
GENDER EQUALITY AND INDIGENOUS PEOPLES’ RIGHT TO SELF-DETERMINATION AND CULTURE

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|---|------|
| I. INTRODUCTION..... | 1053 |
| II. INDIGENOUS PEOPLES’ RIGHT TO SELF- DETERMINATION AND THE COLLECTIVE RIGHT TO CULTURE..... | 1059 |
| A. THE IMPORTANCE OF RECOGNIZING COLLECTIVE RIGHTS OF INDIGENOUS PEOPLES | 1059 |
| B. THE SCOPE OF THE COLLECTIVE RIGHTS TO SELF- DETERMINATION AND CULTURE..... | 1068 |
| III. ADDRESSING GENDER INEQUALITY WITHIN INDIGENOUS COMMUNITIES | 1073 |
| IV. CONCLUSION | 1088 |

I. INTRODUCTION

Let us begin by imagining a community that identifies itself as indigenous and calls itself Sukiris. The Sukiris have lived in the Sukiry jungle long before it came to be part of the territory of the State of Palamor, a constitutional democracy in Latin America that ratified all the main human rights treaties in the universal and regional system. In general, the Sukiris are able to enjoy and transmit their culture, as well as to decide over their affairs in an autonomous manner. In this sense, Palamor recognizes the Sukiris as Indigenous Peoples, and its constitution incorporates the fundamental principles established in the Declaration on the Rights of Indigenous Peoples (the “Declaration”),¹ particularly the right to self-determination.

1. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007) [hereinafter Declaration on the Rights of Indigenous Peoples].

Consequently, the Sukiris have a constitutionally recognized property right over their territories and natural resources and a right to benefit from them economically. Moreover, the Palamorese government is very respectful of its obligation to consult the Sukiris' authority before initiating development projects that may affect their territories and is conscious of sharing the benefits. Lastly, the Sukiris have permanent representatives in the national government and congress, and a special procedure allows the Sukiris to object to any law, policy, or regulation that could interfere with their cultural practices.

As a consequence of this political arrangement, the Sukiris' culture has thrived, allowing the Sukiris to develop a sustainable economy that allows their small community to enjoy their traditions and basic human rights as a collective, while concurrently enjoying individual rights as full citizens of Palamor.

This story, however, seems unlikely. Indigenous communities around the world are threatened by extinction, and their members are among the poorest and most marginalized integrants of our societies. Governments have long believed that by implementing inclusive policies, indigenous communities would gradually assimilate to the larger societies and cultures surrounding them, highlighting that such inclusive policies are good for Indigenous Peoples.² The consequence has been decades of neglect and discriminatory practices toward indigenous traditions, cultures, and demands, particularly toward the most important demand of all: Indigenous Peoples have the right of non-accommodation. Yet, the Sukiris' story may not be that hard to imagine because it likely represents the answering of many Indigenous Peoples' demands. It represents the goal of the very important set of international norms that the international community has adopted and that are enforced by international mechanisms. Thus, if the Sukiris' situation were extended to the different indigenous communities around the world, the international community would likely say that the situation is close to ideal. This essay poses the argument, however, that the

2. See Rodolfo Stavenhagen, *Indigenous Rights: Some Conceptual Problems*, in *CONSTRUCTING DEMOCRACY: HUMAN RIGHTS, CITIZENSHIP, AND SOCIETY IN LATIN AMERICA* 141, 144 (Elizabeth Jelin & Eric Hershberg eds., 1996) (explaining that governments have raised concerns about the consequences of non-assimilation and its effect on "national unity and development").

international community's "ideal" situation for indigenous communities still lacks fundamental protections for individuals within the indigenous communities. It argues that while the international legal framework is appropriately designed to address the rights of indigenous communities and their individual members vis-à-vis the State and the larger society, it fails to address situations of gender inequality within the community. The right to self-determination, as it is currently applied to indigenous communities, can serve as a perpetuation of certain cultural practices that inhibit indigenous women from enjoying equal rights to their male counterparts.³ To demonstrate, let us revisit the Sukiris' almost ideal situation, but this time let us look inside the community. First, by ancestral law, the Sukiri Council, the body in charge of making the most important political decisions for the indigenous community, can only be comprised of male members, which is also true for the representatives of the community that can be elected to the national government. Although this practice could be challenged under Palamor's Constitution, no female member of the community would contravene Sukiri traditions. Second, the tradition for Sukiris is for men to leave the community to work while women stay at home to take care of the household and children. In this tradition, if a woman wants to receive an education or go outside the community, she needs permission from her husband who is often working far away. Thus, Sukiri women and girls are less likely than men to get an education or go outside the community. Lastly, according to tradition, menstruation makes women dirty and evil and, therefore, while a Sukiri woman is menstruating she is not supposed to leave the house. During this time, girls do not go to school and women do not work. As a result, Sukiri girls fall behind in their education and Sukiri women earn less money than the men.

These hypotheticals do not apply to every indigenous community, but they are not that unlikely since most of them are real examples of

3. See Alexandra Xanthaki, *The UN Declaration on the Rights of Indigenous Peoples and Collective Rights: What's the Future for Indigenous Women?*, in *REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 413, 420–21 (Stephen Allen & Alexandra Xanthaki eds., 2011) (emphasizing the peculiar role of indigenous women, who often bear the responsibility of maintaining the indigenous group's culture but also are subject to the same discriminations of non-indigenous women).

practices taken from a study conducted by an indigenous women's organization to detect gender inequality in indigenous communities in Suriname.⁴ The argument of this paper is, therefore, not based on a general negative perception of indigenous cultural practices toward women, but rather on the fact that, if there is something that history has shown us, it is that, with different justifications and through different patterns, gender inequality has been a constant manifestation of different cultures.⁵ There is no reliable indication that indigenous cultures are exceptions to this gender inequality pattern, either because some of their cultural practices may not be egalitarian from a gender perspective, or because they have become less gender egalitarian as a consequence of the interaction with the larger society.⁶ Indeed, the International Work Group for Indigenous Affairs ("IWGIA") recognizes that promoting gender equality among Indigenous Peoples can pose significant challenges since gender equality and customary laws often collide.⁷ And this challenge lays

4. See SANOMARO ESA, *INDIGENOUS RIGHTS, WOMEN AND EMPOWERMENT IN SURINAME* 66, 70 (Ellen-Rose Kambel ed., 1999).

5. See U.N. Special Rapporteur on Violence Against Women, *Its Causes and Consequences, 15 Years of the United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences (1994–2009) – A Critical Review*, Human Rights Council, 39, U.N. Doc. A/HRC/11/6/Add.5 (May 27, 2009) ("Culture-based identity politics has been considered by the mandate holders to pose one of the most serious challenges to women's human rights. They have addressed challenges arising from cultural relativist assertions that reject universality of human rights, particularly with regard to women's equality, as well as cultural essentialist approaches that view some cultures as being inherently misogynist.").

6. See, e.g., Editorial, Kathrin Wessendorf, *INDIGENOUS AFFAIRS*, no. 1–2, 2004, at 4 ("Many indigenous women now find themselves confronted with unequal conditions imposed by the dominant society and subsequently taken up by their own communities. In Sápmi, the influence of the majority society on indigenous culture has led to the man's role becoming that of 'bread winner,' while the woman's role is now confined to the home. Whereas the traditional ideal is that women and men are equal, the reality in current Sami society is different.").

7. See INT'L WORK GRP. FOR INDIGENOUS AFFAIRS, *POSITION PAPER AND STRATEGY: GENDER AND INDIGENOUS WOMEN* (1999) [hereinafter *GENDER AND INDIGENOUS WOMEN*], available at <http://www.iwgia.org/images/stories/sections/about-iwgia/documents/strategy-papers/Genderstrategy.pdf> (noting that within indigenous communities there are traditions that may contradict fundamental rights of gender equality and that the organization struggles to achieve both indigenous rights and gender equality); see also Stavenhagen, *Indigenous Rights: Some Conceptual Problems*, *supra* note 2, at 152 (" [T]here are instances in which the rights of a community to the preservation of customs and traditions can mean the

mainly on the fact that it is the right of Indigenous Peoples to self-determine their way of life, which international human rights mostly aims to guarantee, and an attempt to judge this culture with concepts of gender equality that might be foreign to that self-determination process may be categorized as an intrusion. The challenge is further aggravated when acknowledging that indigenous communities are seriously threatened by extinction. Therefore, any argument on gender equality may appear of secondary importance; what matters first is survival.⁸

The purpose of this paper is to explore this challenge and attempt to increase the importance and urgency of addressing gender inequalities within indigenous communities. It will argue that Indigenous Peoples' rights should not be applied with a gender-neutral lens.⁹ Even though some may question these considerations as being a foreign imposition on indigenous culture, this paper will argue that a directive of human rights is to homogenize a minimum standard of respect for every human being. Therefore, the minimum standards of gender equality we conceive of as fundamental in the international community should be enforced with the same strength within the cultural practices of any indigenous community. This issue is often addressed by stating that when individual rights—in this case, women's right not to be discriminated against—are in conflict with collective rights—in this case cultural rights and self-determination—individual rights trump collective ones.¹⁰ Hence, the individual rights of women affected by discriminatory cultural practices would be safeguarded. This approach, however, is not considerate of the right to self-determination of Indigenous Peoples.¹¹

reduction or violation of the individual rights of some of its members.”).

8. See Xanthaki, *supra* note 3, at 421 (“[T]he negative impact of some indigenous practices and stereotypes on indigenous women has been seen as a taboo by some indigenous activists and scholars; as Radcliffe confirms ‘gender issues remain secondary to the cultural politics of the indigenous movements, where the persistence of a complimentary dual model of gender underpins a tradition and symbolic role for indigenous women.’”).

9. See *id.* at 420 (noting that scholars have yet to examine in depth the relationship between increased collective rights for indigenous groups and oppression of the rights of women within their indigenous groups).

10. See *id.* at 428–29 (discussing the general view that individual rights trump collective rights, and noting arguments that individual rights should be applied in context-specific cases).

11. See *id.* at 430–31 (explaining that UN bodies take the position that a

Thus, this essay argues for an alternative interpretation that is fully respectful of Indigenous Peoples' autonomy and analyzes the right to self-determination in a way that is inclusive of gender equality.¹²

The issue is very delicate and not suitable for general conclusions. Each case demands a tailored solution because it is a case of human rights limits. But this is not a reason not to incorporate a comprehensive gender perspective in all indigenous affairs discussions. At a minimum, the discussion is instrumental to defining what Indigenous Peoples' rights are about, and at the same time defining what we expect from enforcing human rights. Additionally, because, more often than not, gender inequality issues are less visible or urgent than other more "public" concerns,¹³ and chances are that this may be another case since, in fact, the Declaration is mostly silent about guaranteeing gender equality.¹⁴

The scope of this paper has three qualifications. First, it does not claim that all indigenous cultural practices are gender biased, or even that it is a general reality. Second, it does not assume that historical or social grounds for unequal practices that may exist in an indigenous community are the same as western societies, since indigenous cultural practices may not rely on western values and stereotypes. Rather, the concern is whether or not practices lead to unequal opportunities for women to exercise equal rights to men. Lastly, this paper concentrates on cultural practices that do not constitute crimes under domestic law. It is regarding these non-violent, gender-biased practices that make it harder to achieve a balance between self-determination, cultural rights, and gender equality.

community right does not trump an individual right).

12. See ESA, *supra* note 4, at 13–15 (describing the Women's Empowerment Approach and advocating that the indigenous women should be able to exercise the right to self-determination on an equal footing with men).

13. See, e.g., Elizabeth Jelin, *Women, Gender, and Human Rights*, in CONSTRUCTING DEMOCRACY: HUMAN RIGHTS, CITIZENSHIP, AND SOCIETY IN LATIN AMERICA 177, 181 (Elizabeth Jelin & Eric Hershberg eds., 1996) (noting that a key turning point in gender equality was valuing the work that women did in the homes out of the public eye); see also Susan Miller Okin, *Feminism and Multiculturalism*, 108 ETHICS 661, 664 (1998).

14. See Xanthaki, *supra* note 3, at 422 (stating that although Article 44 of the Declaration on the Rights of Indigenous Peoples expressly states that there are to be equal rights for men and women of indigenous groups, there was little discussion as to how the article would apply).

II. INDIGENOUS PEOPLES' RIGHT TO SELF-DETERMINATION AND THE COLLECTIVE RIGHT TO CULTURE

As expressed above, this essay explores whether international human rights law, by recognizing Indigenous Peoples' right to self-determination, lends protection to certain indigenous cultural practices that result in illegitimate gender inequalities. The issue presents a conflict between the collective right to self-determination and culture and the individual rights of indigenous women. This section will attempt to define the scope of those rights before exploring the conflict.

A. THE IMPORTANCE OF RECOGNIZING COLLECTIVE RIGHTS OF INDIGENOUS PEOPLES

In 2007 the UN General Assembly approved the Declaration that expressly recognizes Indigenous Peoples' right to self-determination. Granting Indigenous Peoples the right to self-determination means that Indigenous Peoples have the right, as a collective, to "freely determine their political status and pursue their economic, social and cultural development."¹⁵ Furthermore, the Declaration recognizes that Indigenous Peoples have a collective right to own and benefit from their land and resources,¹⁶ and to promote and develop their culture.¹⁷ However, neither the recognition of indigenous communities as "peoples," nor their corresponding right to self-determination or the recognition of collective rights remains unchallenged. Thus, it is important to express the reasons why this paper frames the issue under the recognition of collective rights to

15. See Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 3.

16. See *id.* arts. 26–27 (providing in part that respect will be given to the customary and traditional land system of the indigenous peoples involved in determining land rights recognized by the State).

17. See *id.* art. 5 ("right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions"); *id.* art. 8 ("right not to be subjected to forced assimilation or destruction of their culture"); *id.* art. 11 ("right to practise and revitalize their cultural traditions"); *id.* art. 12 ("right to manifest, practice, develop and teach their spiritual and religious traditions"); *id.* art. 13 ("right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures"); *id.* art. 14 ("right to establish and control their educational systems and institutions providing education in their own languages").

Indigenous Peoples. In fact, the Declaration is not a binding instrument, and it is, therefore, disputed whether the Declaration creates any special obligation on the State toward Indigenous Peoples.¹⁸ Defining this is important because, although many argue that the Declaration is merely a restatement of previously recognized rights, applied through the particular lens of Indigenous Peoples' situation,¹⁹ others assert that it represents a change in international law since it recognizes a non-state actor with sovereign rights.²⁰ Hence, the novelty of the Declaration is mainly the recognition of the right to self-determination. Self-determination arguably gives a different context to collective rights that have, indeed, been recognized before, for several groups of people, and not exclusively to Indigenous Peoples.²¹

The interplay between the right to self-determination, the collective right to culture, and the individual rights of members of the community is what lends significant complexity to the issue of how human rights law should deal with gender discrimination within indigenous communities. This interplay of rights raises questions such as: Do the individual rights of the Sukiri women not to be discriminated against on the basis of gender trump the collective right to culture of the Sukiris? But if this is true, what is then the

18. See, e.g., Rodolfo Stavenhagen, *Making the Declaration on the Rights of Indigenous Peoples Work: The Challenges Ahead*, in REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 3, at 147, 151 ("At best, the Declaration is considered to be soft law which can be ignored at will, particularly as it does not include enforcement mechanisms).

19. Stavenhagen, *supra* note 2, at 150; see Stephen Allen, *The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project*, in REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 3, at 225, 236 (explaining that indigenous representatives argue that the Declaration is an interpretation of old rights rather than a creation of new rights).

20. See *id.* at 236 (noting that the claim that the Declaration does not create new rights is an "unusual tactic"); see also H. Patrick Glenn, *The Three Ironies of the UN Declaration on the Rights of Indigenous Peoples*, in REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 3, at 171, 174 (describing the Declaration as a "major shift" for international law because its openness to non-state actors is "humanizing").

21. See Allen, *supra* note 19, at 237–38 (distinguishing between the collective rights of indigenous communities from those of other groups, such as minorities, focusing on the unique right to self-determination that is provided exclusively to indigenous communities).

purpose of a right to self-governance? Isn't it implicit that self-determination means that some common goals of the community can be validly pursued, and that this can legitimize the imposition of some limits on individual rights? And, what are the obligations of the State towards Sukiri women's rights, versus its obligations to the Sukiri Indigenous Peoples rights overall? How are individual rights and collective rights compatible? The complexity of these issues, coupled with governmental fear that recognizing collective rights would undermine the State and individual rights, or that recognizing Indigenous Peoples' right to self-determination can lead to their secession, explain the many popular theories that attempt to deal with the right to culture and the protection of ethnic groups without considering collective rights.²² And these theories are largely consistent with the classic liberal approach to human rights that is based on individualism and universality, and does not include collective rights.²³

In this sense, even when the majority of human rights were initially conceived to protect collective interests, the classic human rights system is based on the idea that it is the individual, and not the group, that holds rights.²⁴ Individuals have human rights vis-à-vis the State, which is the only human association that public international law recognizes as a sovereign legal subject (along with the exceptional recognition of colonial regimes).²⁵ To that end, human rights are the approved means of resistance of the individual against the State.²⁶ Under this understanding, groups of individuals can have

22. See, e.g., DWIGHT NEWMAN, *COMMUNITY AND COLLECTIVE RIGHTS: A THEORETICAL FRAMEWORK FOR RIGHTS HELD BY GROUPS* 6–7 (2011) (describing Will Kymlicka's approach to collective rights, which focuses on individual rights within the group rather than the collective whole, and the scholarship that followed his approach).

23. See WIKTOR OSIATYNSKI, *HUMAN RIGHTS AND THEIR LIMITS* 86 (2009) (describing the classic theory that groups cannot claim human rights, but rather individuals can claim them); see also Stavenhagen, *Indigenous Rights: Some Conceptual Problems*, *supra* note 2, at 151 (noting that, according to the classic theory, groups may have other rights, but they cannot be the subject of human rights).

24. See OSIATYNSKI, *supra* note 23; see also Stavenhagen, *Indigenous Rights: Some Conceptual Problems*, *supra* note 2, at 151.

25. See Glenn, *supra* note 20, at 176 (stating that human rights are the sole approved means of resistance to the State).

26. See *id.* (characterizing the rights provided through the Declaration as a

rights, even constitutional rights, but they cannot have human rights that can be invoked against the State or the group's members.²⁷ This framework does not mean, however, that the classic approach to human rights ignores the essential social nature of human life. Most individual human rights, be they freedom of association or freedom of religion, are designed to be exercised as part of a collective.²⁸ Moreover, the classic approach is not blind to the fact that some individuals, because they belong to ethnic groups or other minorities, are in a more vulnerable position in society that often leads to discrimination. For this reason, Article 27 of the International Covenant on Civil and Political Rights ("ICCPR") enshrines the right of members of ethnic, religious, or linguistic minorities to enjoy their culture with other members of the group, to profess and practice their religion, and to use their native language.²⁹ This principle is also developed in many other binding instruments.³⁰ However, the recognition of collective identity in these instruments does not connote the group as a rights holder and, therefore, does not entail an express recognition of a collective right to self-determination or

means of empowerment for individuals against the State).

27. See Stavenhagen, *Indigenous Rights: Some Conceptual Problems*, *supra* note 2, at 151 (noting that however a group is characterized, the group does not have human rights, rather it is the individuals within the group that hold those rights).

28. See *id.* (emphasizing that many protected rights can "only" be exercised in groups and not by individuals alone).

29. International Covenant on Civil and Political Rights art. 27, Dec. 19, 1966, 999 U.N.T.S. 171, S. Treaty Doc. No. 95-20 [hereinafter ICCPR].

30. See, e.g., Convention on the Rights of the Child art. 30, Nov. 20, 1989, 1577 U.N.T.S. 3 (providing that "a child . . . who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language"); see also Convention on the Elimination of All Forms of Discrimination Against Women art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (proclaiming that women shall have equal rights and access to enjoy their human rights and fundamental freedoms); International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 3, S. Treaty Doc. No. 95-19 [hereinafter ICESCR] (stating that all individuals have a right to self-determination, including the ability to exercise their economic, social, and cultural development); International Convention on the Elimination of All Forms of Racial Discrimination art. 1, Mar. 7, 1966, 660 U.N.T.S. 195 (denouncing racial discrimination and defining racial discrimination as including the denial of rights to freely practice political, social, economic, and cultural freedoms).

culture.³¹ The underlying presumption by some commentators is that individual rights are sufficient to enhance the development of the group.³²

Yet, experience has made it increasingly evident that the members of determined social groups cannot enjoy their individual rights of equality unless their collective identities are recognized, respected, and protected. Indigenous communities are a key example of this case. As a consequence, even though the right to culture is universal, the right became especially relevant to advance the struggle for recognition of ethnic and minority groups, thus leading to many multiculturalistic theories.³³ But most of these theories are still constructed based on the liberal conception of human rights that denies collective rights. Although it could be argued that, at least with respect to indigenous communities, these theories are set aside by the Declaration that recognizes collective rights,³⁴ they should still be examined because they continue to give credence to the idea that, even if collective rights are recognized, when a conflict arises, individual rights should always prevail.

A popular exponent of these liberal theories of multiculturalism is Will Kymlicka. He argues that members of ethnic and indigenous communities have “group-differentiated rights,” which are special rights that emanate from the membership to the group and that create special obligations upon the State to protect that membership and the group.³⁵ However, despite emanating from membership, these special rights are individual rights, not collective rights. The existence of these rights derives from the recognition that members of these groups face several inequalities because of their identification with

31. Cf. Joshua Castellino, *Indigenous Rights and the Right to Development*, in REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 3, at 367, 371–72.

32. See Xanthaki, *supra* note 3, at 428–29.

33. See JURGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 206 (1999); see also Stavenhagen, *Indigenous Rights: Some Conceptual Problems*, *supra* note 2, at 151.

34. See Xanthaki, *supra* note 3, at 415 (noting that arguments against collective rights were put aside with the passing of the Declaration, but arguing that collective rights existed prior to the Declaration).

35. See WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 35 (1995) (distinguishing between collective rights and group-differentiated citizenship because the term collective rights erroneously assumes conflict with individual rights).

the group, and that these inequalities affect their capacity to enjoy their individual rights on equal footing with other members of society.³⁶ Hence, in order to ensure equality, the State has an obligation to protect the group and its cultural practices.³⁷ However, this protection exists only as long as it is consistent with the advancement of the individual rights of the members of the group.³⁸ At the same time, because Kymlicka does not recognize collective rights, he rejects that the group can curtail the rights of its members to advance the rights of the group.³⁹

Thus, a theory like that of Kymlicka's could easily provide a solution to our issue of gender inequality in indigenous communities. As applied to the Sukiris' case, we could assume that the Sukiris' cultural practices that undermine women would be illegitimate because they represent restrictions on individual rights imposed by the group, and that, at the same time, the Palamores government could freely interfere to eradicate these practices because its obligation of protection only extends to those cases that promote individual rights.⁴⁰ The aim of this essay is to uphold the individual rights of indigenous women while, at the same time, supporting collective rights of indigenous communities. As Alexandra Xanthaki states:

[I]nsisting on an individualistic system of protection for indigenous peoples merely on the basis that collective rights do not fit with a prescribed version of liberalism would ignore the needs of these communities all over the world for the sake of intellectual coherence. It would mean submitting human rights to the oppression of a western jurisprudential viewpoint.⁴¹

Indigenous Peoples' collective right to self-determination and

36. See NEWMAN, *supra* note 22, at 14 (referring to Kymlicka's theory of minority rights).

37. KYMLICKA, *supra* note 35, at 44 (discussing different ways to protect historical customs wherein limitations are placed "on the basic civil liberties of [a group's] members").

38. *Id.*

39. See *id.* at 34–35.

40. See OSIATYNSKI, *supra* note 23, at 90 (referring to Kymlicka's argument that illiberal practices by cultural groups are not only bad, but intolerable and that, therefore, the larger society has a right to intervene and stop them).

41. Xanthaki, *supra* note 3, at 417.

culture are essential legal and moral standards that should be recognized as binding. They should be binding not only because they were included in the Declaration approved by 143 member States to the UN, but also because Indigenous Peoples' collective right to self-determination and culture have been long present in international human rights law.

To start, the whole theory of individual human rights rests on a fundamental right that belongs to "all peoples" and that is, therefore, inherently collective; this right is namely, the right to self-determination.⁴² Even when this right has been historically reserved for the aggregate population of a State, to cases of colonial regimes or other exceptional circumstances,⁴³ it is defined more broadly, as the prerogative of all peoples to freely determine their political status and pursue their economic, social, and cultural development.⁴⁴ Without this right the whole system of human rights would lack coherence because the main understanding behind the system is that all human beings, both as individuals and as groups, have the autonomy to freely and equally pursue their own paths.⁴⁵ In recognition of this idea, even before the Declaration was approved, the Human Rights Committee ("HRC") had already stated that the right to self-determination, enshrined in Article 1 of the ICCPR, applies to Indigenous Peoples.⁴⁶ Similarly, the HRC interpreted the right to culture recognized in Article 27 of the ICCPR, when applied

42. See S. James Anaya, *Self Determination as a Collective Human Right Under Contemporary International Law*, in OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 4 (Pekka Aikio & Martin Scheinin eds., 2000) (describing that the right to self-determination is for all "people," but noting that the definition of "people" is hotly debated).

43. See *id.* at 5; see also Stavenhagen, *Making the Declaration on the Rights of Indigenous Peoples Work: The Challenges Ahead*, *supra* note 18, at 162.

44. See ICCPR, *supra* note 29, art. 1; ICESCR, *supra* note 30, art. 1; U.N. Charter art. 1.2. The right to self-determination is enshrined in article 1.2 of the UN Charter, and articles 1 of the International Covenant on Civil and Political Rights and International Covenant of Economic, Social and Cultural Rights.

45. Anaya, *supra* note 42, at 8; see also NEWMAN, *supra* note 22, at 122 (affirming that autonomy itself is an ideal that would be "pointless . . . if it were all that mattered" and we could not use it to pursue other interests such as collective forms of life).

46. See Christian Erni & Marianne Jensen, *Implementation of the Right of Self-Determination of Indigenous Peoples*, INDIGENOUS AFF., no. 3, 2001, at 18 (referring to the Human Rights Committee's considerations of the fourth periodic report of Canada on implementation of the Covenant on Civil and Political Rights).

to indigenous communities, as comprising the communal use of territories and resources as well as the right to cultural autonomy and consultation regarding traditional practices.⁴⁷ Likewise, collective expressions of the right to culture are recognized in several international instruments and in the decisions of international courts.⁴⁸ While not all of these instruments are binding, they reflect the understanding that in societies like ours, often comprising of social and economic inequalities and diversity based on ethnic backgrounds and cultures, the enjoyment of individual rights is almost illusory without the recognition of collective identities and rights.⁴⁹ Overall, even without relying on arguments claiming

47. See Elsa Stamatopoulou, *Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples*, in REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 3, at 387, 397 (referring to General Comment No. 23, CCPR/C/21/rev.1/Add.5 and several decisions of the Human Rights committee under the Optional Protocol to the ICCPR).

48. See, e.g., United Nations Declaration on the Rights of Indigenous Peoples, Advisory Opinion (May 2007); see also United Nations Educational, Scientific and Cultural Organization [UNESCO], Universal Declaration on Cultural Diversity, Nov. 2, 2001, 41 I.L.M. 57 (2002) [hereinafter Declaration on Cultural Diversity]; United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992) (acknowledging the special relationship between Indigenous Peoples and their land and the importance of them having control over it and its resources, as well as their involvement in development projects); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities arts. 2–3, G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992) (referring mainly to individual rights but also protecting the cultural and collective identity of the group); ILO, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art. 2, June 27, 1989, 28 I.L.M. 1382 (1989) (declaring that governments should respect social and cultural identities, institutions, and traditions); African Charter on Human and Peoples' Rights, June 21, 1981, 1520 U.N.T.S. 217 (1988). The African Charter has several references to collective rights and the African Commission on Human Rights has issued an Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples. *Id.*; *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment (Inter-Am. Ct. H.R. Aug. 12, 2008), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_185_ing.pdf; *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment (Inter-Am. Ct. H.R. Aug. 31, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

49. See Stavenhagen, *Indigenous Rights: Some Conceptual Problems*, *supra* note 2, at 152 (arguing that collective rights are required for individuals within those collectives to exercise their rights).

customary legal status of some principles of the Declaration,⁵⁰ it is undeniable that the Declaration constitutes a strong political and moral compromise that is quickly developing binding standards through its incorporation into legislation and decisions of national and international organisms.⁵¹

As expressed by Jürgen Habermas, rights are asserted from an individual perspective only in the legal discourse and in courts.⁵² In the political sphere, where the relevant distribution of goods and opportunities are decided, people participate as collective actors, identifying themselves as belonging to particular groups with common goals.⁵³ More often than not, either because of their ethnicity or minority status, society marginalizes some of these groups. For these individuals, there cannot be real equality unless the collective identity of the group is also recognized and protected along with their individual rights.⁵⁴ However, real equality does not exist simply by recognizing an individual right to express one's culture or identity within a group. It has to be complemented with the recognition of the group as a right holder in a way that equally promotes both the experiences of group members, and each person's

50. See, e.g., Anaya, *supra* note 42, at 6 (arguing that the combination of text in international treaties and customary practice is what creates the right to self-determination); see also Clive Baldwin & Cynthia Morel, *Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation*, in REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 3, at 121, 123 (claiming that the overwhelming support for the Declaration with 143 states voting in favor and only four states dissenting provides evidence of customary international law).

51. See, e.g., Luis Rodriguez-Pinero, *The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement*, in REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 3, at 457, 466–71 (stating how the Declaration is a major authoritative source of interpretation of the American Convention and how it influenced the decision of the Inter-American Court of Human Rights in the case of *Saramaka v. Suriname*); see also Stavenhagen, *Making the Declaration on the Rights of Indigenous Peoples Work: The Challenges Ahead*, *supra* note 18, at 154 (referring to the cases of Bolivia, Japan, Canada, and Belize, where national legislation or national courts implemented the Declaration).

52. HABERMAS, *supra* note 33, at 204.

53. *Id.* at 203.

54. See *id.* at 205 (referring to Amy Gutmann's analysis that public recognition as equal citizens requires both, respect for the unique identity of each individual, regardless of gender, race, or ethnicity, and the respect for the traditions of disadvantaged groups).

individual rights.⁵⁵ Only if the group survives and has the opportunity to thrive will its members, who want to remain members and whose complete identity is defined in relation to the group, be able to enjoy their individual rights.

B. THE SCOPE OF THE COLLECTIVE RIGHTS TO SELF-DETERMINATION AND CULTURE

While collective rights are fundamental in protecting members of a group from discrimination by the larger society, collective rights can also lead to abuse by the group over its individual members. Thus, it is important to define the collective rights to self-determination and to culture. First, collective rights are human rights and, therefore, the same obligations are imposed on the State as those defined for individual rights: an obligation to respect, protect and fulfill.⁵⁶ The obligation to respect requires that the State not infringe on the enjoyment of human rights; the obligation to protect provides that the State guard against infringement of these rights by third parties; and lastly, the obligation to fulfill requires positive actions on the part of the State to promote these rights.⁵⁷ Overall, States must

55. See Stavenhagen, *Making the Declaration on the Rights of Indigenous Peoples Work: The Challenges Ahead*, *supra* note 18, at 18 (citing Article 2 of the Declaration as requiring the recognition of equal rights for both indigenous groups and individual members, but noting that this has not been addressed); *see also* Stavenhagen, *Indigenous Rights: Some Conceptual Problems*, *supra* note 2, at 152 (noting practices of female genital mutilation as an example of the conflict between collective rights and individual rights).

56. See *The Foundation of International Human Rights Law*, UNITED NATIONS, http://www.un.org/en/documents/udhr/hr_law.shtml (last visited Mar. 12, 2013) (recounting the history and development of the Universal Declaration of Human Rights and subsequent human rights instruments).

57. "Respect, Fulfill, and Protect" are the three levels of obligations that, in the language of the U.N., describe what International Human Rights Law demands from States. In this sense, the three level obligations have been used to define the obligations of States in relation to different rights, both, civil and political, and economic, cultural, and social. See United Nations, Econ. & Soc. Council, Comm. on Econ., Soc., & Cultural Rights, *The Right to the Highest Attainable Standard of Health*, art. 12, U.N. Doc. E/C.12/2000/4 (2000) (providing the right to the highest attainable standard of health); *see also* UNITED NATIONS FOOD & AGRIC. ORG., *THE RIGHT TO ADEQUATE FOOD IN EMERGENCIES* (FAO Leg. Study No. 77), 2003, at 24 (referring to the scope of the obligation of states in relation with the right to food); *International Human Rights Law*, UNITED NATIONS OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, <http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx> (last visited Mar. 12, 2013) (using "respect, fulfill, and

abide by the *jus cogens* prohibition of discriminating against individuals on the basis of “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁵⁸ This prohibition draws from the basic understanding that human rights are universal since they derive from the inherent human dignity and equality of all human beings.⁵⁹

Yet, recognizing that collective rights are human rights means understanding that, as all human rights that are non-derogable, they are not without limits. In this sense, States can legally impose restrictions on human rights as long as they are justified with a legitimate goal; namely, the protection of national security, public safety, public health and morals, or the rights of others.⁶⁰ These human rights restrictions, however, must be established by law, must be necessary in a democratic society, and proportionate to the fulfillment of the legitimate goal.⁶¹ Thus, human rights law already admits that the rights of others can be a legitimate reason for curtailing some rights when they are in conflict.⁶² It is with this

protect” to define the general obligation imposed on states by International Human Rights Law); *The Human Rights-Based Approach*, UNITED NATIONS POPULATION FUND, <http://www.unfpa.org/rights/approaches.htm> (last visited Mar. 12, 2013) (United Nations Fund for Population Activities); *Obligations of States Parties Under the Convention*, UNITED NATIONS, <http://www.un.org/disabilities/default.asp?id=17> (last visited Mar. 12, 2013) (describing the rights of persons with disabilities).

58. ICCPR, *supra* note 29, art. 2.

59. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948) (declaring that all individuals are entitled to equal treatment and enjoyment of the same rights, including the right to freedom of association, participation in the political process, and a nationality).

60. The standards for the restriction of rights are established in the ICCPR (e.g., articles 12, 18, 19, 21, 22), the American Convention on Human Rights (e.g., articles 12.3, 13, 15, 16, 22, 30), the European Convention of Human Rights (e.g., articles 9, 10, 11, 17–18), and further developed by the Inter-American Court and the European Court of Human Rights. Organization of American States, American Convention on Human Rights arts. 12.3, 13–16, 22, 30, 32, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR]; ICCPR, *supra* note 29, arts. 12, 18–19, 21–22; European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 9–11, 17–18, 62, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

61. See, e.g., ACHR, *supra* note 60, art. 13.2 (stating conditions under which a State may impose limits on freedom of thought and expression); European Convention, *supra* note 60, art. 10.2 (providing the requirements for restricting the right to freedom of religion or beliefs).

62. See Xanthaki, *supra* note 3, at 429 (explaining that when rights conflict, the

approach that a conflict between the collective right to culture of an indigenous community and the individual rights of women that may be affected by discriminatory practices needs to be analyzed rather than by assigning to a predetermined hierarchy to individual rights.⁶³

However, rights cannot be restricted in ways that have the effect of denying the main aim of protection of that right, otherwise it is not proportionate. It is important then to understand the main goal of collective rights, especially that of the collective right to self-determination, before assessing how to balance them against individual rights. As discussed above, groups are recognized as rights holders because this recognition is necessary to promote and protect the individual rights of its members,⁶⁴ but this does not mean that the group cannot restrict individual rights, as liberal theories like Kymlicka's argue. It should also not mean that individual rights always trump collective ones. If the group has a collective prerogative to self-determine its ways of life, there must be some restrictions on individual rights that are legitimate. Consequently, not every cultural practice of an indigenous community that restricts individuals' rights should be considered illegitimate *per se*.⁶⁵ A deeper analysis of the justifications and effects of that cultural practice should be taken into account.

At the same time, the right to culture, either in its individual or in its collective sphere, does not mean a right to maintain cultural practices unchanged. Indeed, the Declaration views indigenous cultures as evolving and open to change, both as a result of the internal exercise of self-determination, and as a result of external influences.⁶⁶ Changes in cultural traditions are not necessarily

human rights law approach is to "accommodate" those rights, thus emphasizing that one law does not trump another unless the law is non-derogable).

63. See NEWMAN, *supra* note 22, at 86 (referring to James Anaya position regarding how conflicts between collective rights and individual rights should be sorted out by a balance between the competing rights).

64. See Stavenhagen, *Indigenous Rights: Some Conceptual Problems*, *supra* note 2, at 152 (arguing that full recognition of individual rights is only possible with the recognition of collective rights, and noting that international human rights agreements first provide for collective rights, which provide the foundation for individual rights).

65. See Xanthaki, *supra* note 3, at 429 (referring to Parekh theory of contextual justice).

66. See *id.* at 426 (noting that the combination of outside influences and recognition of change by the Declaration allows for individual members of the

negative, and the right to culture is not designed to prevent change. The objective of the right to culture is to guarantee the ability to self-define cultural practices and to protect against forced or unwarranted assimilations. Even though Habermas does not support collective rights in general, his opinion on this point is pertinent: “[T]he ecological perspective on species conservation cannot be transferred to cultures.”⁶⁷ Thus, the Declaration establishes the State’s obligation not to subject Indigenous Peoples to forced assimilation or destruction of their culture, along with several positive obligations to protect and fulfill those rights, mainly through the prohibition of discrimination and by providing appropriate redress.⁶⁸ Yet, the Declaration does not say that the State has the obligation to prevent changes in cultural practices or to guarantee their survival. Admitting this would mean stripping the members of the group from their rights to criticize and to decide the traditions by which they want to be bound.⁶⁹ Each culture must allow the interchange of ideas and criticism of its foundations because, on one hand, this is implicit in the rights of political participation and freedom of expression that are fundamental to human rights tradition, and, on the other hand, because it must enable future generations to change the cultural practices with which they do not agree.⁷⁰ These rights that can lead to change within the group are also rights that the State is obliged to ensure.

Thus, just as this paper argued before against theories that claim that individual rights always trump collective rights when addressing cultural practices that result in gender inequalities, it argues against opinions stating that all indigenous cultural practices are protected and that all attempts to change those practices are illegitimate

group to make informed decisions about potential changes that could be made within the group).

67. Jürgen HABERMAS, *supra* note 33, at 222.

68. See Declaration on the Rights of Indigenous Peoples, *supra* note 1, arts. 8–9. On the obligation to fulfill, see article 11 (providing redress through effective mechanisms including the restitution of cultural property), article 12 (enabling the access and repatriation of ceremonial objects and human remains), article 13 (ensuring transmission of language, history, oral traditions and participation in public proceedings), and article 14 (ensuring children’s access to education accordant with traditions and language); on the obligation to protect, see article 15 (taking effective measures to combat prejudice and eliminate discrimination).

69. HABERMAS, *supra* note 33, at 222.

70. *Id.*

interferences.⁷¹ The issue is not then whether Indigenous Peoples' cultural practices that unequally affect women's capacity to enjoy their rights should be changed (since if they are discriminatory they must be) but rather how the change should be made. This is where self-determination takes center stage.

While the collective right to culture is recognized for many ethnic and minority groups, the status of "peoples" and the collective right to self-determination has, until now, been exclusively applied to Indigenous Peoples.⁷² The recognition of a right to self-determination for Indigenous Peoples is related to the theme of redress of the Declaration, which recognizes that many of the historic injustices suffered by indigenous groups have strong grounds in colonialism.⁷³ In accordance with the ICCPR, the ICECSR, and the Declaration, the right to self-determination recognizes the ability of Indigenous Peoples to freely determine their political status and freely pursue their economic, social, and cultural development.⁷⁴ This implies their right to self-government in matters relating to internal affairs.⁷⁵ In this sense, self-determination comprises all the other human rights, collective and individual, and it is the standard by which all rights need to be assessed.⁷⁶ Thus, the right to self-determination implies an ongoing process through which the community defines the different aspects of its ways of life.⁷⁷ This important right imposes restrictions

71. See GENDER AND INDIGENOUS WOMEN, *supra* note 7, at 2.

72. See Anaya, *supra* note 42, at 5, 13 (noting that although "peoples" is a broad, flexible term, the right to self-determination predominantly applies to Indigenous People because the right is in part historically based on decolonization, which characteristically applies to many indigenous groups). Please note, however, that many scholars claim that a right to culture is a customary international norm applicable to other groups. See, e.g., *id.* at 6.

73. Declaration on the Rights of Indigenous Peoples, *supra* note 1, pmbl. (providing expressly that the Declaration is concerned with past injustices suffered by indigenous peoples); accord Allen, *supra* note 20, at 237.

74. Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 3; ICCPR, *supra* note 29, art. 1; ICESCR, *supra* note 30, art. 1.

75. Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 4; see also Anaya, *supra* note 42, at 9 ("In essence, self-determination comprises a standard of governmental legitimacy within the modern human rights frame.").

76. Stavenhagen, *Making the Declaration on the Rights of Indigenous Peoples Work: The Challenges Ahead*, *supra* note 18, at 163; see also Anaya, *supra* note 42, at 9 (agreeing that self-determination includes many human rights).

77. Stavenhagen, *Making the Declaration on the Rights of Indigenous Peoples Work: The Challenges Ahead*, *supra* note 18, at 163.

on the way the conflict of collective and individual rights should be analyzed since Indigenous Peoples have sovereignty that predates and, at least to some extent, trumps the sovereignty of the State⁷⁸

III. ADDRESSING GENDER INEQUALITY WITHIN INDIGENOUS COMMUNITIES

The conclusions reached above are instrumental to addressing gender inequality within indigenous communities. As affirmed above, Indigenous Peoples have a collective right to self-determination and culture, which signifies that they are free to choose, as a group, their political, economic, and cultural organization. Also mentioned above, collective rights must be interpreted in a way that generally promote the individual rights of the members of the group,⁷⁹ keeping in mind, however, that a right to culture is not a right to maintain cultural practices unchanged.⁸⁰

All these standards emerge directly from the Declaration; however, they are stated in a gender-neutral form. As a result, many indigenous communities enforce cultural practices, including the management and control of collective resources, which prevent women from enjoying their individual and collective rights of equality with men. The issue then is whether the collective right to self-determination and culture justifies the enforcement, by the community, of these cultural practices on the female members who do not want to exit the group. The truth is that while the Declaration appropriately defines Indigenous Peoples' rights to target the profound discrimination that indigenous individuals suffer from the larger society, it does not appropriately describe the targeted discrimination within the community. In fact, these discriminatory cultural practices are arguably the result of the exercise of a collective right to culture that is protected in the Declaration; therefore, challenging those practices on the basis that they go

78. Allen, *supra* note 20, at 237 (referring to the statements of James Anaya as UN Special Rapporteur on the Rights of Indigenous Peoples where he claimed Indigenous Peoples' "sovereignty" . . . predates and . . . should trump the sovereignty of the states that now assert power over them.").

79. Stavenhagen, *Indigenous Rights: Some Conceptual Problems*, *supra* note 2, at 152.

80. See HABERMAS, *supra* note 33, at 222 (arguing that group members must be allowed to critique their traditions and practices if the group itself is to survive).

against standards of gender equality seems rather contradictory when those standards are not part of that group's culture. This section explores this contradiction and lays a foundation on how the contradiction should be addressed in a manner that upholds women's rights and collective rights to self-determination and culture.

First, it should be noted that this contradiction does not seem problematic when the cultural practices of an indigenous community involve violence against women in a way that, for example, could make the practice fit within the definition of a crime under domestic criminal law.⁸¹ Such is the case, for instance, with female genital mutilation ("FGM").⁸² In this case, it is rarely even discussed that international human rights law trumps any alleged right to enforce these cultural practices. Although it may be argued whether prohibiting or criminalizing these practices is the best method to eliminate them, there is already general agreement that these practices should be eliminated. This approach of prohibiting cultural practices that involve violence against women has been supported by the CEDAW Committee and the General Assembly of the UN.⁸³ These cultural practices are rejected because they do not promote the individual rights of the members of the group and are not protected by human rights laws.⁸⁴ The international community has determined that it is intolerant of these cultural practices, and, in general, this has not been perceived as an unlawful cultural imposition.

However, the same determination does not extend to cultural practices that do not harm the physical integrity of women or to practices where the harm is more "debatable," such as the lack of political participation of indigenous women, or the unequal control

81. Cf. OSIATYNSKI, *supra* note 23, at 182 (explaining that some cultural practices, like violence against women, will not change without new or altered laws banning the practices).

82. See Stavenhagen, *Indigenous Rights: Some Conceptual Problems*, *supra* note 2, at 152 (stating that collective practices like FGM that violate individual members' rights cannot be considered a human right).

83. See Rep. of the Comm. on the Elimination of Discrimination Against Women, 11th sess., Jan. 20–30, 1992, ¶ 24, U.N. Doc. A/47/38(SUPP) (1993); Rep. of the Comm. on the Elimination of Discrimination Against Women, 9th sess., Jan. 22–Feb. 2, 1990, ¶ 438, U.N. Doc. A/45/38(SUPP) (1990); G.A. Res. 48/104, at 3, U.N. Doc. A/RES/84/104 (Dec. 20, 1993).

84. OSIATYNSKI, *supra* note 23, at 182; Stavenhagen, *Indigenous Rights: Some Conceptual Problems*, *supra* note 2, at 152.

over economic resources.⁸⁵ The different treatment of these situations is not often analyzed, arguably because they evidence cultural patterns of the larger society, and because, from the point of view of those defending Indigenous Peoples' rights, they evidence contradictions in the system that could debilitate the already weak position of indigenous culture. Although there is an undeniable difference of degree and reversibility in these practices that justifies a differentiated treatment,⁸⁶ some comprehensive approach should be enforced because, in fact, the underlying justifications of both types of practices are probably related. The fact that the harm of FGM seems more blatant to the international community does not signify that other "less harmful" practices should be defended, or even tolerated. The degree of harm and reversibility should not only be measured in the individual women "victimized" by the practice, but also in its collective impact and its effect on the distribution of power and opportunities within the community.

The main problem with those cultural practices that do not represent a physical threat to women, but that are still discriminatory, is that they are often presented as the last standing indigenous traditions. Hence, criticizing them or advocating for their change is perceived as a threat to Indigenous Peoples' survival. This holds true even when the challenge is made with the upmost respect for their rights as a group. Indigenous communities, including the women within them, often recognize the women as the repositories of traditional customs. This has often had the effect that traditional norms have a larger impact on women's roles.⁸⁷ As a consequence, while many of these traditions are specially guarded from

85. Cf. GENDER AND INDIGENOUS WOMEN, *supra* note 7, at 2 ("[T] here has been a tendency to consider the relationships between men and women, and women's situation in general within these societies and communities as part of their customary way of living, as something pertaining to their culture and hence not up for discussion. This has even included certain practices that were clearly discriminatory and even oppressive to women.").

86. See OSIATYNSKI, *supra* note 23, at 182 (explaining that more reversible harms or practices, like veils worn by Muslim women, are harder to condemn than irreversible ones, such as female genital mutilation).

87. See GENDER AND INDIGENOUS WOMEN, *supra* note 7, at 8; see also U.N. OFFICE OF THE SPECIAL ADVISOR ON GENDER ISSUES AND ADVANCEMENT OF WOMEN & THE SECRETARIAT OF THE U.N. PERMANENT FORUM ON INDIGENOUS ISSUES, GENDER AND INDIGENOUS PEOPLES' CULTURE (Briefing Note No. 4), Feb. 2010, at 2 [hereinafter GENDER AND INDIGENOUS PEOPLES' CULTURE].

interferences,⁸⁸ other traditions that affect men are less discussed. At the same time, effects of development and external factors have already modified many of the traditional roles of men; for example the introduction of cash, in many cases, has forced men to leave their traditional hunting or fishing activities to assimilate into the regular working force of a larger society.⁸⁹ Conversely, many of the traditions that are related to the private sphere of indigenous life are less affected, and, since traditional roles of women are often related to the household and family, these are some of the traditions that have managed to survive.⁹⁰ While not all of these traditions are discriminatory, some are, and the practices are less visible and more protected.⁹¹

As with the example of the Sukiri community, indigenous women's rights are often limited when compared to those of men. In many communities, men control the access and use of the collective land and in communities where private ownership has been introduced, women do not own or inherit land.⁹² Also, the traditional division of roles often has a disparate impact on women's health and

88. See GENDER AND INDIGENOUS PEOPLES' CULTURE, *supra* note 87, at 2 (explaining that indigenous women are seen as the upholders of the cultural traditions of the community, and noting that this role is more important within the community than gender equality concerns).

89. See GENDER AND INDIGENOUS WOMEN, *supra* note 7, at 13 (noting that in Kenya the introduction of cash ruined the barter system and with it the ability of Maasai women to access resources).

90. Cf. Okin, *supra* note 13, at 665–66 (explaining that the private sphere within the community for indigenous women is often neglected by advocates of multiculturalism when assessing the relationship between collective and individual rights).

91. See *id.* (arguing that not all inequalities are public since some exist informally and in the private sphere of the home).

92. See GENDER AND INDIGENOUS WOMEN, *supra* note 7, at 12 (noting that outside influences on the community can be positive on one gender and not the other, and explaining that these shifts have devalued some positions within the community, such as the woman's role in the home); see also ESA, *supra* note 4, at 66 (referring to studies conducted about how women in indigenous communities have unlimited access to resources, but have no control over the resources that belong to them since it is men who have the ability to decide over them); Wessendorf, *supra* note 6, at 5 (referring to Twa women in the Great Lakes region who have seen their rights to land weakened by individual property rights systems where men are the primary landowners, and discussing the prohibition of female land inheritance in Nepal).

prospects of receiving an education.⁹³ Additionally, in many cases, even if women have important control over the household, it is men who are perceived as the “head of the house.” Men’s control over the household affects women’s freedom of movement (since women often have to ask for men’s permission to leave the village), and women’s participation in political and social organizations (since men often see women’s organizations as a potential threat to their social hierarchy).⁹⁴

Overall, in many communities, women often do not participate in making decisions for the community.⁹⁵ In the private sphere, their ability to decide may be curtailed because they have no authority over whom to marry, the number and spacing of their children, or whether they are in a monogamous marriage.⁹⁶ In the public sphere, women are not often part of the formal decision-making bodies, which usually consist of elderly men.⁹⁷ Certainly, many of these traditions result from the incorporation of western cultural practices and the accommodation, often forced, to modern economy.⁹⁸ However, despite what some scholars claim, this does not render the question of gender inequality in indigenous cultures irrelevant to indigenous women.⁹⁹ In many cases, the group has incorporated these practices as its own practice and perceive them as binding.

As long as these practices discriminate against women, they are in

93. *GENDER AND INDIGENOUS WOMEN*, *supra* note 7, at 11–12 (commenting on how workload, lack of mobility, early marriages, circumcisions, pregnancies, and lack of resources disproportionately affect women’s ability to obtain an education in some indigenous cultures).

94. *See* ESA, *supra* note 4, at 72 (reporting that women’s movement is restricted outside of the community and at times during menstruation within the village); *see also* *GENDER AND INDIGENOUS WOMEN*, *supra* note 7, at 13 (describing the similar restrictive experiences of indigenous women in Guatemala).

95. *See* *GENDER AND INDIGENOUS WOMEN*, *supra* note 7, at 13 (providing that the lack of female decision-making participation can be attributed in part to restraints on a woman’s time and a lack of education).

96. *See id.*

97. *See id.*; *see also* ESA, *supra* note 4, at 71 (describing a few examples of indigenous groups in which women have little to no representation in formal decision-making).

98. *See* *GENDER AND INDIGENOUS WOMEN*, *supra* note 7, at 2 (noting the disproportionate impact that outside influence has on the different genders within an indigenous community); *see also* Xanthaki, *supra* note 3, at 427.

99. *See* Xanthaki, *supra* note 3, at 422 (describing the notion that gender inequality is a Western idea and not relevant within indigenous communities).

violation of fundamental human rights standards that the State is internationally bound to respect, fulfill and protect.¹⁰⁰ The State continues to be bound by these obligations even when these women belong to an indigenous community that has a right to self-determination. It would be odd for international law to obligate the States that have ratified CEDAW to eliminate all cultural practices that are harmful to women, but to excuse indigenous cultural practices of that State because of the indigenous group's right to self-determination.¹⁰¹ Similarly, it seems odd to applaud the Inter-American Commission of Human Rights for obligating the State of Guatemala to change laws that contravene the American Convention because they rely on negative stereotypes of women that constitute an illegitimate discrimination, but to protect indigenous cultural practices without any regard to whether the practices are perpetuating gender inequality.¹⁰² This does not mean that every practice that would be deemed discriminatory in western societies needs to be considered discriminatory when practiced by an indigenous community. For instance, the stereotypes common in western societies that often characterize women as caregivers and men as breadwinners are arguably discriminatory because of the value society gives to the different roles, and not because there is an intrinsic negative characteristic of this division. The same division could not be discriminatory in an indigenous community when it is justified by different reasons. If recognizing diversity means anything, conclusions cannot be just extrapolated from one culture to the other without a careful case-by-case analysis.

Equality does demand, however, that women have equal opportunities to define their own roles and be allowed to challenge them, and the frequent lack of political participation of indigenous women in the self-determination process may be evidence that these

100. See CEDAW, *supra* note 30, arts. 1–2 (defining discrimination against women and requiring States Parties to actively work on eliminating such discrimination).

101. See *id.* art. 5 (“States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudice and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”).

102. See *Morales de Sierra v. Guatemala*, Case 11.625, Inter-Am. Comm’n H.R., Report No. 4/00, OEA/Ser.L/V/II.111, doc. 20 rev. ¶¶ 35–36 (2008).

1995 Fourth World Conference on Women in Beijing, indigenous women's organizations approved a declaration that calls for the eradication of indigenous laws, customs, and traditions that are discriminatory toward women¹⁰⁷ and that demands equal political participation in the indigenous and modern socio-political structures.¹⁰⁸ Latin-American indigenous women made similar statements in a 1997 conference celebrated in Mexico,¹⁰⁹ as did Indian Tribal Women in a Conference in 1998,¹¹⁰ and Asian Indigenous women.¹¹¹ In all these statements indigenous women have acknowledged that some traditional practices oppress them, that they want them changed, and that *they* want to be the force of that change. At the same time, some UN organs have also considered this

2Fwww.forestpeoples.org%2Fdocuments%2Faw_hr%2Fcedaw_guide_jan04_eng.pdf&external=N; GENDER AND INDIGENOUS WOMEN, *supra* note 7; NATIVE WOMEN'S ASS'N OF CAN., ABORIGINAL WOMEN AND SELF-DETERMINATION (2007), available at www.laa.gov.nl.ca/laa/naws/pdf/nwac-determination.pdf; *Indigenous Women*, ASIAN INDIGENOUS PEOPLES PACT, <http://www.aippnet.org/home/indigenous-women> (last visited Mar. 12, 2013).

107. Beijing Declaration of Indigenous Women, NGO Forum, U.N. Fourth World Conference on Women, ¶ 36 (Sept. 7, 1995), available at http://www.ipcb.org/resolutions/htmls/dec_beijing.html.

108. *Id.* ¶ 44.

109. GENDER AND INDIGENOUS WOMEN, *supra* note 7, at 5 (referring to the statements made by Blanca Chancoso, an indigenous women from Ecuador, at the Second Continental Meeting of Indigenous Women from the Americas in which she stated that "indigenous women wish to be recognized as people with rights, not only duties. We need to be seen, within our families and communities, not only as cooks and child-bearers, but also as female human beings. This is what we want, not to be seen as second class people . . .").

110. *Id.* at 9 (quoting a statement made by Indian Tribal Women in a 1998 Conference: "Whereas codification of customary laws and practices is generally a good step for the tribes it is fraught with grave danger for women. There are various tribal practices, which adversely affect women like polygyny, exclusion of women from property rights[,] non-participation of women in collective decision-making, etc. Codifying these negative aspects would permanently harm tribal women. There is, therefore, a need to re-look into the whole matter to advance the interest of women in tribal society.").

111. Xanthaki, *supra* note 3, at 424 (quoting the Baguio Declaration adopted by Asian Indigenous women in the third session of the PFII: "We note with concern that some modern changes in our traditional social, cultural and political institutions and practices have led to a loss of values and codes and behavior which upholds gender-sensitive structures and roles, while accepting our responsibility to change other customary laws and practices which oppresses indigenous women. We will speak up against abusive treatment of indigenous women in the name of custom and traditions.").

important issue. For example, the HRC stated in 2006 that the Canadian Indian Act had a discriminatory effect on indigenous women and their children in matters of reserve membership and matrimony property and mandated the Canadian government amend this with the consent of the indigenous community.¹¹² The HRC stated that “[b]alancing collective and individual interests on reserves to the sole detriment of women is not compatible with the [ICCPR] Covenant.”¹¹³ Another opportunity, the Permanent Forum on Indigenous Issues, emphasized that gender balance must be reinstated within indigenous communities in culturally appropriate ways.¹¹⁴ Despite these initial efforts, attention has not gone much deeper, or, at least, to a more critical examination of how to empirically deal with the issue or how to put indigenous women’s equality in a priority agenda.

This insufficient effort to delve into indigenous women’s equality within the indigenous community has important negative effects. On one hand, many indigenous women’s organizations that support the change of traditional practices have been accused of dividing and debilitating the indigenous movement, or of being “less indigenous.”¹¹⁵ Because indigenous women want to be exactly that—indigenous, plus women, and probably in that order—this type of accusation puts them in a position in which they almost have to choose between protecting their culture or fighting for their equality.¹¹⁶ Thus, the inclusion of a gender perspective in the understanding of collective rights to culture and self-determination is

112. *Id.* at 422 (referring to the Concluding Observations of the Human Rights Committee on Canada, U.N. Doc. CCPR/C/CAN/CO/5 (2006)).

113. *Id.*

114. *Id.* (referring to the Report of the third session of the Permanent Forum on Indigenous Issues).

115. *See id.* at 421 (noting that scholars have shied away from gender equality issues in addressing indigenous rights, thinking that the topic works against the community); *accord* GENDER AND INDIGENOUS WOMEN, *supra* note 7, at 3 (noting the opposition indigenous women face in addressing gender inequality, but noting their persistence); Wessendorf, *supra* note 6, at 4 (quoting Jorunn Eikjok, a Sami woman: “We were unpopular among our fellow sisters in the wider community for bringing in our ethnic and cultural identity as women”).

116. *But see* GENDER AND INDIGENOUS PEOPLES’ CULTURE, *supra* note 87, at 3 (challenging the separation of gender equality and the right to culture by arguing that women require individual and collective rights for full enjoyment of human rights).

fundamental not only to address indigenous women's claims, but also to convey the message that this is not a division. Rather, this is an empowerment of Indigenous Peoples.

On the other hand, not strongly addressing this issue, or assuming that it is less urgent or independent from the community's survival, enables States to use the pretext of protecting individual rights as an excuse to strip Indigenous Peoples from control over their internal affairs.¹¹⁷ In this sense, even when recognizing collective rights, the approach towards collective and individual rights often embraced under human rights standards still draws from the same premises relied on by liberal theories that deny collective rights: collective rights are recognized, but whenever they conflict with individual rights, the latter trumps. This seems to be the approach in the Universal Declaration on Cultural Diversity, stating that "[n]o one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope."¹¹⁸ The UN Guidelines on Indigenous Peoples' Issues similarly states this idea,¹¹⁹ and it is this incorrect approach that allows the State to justify unwarranted interventions in matters that should be the sovereign concern of indigenous communities.

Arguing that individual rights always trump collective rights is almost like emptying collective rights of any significant meaning. It is like saying that an indigenous community has a right to self-determine their cultural practices but only as long as it is completely in accordance with the majoritarian standards.¹²⁰ This approach does not respect either the collective rights of Indigenous Peoples to self-determine their ways of life, or the individual rights of indigenous individuals to live their culture. Holding that individual rights always trump collective rights has the effect of alienating indigenous women from their own cultural practices that, even if they might question as discriminatory, they perceive as binding and they respect. If

117. See Xanthaki, *supra* note 3, at 421 (stating that States invoke the protection of individual rights to limit collective rights).

118. Declaration on Cultural Diversity, *supra* note 48, art. 4.

119. U.N. DEV. GRP., GUIDELINES ON INDIGENOUS PEOPLES' ISSUES 14 (Feb. 2008), <http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf>.

120. See Xanthaki, *supra* note 3, at 429 (stating that assigning a fixed predominance of individual rights over collective rights is a "simplistic solution . . . that creates more problems than it solves").

collective rights are always trumped, then the group has no autonomy. To avoid this, the decision for change must come from within the indigenous community, but never without the involvement of indigenous women in this debate. Thus, self-determination cannot be gender-neutral.

If we uphold collective rights, we must admit that individual rights do not always trump collective rights. A right to self-government inherently means that there is going to be an authority that will decide on general rules applicable to everyone who wants to be in the community. Hence, as with any other governmental authority, there are legitimate general interests that Indigenous Peoples can pursue that might have the legitimate effect of limiting the exercise of some individual rights.¹²¹ However, as with any government and society, not all cultural practices and general rules are consistent with international human rights. Those that are not consistent with international human rights cannot be protected under the pretext that they derive from a right to the self-determination. Sovereignty also has limits. The international community has agreed that there is a minimum homogeneous set of guarantees that derive from the dignity and equal respect owed to human beings that limits governmental authority. The Declaration recognizes that Indigenous Peoples must have full enjoyment, as a collective and as individuals, of all human rights as recognized in human rights law.¹²² While skeptics could argue that this understanding already constitutes an imposition of western values (since human rights standards have been criticized as such), those who strongly believe in the human rights cause should respond that it is a commitment, undeniably often political, but a pact to peacefully share this world leaving no one behind.

While in theory this seems logical, its practical application is not as straight forward. The main vacuum created by the Declaration is that while it recognizes Indigenous Peoples' sovereignty over their internal affairs that, to some extent, displaces the sovereignty of the State; the Declaration does not define, nor has there been any attempt to define, whether this creates any particular obligation on Indigenous Peoples to express the right to self-determination in

121. See NEWMAN, *supra* note 22, at 24.

122. Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 1.

accordance with human rights standards.¹²³ Certainly, Indigenous Peoples have agreed to this through their participation in the negotiation of the Declaration, but this does not explain how this duty should be enforced or how violations should be made accountable.¹²⁴ The international obligations certainly remain within the State, but since the right to self-determination imposes on the government a degree of deference for the self-governance of the community, it arguably debilitates the strength of its accountability. This vacuum is understandable. The international obligations imposed on legal persons other than States are an intellectual challenge to the established human rights theory (although the same was originally said of collective rights). More importantly, certainly no Indigenous Peoples are in a situation to affront international obligations nor are they actually enjoying their self-determination right. But the complexity of the issue should not discourage the debate.

Faced with the conflict of individual and collective human rights, scholars like James Anaya and Alexandra Xanthaki have claimed that the issue is rather simple: It can be correctly addressed through the general understanding that rights (that are not derogable) have no hierarchy and that an ad-hoc analysis of every case would allow for the resolution of the conflict in a way that preserves the core values of competing rights.¹²⁵ Accordingly, States could lawfully restrict the exercise of collective cultural rights as long as the restriction is established by law, necessary in a democratic society, based in the pursuance of a legitimate goal, in this case the protection of individual rights of indigenous women, and proportional to furthering that goal.¹²⁶

123. See, e.g., *id.* pmb., art. 3 (lamenting the effects of colonization on Indigenous Peoples rights, including the right to self-determination, and obliging States to protect these rights while saying nothing about the role or obligations of the Indigenous Peoples themselves).

124. See Stamatopoulou, *supra* note 47, at 403 (referring to the duties assumed by Indigenous Peoples to uphold human rights).

125. NEWMAN, *supra* note 22, at 86 (referring to James Anaya's understanding that conflicts between collective rights and individual rights are a "non-issue" since rights always need to be balanced against competing rights); Xanthaki, *supra* note 3, at 429–30.

126. See Xanthaki, *supra* note 3, at 430; see, e.g., *Michaud v. France*, App. No. 12323/11, Eur. Ct. H.R. ¶¶ 59–60 (2012), available at <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-4177258-4942718> (debating whether the

This understanding is accurate but incomplete. It is accurate because it does not render collective rights irrelevant and it serves to justify, for example, the implementation of legal measures criminalizing or otherwise prohibiting FGM, not based on the fact that individual rights always trump collective ones, but on the result of a proportional and reasonableness balancing test.¹²⁷ It also serves to justify how cases like *Santa Clara Pueblo v. Martinez* should probably be resolved differently under a human rights approach.¹²⁸ Female members of an American Indian tribe in the United States brought this case requesting declaratory and injunctive relief for a discrimination claim based on a tribal ordinance that denied tribe membership to children of female members who married outside the tribe, but extended that membership to children of male members who married outside the tribe.¹²⁹ The United States Supreme Court decided that American Indian tribes are “[d]istinct, independent political communities, retaining their original natural rights in matters of local self-government,” and that this ordinance was protected by the tribe’s autonomy.¹³⁰ A balance of rights and interests, as described above, in a State that has ratified CEDAW, for example, should be resolved differently and such discriminatory practice should not be upheld.

However, the balancing of rights proposed by these scholars is not enough to address gender inequality within the indigenous

interference was in accordance with the law or necessary in a democratic society and therefore a valid restriction of the applicant’s rights under Article 8 of the European Convention on Human Rights); *Baena-Ricardo v. Panama, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 72, ¶¶ 146–47 (Feb. 2, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/Seriec_61_esp.pdf (deciding whether a Panamanian law regulating the right to assembly permissibly restricted that right to protect democracy and constitutional order).

127. See *Female Genital Mutilation (FGM): Legal Prohibitions Worldwide*, CTR. FOR REPRODUCTIVE RIGHTS, <http://reproductiverights.org/en/document/female-genital-mutilation-fgm-legal-prohibitions-worldwide> (last visited Mar. 12, 2013) (providing an account of the different legal measures adopted by countries to eradicate FGM practices).

128. See generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62–63 (1978) (explaining that Congress decided to selectively apply constitutional safeguards to Indian tribes through the ICRA “to fit the unique political, cultural, and economic needs of tribal governments” and thereby protect the tribes’ right to self-determination).

129. *Id.* at 49.

130. *Id.* at 55.

community, since implicit in this assumption is the idea that the State has the opportunity to balance rights in concrete cases. For many reasons, this has not been the case with discriminatory cultural practices of indigenous communities. A majority of the States with indigenous populations do not have the legal structure that would enable a case like *Santa Clara* to arise (either because indigenous communities do not have the sovereign status that enables them to be sued, the issue is not of political concern, or indigenous women are not organized in a way that would generate the claim). Even if States had the legal structure to hear cases such as *Santa Clara*, this is probably not what indigenous women want since it implies challenging the community. Assuming that challenging this discrimination can be solved by balancing tests does not give many real options to indigenous women. The prohibition of discrimination imposes on the State positive obligations that are not limited to providing redress. Therefore, along with balancing rights in concrete cases, the elimination of discriminatory practices must come as a result of a dialogue originated in the community, and supported by the implementation of governmental policies and programs. Yet, States must ensure indigenous women's participation in this dialogue, or else indigenous women will have no recourse for their claims.

The right to self-determination cannot be applied in a gender-neutral form. Women must be part of this process, and the State and international community must take all permissible measures to make sure women can participate by encouraging the dialogue in that direction, not in whatever direction the self-determination manifests. Also, when international and domestic courts have the opportunity to uphold Indigenous Peoples' collective rights to culture or property over their lands and resources, they should incorporate a gender perspective in the analysis. The international community has been a successful forum through which indigenous women have channeled their claims for political participation in the internal affairs and control over the community's economic resources. This claim, however, has yet to be endorsed by the international community as a violation of a right and not just as an undesirable situation. Without the international community's endorsement, this claim will not have much influence within the communities.

For these reasons, the State has the obligation to guarantee that

women are able to freely participate in this debate.¹³¹ According to Friedman, for individuals within a group to be able to freely make decisions they must be able to (1) choose among a significant and morally acceptable number of alternatives, (2) make their own choices free of coercion, and (3) develop, earlier in their lives, the capacities needed to reflect on their situation and make decisions about them.¹³² Measuring these conditions is difficult, but attempting to ensure them is what the State must assume as the content of its positive obligations.

It must be asked, however, what happens if the decision reached under those premises is to continue enforcing practices that affect women's rights?¹³³ To which we must answer: respect the decision.¹³⁴ In fact, different communities can reach different decisions toward cultural practices. For example, on cases of rape or wife battering, indigenous women from New Caledonia have criticized as discriminatory the tradition that the fines imposed on the violator go to the community and not to the victim, but indigenous women from the Cordillera who felt that this approach increased the gravity of rape since it is the whole tribe that feels violated have upheld the tradition as legitimate.¹³⁵ The decisions reached must be respected in the same way that women who believe criminalizing abortion is discriminatory respect the norms that criminalize it, or in the same way that many women criticize many of the cultural practices of western communities but respect their source. What is fundamental is for the debate and dialogue to exist and be open; thus, at a minimum, societies must leave the door open for future generations to change aspects of their culture as they choose. A right to culture does not mean a right to impede change, and, for those who are not part of any indigenous community, but believe that some indigenous cultural practices are discriminatory against women, can and should speak out and help these changes occur through mutual respect, education and empowerment policies.

131. See Xanthaki, *supra* note 3, at 425 (citing articles in the Declaration that support an individual's right to make decisions without interference).

132. *Id.*

133. See *id.* at 427.

134. See *id.* at 428 (arguing that the decisions of indigenous groups in the application of human rights norms deserve the same deference conferred to states).

135. GENDER AND INDIGENOUS WOMEN, *supra* note 7, at 9.

IV. CONCLUSION

This essay presented Indigenous Peoples' rights and struggles through a different perspective, a perspective that is not much discussed. The perspective is one that is often perceived as a threat to the main issue for Indigenous Peoples: guaranteeing their survival and development as a group. It argued that some cultural practices of some indigenous communities might likely have the same discriminatory effects on indigenous women that some cultural practices of some non-indigenous communities have on non-indigenous women. Many indigenous women are not allowed input in the decision-making processes of their communities, they do not own or have power to decide over collective lands and resources, and they are affected by menstruation taboos that impede their abilities to work and educate themselves in a way that men often can. Many of these women have stood up and denounced these practices in the same way that women from non-indigenous communities have done.

However, indigenous women face particular obstacles in this fight. On one hand, the collective right to self-determination and the right to culture can be understood to protect some of these practices because they derive from the autonomy of the community. On the other hand, the community may resist these claims because they are perceived as divisive to the indigenous movement. The same perception seems to emerge from the international community advocating for Indigenous Peoples' rights. Not because there is an intentional desire to omit gender inequality claims, but because the struggle for recognition, the threats of extinction, and the human rights abuses indigenous communities face around the world are so acute that other needs appear to be more compelling. At the same time, the issue presents complex collisions of collective and individual rights that have not been deeply analyzed in concrete cases, and the issue demands answering fundamental questions, such as: What is the purpose of human rights law? How do difference and equality interplay? What is the minimum standard of tolerance for the differences that human rights admit? It may be that we are not yet prepared to address all of these questions. Meanwhile, however, indigenous women who appeal for change in some aspects of their traditional culture are presented with scarce

options: it is often a decision between either supporting indigenous life as is or be considered less indigenous when making a claim for equality.

While it is affirmed that collective rights are fundamental human rights, which coherent implementation admits the group can validly limit the exercise of some individual rights, this cannot mean that discriminatory practices can be enforced, and this does not mean that any practice western societies consider discriminatory indigenous communities must also consider discriminatory. The decision to invalidate a tradition must lie with the community, and the State and international community must be respectful of the community's autonomy. However, gender equality must be enforced in the community's self-determination process. Indigenous rights, as all other human rights, cannot be applied in a gender-neutral form. Indigenous women need to have a voice in decision-making processes, in the management of resources, and in the representation of the group. An open forum is the core value of non-discrimination that must be ensured. In the same way that gender discriminatory practices are debated and questioned in other communities, they should be debated and questioned in indigenous ones. The important thing is that they are debated.

This essay is just that, an essay. It probably did not propose novel concepts, nor did it attempt to do so. It probably made some assertions that can be questioned, but that is exactly the point. This essay attempted to show a complex problem for which, although not easy, solutions are available, but are not being argued. Overall, it attempted to show how a demand for recognition of women's rights—that of indigenous women to change some discriminatory cultural practices of their communities—may be silenced by other struggles that are deemed to be more urgent. This, regrettably, is not news in humanity's history. Including gender perspectives as a fundamental indigenous issue should be largely supported: not only for the discrimination and abuses indigenous women suffer from the larger society, but also within their communities. At a minimum, this support would certainly empower indigenous communities and increase their bargaining power toward the larger society.

Human rights demand respect of indigenous and non-indigenous culture. Yet, this does not mean cultural traditions cannot be

questioned. As anthropologist and feminist advocate Diane Bell has put it:

[U]ncomfortable as it may be, if one has a voice, one should speak. The issue for me is to find ways of doing this that are grounded in actual relationships with the people whose reality is being represented by an “outsider.” Thus far this strategy has not been altogether successful, but I’m not sure there is any acceptable way of saying women are being abused, and for many reasons—conflicts of interest, powerlessness, racial cringe—we’re not paying attention and we’re not acting on what we know.¹³⁶

136. GENDER AND INDIGENOUS WOMEN, *supra* note 7, at 15.