

THE INDIGENOUS RIGHTS OF PARTICIPATION AND INTERNATIONAL DEVELOPMENT POLICIES

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Under the current international regime, policies that affect indigenous peoples, including those of development assistance and cooperation, are illegitimate if they are negotiated without indigenous participation. Even though the traditional pattern or custom, which instead is one of indigenous exclusion, is still operative in form and substance. Indigenous peoples can see this matter as one of a legal entitlement that requires their prior consent and that is asserted in the development and deployment of policies that affect them. Others would rather see the test of legitimacy as one that simply requires informed, good faith consultation with the objective of achieving indigenous consent, but without requiring actual consent even when these policies displace resources belonging to indigenous territory.

Even though both sides cast their positions in normative terms, we are in a transitional phase between authoritative but indefinite rules of indigenous rights. Like it or not, the result is a panoply of positions, all of which are defensible under the current international regime. In my view, this leads to a double implication, a pair of ideas that I will attempt to argue in this article.

1. Under current international law, the right of indigenous peoples to participate in any kind of pertinent policy-making moves along an extremely wide spectrum between simple consultation and strict consent.

2. The rights of indigenous peoples are being increasingly recognized both in international instruments and custom, mainly due to the indigenous peoples' own initiative, but also to the cumulative effect of diffuse international and state practice in relation to these peoples. Needless to say, development agencies play a prominent role here, an additional reason why the definition of their own codes of conduct is so important.

I shall develop these ideas in the following order: (1) the right of participation as a manifestation of self-determination; (2) customary international law of indigenous exclusion; (3) the international landscape between participation and exclusion; (4) unexpected indigenous participation on the global stage; (5)

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customary international law of indigenous participation; (6) concerning the responsibility of development and aid agencies.

A. The right of participation as a manifestation of self-determination

The fifth section of the United Nations Draft Declaration of Indigenous Rights contemplates the right of participation in all decisions and all procedures that may interest indigenous peoples, unequivocally referring to the effectiveness of full self-determination:

Article 3. Indigenous people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;

Article 19. Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures as well as to maintain and develop their own indigenous decision-making institutions;

Article 20. Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.¹

The explicit requirement of free and informed consent of indigenous peoples to whatever measures may affect them is consistent with their right to free and unrestrained participation. We are not dealing with an expression or extension of the constitutional right of civic participation, but rather with a legal attribute of a self-determining people. It is not about indigenous peoples concurring with decisions along with a citizenry that deems to include them. Rather, they decide for themselves, through representatives chosen by their own procedures, the reasons for and bases of their participation.

That is how the right of participation for indigenous peoples is formulated in the United Nations Draft Declaration of Indigenous Rights. It is only a draft. Such a right, in such terms, is not explicitly found in binding text of

1. *Draft Declaration on the Rights of Indigenous Peoples*, U.N. Human Rights Commission, Sub-Commission of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1994/2/add.1 (1994), available at <http://www1.umn.edu/humanrts/instree/declra.htm>.

any single human rights declaration, convention, or jurisprudence within the international human rights system, although its root lies within this normative system. The Draft Declaration of Indigenous Rights is but a new step in the development of the international human rights regime that builds on the Universal Declaration of Human Rights. It is presented in declarative terms exactly because the instrument does not create these rights out of thin air, but instead confirms their prior existence and gives them practical meaning.

The question remains, however: The right to unrestrained and effective participation of indigenous peoples already exists within the international human rights regime, yet it needs a specific instrument to make it recognized and respected. Why is this?

B. Customary international law of indigenous exclusion

Self-determination as a right of a people to be in charge of itself not only in political but also in economic, social, and cultural matters, and so to decide for itself through its representatives selected through its own procedures, is firmly recognized in the first articles of the two principal instruments of the international human rights regime, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights:

Article I. (1). All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.²

Although “*All peoples*” literally includes indigenous peoples, recognition of this has not caught on – the motivating reason behind the current effort to make this recognition explicit. But by what basis have indigenous peoples continued to be excluded from the human right of self determination? Nowhere in the normative body of international human rights law (i.e., that developed by the United Nations since the Universal Declaration) is exclusion made explicit. But exclusion is a fact, one that suggests the existence of an underlying norm of customary international law of such force that its nullification requires the formulation of a specific instrument like the Declaration of Indigenous Rights.

2. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), (entered into force Mar. 23, 1976), available at <http://www1.umn.edu/humanrts/instrree/b3ccpr.htm>; International Covenant on Economic Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, art. 1(1), U.N. Doc. A/6316 (1966) available at http://www.unhchr.ch/html/menu3/b/a_ceschr.htm.

General terms set forth in the international human rights covenants have not sufficed.

It is worth noting that indigenous exclusion came about in the context of the decolonization policies of the United Nations, policies that expressly ruled out self-determination for peoples contiguous with or found within the recognized boundaries of states. This political context, however, did not change the aim or substance of any human rights instrument. Even beyond that context, the effects of exclusion still do not disappear. There is an unconscious, unformulated, international customary norm that produces the short circuit. Nor is this norm that hidden, for it left its imprint on the Universal Declaration:

Article 2. (1). Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. **(2).** Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.³

The second paragraph does not establish the exception, but it does allow for the understanding that the subordination of entire peoples does not affect the rights of their constituent individuals. This is exactly the interpretation that the drafters came to correct in the Covenants to situate self-determination of peoples as a premier right, first among all other rights-- whether they be civil and political, or economic, social, or cultural – and as so essential to the very rights of individuals. With the Covenants, it is fairly understood that the denial of peoples' rights has a harmful effect on the human rights of individuals. If such an approach has yet to reach indigenous peoples, it is because of the continuing influence of the contrary customary norm reflected in the aforementioned paragraph of the Universal Declaration – that norm which the draft declaration on indigenous rights would definitively nullify.

With things as they are, waiting for progress on the draft declaration is not the only option. The right of peoples to self-determination currently exists in the international regime, but it is undermined by the weight of a customary norm of indigenous exclusion. Under these circumstances, the exclusionary norm can be countered through the development of international practice that goes against that norm, that is, through the same customary norm-building process that gave rise to the exclusion in the first place and that may eventually render a specific

3. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 13, art 2, U.N. Doc. A/810 at 71 (1948), *available at* <http://www.un.org/Overview/rights.html>.

indigenous rights declaration unnecessary. On the other hand, patterns of exclusion may continue. In fact, both things are occurring. Here we have a schizophrenic regime where international development agencies define for themselves the parameters within which they operate.

C. The international arena between exclusion and participation

The international instrument that actually deals specifically with indigenous rights simultaneously embraces both indigenous exclusion and the requirement of participation: exclusion of rights as “peoples” and the requirement of participation under a different rubric. The latter is what the instrument effectively advances, despite the former. The exclusion does not prevail. It is not endorsed but is rather noted within an effort to formulate the rights of indigenous peoples within a the realist rendition of the established international regime. I am referring, of course, to Convention No. 169, the International Labour Organisation Convention Concerning Indigenous and Tribal Peoples in Independent Countries:

Article 1 (3) The use of the term “peoples” in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Article 6 (1) In applying the provisions of this Convention, Governments shall: Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them; Establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

(2.) The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.⁴

Here we have a formulation of the right of participation that is not an expression of self-determination, and which results in an inferior standard for the

4. Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, (entered into force Sept. 5, 1991), *available at* <http://www1.umn.edu/humanrts/instree/r1cip.htm>.

indigenous position. It codifies the argument that consultation in the context of indigenous participation “at least in the same manner as other sectors of the population” is sufficient. There is no option not to participate. Consensus is seen as the desired result of a consultation, not the requisite decision from the indigenous party so entitled to self-determination. The ILO Convention assumes that a guarantee of informed consultation, along with the good faith with which it is to be undertaken, can result in legitimate policies on matters on which no consent is reached. The negotiating positions of all parties are affected by this assumption and the indigenous position is debilitated.

The dynamic generated by the right of consultation can lead to practical consent on particular matters, but it does not establish a legal claim for the indigenous party. The ILO adopted Convention 169 without itself putting into practice the indigenous right of consultation that is contained in the convention. And it promotes the Convention without providing a platform for indigenous participation. The ILO has yet to establish a forum within the Organization for indigenous representatives to be involved in the development of international policies regarding indigenous rights. It turns out that Convention 169 does not apply to the ILO itself, since it purports to decide issues of indigenous rights without consulting indigenous peoples.

There are other norms in the international order relating to the right of participation of similar import to ILO Convention 169. The most relevant example is the Convention on Biological Diversity. Instead of falling back on the traditional norm of full indigenous exclusion, the empowerment of states for the control over natural resources through this Convention does not overlook the existence of indigenous peoples:

Preamble

Reaffirming that States have sovereign rights over their own biological resources,

Reaffirming also that States are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner,

Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components,

Article 8. In-situ Conservation

Each Contracting Party shall, as far as possible and as appropriate:

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous

and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.⁵

We are talking about natural resources that are clearly indigenous, of natural resources known thanks to the non-predatory economies and empirical science of indigenous peoples, a type of experience and understanding that is not recognized as intellectual property by the current international law. The Convention directly assigns to states rights over these natural resources, charging them with the mission of communicating to and participating with indigenous peoples. The application of protective policies by states requires indigenous approval. There is no indigenous right over the natural resources themselves, but rather a right to participate in the policy-making processes of the states that control resources. Profits must be shared with the rest of humanity through the states' powers, not taking into account indigenous rights. It is another example of a regime based on the assumption that the right of participation is not an expression of self-determination for indigenous peoples.

There are multiple examples of the schizophrenic interplay between exclusion and participation in the international legal system, the core United Nations instruments themselves included, but I believe that ILO Convention 169 and the Convention on Biodiversity are sufficiently illustrative.

D. Unexpected indigenous participation on the global stage

The Convention on Biological Diversity may also generate a dynamic superior to and distinct from what has just been examined. It envisions a periodical Conference of the Parties (Article 23), to act as a governing or global parliamentary body on biodiversity. Over the past decade a sufficient amount of experience has been amassed in these summits to understand that, in practice, this issue of indigenous presence does not correspond exactly to the limited language of the Convention.

The Convention clearly envisions indigenous humanity *in situ* and contemplates that it is to be protected *in situ*, within the local sphere. Matters of global significance are understood to be the responsibility of the community of states. These aspects of the Convention, which are revealed by a strict reading of the international instrument, are ones that can be seen modified by initiatives of

5. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (1992), available at <http://www.biodiv.org/convention/articles.asp>.

indigenous peoples, who convened at the summits to constitute parallel parliaments whose resolutions could be transferred as proposals directly to the Conference of the Parties. This phenomenon presents two opposing issues, both of which deserve attention.

The first is the well-known and persistent customary international law norm of indigenous exclusion, under which domestic inclusion is currently expressly covered. The indigenous participation strictly outlined by the Convention is within the exclusive sphere of the state in question. According to the Convention, that is the indigenous *locus*, and the document provides nothing more in terms of participation. This is one side of the coin; the other side is entirely different. There is an international indigenous presence ready to make itself heard, and it has a much wider reach than that which the Convention identifies as corresponding to the indigenous. The indigenous profile at the parallel summits is not the same as the one laid out in the Convention.

It is this point that deserves to be emphasized. One must not forget that indigenous peoples identified in the Convention are the ones who have survived in their own areas with knowledge and experience of biodiversity unknown to the outside world. The image of indigenous peoples offered by the parallel summits corresponds to the Convention's characterization only partially. The parallel summits bring to light a much different universe. Here we find a wider range of peoples who share in a common identity of recognition insufficient to be considered as equals among the rest, while the text of the Convention revolves around the determinism of only a certain sector--states. All understand themselves as indigenous impacted by the Convention, and with the right to participation, which they exercise despite the very absence of such a right in the Convention.

Indigenous peoples currently exercise a right consistent with that foreseen for the future. They aren't waiting for external recognition, inasmuch as they themselves understand the right to already exist. It is the "right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions," as provided in the Draft Declaration (Article 19). The Convention on Biological Diversity, on the other hand, in the opening line of Article 8(j), calls for indigenous peoples to maintain themselves *in situ*, participating "[s]ubject to [the] national legislation" of the state within whose boundaries they are located. Consequently, in Annex II concerning *Arbitration and Conciliation*, only the option of mediation between states is considered, as if mediation between states and indigenous peoples would never be necessary, on the assumption that indigenous peoples should remain indefinitely confined within the non-indigenous states' jurisdiction.

E. Customary international law of indigenous participation

The experience of unanticipated indigenous participation pushing the Convention on Biological Diversity beyond its explicit provisions is evidence of a trend visible in many other international arenas, including the United Nation's permanent bodies. It is not necessary to extend the inquiry into other manifestations of this theme in order to appreciate its crucial importance to our current topic. I am referring to the change in indigenous rights from the older and still influential customary norm of exclusion to the developing customary norm of participation, already in practice. Both are important and influential, although neither is codified in writing. That is the essence of customary law.

The customary norm also shares a facial value with the codified norm on the key issue of indigenous identity. The narrow view taken by the Convention on Biodiversity, that resource-rich indigenous peoples are merely guardians of the resources, while control and management rest with states for the benefit of humanity as a whole, is currently in general use among international agencies, from financial institutions to humanitarian organizations. Indigenous peoples are those that maintain exclusive spatial domains with their own resources and that are not *de facto* under the jurisdiction of the state whose boundaries surround their lands. Recognition is offered in return for their submission to the state. The suspicion arises that the underlying motive is for the latter, i.e. to gain access to indigenous peoples' resources.

Contrary to policies of international development agencies that are attempting to put an end to the indigenous challenge, the new customary norm sustains and develops a process of open self-identification. Although, the new norm cannot be said to be uncontroversial, for it is clearly bounded by the sharp force of the old customary, exclusionary norm. The peoples that have been excluded, both through colonialism and decolonization, are those that insert themselves through their own initiative. They are the ones who demand participation through self-determination, in accordance with an implied right for an equal footing among peoples. With the one and only common trait of prior exclusion under past colonial duress, the range of indigenous settings is immense, involving diverse possibilities for the right of participation even under self-determination assumptions.

Providing only for means of indigenous participation at the highest level of abstraction is inexcusable. International policies that affect indigenous peoples in the broadest sense should not be advanced without dialogue, but at the same time it must be added that this participation must be tailored to indigenous patterns of decision-making. Participation at the broadest level of deliberation should not supplant local participation. All indigenous peoples have the right to participate in the process of making and implementing decisions that might affect them. In the case of many affected indigenous peoples, the same right must even be extended to each local community in accordance with internal structures of organization.

Participation can present particular challenges in the case of peoples whose communities have been dispersed and integrated into the political structures of states, which is often the case today in the aftermath of colonial history. While, from the indigenous perspective, consultation must involve the communities' representative authorities, those same indigenous authorities tend to be acknowledged by the state as community leaders but with only auxiliary roles beyond the communities themselves, and as lacking authority of their own to act in representative capacities outside of their communities and for the purposes of discussions on international development cooperation. The state can argue that the accommodation of indigenous communities on such terms of recognition of their own authorities complies with international standards. The ILO has so condoned. International development projects, above all those administered by governments, tend to proceed on the assumption that the projects shall be implemented according to the plans of the host state. This is the way it is done, and one becomes used to it, although it does not appear that this practice respects the present customary international law of participation of indigenous peoples as entities internationally distinct from the states in which they are included without their consent.

F. Concerning the responsibility of development agencies

The essential rule of customary international law requires distinct and direct consultation with the indigenous party on every level at which it is has a presence, whether global or local—even in cases where it is not provided for by written instrument. The rule applies to international institutions themselves. Today, for example, it would not be legitimate for the Biodiversity Summits to function according to the strict provisions of the Convention. Indeed, the legitimacy of ILO decisions involving indigenous issues made without indigenous participation is itself currently in doubt.

Consultation is one thing; consent is another. The former moves towards the latter, but it can be developed and resolved without achieving it. Consultation can promote positions, enhance projects, and even establish some terms of cooperation, without necessarily reaching full consent. However, from an indigenous perspective and within the present international order, the right to participation can be perfectly conceived of and demanded as an expression of self-determination requiring consent. This is already a legitimate proposition within the current established international order, without any need to wait for the Declaration of Indigenous Rights to come along to revalidate it.

Nevertheless, such a right of consent is not part of the authoritative customary norm, which is anyway much more vague and elastic. Nor does it conflict with the established international order to take the position that all that is required is consultation in good faith, or that, so long as the state doesn't violate

international law (including ILO Convention 169), it can negotiate in the name of indigenous peoples who live within its boundaries.

While the Declaration of Indigenous Rights has not been approved in its present form, international agencies do have options. While approval is delayed, the authoritative principle will be able to continue taking shape, either toward the most rigorous or most lax terms, by means of ongoing transnational discussions and patterns of behavior; that is, through impulses more or less at odds with each other, and through agents, including lately indigenous parties, acting more or less concurrently. Perhaps the final Declaration will resolve the standard determined by current self-determination practice.

Throughout this paper, I have referred to the discretion and the responsibility of international development agencies. Given the present situation of indigenous rights in the international field, when agencies define the terms of their programs and projects and engage with states to advance the objectives of cooperation and participation, they are not only regulating their own activity, but they also may be affecting the evolution of indigenous rights, either helping or hindering the process. They are actually contributing to the creation of international law by the avenue of custom.

Promoting indigenous participation results in the development of human rights, which is a key element of, not inimical to, development itself. Indigenous participation and consent constitute not only procedures, but above all objectives, for they themselves promote human development.

REFERENCES

- S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW*, (2d. ed. 2004).
Gregory Fox, *The Right to Political Participation in International Law*, 17 *YALE J. INT'L L.* 539 (1992).
PAUL KEAL, *EUROPEAN CONQUEST AND THE RIGHTS OF INDIGENOUS PEOPLES: THE MORAL BACKWARDNESS OF INTERNATIONAL SOCIETY*, (Cambridge Univ. Press, 2003).
P.G. MCHUGH, *ABORIGINAL SOCIETIES AND THE COMMON LAW: A HISTORY OF SOVEREIGNTY, STATUS, AND SELF-DETERMINATION*, (Oxford Univ. Press, 2004).
RONALD NIEZEN, *THE ORIGINS OF INDIGENISM: HUMAN RIGHTS AND THE POLITICS OF IDENTITY*, (Cal. Univ. Press, 2003).
TONY SIMPSON, *INT'L WORK GROUP FOR INDIGENOUS AFFAIRS, INDIGENOUS HERITAGE AND SELF-DETERMINATION: THE CULTURAL AND INTELLECTUAL PROPERTY RIGHTS OF INDIGENOUS PEOPLES* (1997).
PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* (Manchester Univ. Press, 2002).

