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RESEARCH BRIEF

Rights to Lands, Participation and Consultation of Indigenous Peoples

A summary of the Inter-American Court of Human Rights' Judicial Interpretation

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ABSTRACT

This summary proposes a critical legal analysis of the jurisprudence of the Inter-American Court of Human Rights regarding indigenous peoples' rights to lands, participation, and consultation. It focuses on the role that cultural diversity as a legal standard has played in the recognition of the indigenous peoples' right to consultation and participation in all matters that directly affect them, as a guarantee for the protection of their right to communal property and natural resources traditionally used, and for safeguarding their cultural identity.

KEYWORDS

indigenous peoples – human rights – judiciary/courts – diversity – culture – Latin America

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NB: This is a summary of an article published by the International Journal on Minority and Group Rights 23 (2015) 39-79.

Link to the web page of the journal in which the full article is available:
http://booksandjournals.brillonline.com/content/journals/15718115/23/1/

INTRODUCTION

As a result of the indigenous peoples' struggles for the recognition and protection of their human rights, the regional Inter-American Court of Human Rights (the Court, or I-ACtHR) has recognized their right to consultation and participation in all matters that could directly affect them, particularly in regard to the recognition of communal property rights over their ancestral lands and natural resources that they have traditionally used. The Court has interpreted the scope of these rights in a broad manner, including the protection of the right of members of indigenous communities to enjoy their own culture and traditional practices as different peoples.

In the Case o*f the Mayagna (Sumo) Awas Tingni Community*,[1] the Court recognized, for the first time, the right to communal property over indigenous peoples' traditional lands, as protected under Article 21 (Right to Property) of the American Convention on Human Rights (American Convention or ACHR). After this initial development, the jurisprudence of the Court further expanded the scope of protection of Article 21 ACHR to include the right to own the ancestral lands and natural resources that they have traditionally used within their territory.

The innovative rationale behind this decision is the effective protection and preservation of the physical and cultural survival of these people. Without access to their traditional territories and natural resources traditionally used, they would not be able to ensure their survival. According to the Court, the aim and purpose of the special measures for the members of indigenous communities is "to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States."[2]

In order to deliver effective protection to the right of communal property as guaranteed by Article 21 ACHR, read in conjunction with Articles 1(1) and 2 of the Convention, States have to undertake positive measures targeting indigenous communities, including their effective and adequate consultation and participation in decision making processes that could directly affect them. According to this jurisprudence, the right to consultation of indigenous peoples in all matters that could directly affect these people is not only a general principle of international law, but also a *conventional standard*.[3]

INTERNATIONAL RECOGNITION OF INDIGENOUS PEOPLES' RIGHTS TO CONSULTATION AND PARTICIPATION

The right of indigenous people to consultation and participation on all decisions (and decision-making processes) that could directly affect them has been recognized under international law in the 1989 International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples (ILO Convention) and the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration or UNDRIP).

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1 *See Case of the Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, 31 August 2001, I-ACtHR, Merits, Reparations and Costs, Series C No. 79.

2 *Cf. Case of the Saramaka People* v. *Suriname*, 28 November 2007, I-ACtHR, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 172, para. 121.

3 *Cf. Case of Kichwa Indigenous People of Sarayaku* v. *Ecuador*, 27 June 2012. I-ACtHR, Merits and Reparations, Series C No. 245, para. 164.

Under the normative structure of the ILO Convention No. 169, the obligation of governments to consult concerned indigenous peoples (Article 6.1.a) must be read together with the principle of participation (Article 7.1). According to the latter, indigenous peoples have the right to decide their own development priorities and to participate in the formulation, implementation and evaluation of development programs that could affect them directly.

The UN Declaration on the Rights of Indigenous Peoples has also incorporated these principles, providing further protection to the principle of consultation under international human rights law. According to Article 19 of the Declaration, "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

In addition, Article 6(2) of ILO Convention 169 imposes a complementary obligation for the effective adequate implementation of consultations. According to this provision, state authorities and the indigenous communities participating in the consultation process should act not only in *good faith*, but also in a *culturally appropriate manner*, allowing effective interaction with State authorities and other third parties concerned, and with the *genuine* objective of achieving consent, or reaching an agreement *visàvis* the proposed measures, *independently* of the result obtained. The obligation to act in good faith also means that the undertaken negotiations should be conducted in a *culturally sensitive manner*, "through their own representative institutions" (Article 19), which also means "through representatives chosen by themselves in accordance with their own procedures" (Article 18).

Good faith also means that these communities would have to engage in the negotiations and eventually accept the *democratic outcome* of the process in *good faith*, even if they find themselves in disagreement with the said dialogical result.

COURT'S METHODS OF INTERPRETATION

Vienna Convention on the Law of Treaties

The Court applies in its interpretation of the American Convention both general and particular rules of interpretation. The first ones find expression in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention or VCLT), and the second ones have been a jurisprudential creation of the Court.

The first guidance in the interpretation of the Convention is provided by its own *object and purpose*, which in the case of the American Convention on Human Rights is the "effective protection of human rights". Therefore, the interpretation of the American Convention cannot be done in a form that deprives efficacy to the scope of protection of the rights and freedoms enshrined in the American Convention. As a complement of this principle, Article 29 ACHR incorporates the principle of *nonrestrictive interpretation*, which precludes any restrictive interpretation of the rights and freedoms recognized in the Convention by virtue of domestic legislation or the implementation of other conventional obligations.

An effective protection of conventional rights also requires a consideration of all circumstances and relevant contextual factors of the case under analysis, considering the changes over time and "present-day conditions". An evolutionary interpretation of the American Convention, must take into account not only the instruments and agreements directly related to

it (Article 31(2)(a)(b) VCLT), but also "any relevant rules of international law applicable in the relations between the parties" (*cf.* Article 31(3)(c) VCLT). This does not mean that the Court would resolve a given case through the direct and exclusive application of an instrument other than the American Convention.

American Convention on Human Rights

According to the interpretation provided by the Court, Article 21 of the American Convention guarantees the protection of the special relationship that indigenous communities have with their ancestral lands and natural resources traditionally used, and their social, cultural and economic survival. Read in relation with Articles 1(1) and 2 ACHR, Article 21 ACHR imposes a positive obligation on States to adopt the necessary special measures that will enable them to fully exercise those rights. Among those positive obligations, the regional tribunal has identified the obligation to enable the participation of members of indigenous communities in all decisions that could directly affect them, by means of guaranteeing their right to effective and culturally adequate consultations.

Moreover, the Court has interpreted Article 21 ACHR in the light of other relevant international instruments that are part of the same *international human rights law system* in order to avoid a potentially *restrictive* interpretation precluded by Article 29 ACHR. As stated by the International Court of Justice (ICJ), "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."[4] By applying this method of *systemic interpretation*, the Court found that, in most cases in which indigenous people's property rights were at stake, the ILO Convention No. 169 was – among other international instruments – the most suitable instrument for the interpretation of the rights enshrined in the American Convention.

Through reading the text of the Convention in the light of the ILO Convention 169, the Court has also drawn an interconnected line between *identity*, *culture* and *traditional land* and *natural resources* pertaining to their lands, as part of the elements that integrate the scope of protection of Article 21 ACHR (right to property). The ILO Convention expressly recognizes "[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy" (*cf.* Art. 14(1)). This provision also clarifies that the right to property extends to the right "to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities", which could embrace the *whole* territory they use, including the surface as well as the sub-surface of their land. The ILO Convention also clearly states that the rights to natural resources 'shall be specially safeguarded' (*cf. Art*. 15(1)(2)), meaning that States have to introduce special measures for the protection of the natural resources that these peoples have traditionally used.

Systemic References to Other International Human Rights Instruments

In two cases regarding the State of Suriname, whose domestic legislation does not recognize the right to communal property of members of tribal peoples and has not ratified either of the two ILO Conventions, the Court referenced the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

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4 *Cf. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276* (1970), 21 June 1971, icj, Advisory Opinion, *I.C.J. Reports 1971*, pp. 16 and 31.

In connection with both UN Covenants, their common Article 1, the *right of self-determination* enshrined in them, recognizes that *all peoples* have the right to "freely pursue their economic, social and cultural development" (*cf.* Art. 1(1)), to "freely dispose of their natural wealth and resources", and to "not be deprived of its own means of subsistence" (*cf.* Art. 1(2)). As in the case of the ILO Convention, references to these dispositions are possible due to the application of the principle of non-restrictive interpretation (Article 29(b) ACHR). In fact, in order to extend the scope of protection to the right to communal property of indigenous peoples, an additional reference is made to Article 27 of the ICCPR.

Finally, this extension is reinforced by the wording of the UN Declaration on the Rights of Indigenous Peoples (Declaration), which has clearly recognized the right of indigenous people to *internal* self-determination. Based on the recognition of indigenous peoples' distinctive spiritual relationship with their traditional lands and territories, this *culturally tailored* right to property could be considered as a concretization of the right to *internal* self-determination enshrined in Article 3 of the said instrument.

Although the Declaration is not a legally binding instrument, it could be used as an *interpretative tool*, enshrining the already existing human rights standards and obligations under the authoritative view of the UN General Assembly, which has adopted it. Therefore the Declaration on the Rights of Indigenous Peoples can be considered an integrative part of that "set of international instruments of varied content and juridical effect (treaties, conventions, resolutions, and declarations)."[5]

In conclusion, a systemic, dynamic and evolutive interpretation of the right to property protected under Article 21 ACHR, interpreted in the light of common Article 1 of the 1966 Covenants, but read *in the light* of the dispositions enshrined within the UN Declaration could lead to a stronger, more protective, interpretative construction.

Judicial Interpretation and Accommodation of Cultural Diversity

The interpretation of the rights embodied within the Convention must take into consideration *society as a whole*, paying due account to the complex plurality of cultural understandings that are present (contextual interpretation) and in accordance with the current present conditions existing at a given time (evolutive interpretation).

In culturally diverse societies, the *principle of pluralism* in a democratic society requires *positive* measures that guarantee a fair protection of that plurality of views while implementing the *least possible* restrictive interpretation toward the enjoyment of those rights. However, the need for positive measures and culturally tailored actions does not mean that certain cultures have to receive particularly favorable treatment.

In a democratic society, all cultures (majorities and minorities alike) are, or *should be, placed* in the same non-differential legal position.

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5 *Cf. Juridical Condition and Rights of the Undocumented Migrants*, 17 September 2003, I-ACtHR, Advisory Opinion oc-18, Series A No. 18, para. 120.

EVOLUTIONARY AND CULTURALLY TAILORED UNDERSTANDING OF COMMUNAL PROPERTY

For the regional tribunal, the relationship between indigenous people and their traditional lands has two distinguishable elements: material and spiritual. A *material* element, in a sense that the lands provided to these peoples are their essential means of subsistence, and a *spiritual* element, because it is through this relationship that indigenous peoples find their own cultural identity. The essential relevance of this relationship in indigenous peoples' cultures makes it equally central for the configuration, maintenance and development of their *indigenous* identity.

Accordingly, the Court has recognized that indigenous' tenure systems and traditional communal understanding of property are protected under Article 21 ACHR precisely because they constitute an essential part of their *cultural identity*.[6] Consequently, the non-recognition of the right to collective property over traditional lands and natural resources traditionally used by indigenous peoples would also amount to a *deprivation* of their culture. In other words, the lack of recognition of their right to communal property will prevent them from living their life *with dignity* that is in accordance with their own cultural understandings and philosophical views.

Right to Participation and Consultation as a Safeguard for Indigenous Peoples' Identity

In the views of the regional tribunal, indigenous peoples' cultural and economic survival depends on "their access and use of the natural resources in their territory that are related to their culture and are found therein."[7] To guarantee cultural survival, Article 21 ACHR has been interpreted as requiring the adoption of certain special measures to be conducted with "previous, effective and fully informed consultations" with the communities involved.[8]

As a conventional standard – the right to communal property of indigenous peoples is not an absolute right. Property may be subjected to lawful restrictions as clearly stated by Article 21(2) of the American Convention. However, this does not mean that State authorities could grant concessions for their exploitation or extraction with disregard of indigenous peoples' rights. In fact, States could retain – in accordance with their own national legal system – the ownership and the right to exploitation over the natural resources found on and within traditional indigenous land and territories, which have not been traditionally used by them, including – of course – mineral or sub-surface resources.[9]

However, because the extraction or exploitation of natural resources – *not owned* by indigenous communities – could most likely affect or interfere with their access to those resources that are necessary for their subsistence, the Court has identified general and specific safeguards. Some of these include *effective participation* of and *sharing* of reasonable *benefits* with affected communities and *a prior environmental* and *social impact assessment* of those activities on the traditional lands.[10] States also have the duty to obtain their *free*, *prior* and *informed consent*, according to their customs and traditions "in addition to the

6 *See Case of the Yakye Axa Indigenous Community* v. *Paraguay*, 17 June 2005, I-ACtHR, Merits, Reparations and Costs, Series C No. 125, para. 135.
7 *Sarayaku* v. *Ecuador*, *supra* note 3, para. 120.
8 *See Saramaka* v. *Suriname*, *supra* note 2, paras. 101, 129 and 194(a).
9 *Cf.* ilo Convention No. 169, *supra* note 27, Art. 15(2).
10 *Cf. Saramaka People* v. *Suriname*, *supra* note 2, paras. 129–140.

consultation that is always required", any time that a major development or investment plan "may have profound impact on the property rights" of those communities.[11]

It is important to clarify that a state authority's obligation to obtain indigenous peoples' free, prior, and informed consent cannot and must not be interpreted as affording the affected communities a sort of *veto right* power. If such *consent* cannot be obtained, States must follow the appropriate procedures with the *genuine* objective of achieving consent, independently from the result obtained. Recognizing *veto power* for indigenous communities would not be justified in a pluralist and democratic society where decisions are *dialogically* and *procedurally* based.

CONCLUSION

The Inter-American Court has extended the content and scope of protection of Article 21 ACHR beyond the borders of a *mere* right to property, and even farther away from the *mere* recognition of the right of indigenous people to communal property over their traditional lands and natural resources traditionally used. The scope of protection of this article has been expanded in order to safeguard indigenous people's *cultural identity*, with a right of the members of these communities to participate and to be consulted – in accordance with their own customs, traditions and representative institutions – in all decisions that directly affect or could affect their culture and traditional practices.

Thus, any restriction or interference with the enjoyment of the special relationship between indigenous people and their lands would not only endanger their identity, as *distinguishable* peoples, but also – and most importantly – their possibility to enjoy a *life in dignity*, or a *dignified life*, according to their own cultural understandings, traditions and world's views.

The effective protection of the right to communal property under Article 21, conjointly read with Article 1(1) and 2 of the Convention, requires the adoption of *special measures* that will guarantee its full and equal exercise by indigenous peoples. The reference to international standards has also enlightened and expanded the scope of protection of Article 21 ACHR, by virtue of the application of Article 29(b) ACHR.

Democracy is substantially a *method* of taking collective valid decisions and peacefully resolving disputes. In this sense, the right to participation and consultation of members of indigenous communities through their representative institutions could be seen as a procedural and inclusive guarantee that reinforces and facilitates that dialogical process.

11 *Ibid*., para. 137. The obligation to consult was further reaffirmed in *Sarayaku*, by considering it as a *general principle of International Law. See Sarayaku* v. *Ecuador*, *supra* note 3, paras. 164–167, 177, 232.