence on the weight of individual rights in indigenous collective consultation processes.

This paper demonstrates a critical view on community participation and highlights one specific aspect of its implementation, namely, individual members’ opportunities to take part in decision-making in strongly collective settings. Groups within indigenous communities, especially indigenous women, play a significant role in this regard. Particularly, this paper presents a legal analysis of the dilemma of balancing individual and collective rights in indigenous community consultations. In view of differing interests at stake in a culturally challenging environment, international and regional human rights mechanisms adopt contradicting positions on the importance of inclusive participation. The aim of the paper is to present this current legal and socio-political dilemma in indigenous rights contexts and to identify common positions that could contribute to their resolution in future rights disputes.

2. Theoretical Considerations of Community Participation

Individual citizens and communities gain voice through different channels of contemporary democratic institutions. Pluralist representative democracy remains one of its most widely accepted and frequently practised forms. The latter form allows political parties to represent citizens, communities and major social groups in the system and to provide them with an indirect share in decision-making. However, theorists of representative democracy and ‘ballot box proponents’ are criticised based on their ‘minimalist conception of democracy’. In the context of developing countries, critics point to educated and well-off minorities and their involvement in political affairs at the expense of the rural, illiterate majority. Similarly, representative channels do not take culturally different manifestations of decision-making, such as indigenous consensus building, into account. Proponents of community participation thus neglect classical conceptions of representative democracy and demand more small-scale decision-making at community level corresponding to the theory of neighbourhood democracy. Others have argued for more society involvement in major governmental services such as; education and infrastructure under the name of ‘empowered participatory governance’. This implies a changing role of civil society: it allows societal actors to participate in the core functions of government. Particularly, civil society abandons its

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watchdog function and acquires responsibility in previously State-dominated executive oversight.

Civil society can assume its ‘new’ position in many respects. Firstly, it allows for political and social recognition through participatory processes. Excluded identities enter political spaces of decision-making through political participation and are meant to achieve political equality. Social participation, on the other hand, would enable them to seek inclusion in these spaces of decision-making. This way of ensuring inclusive participation suggests a more active role of citizens: citizens are understood as ‘makers and shapers’ rather than ‘users and choosers’ of services, participation fundamentally attributes agency to individual citizens and communities. Furthermore, inclusion in the context of governance processes is fundamental due to the recognition of competence attributed to civil society and the legitimacy of people who were previously considered as unsuitable to participate in decision-making. The concept of citizenship further strengthens this approach; it provides that citizens can act as agents. Proponents of the participatory paradigm and its emphasis on political recognition usually refer to a broader objective, namely transformation. Marginalised people and people living in poverty, in particular, are meant to actively transform their environment and structures which reproduce such conditions. At the same time, this implies a transformation of people themselves in addition to changing their environment: it is the ‘struggle to be more fully human’. Participation in decision-making can also be regarded as an important capacity-building process: in the course of decision-making, learning takes place, which is later internalised and can produce changes in confidence, leadership, attitude and behaviour generally. Participatory approaches thus enable social transformation and serve broader struggles, but also aim at securing individual rights in the context of citizenship. The success of participatory approaches is also conditioned by their ability to secure participation for subordinate and marginal groups.

Secondly, civil society demonstrates its role as participant in governance in the form of deliberative or communicative democracy. Citizenship essentially provides citizens with a say and provides the tool to negotiate how power is exercised and by whom through dialogue. Monological solutions determined by the élite are replaced by a multilogue, which ensures that norms are determined by all. Dialogue can serve as an elementary tool in

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providing a forum for those formerly excluded from the public sphere, decision-making and those in power. It also provides democracy with legitimacy: norms are considered valid if they are approved by those affected, who have the capacity as ‘participants in a practical discourse’. Deliberative or communicative democracy must also allow different public spheres and value systems in order to be participatory in a truly inclusive way. It requires people’s own terms and traditions to be considered: this does not exclusively refer to cross-cultural contexts, but also includes identification with other groups, such as gender, generations or classes and thus enhances the complexity of citizen participation through dialogue. This suggests that these subgroups exist in different public spheres; a singular public sphere would strengthen dominant groups in their control of public debate and would imply the subordination of multiple actors. Accordingly, different marginalised identity groups exist in ‘subaltern counter-publics’ that comprehend multiple forms of discursive contestation and provide forums for these groups to develop identities and interests.

Community participation thus creates a form of inclusion in decision-making at the individual and collective level that complements general civil and political rights in representative democracies. It increases accessibility to these rights by allowing small-scale decision-making and direct influence. At the same time, it has the potential to empower citizens through their role as agents in the participatory processes and as active members in public dialogues. For instance, health committees at community level in Burundi, illustrate the influence of representatives elected by the population on the design of development plans, decisions on the allocation of funds, technical and administrative co-management, including controlling the finances and planning and evaluations. Similarly, land management projects in Central India are conducted in the form of participatory mechanisms: Bhil tribal members participate in projects and make claims on project resources and gain access to essential benefits, such as wage labour, low-interest credits, agro-inputs etc. However, development projects and State initiatives reveal the downside to participatory approaches, namely their authenticity.

3. Genuine participation – Power without Representation?

In theory, community participation envisages the improved accessibility of political rights; in practice, however, participation is often denied or disguises forms of non-participatory approaches by populist regimes. Authoritarian regimes frequently use participation to legitimise power and apply specific techniques such as mass demonstrations in their support and other ‘voluntary’ activities that serve their purposes. Participation becomes a form of rhetoric that resembles self-deception and entails low levels of authenticity; it is specified as ‘authoritarian participatory rhetoric’. Some argue that participation is used as a State control strategy towards citizens: ‘incorporation, rather than exclusion, is often the best means of

control’. Others make the existence of participation dependent on its practical value: participation is granted as long as it reduces government costs, responsibilities, transfers services to non-governmental sectors and communities, or involve volunteer labour. Apart from authoritarian regimes, allegedly democratic and grassroots regimes also deny participation. For example, Bolivia’s first indigenous President, Evo Morales, was criticised for his controversial position and oppression of indigenous lowland communities in a current infrastructure project.

Similarly, citizens’ participation is regarded as ‘impractical’ in some development projects; it is described as resource intensive, expensive, time consuming and as initiatives with limited effects. Stakeholders in development programmes consider the punctual production of results as ‘too important to be left to participatory processes’. This is based on the performance and efficiency requirements that determine the speed and the degree of programme completion: ‘too participatory’ approaches, which are dedicated to human rights-based approaches, investigations of subgroups’ needs, or contributions to local control are considered as ‘underperforming’. Accordingly, projects are implemented in the name of ‘participation’; however, powers are devolved to groups that do not necessarily represent communities. West African Sahel participatory forestry policies and projects devolve decision-making, duties and responsibilities to non-representative groups and individuals with high commercial interests and other local authorities that are unaccountable to the respective communities. Research in Burkina Faso, Mali, Niger and Senegal reveals that colonial rulers used village chiefs as their main contacts and shifted powers to them: these structures still influence current decision-making structures between State and outside organisations on the one hand and the community level on the other hand. In the mentioned countries chiefs are not systematically accountable to the village, subgroups such as women are largely under-represented or excluded. Due to the low levels of genuinely inclusive participation in these communities and the devolution of relevant decision-making powers to non-representative bodies, these processes are described as a form of ‘privatisation’ through ‘privatised use rights’. The practice of privatising rights demonstrates a serious misunderstanding of human rights generally and their implementation in a non-discriminatory and equally applied manner in particular. The devolution of powers to the local élites who do neither represent nor demonstrate accountability to their communities exemplifies one of the most ostensible forms of popular or community participation.

3.1 Representation without Power?

30 John Ackerman, ‘Co-governance for Accountability: Beyond ‘exit’ and ‘voice’’, p.322. See fn.07.
36 Jesse Ribot, ‘Participation without Representation’, p.298. See fn.34.
37 Jesse Ribot, ‘Participation without Representation’, p.298. See fn.34.
38 Jesse Ribot, ‘Participation without Representation’, p.304. See fn.34.
Ever since the release of the often-quoted article on citizen participation by Sherry Arnstein, community participation has been intrinsically tied to the concept of power. Accordingly, citizen participation is understood as a form of redistribution of power that enables excluded citizens to be included in future decision-making processes. Arnstein distinguishes between eight levels of participation, ranging from manipulation, through therapy, informing, consultation, placation, partnership, delegated power to citizen control. Importantly, Arnstein reveals different forms of representation without power and difficulties associated with some ‘rungs of the ladder’ of citizen participation. Namely, public meetings that provide superficial information, repress questions, or provide unrelated answers do not count as a process that genuinely informs citizens. Similarly, numbers on meeting attendance, answers of questionnaires do not allow for more insights into citizens’ true input and influence on decision-making. Similarly, citizens need to be included in all phases of decision-making processes: merely allowing them to advise or take part in planning processes and reserving ultimate judgement on the feasibility or legitimacy for public authorities does not represent genuine citizen participation. At the same time, citizen control does not mean absolute control; this concept would hardly find either acceptance or legitimacy in representative democratic systems. It rather refers to a certain degree of power or control delegated to citizens in order to direct institutions or programmes and to be included in their policies and management respectively.

Similarly, other experts on participatory approaches consider the concept of power as a necessary prerequisite for genuinely participatory projects: the degree of power is important in determining whether individuals or communities can gain more control over conditions that affect their lives. Others determine specific degrees of participation according to forms, interests, and functions of each type: participation ranges from nominal participation through instrumental participation, representative participation to transformative participation. Again, power is gradually devolved to the communities in each phase of participation. While citizens are mere formal members of groups in meetings or provide labour for educational projects in the first type of participation, they actively form groups, elaborate their own plans, influence project management and take collective action in the third and fourth form of participation. Another contentious aspect regarding the concept of power in participatory decision-making processes is the way it is gained. Some scholars refer to an evolutionary process of devolution of powers by ‘power holders’ to ‘powerless’ or excluded citizens; others consider this a contradiction. Rather, it is argued that genuine empowerment requires power to be seized and constructed by the people; it is clearly not handed down.

The outlined theoretical framework on participatory approaches, representation, power and empowerment processes deliver insights into the power relations between power holders and disadvantaged communities. However, it treats both sides as homogenous blocs and disregards internal differences, power relations at micro level and disadvantaged groups within communities. As illustrated, local élites often take advantages of their positions and do

not necessarily represent the true interests of all members. The forthcoming discussion illuminates different aspects of inclusion or exclusion in participatory processes at community level that turn them into particularly genuine or ostensible forms of community participation.

4. Inclusive Participation – The Role of Disadvantaged Subgroups in Communities

Participatory development programmes focus on empowerment of communities; however, some regard communities as ‘fixed and unproblematic’. Consequently, in some cases internal differences within communities, corresponding power relations and individual rights are obscured. The devolution of decision-making powers from development agencies to community committees seems to be sufficient to meet ‘participatory requirements’ of development standards: subordinate or marginalised groups are not necessarily included in these committees. Participatory development programmes in Botswana demonstrate that local committees may use these empowerment approaches to further marginalise subgroups. Disadvantaged or ‘voiceless’ subgroups in communities could be understood as the aforementioned identity groups. More apparent subgroups such as gender and age groups exist alongside less tangible formations such as classes, education castes. Conflicting intersectionalities and affiliations with several identity groups further complicate the picture. Some community members suffer multiple discriminations due to their belonging to several groups such as gender and age, or ethnicity and class.

Women, for instance, are described as one of the most excluded groups whose interests are largely marginalised and disregarded in participatory processes. Empirical evidence reveals that women are appropriately represented in committees, but do not dispose of adequate power to influence decision-making. Namely, male leadership in the said committees prevents women from exerting influence; women hardly participate as voters, members or attendees of meetings. This exemplifies a situation in which representation is being granted without devolving power. In other cases, women do not truly represent other women: female representatives may want to strengthen family interests rather than identify with other women; other ‘lines of connectedness and difference’ play a role in this context.

At the same time, intersectionalities further impede the enjoyment of participatory rights. Studies show that older women exert considerable influence on younger women in participating in meetings: older women prevent younger women as a result of their intra-household relations from participating in meetings. Other projects in rural India disclose similar intersectionalities that exacerbate discrimination of particular subgroups. Women are chosen as representatives based on their level of education or family members of economically, politically or socially dominant people of the community. Educational

standards and family status thus further limit the participation of some women. Furthermore, representation does not involve decision-making powers. Female membership of committees is solely formal without the awareness of most female members of their membership; women mostly endorse decisions made by male committee members.\(^{58}\) Cultural codes and local administrative structures do not allow women’s participation beyond the private space and their families; women’s attempts to be included beyond the private sphere are considered as ‘transgressing the boundaries of their defined spaces’.\(^{59}\) Community members thus encounter diverse challenges: women, for instance, do not solely suffer discrimination based on gender, they also face challenges such as age difference and education-related or socio-economic background.

Essentially, communities in development projects are divided by ‘externally defined axes of difference’, which impose individuals into specific identity groups while ignoring or overseeing local people’s own interests, agendas, or bases of identity.\(^{60}\) This significantly enhances the complexity of identifying and evaluating the inclusion of disadvantaged or marginalised groups in communities. At the same time, projects can unconsciously create new patterns of domination and new positions, or strengthen a few leaders in the long term. Development projects provide evidence for such patterns: when projects offer new positions, individual members become more involved than others and enforce unequal structures within communities.\(^{61}\) Consequently, participatory communities have the potential to overcome dominant structures; however, they face the challenge of reproducing or intensifying subsisting power imbalances at the same time.\(^{62}\) Strengthening disadvantaged groups in communities thus becomes particularly challenging where project staff and the respective community are interacting in a culturally heterogeneous setting. Consultations of indigenous communities in decisions that affect them might serve as a challenging illustration.

### 4.1 Conflicting Identities in Inclusive Participation? – Indigenous Peoples as an Example

The empowerment of individuals and granting of individual rights becomes a specifically challenging issue in the context of indigenous rights claims. In comparison to other disadvantaged communities or groups, a gradually evolving international legal framework supports indigenous peoples. The indigenous rights movement in the second half of the 20\(^{th}\) century and developments in recently established UN forums have increased global awareness of indigenous peoples’ living conditions and strengthened their collective rights at UN and regional levels. However, a strong collective rights agenda should raise concerns over the consideration of individual indigenous rights, such as female community members, the consideration of indigenous youth, persons with disabilities or other potentially marginalised subgroups. While some refer to the incompatibility of collective and individual rights,\(^{63}\) (see Figure 1, p.11) others take a more moderate approach that allows both sets of rights to coexist and to mutually reinforce each other (see Figure 2, p.11).\(^{64}\)

According to proponents of the first approach, increased autonomy for indigenous communities shields them from protecting individual rights and prevents States from interfering with indigenous ‘usos y costumbres’, their customs and traditions. Discussions on


individual versus collective rights are typically divided into two normative frameworks: liberal-individualists derive group claims from individual interests and rights; conversely, corporatists or collectivists do not consider group members as such, but focus the communities’ common interests. As an advocate of the former framework, Peter Jones argues that groups cannot be regarded as subjects of human rights due to their conflict and possible precedence over individual rights claims. In order to exclude any dichotomies with individual rights, Will Kymlicka rejects the term ‘collective rights’ altogether and establishes ‘group-differentiated rights’ instead. While collective rights are presumably exclusively granted to collectivities as distinct from and conflicting with individual rights, group-differentiated rights can be exercised equally by individuals. Hence, group-differentiated rights emphasise indigenous peoples’ particular rights, such as their right to ancestral territories, in comparison to other non-indigenous groups. Collective rights, however, could be understood as placing the community over the individual, restricting individual rights. In that sense a woman’s right not to be harmed or physically abused could conflict with the community’s culture or tradition not to interfere with family matters. Others focus on the adequate balance between both sets of rights: as soon as collective rights grant more than required, the State is criticised on the basis of uneven implementation of individual rights. It is further argued that ‘oversight and reasonable limitations’ on indigenous decision-making would prevent abuse of individual human rights. However, such limitations on indigenous justice systems do not only imply the respect of individual rights, but also entail the enhanced subordination of indigenous decision-making structures to the will of dominant society. The latter is thus provided with essential discretionary powers as to the selection of indigenous customs and practices. However, cases of autonomous indigenous justice systems reveal significant challenges regarding the consideration of individual rights: indigenous judges, for instance, rely on discriminatory gender ideologies in Puebla, Mexico. In other communities women are not allowed to politically participate in relevant forums, such as communal assemblies, or to hold offices. In such cases, collective rights take precedence over individual rights.

On the other hand, collective rights constitute an essential framework within which disadvantaged subgroups conceptualise their rights: women’s rights, for instance, are associated with ‘broader struggles against inequality, poverty, racism and discrimination’ in the context of collective rights. Poverty, for instance, affects indigenous households disproportionately: ethnic exclusion and inequality contribute to their economic and social status in society. Indigenous women are among the most vulnerable groups of indigenous peoples generally; they suffer from illiteracy and monolingualism more than male community members. Furthermore, indigenous women suffer violence related to their ethnicity, class and gender.

69 Rachel Sieder and Maria Teresa Sierra, ‘Indigenous Women’s Access to Justice in Latin America’, p.6. See fn.64.
70 Rachel Sieder and Maria Teresa Sierra, ‘Indigenous Women’s Access to Justice in Latin America’, p.27. See fn.64.
72 Rachel Sieder and Maria Teresa Sierra, ‘Indigenous Women’s Access to Justice in Latin America’, pp.21, 38. See fn.64.
73 Rachel Sieder and Maria Teresa Sierra, ‘Indigenous Women’s Access to Justice in Latin America’, p.10. See fn.64.
historical relation to non-indigenous society: violence is not limited to gender, but is exercised through intersectionalities of violence. Besides, discrimination and racism are particularly existent in official justice systems. Namely, justice officials discriminate on the basis of indigenous background; structural barriers such as language, cost and distance prevent indigenous peoples from accessing official justice systems on an equitable basis. These obstacles to enjoying basic rights are particularly relevant for indigenous women. Due to the high degree of illiteracy among indigenous women and the lack of interpreters and defence services, they are more disadvantaged than other community members. However, these issues of concern provide important forums of change. By actively confronting inequality, poverty, racism and discrimination, indigenous peoples enhance their collective rights and the living conditions of indigenous subgroups. Conversely, indigenous women’s movements in their fight for recognition and awareness also contribute to indigenous peoples’ collective rights – they act as catalysts of change. Human rights discourses and mechanisms are used by indigenous women in their specific cultural contexts and challenge dichotomous discussions on rights and cultures. Culture is used as a flexible and heterogeneous concept that is reshaped by its integral parts, the people. The interdependence of individual and collective claims is also recognised by indigenous peoples; the interactive character of both sets of rights becomes apparent in the context of dual standing group rights. In Mohawk traditions, for instance, collective power is based on six principles, namely ‘active participation of individuals, balancing many layers of equal power, dispersion of power, situational dynamics of power, non-coercive nature of power, and power that respects diversity’. This tradition reveals high degrees of decentralisation and a strong interdependence of collective and individual levels. Participation of individuals in community decision-making could test the reconcilability of individual and collective rights and the genuine character of indigenous community participation.

Rachel Sieder and Maria Teresa Sierra illustrate the degree of individual participation in indigenous decision-making in the case of indigenous women in Latin America. The authors reveal a paradoxical form of participation: despite the increased presence of indigenous women in formal and informal governance mechanisms, political decision-making powers are largely reserved to their male counterparts. This reflects a particular form of ostensible community participation, namely, representation without power. Furthermore, public offices are not assumed easily, rather indigenous women face serious obstacles in their communities and families, such as prejudiced positions and judgements, opposition and pressure. However, the significant influence of indigenous women in challenging commonly held gender roles and therefore traditional community justice structures might outweigh the costs. Indigenous women themselves have significantly contributed to gaining voice in decision-making. For instance, Guatemalan indigenous female activists have used the Mayan principles of complementarity, equilibrium and duality in order to reject domination and to transform power relations. Other regions reveal the specifically vulnerable role of indigenous women in decision-making: female indigenous activists in Sudanese Nubia report

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74 Rachel Sieder and Maria Teresa Sierra, ‘Indigenous Women’s Access to Justice in Latin America’, p.15. See fn.64.
76 Cindy Holder and Jeff Corntassel, ‘Indigenous Peoples and Multicultural Citizenship: Bridging collective and individual rights’, p.144. See fn.75.
77 Rachel Sieder and Maria Teresa Sierra, ‘Indigenous Women’s Access to Justice in Latin America’, p.16. See fn.64.
78 Rachel Sieder and Maria Teresa Sierra, ‘Indigenous Women’s Access to Justice in Latin America’, p.16. See fn.64.
on multiple challenges. As Nubians and indigenous peoples they are confronted with high levels of animosity by the ruling Arab Islamic regime. At the same time, the regime divides between men and women in educational sectors and public meetings that prevent Nubian women from having a voice in decision-making with the State. Despite their strong role within their communities, cultural and religious settings in State institutions exclude indigenous women from decisions that affect them. In Kenya, by contrast, indigenous women formally enjoy enhanced participatory rights: constitutional provisions reserve defined seats for female representatives of all counties, additionally, it is prescribed that every elected body can only contain up to one third of the same gender. Despite these recent constitutional changes, Kenyan indigenous women encounter various challenges such as cultural barriers, different forms of harassment and limited funding in relation to decision-making. The role of disadvantaged subgroups such as women becomes particularly apparent in direct community participation that includes individual and collective rights. Consultations held by States in indigenous communities could provide further insights into the challenging interplay of collective and individual rights. Similarly, the corporative sector plays a role in consultation processes that are unlawfully delegated to companies by the responsible States. Hence, States and companies deal with the “individual versus collective claims dilemma” and manipulate individual actors with the aim of imposing their will and interests. Recent international and regional jurisprudence has demonstrated this ‘legal dilemma’ and disagreement among relevant courts and institutions in balancing indigenous peoples’ individual and collective rights.

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5 Balancing of Individual and Collective Rights in International Human Rights Regimes

International human rights law provides several protection provisions for participatory rights in general and indigenous peoples in particular. Indigenous peoples benefit from previously established human rights treaties that stipulate participatory rights applicable to all under the umbrella of civil and political rights and respective rights to be granted to particular

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81 Emma Hughes, ‘Displacement and indigenous rights’, p.113. See fn.79.

82 Emma Hughes, ‘Displacement and indigenous rights’, p.118. See fn.79.


84 Korir Sing’Oel and Laura Young, ‘Kenya’, p.374. See fn.82.

85 The International Covenant on Civil and Political Rights (ICCPR) includes the right to self-determination of all peoples (Article 1(1)) and the right of every citizen to take part in public affairs, to vote and be elected and to have access to public services (Article 25). The Human Rights Committee also stresses the opportunity to
groups. Notably, some indigenous peoples have successfully claimed minority rights in relation to the development of cultural identity and the right to participate in decision-making requiring the free, prior and informed consent of community members. The Human Rights Committee (HRC) has also clearly linked the right to self-determination and the corresponding free disposal of natural wealth and resources to indigenous peoples. Similarly, indigenous peoples enjoy participatory rights under general non-discrimination provisions: they have the right to effective political participation including informed consent whenever decisions directly affect their rights and interests and are entitled to *control and use communal lands, territories and resources*. Further, indigenous peoples are given the right to participate in the management and conservation of natural resources according to international legal provisions on non-discrimination. At the same time, the Committee on the Elimination of Racial Discrimination (CERD) recommends States to seek free and informed consent prior to granting licenses to private companies for economic activities on indigenous territories. Merely consulting indigenous peoples would not meet the requirements of CERD’s general comment no.23; consent is thus recommended prior to exploiting the resources. Finally, indigenous peoples’ rights have received increasing attention in the context of housing, food, education, health, water and intellectual property. Indigenous peoples are not only granted the right to maintain, protect and control their cultural heritage and traditional knowledge, the principle of consent should be respected in ‘all matters covered by their specific rights’. In accordance with the latter State obligation, the Committee on Economic, Social and Cultural Rights (CESCR) has repeatedly referred to the necessity to undertake consultations ‘as a basis for obtaining the prior, freely given and informed consent of indigenous people and nationalities for natural resource development projects that affect them’. In this context the Committee demands the respect for community

participate directly in settings that have the ‘the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens’ (General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service. para. 6). Article 27, ICCPR, e.g. establishes minorities’ rights with particular regard to their culture, religion and language. Respective cultural rights include a particular way of life ‘associated with the use of land resources, especially in the case of indigenous peoples’ (General Comment no 23: The rights of minorities. para. 7)

94 CESCR, General Comment no 21: Right of everyone to take part in cultural life (Article 15, para. 1(a)), UN Doc. E/C.12/GC/21, 21 December 2009. para. 37.
95 CESCR, Concluding Observations of the Committee on the third periodic report of Ecuador as approved by the Committee at its forty-ninth session, UN Doc. E/C.12/ECU/CO/3, 13 December 2012. para. 9(1). For further
consultation procedures and resulting decisions. However, conflicts with individual rights are not specifically addressed by the respective human rights treaty committees. Instead, general references to human rights law are made without approaching the potential conflicts that might be produced in the realisation of individual claims in the context of collective rights.

Apart from jurisprudence of CCPR, CERD and CESC, specific human rights instruments contribute to the codification of these rights. The first international legal instrument dedicated to the protection of indigenous peoples’ rights is the International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples in Independent Countries No.169 (C169). C169 contains a number of provisions on participatory rights, namely to participate in and to be consulted on various issues that affect indigenous peoples. Accordingly, indigenous peoples have to be consulted when legislative or administrative measures are adopted that directly affect them. They also have the right to freely participate in decision-making in elective institutions as well as institutions in charge of policies and programmes that concern them. The Convention further stipulates that consultations have to be carried out in good faith, appropriate to the circumstances and comprehend the objective of reaching agreement or consent regarding the respective measure. Additionally, the element of representativity plays a crucial role in ensuring that consultation is carried out with true representatives of the communities affected. Further, C169 establishes that indigenous peoples are entitled to participate in formulation, implementation and evaluation related to development plans and programmes that affect them. Finally, indigenous peoples are enabled to participate in the use, management and conservation of natural resources that pertain to their lands. Despite significant advances in the universal protection of indigenous peoples’ participatory rights, C169 limits the element of agreement or consent in Article 6(2) to a mere objective of consultation. Furthermore, individual rights are not specifically addressed in the framework of consultation procedures. While C169 includes provisions on indigenous peoples’ enjoyment of human rights without discrimination and specifically stipulates the equal application of its provisions to female and male community members, it does not specify this in the context of participatory rights. C169 also requires the consideration of the problems that face indigenous peoples as individuals in the context of recognising their values and practices. Finally, the Convention establishes that indigenous peoples’ rights to their own customs and institutions shall be respected as long as these are not incompatible with national and international law.
international human rights law.\textsuperscript{106} Again, C169 does not establish specific contexts in which individual rights need to be respected, nor does it provide procedures or guidelines to deal with such possible conflicts. Similarly, the phrase ‘compatible with human rights law’ does not give indications as to the level of weighing both sets of rights. Resembling phrases have been adopted by the second fundamental international instrument for the protection of indigenous peoples’ rights, namely the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

General participation-consultation rights and participation in decision-making are significantly developed by the UNDRIP. Accordingly, the Declaration requires States to consult with indigenous peoples before legislative or administrative measures are adopted, it grants the right to participate in decision-making regarding issues that affect their rights, it enables them to maintain their own decision-making bodies, and to be consulted prior to the approval of any project that affects their territories and land, particularly their resources.\textsuperscript{107} However, UNDRIP does not provide any guidance as to the consideration of individual rights in consultations with States. The Declaration grants a number of collective rights with particular attention to indigenous peoples’ customs, practices, traditions, procedures and juridical systems; it also allows indigenous peoples to regulate individual members’ responsibilities in their communities.\textsuperscript{108} On the other hand, individuals specifically have to be treated without discrimination; indigenous women and children enjoy full protection from violence and discrimination; the needs and rights of indigenous elders, women, youth, children and persons with disabilities have to be considered; and all indigenous distinctive customs and procedures need to be in accordance with international human rights standards.\textsuperscript{109} In addition to national sovereignty issues, the reconcilability with human rights law entails the only limit to group rights of the Declaration. Yet, it also comprehends one of the most contentious issues. The instrument largely lacks guidance as to the balance of collective and individual rights that confronts courts and policy makers at regional and national levels in consultation processes. This failure might jeopardise its aspirational goals.\textsuperscript{110}

5.1 International and Regional Responses to the Legal Dilemma

In the UN system, there are four organs with a mandate specific to indigenous peoples’ rights and matters, namely, the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) succeeding the Working Group in Indigenous Populations (WGIP), the Permanent Forum on Indigenous Issues (PFII) and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples (SR). EMRIP contributes significantly to the development of indigenous peoples’ right participation in decision-making; it differentiates between their internal decision-making processes and institutions on the one hand and decision-making in relation to State and non-State institutions on the other hand.\textsuperscript{111} However, individual indigenous rights to decision-making are not considered in its thematic studies. While it emphasizes the vulnerable situation of indigenous women and girls in social conflict

\textsuperscript{106} C169, Article 8(2).
\textsuperscript{108} See Articles 34 & 35 UNDRIP for instance.
\textsuperscript{109} See Articles 2, 22(1)&(2), 34, 44, 46(2)&(3) UNDRIP.
contexts, their participation in decision-making is not discussed. Rather, the Mechanism clarifies that indigenous communities shall establish their own procedures to determine with whom governments and companies should consult in situations of ‘conflicting views on the legitimate representatives’ of the respective community. Limitations to such procedures are not mentioned. This priority demonstrates the importance of indigenous peoples’ collective rights and collective, internal self-determination; at the same time it ignores internal power imbalances in indigenous communities and the rights of subgroups. Conversely, the Special Rapporteur interprets the UNDRIP in a somewhat different way. The current SR devotes significant parts of his advisory reports to the contentious issue of the duty to consult and the understanding of consent. Specifically, he emphasises the empowering character of consultation procedures, the equal role of concerned parties and genuine dialogue. While he stresses the importance of respecting indigenous peoples’ own institutions of representation, the SR also reminds indigenous peoples of developing and revising their institutions in order to establish institutions of representation. In the latter context, James Anaya states that indigenous institutions need to function in conformity with international human rights law and respect the needs of indigenous women, youth, children, elders and persons with disabilities as stipulated in Article 22 UNDRIP. Despite the absence of further elaborations on the implications of the provision, his comments reveal a clear orientation towards the consideration of individual rights.

The Permanent Forum goes one step further: it provides alternative interpretations of the Declarations and strongly emphasizes individual rights. It points out major problems in consultation processes with extractive industries such as the limited selection of specific individuals or communities by companies and governments in negotiations that did not represent their communities. This shows that the power imbalance and inappropriate, non-representative forms of decision-making are not disregarded by the Forum. In recent thematic sessions and workshops, PFII has devoted its discussions to particular indigenous groups, namely indigenous women and girls on the one hand and indigenous youth on the other hand. The Forum elaborates on indigenous women’s participatory rights in the broad context of non-discrimination and violence against women. The PFII regards violence against women as a broader implication of the absence of women’s participation in decision-making. Further, the Forum refers to the significance of free, prior and informed consent in that regard and states that the exclusion of women from negotiations regarding resource extraction, peace agreements or land rights jeopardises the overall self-determination of indigenous peoples. According to PFII, the exclusion of women from such projects implies that ‘the self-determination of indigenous peoples can never be truly achieved’. In its final recommendations, the Forum reemphasises its inclusive understanding of indigenous peoples’ self-determination: it regards the elimination of patriarchal social relations and discriminatory consequences.

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113 EMRIP, Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries, UN Doc. A/HRC/EMRIP/2012/2, 30 April 2012. p.18.
118 PFII, Combating violence against indigenous women and girls, p.8. See fn.111.
119 PFII, Combating violence against indigenous women and girls, p.8. See fn.111.
policies as a precondition for indigenous self-determination. In this sense, the Forum takes an intermediatory approach; it allows for the conceptualisation of individual rights in the framework of collective claims. It further requests the SR and EMRIP to incorporate the particular dimension of indigenous women in their studies on indigenous peoples in extractive industries and corresponding decision-making and the framework of free prior and informed consent.

Indigenous youth rights have equally gained importance in discussions and recommendations issued by PFII. Indigenous youth participation also plays a role in forums and discussions. Namely, their right to participate in decision-making is established where decisions affect their wellbeing. In that regard, the PFII stresses the diversity in indigenous youth worldwide and their different expectations that impede the establishment of a single participation model for all. The Forum also calls for conceptual differentiation between participation in indigenous and non-indigenous institutions internationally, and indigenous peoples who live in indigenous and non-indigenous communities or populations.

At regional levels, the Inter-American system stands out with the most extensively developed jurisprudence on indigenous peoples’ participatory rights. Indigenous peoples’ rights are not included as such in Inter-American human rights instruments. However, their rights can be derived from general human rights applicable to indigenous peoples. Accordingly, indigenous peoples enjoy civil and political rights as stipulated in the American Convention of Human Rights (ACHR) (1969) and social, economic and cultural rights as specified in the Protocol of San Salvador, namely the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988). Additionally, indigenous peoples enjoy rights as defined in respective instruments on refugees, the prevention and punishment of torture, the abolishment of the death penalty, the forced disappearance of persons, women’s rights, non-discrimination against persons with disabilities and the environment. Indigenous peoples’ rights have also been introduced into Inter-American case law: the Inter-American Court of Human Rights (IACtHR) delivered judgements of great significance in the field of indigenous peoples’ rights, such as Yakye Axa Community v. Paraguay, Yatama v. Nicaragua, Moiwana Community v. Suriname, Sawhoyamaxa Indigenous Community v. Paraguay, Saramaka People v. Suriname or Xákmok Kásek Indigenous Community v. Paraguay. The establishment and expansion of

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120 PFII, Combating violence against indigenous women and girls, p.8. See fn.111.
121 PFII, Combating violence against indigenous women and girls, p.8. See fn.111.
126 Yakye Axa Indigenous Community v. Paraguay, Inter-American Court of Human Rights (IACtHR), Series C no 125 (2005).
130 Saramaka People v. Suriname, IACtHR, Series C no 172 (2007).
indigenous peoples’ rights in Inter-American jurisprudence also includes indigenous participatory rights. Despite any explicit reference to indigenous peoples’ rights or rights to consultation and consent, Inter-American human rights organs have found a way to introduce these rights into jurisprudence. An evolutionary interpretation of various political rights provisions allowed the Court to establish compulsory consultation procedures for indigenous peoples. The American Convention on Human Rights grants everybody the right to participate in governance and the right to property including the prohibition to use or exploit other people’s property. Specifically, the IACHR has evolutionary interpreted the said provisions in its elaborations of principles that would eventually coin the duty to consult, namely it has interpreted the said rights in conjunction with other relevant rights pertinent to indigenous peoples. Similar to the Court, the Commission understands consultation as an element of other material rights codified in Inter-American legal instruments, exemplified by the right to property. The mentioned Yatama v. Nicaragua Court judgement, for instance, reflects the significance of participatory rights. Apart from general participatory rights, the IACHR has also interpreted the right to prior consultation and consent. The landmark decision on the right to consultation at the Inter-American level, Saramaka People v. Suriname, refers in detail to the right to consultation and specifies contexts in which free, prior and informed consent is mandatory. In the recently pronounced judgment Kichwa Indigenous People of Sarayaku v. Ecuador, the Court derives from the domestic legal developments in C169 State parties a further reaching obligation, namely it considers the obligation to consult a general principle of international law.

In relation to balancing collective and individual rights, the Court largely avoids pronouncing itself on such issues. However, it identifies some criteria as incompatible with the element of good faith, i.e. bribing community leaders or negotiating with individual community members are regarded as subverting the social cohesion of such communities. The latter requirement not only accentuates the need for respecting the community’s own decision-making processes and institutions, it also reveals the inclusive and holistic approach of the Court that seems to object to excluding community members from participating. Apart from indigenous peoples’ alleged own societal and cultural barriers to inclusive participation, the Court thus identifies external influences as hampering collective decision-making. A study on the State’s subverting influence on indigenous collective process in Canadian land claims agreements comes to the same conclusion: the authority structures of the State itself and its institutions in decision-making processes undermine indigenous ‘own more consensual traditions’. Also, summaries of land agreements would only be available to community leaders, without providing opportunities for all to access the summary and to limit such opportunities to very few community meetings. State mechanisms thus further limit

133 American Convention on Human Rights, Article 21.
134 Inter-American Commission on Human Rights (IACHR), Maya Indigenous Communities of the Toledo District Belize, Report N° 40/04 Case 12.053 (Merit), 12 October 2004. According to the Commission, ‘one of the central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories’ para. 142.
137 Kichwa Indigenous People of Sarayaku v. Ecuador, IACHR, Series C no 245 (2012). para. 164. ‘In other words, the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law’.
indigenous people’s inclusive opportunities to collectively participate in decision-making. Apart from general ‘no-bribing’ clauses, the Court does not elaborate on individual members’ right to participation in consultations in Saramaka People v. Suriname or Kichwa Indigenous People of Sarayaku v. Ecuador despite extensive discussions on the right to consultation. Only after a State request for further interpretations, the Court clarifies some representative issues in consultation processes. Accordingly, the Court deliberately refrained from specifying the actors of consultations. It concludes that representation issues should be decided by the respective indigenous community, and not by the State, in accordance with their customs and traditions. The Court thus avoids issues related to international human rights standards and participation of individual members. While it does not explicitly exclude individual rights, it refrains from providing a forum for individual complaints related to participation in case they would conflict with indigenous peoples’ customs and traditions.

In contrast to the Court, the Inter-American Commission on Human Rights (IACHR) takes a less moderate approach. Importantly, the Commission stresses the inclusive character of participation in decision-making. Apart from indigenous peoples’ collective rights and the consideration of ‘peoples as a whole’, individual members’ rights in decision-making are identified. Accordingly, the IACHR asserts that the collective interest of the respective communities cannot prevail to the detriment or the ‘exclusion of individual members’ in such processes. Consultation must include information and consent of the entire indigenous community. Respective case-law affirms the State obligation to inform all members of the respective community and to provide an ‘effective opportunity to participate individually or as collectives’. According to the Commission, the conditions of indigenous peoples’ full participation regarding property rights are not met in the following situations: in cases where not all members enjoy the right to participate in the selection, authorisation or mandate of their representatives; at times when only a part or segment of the community promotes claims without corresponding mandates; or whenever members of the community as a whole are not consulted when substantial decisions are made. However, the Commission also establishes that representation of concerned communities must be established by themselves and be in line with their traditions and customs as stipulated by the IACtHR in Saramaka People v. Suriname. The Commission extensively elaborates on the importance and conditions of cultural adequacy of consultation processes. Accordingly, relevant international instruments prescribe indigenous peoples’ own traditional decision-making and refrain from imposing a single model of representation allowing for diversity. The Commission thus demonstrates a fundamentally different approach towards considering individual indigenous members’ rights to participate in consultation processes. However, it does not allow for individual participation without considering cultural settings and traditional decision-making specific to the respective communities. The Commission thus establishes an individual rights approach in a collective framework with a culturally sensitive perspective. At the same time, it demonstrates that collective consultation processes need to assert individual rights in order to be truly inclusive.

143 IACHR, Indigenous and tribal peoples’ rights over their ancestral lands, para. 286. See fn.134.
144 IACHR, Maya Indigenous Communities of the Toledo District Belize, para. 142. See fn.128.
145 Mary and Carrie Dann (United States), IACHR, Report N° 75/02. (Case 11.140). para.140.
146 IACHR, Indigenous and tribal peoples’ rights over their ancestral lands, para. 287. See fn.134.
147 C169, Article 6(1); UNDRIP, Article 32.

The preceding discussion demonstrates that individual participatory rights have not been clearly introduced into the indigenous rights regime. The previous theoretical considerations show that stakeholders and judges face enormous complexities when they are confronted with diverse intersectionalities and affiliations in communities. On the one hand, indigenous customs, traditions, practices, juridical systems and the collective will of the respective indigenous community need to be respected and encouraged. On the other hand, decisions should not be taken by commercially interested, non-representative élites who are not accountable to their communities. The importance of State mechanisms as well as corporate initiatives and their negative influence on indigenous decision-making such as selections of ‘project-prone’ representatives should not be disregarded in this context. While individual rights do not necessarily contradict collective rights and could be conceptualized in the latter framework, not mentioning them would allow for an exclusive form of decision-making. Highly relevant mechanisms for the implementation of indigenous rights, such as EMRIP and IACtHR, avoid individual rights in the context of collective participation in consultations (see figure 3, p.18). However, almost all relevant human rights bodies agree on the following aspect: negotiations with individual community members and bribing are not accepted. Representation thus clearly plays a role in all human rights forums. This could provide a possible point of departure from which all corresponding mechanisms could develop a more comprehensive protection against elitist decision-making and inclusion of different community sectors at the same time. Negative obligations such as the prohibition to negotiate with a few members could evolve into positive obligations, namely the active integration of indigenous women, youth, elders, children and persons with disabilities in consultation processes. Another commonality is the participation of indigenous peoples in all stages of decision-making, such as planning, preparation, execution, monitoring and evaluation. This illustrates the importance of the element of control or power in participatory mechanisms.

Now, commonalities could inspire progressive developments in the field of individual indigenous rights. The consideration of such rights at the highly influential Inter-American level shows great promise for more inclusive approaches in international jurisprudence. The PFII and IACHR reveal how collective self-determination can be strengthened and even conditioned by individual rights and positively affect individual and collective wellbeing (see figure 4, p.18). Courts could not complain about missing legal bases—non-discrimination provisions have found their way into all indigenous peoples’ rights instruments.