Protection of Indigenous Minorities: recent trends and perspectives

Albrecht Weber

Abstract Deutsch

Die Menschenrechtspraxis gegenüber indigenen Völkern ist in konstitutioneller Hinsicht recht unterschiedlich ausgestaltet. Während einige Common Law-Länder kaum eine konstitutionelle Bedeutung zugestehen (zB USA, Australien, eingeschränkt Neuseeland), andere vielmehr dies ausdrücklich in jüngerer Zeit textlich verankern (zB Kanada; Südafrika), zeigen jüngere Entwicklungen in Lateinamerika eine ‚gleitende Skala' einer fortschreitenden Konstitutionalisierung. Die verfassungsrechtliche Verankerung stärkt die Durchsetzung völkerrechtlicher Pflichten unabhängig von der jeweiligen Implementation des Völkerrechts im innerstaatlichen Recht und bietet zusätzliches vergleichendes Material für die richterliche Begründung internationaler Gerichte (zB IACtHR) wie nationaler höchster Gerichte.

Während im europäischen Verständnis Minderheitenrechte im Wesentlichen als individuelle Rechte in kollektiver Ausübung verstanden werden (zB Europäische Rahmenkonvention über den Schutz nationaler Minderheiten), spiegelt die konstitutionelle und judikative Entwicklung in Lateinamerika eine sensiblere Beachtung von Kulturen, Traditionen, Habitate und Umgang mit natürlichen Ressourcen, um die Identitäten der Ureinwohner zu schützen. Dies manifestiert sich prozedural besonders in Beteiligungsrechten wie „freie und informierte Zustimmung" ("free and informed consent") bei Ansprüchen aus Land-Verträgen ("land claim agreements"), die als „wohlerworbene Rechte" des internationalen und regionalen Menschenrechtsschutzes gedeutet werden können. Ferner erscheinen Ansprüche auf gleichen richterlichen Rechtsschutz durch Antidiskriminierungsklauseln wie auch ‚Affirmative Action-Klauseln' im Einzelfall angezeigt. Politische Beteiligungsrechte und kommunale wie regionale Repräsentation gehören heute ebenfalls vielfach zum Inventar von Minderheitenrechten in der südlichen Hemisphäre.

Abstract English

The human rights practice regarding indigenous peoples is rather heterogenous in a constitutional perspective. Whereas some common law-countries only concede a restricted relevance (eg USA; Australia; partly New Zealand), others in more recent times expressly guarantee it in their constitutional charter (Canada; South Africa), recent developments in Latin America illustrate a "gliding scale" of constitutional implementation. Constitutional entrenchment reinforces the execution of human rights duties independent from the respective rank and position in the internal law and offers additional comparative material for the reasoning of international courts (eg IACHR) and national courts.

Whereas in the European understanding minority rights are essentially interpreted as individual rights performed collectively (eg European Framework Convention for the Protection of National Minorities) the constitutional and judicial evolution in Latin America mirrors a more sensitive respect of cultures, habitats and exploitation of natural resources for the protection of the identities of indigenous peoples. In a procedural perspective this is manifest in participatory rights like "free and informed consent"

concerning "land claim agreements" which may be interpreted as 'acquired rights' of the international and regional human rights protection. Furthermore claims of equal judicial protection based on antidiscrimination – and affirmative action clauses may be recommendable. Rights of political participation and rights of regional and municipal representation often are part of the normative inventory of minority rights in the southern hemisphere.

1. Introduction

The protection of indigenous minorities has become a major subject in human rights law over the past decades. Whereas the International Covenant on Civil and Political Rights (ICCPR) only contains a general norm (Art 27) protecting linguistic, religious, and/or cultural minorities which include indigenous peoples in the long-standing practice of the Human Rights Committee (HRC)[1], other international conventions and texts refer more specifically to the status of 'indigenous peoples'. Foremost the "Indigenous and Tribal Convention" of the ILO No 169 (1989) deals extensively with the general policy, ownership of lands, recruitment, and employment, vocational training; social security and health; contacts; and administration (Titles I-VII)[2]. The UN General Assembly adopted a "Declaration on the rights of persons belonging to national or ethnic, religious or linguistic minorities" in 1992[3]; based on this previous resolution it proclaimed the "International Decades of the World's Indigenous Peoples"[4] to strengthen UN efforts to ameliorate the conditions of indigenous peoples. The OAS issued a Declaration on the Rights of Indigenous Peoples and the Plan of Action (2017–2021)[5]. Also the Responsibility to Protect (R2P) for indigenous peoples has moved into the focus of international law[6].

Special attendance in Europe was attained by the "Framework Convention on the Protection of National Minorities" of the Council of Europe (1995)[7] and the "European Charter for the Protection of Regional and Minority Languages" (1992)[8]; both however, do not expressly refer to 'indigenous minorities' due to the fact that minorities are normally protected by the general rights flowing from international and regional human rights instruments[9].

1 See at W. A. Shabbas, ICCPR, Nowak's Commentary (3rd ed, 2019); Art 27; n 29 ss; Joseph, S./Castan, M.; The ICCPR, Cases, Materials and Commentary; OUP (2013); Art 27; 823 pp.
2 1650 UNTS, 383.
3 A/Res 47/135; based on a study of F. Capotorti for the Human Rights Commission.
4 Eg No 48/163 (1993), No 58/158 (2003) and 2019 (Year of indigenous languages).
5 OAS Declaration, 15/6/2016/AG/Res1888 (XLVI-0/16).
6 See eg Viikari, L., R2P and the Protection of indigenous Peoples in Hilpold, P. (ed), Responsibility to Protect (R2P). A New Paradigm of international Law; Leiden/Boston (2015), pp. 384.
7 ETS No 157.
8 ETS No 148.
9 As far as recognizable in Europe only the constitution of Ukraine refers to "indigenous people" without defining the term (Art 11).

However, it may additionally be mentioned that regional human rights conventions, like the ECHR, the ACHR, The African Convention of Human and People's Rights (Banjul-Charta)[10], do not contain minority protection clauses. Therefore, minority protection of 'indigenous' groups (like the "Sami" in Sweden, Finland, or Norway) relies mainly on the specific instruments of protection of minorities (Framework Convention; European Charter of Regional Minority Languages), the adjudication of non-discrimination clauses (eg Art 14 ECHR) or the supervision by international human rights bodies (HRC; CERD Committee, ICESCR Committee, CEDAW Committee)[11].

The protection of minority indigenous rights outside of Europe and North America is generally less well known. Thus, this contribution is dedicated to Prof Gornig, eminent expert of minority rights. The author mainly focuses on recent developments in Australia and New Zealand, Latin America and Africa from a human rights and constitutional perspective which will illustrate the different approaches and constitutional designs.[12]

2. Definition

Contrary to a missing definition of minority rights in an international human rights document[13] the "Indigenous and Tribal Convention" (ILO No 169) attempts a double definition regarding "tribal peoples" and "indigenous peoples": "Tribal peoples" are characterized "whose social, cultural and economic conditions distinguish them from other sections from the national community, and whose status is regulated partially or wholly by their own customs or traditions or by special laws or regulations" (Art 1a), whereas "indigenous peoples" are regarded "on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment or present boundaries and who, irrespective of their legal status, retain some or all of their own social, economic and political institutions" (Art 1b).

As the Convention further underlines, the self-identification of both groups is a fundamental criterion for the application of the Convention (Art 1 para 2). The definitions are largely congruent focusing on the social, economic, and cultural

10 The 'Arab Charter on Human Rights' (1994) contained a modest guarantee: "Minorities shall not be deprived of their culture and to follow the teaching of their religions" which apparently was not reiterated in the Revised Charter (2004).

11 For indigenous people in international law see J. Anaya, Indigenous People and International Law; OUP (1996).

12 For an overall survey see D. Kugelmann The Protection of Minorities and Indigenous Peoples respecting Cultural Diversity, in v. Bogdandy/R. Wolfrum (eds), M.P. I. Yearbook of United Nations Law, Vol11 (2007) 233 pp.; A. Weber in W. Babeck/A. Weber, Writing Constitutions, Vol II, Chapt. 9 (Minority Rights). Springer, Heidelberg (to be published 2023).

13 Also Art 5 para 1 Framework Convention (see n. 6) does not contain a definition but a substantial circumscription of the essential characteristics analogous to Art 27 ICCPR.

conditions of the minority groups even if the latter criterion is not expressly mentioned for indigenous peoples but forms undoubtedly an indispensable element for indigenous peoples which is closely linked with their customs and traditions, habitat, 'way of life' inherited from their ancestors. The distinctive criterion between the two groups, therefore, is the historical background of colonization and settlement by foreign nations for indigenous peoples (USA, Canada, Australia, and New Zealand; Southeast Asia; Latin America; Africa) whereas "tribal peoples" live as minority groups with their own social, economic and cultural traditions without the pre-existence of colonization and land settlement[14]. Even though the distinctive elements of minority groups (being characterized by linguistic, religious, or 'cultural' specificities being in a numerically minor position versus the dominant majority population[15]) will generally be common with indigenous peoples fulfilling at least one of the elements (cultural diversity) the focus moves more towards the specific social, economic, cultural and political environment of indigenous and/or tribal peoples. The cultural diversity and distinctiveness of indigenous minorities must be closely viewed and interpreted with their ancestral traditions, lands, social, economic, and political institutions. As we cannot focus on all of these criteria we limit our considerations mainly to the land claims and environmental use and participatory rights.

3. Australia and New Zealand

Indigenous customary law in Australia was not recognized since the colonization after 1788 where the doctrine "terra nullius" prevailed for a long time[16]. Only in the landmark decision "*Mabo v Queensland (No 2) (1992)*" so-called "native titles" were recognized encompassing land and water resources rights; however, where the Crown performed, sold, or granted their own claims, native titles would extinguish. The High Court also underlined the co-existence of the Australian and indigenous legal order[17]. Although some further rulings tried to limit the effects of this decision it was followed by the establishment of the "Native Titles Act" 1993 and the "Indigenous Land Fund". In the follow-up, various reports of aboriginal representative bodies stressed the need for constitutional reform[18]. In the 1990ies under the auspices of a "practical reconciliation policy" (Howard Government) constitutional protection declined and the High Court *in Kartinanzari* v. *Commonwealth*[19] declared that Parliament may even repeal laws favorable for aboriginal

14 For example the Sami or the Roma people and others in Europe.
15 See the predominant definition proposed by Capotorti; n. 3.
16 For a concise survey see at W. Babeck; Einführung in das australische Recht mit neuseeländischem Recht, 2. A, 2017, 21 ss.
17 For a more detailed view see Report of the Government Expert Panel "Recognizing Aboriginal and Torres Strait Islanders in the Constitution" (2012), pp. 35.
18 E.g The Council for Aboriginal Reconciliation, sub 7–11 (quoted at the Expert Panel Report, p. 36).
19 1998, 195 CLR 337.

people (Sec 51 [xxxvi] Const)[20]. The Government Expert Panel (2012)[21] underscored the limited understanding of Australians of their constitutional history and especially the exclusion of the 'First Nations'; among a number of innovative considerations it mainly recommended a constitutional reform aiming at the recognition of "Aboriginal and Torres Strait Islander Peoples" (ATSP) as "First Peoples", of the continuing relationship of ATSP with their traditional lands and waters and of their continuing cultures, languages, and heritage[22]. These conclusions aim at the very core of indigenous rights pointing at the close nexus with their ancestral lands, culture, and language.

However, until today a constitutional amendment incorporating indigenous rights and 'First Peoples' has not been reached on the federal level. Only three states have at least indirectly recognized aboriginal rights in their preambles or first articles (Queensland; Victoria, New South Wales)[23] ; while recognizing aboriginals as 'first peoples', their customs and traditions, relationships with ancient lands, and contribution to Australia's cultural heritage, these are of a purely symbolic nature because they exclude any direct legal effect and do not grant any individual or collective claim rights. The situation for aboriginals – apart from their economic, social, and educational situation – also from the constitutional point of view remains rather unsatisfactory[24].

It is mirrored in the famous "ULURU Statement of the Constitutional Convention" of the ATSP (2017) and maybe cited here[25]:

> "The sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islanders Peoples who were born therefrom, remains attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown."

As long as this basic assumption will not be recognized and transformed into constitutional norms the never-ending dispute on land claim settlements will obviously continue without a legitimate constitutional basis (Land Use Agreements; TOSA).

In *New Zealand*, one of the rare cases where no written coherent constitution exists (like UK; Israel), a number of quasi-constitutional laws however regulate basic fundamental principles, organization and topics normally to be entrenched in a formal constitution.

Besides the Constitution Act 1986, the Judicature Act 1908, the Electoral Act 1993, in our context the *Treaty of Waitangi* (1840) and the *New Zealand Bill of*

20 See at W. Babeck (n. 14) 25.
21 See n. 15; p. 47.
22 Report, p. 131.
23 Victoria: 1975 amended: Art 1 A para 2 a)–c) however limiting any direct legal effect; Queensland as amended: Preamble lit. c), however also restricting any legal effect (Sec 3a); New South Wales: Sec 2 par 2 lit a–c; similarly excluding any legal effect (para 3).
24 A critical appraisal also at Fähnders; Faz 3/9/2021: Ein halbes Leben hinter Gittern; p. 3.
25 ULURU Statement para 2.

Rights 1990 is of special relevance.[26]. In the Treaty of Waitangi the Maori-leaders conferred the 'sovereignty' on the British Crown which in the British understanding meant the conferral of all legislative competences to the Crown whereas the Maori obviously interpreted the notion ('kawatanaga') in a more restricted sense of governmental authority[27]. On the other hand, the exclusive and undisturbed possession of Maori rights of their lands, waters, and fishery areas was recognized, whereas the Crown reserved the rights of preemption for these possessions (Art II); all Maori people became citizens of New Zealand (Art. III). The treaty was soon not respected by the Government and the treaty-making power of the Maori disputed; for being effective the treaty should have been implemented by Parliament which until today has not taken place.[28] Even though the Treaty is a significant example of colonial predominance and intercultural misunderstanding the agreement found entry into legislation (Treaty of Waitangi Act 1975; Waitangi Settlement Act 1992) and judicial case law. In the *'New Zealand Maori Council Land's case'*[29] *(1987)* the Appeal Court ruled on a statute (State Owned Enterprise Act 1986) interpreting the Waitangi Treaty in a teleological sense in favor of the Maori people[30].

As to the Waitangi (Fisheries Claims) Settlement 1992, the claims between the Maori and the Government were settled on the basis of consent by 50 tribes in favor, 15 tribes opposing it.[31] The latter opponents filed an individual communication to the HRC asserting that the consent was not effectively achieved and their traditional fisheries rights were abrogated.

In "Mahuika v. New Zealand"[32] the HRC however rejected the arguments of the 'Maori minority':

> "…Where the rights of individuals to enjoy their own culture is in conflict with the exercise of parallel rights of other members of the Minority group, or of the minority as a whole, the Committee may consider whether the limitation in issue is in the interest of all the members of the minority and whether there is a reasonable and justification for the application of its individuals who claim to be adversely affected".

The Committee acknowledged the efforts by the Government to find a definite, consensual solution of sharing fishery quotas for commercial fishing (ca 40% for the Maori) and underlined the relevance of the fisheries for the indigenous culture of the Maori people. Whether a certain percentage of indigenous participation is representative for land claims and fisheries settlement agreements may always be controversial unless this is not provided for by indigenous rules, customs, or stat-

26 See at W. Babeck (n. 14), 258 pp.; Webb/Sanders/Scott, The New Zealand Legal System; Structures and Processes, 2010, 201.

27 Webb/Sanders/Scott, (n. 25), 208; W. Babeck (n. 14), 260; for a detailed study on the legal interpretation see M. Ehrmann, The Status and Rights of Indigenous Peoples in New Zealand; in 31 ZaöRV (1999), 463 pp.

28 Webb/Sanders/Scott, n. 25), 213; Babeck (n. 14), 261.

29 New Zealand Council v. Attorney General (1987), 1 NZLR 641.

30 Webb/Sanders/Scott (n. 25), 219 s.

31 For rulings of NZ courts see more at Ehrmann, (n. 24), 478 pp.

32 Communication No 547/93; § 9.6.

utes recognized by the state. The case also demonstrates that individual minority rights may be in conflict with the collective rights of the majority of an 'indigenous minority'[33].

It should also be mentioned that according to the Electoral Act 1993 by introducing a mixed-member representation system, a proportional seat distribution for Maoris is guaranteed[34]. From the constitutional standpoint more innovative than in Australia is the express recognition of indigenous rights in Section 20 of New Zealand Bill of Rights (1990)[35] the wording of which was derived from Art 27 ICCPR; the affirmation that the Bill of Rights should be interpreted in accordance with the ICCPR reflects the openness towards international human rights law.

4. Latin America

In Latin America, quite a number of constitutions refer to indigenous peoples (Argentina, Mexico, Nicaragua, Honduras, Panama; Colombia; Ecuador, Bolivia; Brazil, Peru; Venezuela) whereas others still abstain (Uruguay; Chile). A special focus is regularly directed to the preservation of 'indigenous' or 'aboriginal languages' (Costa Rica: Art 76; Honduras: Art 84; Panama: Art 88; San Salvador: Art 62 para 2; Peru: Art 17); in Mexico, Nicaragua as well as in the more 'progressive constitutions' of Bolivia, Colombia, Brazil, Ecuador or Venezuela this appears as an integral part of the preservation of 'indigenous cultures' aiming to recognize, respect and promote the self-identification, maintenance of ancient traditions, languages, habitat, way of life, ancestral lands, hunting and fishing, the participation of indigenous communities in projects and planning of environmental issues which directly affect them, and representation in elective bodies on the respective levels of the state. These principles are not anew or have been invented by constitutional drafters in Latin America in the last two decades but rest on a solid fundament of international human rights texts (ILO Convention No169; UN Resolution 1992; European Framework Convention, European Charter of Regional and Minority languages; OAS Declaration)[36], the case law emanating from the HRC and other human rights bodies (CERD, ICESCR, CEDAW) or national Supreme and Constitutional Courts. For the purpose of our selective survey, it may suffice to recall the positive obligations of the state enshrined in Art 4 ILO "Tribal and Indigenous Convention" ("to safeguard the persons, property, labor, culture, and environment of the peoples concerned"); the recognition and protection of "the social, cultural, religious and spiritual practices" (Art 5 para 1) and the specific positive state obligations flowing from the "Title on Land" with the recognition of ancient lands

33 See also S. Joseph/M. Castan (n. 1), 846.
34 See Electoral Act, as amended in 2020, Sec 45, para 3.
35 NZ Bill of Rights Act 1990, No 109: Sec 20.
36 See above sub 1. A. Xanthaki, Indigenous Rights and UN Standards: Self-Determination, Culture and Land, CUP 2007; J. Gilbert, Indigenous peoples' rights under international law: from victims to actors; Leiden 2016.

(Art 13–19)[37], the duty for consultation and promotion of free participation at all levels of elective institutions (Art 6).

The HRC in its General Comment No 23 to Art 27 ICCPR expressly referred to indigenous cultures as an integral part of minority rights when stating:

> "Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities or hunting and the right to live in reserves. The enjoyment of these rights may require positive legal measures of protection to ensure the effective participation of minority communities in decision making that affect them"[38].

The CERD (on the Elimination of Racial Discrimination) issued a similar recommendation No 23 (1997) underlining from the viewpoint of non-discrimination the need for recognition of indigenous cultures; conditions allowing for a sustainable economic and social development compatible with their cultural characteristics; equal rights in effective participation in public life; preservation of their languages and the recognition of ancestral lands, the restitution of deprived lands (without their free and prior consent) and, if not feasible, substitution by compensation[39].

These few comments illustrating an increasing evolution of specific principles of indigenous human rights law are strengthened by developments in human rights courts and constitutional law in Latin America; due to the rather frequent constitutional changes in South America, we are not able to adequately evaluate historical continuities and disruptions[40].

We will focus on some essential elements concerning definitional attempts, self-identification and 'multinational nations', native land rights, and exploitation of natural resources.

4.1. Constitutional definitions

Besides the rather comprehensive definition of 'indigenous peoples' provided for by the ILO Tribal and Indigenous Convention (Art 1)[41], apparently, two constitutions (Mexico and Paraguay) strive for their definitions which are in accordance with the notion and concept of the ILO Convention. Whereas Art 62 Paraguay Const. reflects a compacted version of the ILO definition[42] the wording of Art 2 Mex Const. is more detailed which is typical for the whole Mexican Constitution:

37 Art 13–19, esp. 14, 15.

38 GC No 23, §7 with references to communications concerning Canada and Sweden.

39 General Recommendation No 23,18/8/1997, No 4–5.

40 A compilation of indigenous rights can be found in 'Derechos de los Pueblos Indígenos', Base de Datos Politicos de los Americas, accessed 1/9/2021). For an interesting survey of the three 'Bolivarian Constitutions' (Venezuela, Bolivia and Ecuador) see M. Tushnet, The New "Bolivarian Constitutions": A textual analysis, in R. Dixon/T. Ginsburg, Comparative Constitutional Law in Latin America; 2017, 126 pp.

41 See above sub 2.

42 Art 62 reads: "This constitution recognizes the existence of the indigenous peoples, defined as groups of a culture prior to the formation and organization of the Paraguayan State".

> "The nation is multicultural, based originally on its indigenous peoples, described as descendants of those inhabiting the country before colonization and that preserve their own social, economic, cultural and political institutions, or some of them" (para 2)

which corresponds largely to the notion of the ILO Convention.

Furthermore, the constitution describes the term 'indigenous community' more narrowly (Art 2 para 4)[43] which apparently is linked to other textual references not to be related here. Artt. 1, 2 are located in Title I; Chapter One ("Human Rights and Guarantees") and contain the basic commitments to international treaty law (and interpretation in conformity with the latter) and human rights law 'in specie' (Art 1 para 2, 3). Thus, it may be assumed that the long and detailed textual commitment to the protection of indigenous peoples (Art 2 comprising ca 3 pages: A, I-VIII and B, I-IX) are basic constitutional or 'directive principles' with a number of 'positive 'state obligations which will partially be mentioned infra.

4.2. Self-identification and autonomy; multicultural or 'multinational' state?

Self-identification and autonomy of indigenous peoples constitute the very core of Latin American constitutions referring to indigenous peoples (including Mexico having the oldest constitution since 1917, often amended).

Argentina's Constitution (1994) recognizes the "ethnic and cultural pre-existence of indigenous peoples" and requires bilingual education; legal standing; possession of community property; participation in administration of their natural resources (Art 75 No 17 ArgentineC).

The *Mexican Constitution* (Art 2 para 5) expressly refers to the 'right of self-determination' deriving from it the right of autonomy and positive state obligations encompassing the autonomy of their own organization, preservation of culture and language, use of their own legal system; self-representation in own elective bodies, preferential use of natural resources of the habitat and property ownerships, full access to state jurisdiction as well as to establish "the necessary institutions and policies to guarantee indigenous peoples rights and comprehensive development of indigenous communities" (Art 2, sec. A-B).

The 'revolutionary' constitution of *Nicaragua (1987/2005)*[44] defines the people as "a multi-ethnic character and forms an integral part of the Central American Nation" (Art 8), protects the "identity and culture" of indigenous peoples, prescribes the preservation of communal forms of land property and own forms of social organizations and administration (Art 5).

The *Constitution of Brazil (2013)* is much more reluctant to define itself as a 'multinational culture or nation' (even though this is evident) but identifies itself as a 'pluralist society'(preamble) and political pluralism (Art 2) without assigning

43 "An indigenous community is defined as the community that constitutes a cultural, economic and social unit settled in a territory and that recognizes its own authorities, according to their customs".

44 See esp. Preamble and Art 3 NicaraguaC.

indigenous peoples a prominent place in the constitution; it only mentions the "Indians" at the end of the constitution (Chapter VIII); it implies the recognition of all criteria for 'indigenous peoples' with a specific focus on land rights (Art 137 para1–7). The constitutional concept although containing many social and economic rights is completely different from Mexico or the Andean states.

In *Colombia* the state "recognizes and protects the ethnic and cultural diversity of the Colombian nation" (Art 7 ColC) which may be interpreted as a confession to a multicultural state[45], but only a few references to indigenous peoples can be found (Art 63: land use; Art 246: justice system); however, for the first time, it opened the possibility for Afro-Colombians to claim specific land rights as an ethnic group (Transitory Article 55)[46].

In *Venezuela's* constitution (2009) besides a generic reference to the cultural heritage of the nation (Title III, Chapt. VI), the rights of the native people are dealt with in Title III, Chapt. VIII. The state "recognizes the existence of native peoples and communities" (Art 119), reinforced by the right to maintain and develop their 'cultural identity, world view, values, spirituality and holy places' (Art 121) which provides a rather strong fundament for ethnic and cultural self-identification.

In *Peru* the constitution (2003) refers in a similar way to linguistic and cultural diversity. In the Chapter on fundamental rights (Art 2 no 19) and protects native languages (Quechua; Aymara) as 'official languages' where these are spoken predominantly (Art 48).

The most advanced or 'progressive 'constitutions however are the constitutions of Bolivia and Ecuador.

Bolivia is defined as a 'plurinational state':

"Bolivia is constituted as a Unitary Social State of Plurinational Communitarian Law" ("Estado Unitario Social de Derecho Plurinacional Comunitario") which apparently links the unitary principle with the social principle (manifestly inherent in the constitution) and a 'plurinational' concept of law. It also recognizes the "pre-existence" of ancient nations, autonomy, and cultures expressly (Art 2).

The constitution contains an own Chapter IV on "Rights of Nations and Rural Native Indigenous Peoples" dealing extensively with indigenous rights and practically comprises all relevant rights of free self-determination; participation, autonomous self-administration, right to consultation in matters affecting them, cultural identity (Art 30) and the 'spirituality' of the indigenous peoples must be recognized (Art 86).

One of the most remarkable norms of cultural self-identification[47] is found in Art 98:

> "Cultural diversity forms part of the essential foundation of the Plurinational Communitarian State. Interculturality is the instrument of cohesion and harmonious conviviality among all peoples and nations."

45 See H. Alviar Garcia; Looking beyond the constitution: the social and ecological function of property; in Dixon/Ginsburg (n. 40), 160.

46 Later consolidated by law 70/1993; Alviar Garcia (n. 45) ib.

47 See M. Tushnet (n. 39) 136.

Even if this is obviously a directive or objective principle the interpretive value for constitutional jurisdiction of a 'Plurinational Constitutional Court (Title III, Chapt. VI) cannot be underestimated.

Ecuador similarly defines itself as a "unitary; intercultural, multinational state (Art 1 EcuadorC), and the concept of multiculturalism and 'plurinationalism' is interwoven in the whole constitution. Chapt. IV deals with the "Rights of communities, people and nations" and includes the 'Afro-Ecuadorian People and the Black-Country people (Art 56). Art 57 enumerates not less than 21 topics being essential for the protection and promotion of the indigenous population which cannot be related here.

Whether the extensive normative regulation of indigenous rights in Bolivia and Ecuador has become effective in legislative implementation and judicial case law cannot be evaluated here; however, undoubtedly it marks a 'semantical text evolution' (Häberle) in comparative constitutional law.

4.3. Land rights, natural resources, and the environment

The most elaborate constitutions on land rights and natural resources are certainly those of Argentina (Art 75 No 17: as competence norm); Mexico (Art 2, A.V, VI), Nicaragua (Art 5), Paraguay (Art 64), Brazil (Art 137 para1–7), Colombia (Art 63; Trans. Art. 55), Bolivia (Art 30) and Ecuador (Art 57 No 4, 5).

Whereas earlier constitutions are more modest by recognizing the existing forms of property and land possessions[48] more recent constitutions – apparently under the influence of international treaty law and political ambitious concepts of multinationalism – declare the communal land property rights as inalienable:

Art 57 Ecuador C provides: *"The indigenous peoples have the following collective rights: No4:to keep ownership ... of their community lands, which shall be inalienable, immune from seizure ..."* and No 5 reinforces the ownership of ancestral lands and the "free awarding of these lands"[49].

Art 231 para 4 Brazil C states: *"The lands referred to in this article are inalienable and indisposable and the rights thereto are not subject to limitation".*

Even the removal of indigenous people is expressly forbidden (except by referendum of National Congress in Brazil: Art 231 para 5; Art 64 para 2 Paraguay C).

An ambiguous norm of the Brazil C (Art 231 para 6) even declares any acts relating "to occupation, domain, and possession of the lands and exploitation of the natural riches of the soil, rivers, and lakes" as null and void, however subjecting it at the same time to "relevant public interest" concretized by supplementary law and largely excluding a right to indemnity and suing ("except in what concerns improvements derived from the occupation in good faith, in the manner prescribed by law"). The formulation demonstrates the potential undermining of a constitutional individual and collective right by the legislature and reminds us to a certain

48 Eg Art 2 para A, VI Mex C; Art 5 Nicaragua C.

49 Similar Art 231 para4 Brazil C; Art 64 Paraguay C (even more explicit).

degree of the Australian attempts to limit the effects of the Waitangi Treaty even though the latter never attained constitutional rank until today.[50]

Even where constitutional guarantees were lacking or are weak the HRC intervened in some cases:

In POMA POMA v. Peru[51] the claimant alleged that drilling wells on native wetlands deprived local farms of water for raising llamas and interfered with her right under Art 27 ICCPR. In one of the rare cases where the Committee directly based its ruling on this article (and not Art 26: non-discrimination), it conceded that a state may legitimately undertake to promote economic development but must comply with the obligations of Art 27 and this must not amount to a denial of the right to enjoy its own culture; a way of life and livelihood of persons belonging to the indigenous community[52]. A further relevant argument was that the claimant was not consulted and unable to participate in the diversion of the water project[53]. This clearly shows that indigenous rights not only comprise substantial customs, traditions, way of life but correspondingly must be accompanied by procedural rights of participation, consultation, and informed prior consent if native lands, environmental use of natural resources are at stake and may directly affect the people[54].

Similar communications of the Committee were addressed to Brazil[55] or Mexico[56], Nicaragua, and Panama[57].

The right to native lands and complementary procedural rights was impressively underlined in an abundant case law of the Interamerican Commission of Human Rights (IACHR) and the Inter-American Court of Human Rights (IACTHR).

In *Saramuki vs Surinam*[58] the Court established clearly that the exploration and extraction of natural resources in ancestral lands do not constitute a breach of the indigenous subsistence as such but the state must comply with the following safeguards:

(1) effectuate a process of participation guaranteeing the right to consultation ("consulta") especially in planning and development procedures
(2) realization of an environmental impact assessment
(3) distribution of the benefits flowing from the exploitation of natural resources as a form of compensation.

50 However, the Tribunal Federal Supremo do Brazil recognized in "Reposa do Serra do Sul" the prevalence of collective titles over private property also referring to Art 231 Brazil C.
51 Communication No 1457/06.
52 Communication; ib, § 7.3 ss.
53 HRC ib, § 7.6.
54 For more insights see C.D. Doyle, Indigenous peoples, title to territory, rights and resources: the transformative role of free prior and informed consent, Routledge (2017).
55 UN CCPR/C/79/Add.66.
56 1994/CCPR/C/79/Add.31.
57 See further references at Shabbas (n. 1) Art 27; § 35 concerning basic needs as health, water, supply, electricity or education.
58 IACTHR, 12/8/2008; "Caso Pueblo Saramaka vs Surinam"; §§ 25–27.

Even more interesting is the evolutive approach of the IACTHR interpreting Art 21 ACHR which does not expressly guarantee indigenous property rights but the use of the property to everyone. The Court in a profound study referred to the internal norms of member states (mentioned above) and court decisions (concerning Nicaragua, Paraguay, and Surinam) and took into consideration human rights texts (like the ILO Convention. No169). It led the Court to the assumption that the right to consultation is a "principle of international law".

Looking at the case-law of the IACHR and the Court there were more than 35 cases in the last three decades (1991–2018) dealing with indigenous issues (not all of them referring to communal lands)[59].

It should not be left unnoticed that constitutional case law has also contributed to the development of indigenous rights as 'collective rights. Thus, the Colombian Constitutional Court declared:

> "Indigenous communities are subjects of fundamental right; those rights are neither the same as the individual rights of each one of their members nor the addition of these"[60].

5. Africa

Due to the enormous ethnic complexity of tribes and indigenous peoples living long before European colonization in wide areas of rural lands and communes, state borders as established during the colonization period in the second half of the 19th century frequently crossed and divided the natural bonds and living together of neighboring tribes[61].

Many constitutions contain non-discrimination clauses for linguistic minorities (e.g. Ethiopia: Art 5; Nigeria: Art 16, 21; Somali C: Art: 31 para 3; Angola C: Art 19 para 2; Namibia: Art 19). Sometimes special obligations of the state to promote and protect the diversity of languages and the development and use of 'indigenous languages' are expressly enshrined (Kenya: Art 7 para 3 a; b); South Africa Constitution: Art 6 para 2 SAC). Frequently African constitutions declare "official languages" which were the colonial languages, or even primordially "national languages" frequently spoken by larger communities. The most prominent example is of course South Africa recognizing not less than 16 official languages (Art 16 para 1 SAC), but also Kenya distinguishing between Kishwahili as 'national language' and English and Kishwahili as 'official languages'; similar distinctions can be found in Burundi (Art 5) and Ruanda (Art 8).

59 See Rapporteurship on the Rights of Indigenous Peoples, OAS ; eg also decision IACTHR "Caso Pueblo Indígena Kichwa y Sarayaku v Ecuador", 27/6/2012, resuming precedent jurisprudence, 35 pp. (39).

60 Ruling T-514 (2009), MP E. Vargas Silva; Cons. b.2, quoted at Alviar Garcia (n. 45), 159.

61 See "Ethnicity and Nationalism in Africa" (1999); J. Gilbert, Constitutionalism, ethnicity and minority rights in Africa: a legal appraisal from the Great Lake Region, in International Journal of Constitutional Law, 11(2) 2013, 414, 4.

The Democratic Republic of Congo (DRC) comprising not less than 250 ethnic groups paved the way after the Pretoria Accord (2002) for the recognition of ethnic minorities and inserted a constitutional guarantee to promote the co-existence of all ethnic groups and a duty to protect (Art 13, 51 DRC Const), even though in practice the contradiction between constitutional normativity and reality continued[62]. Different approaches after the atrocious genocide in Ruanda and Burundi (1994) were attempted: whereas in Burundi the constitutional reform-besides the recognition of ethnic, religious, cultural minorities in governance (Art 1 Burundi C) – focused on the share of political power in the National Assembly (60% of seats for Hutu; 40% for Tutsi), the post-genocide constitution Ruanda (2003) took the opposite stance that a 'political party 'shall not be founded on the criterion of ethnicity or other discriminatory elements (Art 54 Ruanda C).

As to the complex problem of property, expropriation, and restitution or compensation of colonized land, human rights texts are generally silent. However, the African Charter of Human and People's Rights (AfrCHHPR/BanjulCH) declares – besides the right to property (Art 14 para 1) – not only the free disposition of the people of their wealth and natural resources but also states in Art 21:

> In the "case of spoliation the dispossessed people shall have the right to the lawful recovery of this property as well as to an adequate compensation" (para 2),

and further declares:

> "that state parties …shall undertake to eliminate all forms of foreign exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their natural resources" (para 5).

One may doubt if this anti-colonialist wording is appropriate for judicial adjudication at all, but the AfrCtHPR ruled in a remarkable landmark decision (*Case Okieg Indigenous Community v Kenya;* 2017)[63] for the first time that the eviction of indigenous peoples from their ancestral lands in Kenya ("Mau Forest") without prior consent interfered with their property right (Art 14) in conjunction with Art 21, 22 of the Charter.

The Court in a very long and detailed ruling (702 pp) interpreted the cited articles in the light of international human rights instruments, especially the respective UN GA resolutions for the protection of indigenous peoples[64]; after having expounded the right to property (Art 14) not only as an individual right in the traditional (liberal) sense but as well as the collective right for indigenous communities when examining it in conjunction with Art 21 AfrChHPR, the Court states:

> "The Court recalls…that has already recognized for the Okieg a number of rights to their ancestral lands, namely the right to use (usus) and their right to enjoy the produce of the land (fructus)which presupposes the right to access to and occupation of the land. Insofar those rights have been violated by the Respondent. The court holds that the latter has

62 Gilbert (n. 61) sub 4.

63 AfrCtHPR, 26/5/2017; No006; §§ 112–123.

64 See above sub 1.

violated Art 21 of the right to enjoy and freely dispose of the abundance of food produce of their ancestral lands"[65].

Comparing this fist ruling on indigenous land claims based on the regional human rights protection in Africa (in conformity with international and comparative law) the judicial approach towards indigenous rights as primarily collective rights appears rather similar to the IACtHR and related constitutional decisions in Latin America.

We cannot examine here the constitutional effectiveness and political stability of the different constitutional designs but one might subscribe to the assumption that the western approach to minority rights as individual/collective rights must be adapted to the political, economic, and social conditions of the heterogeneous situations in Africa[66].

6. Concluding Remarks

As our considerations focused on the human rights practice for indigenous peoples in the Southern hemisphere one may cautiously attempt some preliminary conclusions.

Whereas some common law countries reveal a rather different constitutional approach to the protection of minorities and especially native peoples (USA; Australia or New Zealand on the one hand and Canada on the other), recent developments in Latin America illustrate a gliding scale towards better constitutional protection of minority rights. This however does not automatically mean that constitutional rights are better protected in political and administrative reality as many human rights violations in Latin America illustrate in the abundant case law of the IACtHR and national courts. The different approaches to constitutional firm commitments apparently depend on the history of colonization, tradition, and legal culture of common law: Australia and to a lesser degree New Zealand shrink from inscribing more than symbolic or programmatic principles into a constitutional charter, but the predominant examples of Canada (1982) and South Africa (1994) teach a different story. Constitutional adjudication and interpretation could rely on a firm constitutional fundament to be developed in conformity with international law and with a view to comparative law.

A second remark: minority rights in the European understanding are mostly understood as individual rights exercised 'collectively' or in 'community'. Even though Art. 1, 3 "European Framework Convention on the Protection of National Minorities" illustrates that the individual right is closely linked to the group right which was underscored by the "Venice Commission for Democracy Through Law" in its "Explanatory Report to the Draft of the Framework Convention"[67], there is an obvious shift from the liberal-individual perspective of minority rights to a more

65 AfrCommHPR v State of Kenya ('Okieg Indigenous Community') (n. 62), § 201.
66 Gilbert (n. 61) sub 4.
67 CDL (1991), 008, Art 1, § 15.

collective concept of minority rights in the case-law of human rights courts in Latin America and nowadays in Africa. This is moreover affirmed by a comparative exchange of concepts and ideas centering around the specific nature of indigenous rights by Constitutional Courts and Supreme Courts in Latin America as far as cognizable. The specific characteristics of native or indigenous rights require a more sensitive approach to the cultures, traditions, habitat, and use of natural resources to preserve and develop their collective identity manifestly in the use of their ancestral lands and environment. Procedural or participatory rights to consultation, 'free and informed consent' to land claims agreements can be interpreted as 'inherent rights' and principles of international and regional human rights law. Further rights of equal access to justice may be warranted by non-discrimination clauses but affirmative action for the co-existence of legal systems, maintenance of native legal traditions for certain subjects (as far as not incompatible with state law) may be advisable and have been enshrined in many constitutions. Finally, political participation and representation on the communal, regional, or (central or federal) state-level must be reinforced with the free will of the former 'subjects' (for example proportional or even quota representation in elective bodies).

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