

# International Law on Domestic Indigenous Political Representation

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## [p.112] INTRODUCTION

Over the last twenty-five years international recognition of the human rights of indigenous peoples has been increasing. The recognition has encompassed two aspects. One aspect is the recognition that existing, relevant human rights law has not been applied to the particular situation of indigenous peoples, such that they have not been accorded their full human rights. A second aspect is the recognition that the understanding of human rights laws required development and articulation of more specific, relevant [p.113] standards. This latter recognition has progressed from research and identification of the problems to statements of support for their resolution and finally to action in support of solutions. Importantly for international human rights law, such solutions have included the development of international standards to guide state actions.

This paper is concerned with the recognition of indigenous claims to greater control over and participation in decision-making about their lives. Indigenous peoples point to the lack of such control and participation as a significant problem and an impediment to achieving indigenous peoples' human rights. The need to address this lack of control has been recognized internationally and has resulted in the development of international guidelines for doing so. However, the guidelines do not yet fit easily with existing international human rights laws on participation in decision-making within states. This paper aims to describe this "uncomfortable fit," and hopefully also how it might be overcome.

This paper first outlines the claims that indigenous peoples have made for why they need greater control over and participation in decision-making regarding their lives.<sup>fn1</sup> These claims are based on self-determination, which is seen as a pre-condition for upholding all their other human rights. As a means of achieving self-determination, indigenous peoples have claimed rights to a variety of methods of participation, from enhanced participation within the mainstream state processes (including guaranteed representation as well as consultation and consent over decisions that concern them) to complete authority and self-government by the group over autonomous indigenous territories. Part I also briefly outlines the significance of indigenous peoples making these claims as groups rather than on behalf of indigenous individuals.

Part II of the paper then discusses concepts of democracy and how democratic theorists suggest that minority group interests within a state are best protected. Importantly, the methods claimed by indigenous peoples are supported by some democratic theorists, who recommend

the adoption of group-based, power-sharing mechanisms in order to better accommodate minority interests.

These mechanisms are also supported by the emerging international law on indigenous rights, as discussed in Part III. Most of this discussion focuses on the 2007 UN Declaration on the Rights of Indigenous Peoples, its development, and the likely application of the provisions concerning indigenous participation in decision-making. The paper also addresses the [p.114] recognition of the indigenous right to participate in political decision-making by other human rights bodies and/or in other international human rights documents of the rights of indigenous peoples. An important aspect of the discussion is the noted change in recognition of indigenous rights in international law from solely individual rights to now include group-based rights.

Part IV discusses the more general rights to political participation in international law. Today, these rights are largely discussed as part of an arguably emerging right to democracy in international law. This Part addresses whether this emerging right to democracy contains or even reflects the suggestions for effective political participation recognized as an emerging right of indigenous peoples, discussed in Part III. Part IV also notes how, despite extensive support in international law for minority rights, including with regard to political participation, the emerging democratic rights are largely interpreted as providing for liberal, individualistic procedural protection. In contrast, the group rights and the types of measures claimed by indigenous peoples and recognized in the emerging law on indigenous rights call for a more substantive conception of effective political participation.

The comparison between the different areas of international rights law—that related to indigenous rights and that related to democratic rights—enables an assessment to be made of how well the emerging indigenous rights ‘fit’ with international human rights law. The indigenous rights do not yet fit within the standard interpretations of democratic rights, at least with respect to indigenous group rights to participation in political decision-making. There are, however, some positive illustrations for how such a fit might be made more comfortable so that indigenous peoples may be accorded their full human rights. This paper will conclude by outlining these illustrations.

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## [p.179] **CONCLUSION**

This paper has focused on the claims made by indigenous peoples for self-government and participation in decision-making, and on the support given to these claims from democratic theorists and in international law. The theory about democratic governance supports the indigenous claims made. [p.180] For example, there is support for autonomous self-government in indigenous territories, guaranteed representation within mainstream government (at national, regional, and local levels), and consent to (i.e., veto over) matters particularly concerning them. The aim is power sharing at national, regional and local levels through indigenous political participation, by the individual and the group.

There are two reasons given for the choice of these devices. The first is instrumental: only through such high-level political participation in decisions which concern indigenous peoples, it is argued, will indigenous rights be protected—both the traditional, liberal, individualistic human rights and the more contentious modern concepts of group rights. The

second reason focuses more on the group than the individual: that a key aspect of indigenous self-determination is self-government. For most indigenous peoples, self-determination will be exercised through self-government within the states in which they live rather than through secession and formation of an independent indigenous state. As a result, discussion has turned to how to achieve self-determination through self-government within the modern democratic state.

In this respect, indigenous peoples have argued that self-government entails control over internal and local affairs, especially where the indigenous peoples do not exercise complete autonomy. Many of these internal affairs are currently governed by the wider mainstream government. Even where indigenous peoples exercise degrees of local autonomy, their physical location within the wider state necessarily entails that a wider range of matters that concern them are decided outside that sphere of autonomy. Thus, in order for indigenous peoples to be self-governing and to achieve self-determination, they need to hold a greater degree of control within the mainstream state. As control is exercised from the top, they argue that they need to participate in the decisions at the highest political levels. From a self-determination perspective, this needs to be a guaranteed feature of the constitutional and political landscape, and not one left to the whim of non-indigenous voters. Such participation thus needs to be enshrined in constitutional legislation as guaranteed political representation.

Both democratic theories and self-determination theories have suggested the same conclusion: indigenous peoples need a range of measures implemented to ensure their participation in political decision-making. These measures will need to include some form of guaranteed political representation at the highest levels of mainstream politics and government, at local and national levels. But these measures also should include arrangements aimed at self-government at a more local level. All of these [p.181] needs should be addressed as a matter of constitutional or electoral system design and reform.

As we have seen from Part III, this idea is supported by the emerging international law on indigenous rights. International law increasingly recognizes that indigenous peoples require some form of guaranteed political representation and power of decision-making as a human rights concern. Further, for indigenous peoples to realize their human right to participation in decision-making, states need to take special measures. The measures recognized in international law largely match those discussed in Parts I and II, ranging from consultation on measures affecting indigenous peoples to effective representation in government and even autonomy as a means of self-government. International human rights law does not prescribe how best to achieve these ends or measures, but the international actors were certainly familiar with the interpretations described in this paper, namely that the international standards will inevitably entail some form of belated state building and re-drawing of boundaries of power within states.

In contrast, however, international law on democratic governance is not so accommodating of the group rights or claims emerging in the indigenous rights arena. Democracy has been interpreted as being a liberal set of procedural guarantees for individual participation in electing the government of a state. While group rights to cultural protection have been recognized, they are not well carried over into the field of electoral participation. Applications of the law to particular cases have denied the legality of some group

accommodations, even where they match measures suggested by political and legal theorists (such as the measures suggested in the Lund Recommendations). Further, cases of arguably substantive discrimination against minority groups have been upheld, often in the name of formal individual equality. It has been argued that the various cases show that the consociational approaches, favored by theorists and consistent with the indigenous rights, are contrary to the international laws on democracy.

The Latin American experience shows that this interpretation of rights of political participation is not universal. It shows that group rights and minority guarantees for indigenous peoples can be upheld even pursuant to standards worded almost identically as in the cases where the same kinds of claims are denied. This thus suggests that it is not as hard a task as it may seem to integrate the indigenous rights standards into existing democratic political participation standards.

Whatever the size of the task, effort will need to be made to reconceive the existing principles of political participation in international law if indigenous rights are to be integrated across the body of human rights law. For example, elections need to be seen as a means to an end, not as the end [p.182] in themselves. The appropriate end is self-determination of a people, and thus effective participation in decision-making. As such, a substantive interpretation needs to be taken to such rights of participation, in law not just in theory. Only with such a conception of democracy will self-determination be able to achieve its claimed status as the master right through which other human rights will be protected.<sup>294</sup> At the moment, self-determination is certainly not sufficient as a master right for indigenous peoples. Indeed, it is not even sufficient for achieving indigenous peoples' full or effective democratic participation, let alone be used as a means to guarantee their other human rights.

In conclusion, the emerging indigenous rights of participation in decision-making are ground-breaking and challenge the international human rights system to rethink some of its fundamental tenets, as illustrated in the existing field of political participation rights. This is particularly noticeable with respect to the recognition of group rights. Thus, at the moment, indigenous rights are not as comfortable a 'fit' as they need to be if they are to be effective. However, on the positive side, there are useful examples of how a more comfortable fit might be achieved. I will adopt that classic academic maxim: there is room for further useful work on this topic. Importantly, such further work can make a positive difference to peoples' lives through the creation of more effective measures for realizing their full self-determination.

### **Footnotes:**

<sup>1</sup> Throughout the paper, references to "participation in decision-making" or "political participation" are shorthand for this longer description of the claims.

<sup>294</sup> Deliberately unaddressed in this paper is whether there are other reasons why self-determination may not be achievable. For example, it is also argued that other rights—especially economic, social and cultural rights—need to be realized before people can take advantage of rights to political participation. Such arguments are independent of the focus of this paper on the rights of political participation themselves.