Indigenous collective Rights to Consultation and representative Speech

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Abstract:

Indigenous participatory rights, as set out in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), are collective rights for Indigenous Peoples to have a say in decisions affecting them—something these communities are envisaged as doing "through their own representative institutions" (Article 19). However, the conditions of group representation are not clearly spelled out in the UNDRIP or in commentaries on its provisions. Our article addresses this in two inter-connected ways. First, we distinguish genuine spokesperson speech from three other kinds of representative speech (speaking *about the group*, *speaking as a group member*, and speaking *in behalf of a group*). Second, we identify two minimal conditions of genuine spokesperson speech: that spokesperson be authorised by the group in whose name they speak, and that the spokesperson speaks for the group willingly and knowingly. While relatively simple in theory, each of these conditions throws up a number of questions, such as who gets to authorise a spokesperson and how individuals might be compelled into acting as spokesperson. We conclude the paper by turning briefly to the issue of how states and the law ought to better ensure that Indigenous Peoples are able to have a say through their proper spokespersons.

Keywords: Indigenous participation – collective rights -- consultation – FPIC -- spokesperson speech

Introduction

In international human rights law, Indigenous rights to participation are recognised as collective rights in the sense that Indigenous Peoples, as Peoples, are themselves the rights holders. As a result, in the event that any kind of policy, law or activity is being considered that will affect an Indigenous community, the community itself will have a right to participate – including through processes of consultation and consent – in the assessment, planning and decision-making. In consultation and consent processes, this means the affected Peoples

should have their say - raise objections, propose alternatives, negotiate terms, withhold or give consent and so on – and it is the voice of the Peoples that must be heard.[1]

In many cases, the way Indigenous Peoples have their say is through their representatives or spokespersons. In terms of ILO 169[2] and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[3] the affected community should be free to choose their spokespersons in accordance with their own political and legal customs and traditions and, as a result, these instruments are not prescriptive in regard to the appointment of spokespersons.[4] In practice, however, genuine spokesperson speech is sometimes confused with other kinds of representation, which fall short of the community itself having a say. When this happens, Indigenous Peoples are sometimes taken as having spoken, when in fact they have been denied the chance to participate.

In this paper, we set out to do two main things. First, we distinguish genuine spokesperson speech – when an individual speaks for a group – from three other kinds of representative speech that do not count as the speech of the group. These are when someone

[1] In this paper, the focus is on Indigenous representation through spokespersons in relation to the rights to consultation and consent in Articles 18 and 19 of the UNDRIP. However, other articles in the UNDRIP also highlight the importance of Indigenous political and legal systems, including article 4 (the right to self-government in relation to internal and local affairs) and article 5 (the right to maintain and strengthen Indigenous Peoples' distinct legal, economic, social and cultural institutions). Reading article 4 and 5 together, suggests that, Indigenous Peoples' right to autonomy is a right exercised through the appointment of their own representative and governance institutions. As with articles 18 and 19, the question of how these representatives are to be selected is not answered in the text of the UNDRIP itself. While this is beyond the scope of this paper (which is primarily concerned with spokesperson speech in the context of consultation), we believe many of the issues we address here in relation to representation are also important in the context of the article 4 right to self-government. Thank you to the external reviewer for raising this.

[2] International Labour Organisation (ILO), "Indigenous and Tribal Peoples Convention, C169" (1989).

[3] UNGA Res A/RES/61/295 Declaration on the Rights of Indigenous Peoples (Adopted on 12 September 2007).

[4] ILO 169 refers to 'their representative bodies' in article 6 and 12. The UNDRIP states that Indigenous peoples have the right to participate 'through representatives chosen by themselves in accordance with their own procedures as well as to maintain their own indigenous decision-making institutions' in article 18. Although not binding, the Expert Mechanism on the Rights of Indigenous Peoples has interpreted this as ensuring Indigenous Peoples "the freedom to be represented as traditionally required under their own laws, customs and protocols, with attention to gender and representation of other sectors within indigenous communities." Expert Mechanism on the Rights of Indigenous Peoples, "Free, Prior and Informed Consent: A Human Rights-Based Approach" (United Nations Human Rights Council, 2018), Paragraph 20c. Significantly the Expert Mechanism envisions an understanding of this freedom as encompassing the evolution of Indigenous laws, customs and protocols to ensure equality and inclusion for different sectors within Indigenous communities where they are not already included.

speaks *about the group*, when someone *speaks as a group member*, and when someone speaks *in behalf of a group*. Distinguishing the phenomenon of spokesperson speech from these other kinds of speech is necessary both to ensure that they are not substituted for the genuine speech of the community, and to help identify the features of spokesperson speech.

Second, we discuss what we see as two central conditions or criteria for spokesperson speech. While Indigenous Peoples have the right to appoint their own representatives in accordance with their own political and legal processes and traditions, we set out what we see as two minimal and necessary conditions that must be in place in order for a representative to count as speaking for the community. These are (a) the spokesperson must be authorised by the community and (b) the spokesperson must willingly and knowingly act as a spokesperson. Where someone purports to speak for the group but lacks authorisation, this will not count as the speech of the community. Likewise, where someone attempts to speak for themselves but are taken, unwittingly or unwillingly, to be speaking for the community, this too should not be counted as the community's speech. While relatively simple in theory, each of these conditions throws up a number of questions and challenges in their application. In particular, questions arise in regard to who gets to authorise a spokesperson and how individuals might be compelled to act as spokesperson, against their will. We conclude the paper by turning briefly to the issue of how states and the law ought to better ensure that Indigenous Peoples are able to have a say through their authorised and willing spokespersons, and how to ensure that they are not only spoken about, or spoken in behalf of, in ways that prevent their collective participation.

In understanding the nature of collective speech, and recognising the kinds of practices that are sometimes substituted for the genuine collective speech of a community, this paper seeks to contribute to the body of literature that has interrogated and criticised consultative approaches to ensuring sound decision-making processes that affect Indigenous

Peoples for failing to ensure inclusive governance. Indigenous rights to participation (and particularly rights to consultation) have been described as a weak means of protecting Indigenous interests.[5] Indigenous activists and scholars have detailed the many ways in which Indigenous rights to consultation are undermined and denied by states and corporations seeking access to Indigenous land. Often the denial of Indigenous rights to consultation is all too obvious - states simply ignore consultation obligations, or hold meetings in inaccessible places, or engage in consultation far too late, once the matter is *fait accompli.*

In many cases, however, the failures of consultation are far more subtle, allowing states to claim they have consulted affected communities when in fact those communities have not truly had a say. Something resembling a consultation process may take place, there may be meetings and information sharing and Indigenous individuals may participate, yet the affected community is not allowed to have their say collectively, and are instead spoken about or spoken in behalf of. These other kinds of 'representative speech' might, on a surface level, look similar to collective speech - a person with expertise and knowledge, perhaps someone from the affected community, might be speaking about the interests and demands of the community. It is for this reason that we have set out to distinguish collective speech from other kinds of representation, and to identify what it takes for the speech of a representative to amount to collective speech.

In this paper, we refer to both collective and group speech. While this paper is focused on the collective rights of Indigenous Peoples to speak in consultation processes (and

[5] See, for example, César Rodríguez-Garavito, 'Ethnicity. Gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields' (2011) 18 Indiana Journal of Global Legal Studies 263; Riccarda Flemmer and Almut Schilling-Vacaflor, 'Unfulfilled Promises of the Consultation Approach: The Limits to Effective Indigenous Participation in Bolivia's and Peru's Extractive Industries' (2016) 37 Third World Quarterly 172; Armando Guevara Gil, this link will open in a new window Link to external site and Carla Cabanillas Linares, 'Mineralizing the Right to Prior Consultation: From Recognition to Disregard of Indigenous and Peasant Rights in Peru' (2020) 20 Global Jurist; Alexander Dunlap, '"A Bureaucratic Trap:" Free, Prior and Informed Consent (FPIC) and Wind Energy Development in Juchitán, Mexico' (2018) 29 Capitalism Nature Socialism 88; Robert Mbeche, 'Climbing the Ladder of Participation: Symbolic or Substantive Representation in Preparing Uganda for REDD+?' (2017) 15 Conservation and Society 426.

engage in collective speech), our understanding of what spokesperson speech requires and involves is not only applicable to Indigenous Peoples. Other groups of people speak as a group through spokespersons, and while these groups do not necessarily have collective rights and entitlements in regard to their appoint of their spokespersons, the basic conditions of group speech are shared. When discussing the speech of Indigenous Peoples, we use the term 'collective speech', when expanding beyond that particular context to make more general claims about spokesperson speech, we refer to groups and group speech.[6]

Indigenous Collective Rights to consultation in the UNDRIP

One of the defining features of Indigenous rights to participation, including rights to consultation and consent, that distinguishes these rights from the participatory rights of other rights holders, is that they are *collective* rights.[7] That is to say, it is Indigenous Peoples, and not just the individual members of an Indigenous community, that have a right to consultation and consent, a right to access to information, access to justice, and to have a say in decision-making processes that affects the community.[8] When an Indigenous community participates in consultation, it is the community itself that should be called on to raise questions, make comments, object or agree to proposals, and so on.

[6] In this sense, our distinction here is different from that adopted by Jessica Eichler (for whom groups refers to a much looser idea of a social group – such as children or women) and we are not following the model of those who distinguish collective rights or interests from corporate rights (on this line, our whole discussion pertains to corporate rights but we use 'collective' in line with international human rights law instruments and bodies). See Jessika Eichler, *Reconciling Indigenous Peoples' Individual and Collective Rights: Participation, Prior Consultation and Self-Determination in Latin America* (Routledge 2019).

[7] Not all Indigenous rights are collective rights. The UNDRIP distinguishes between the rights of Indigenous peoples (see, for example, article 5) and 'indigenous individuals' (see, for example, article 6). Some rights are recognised as both individual and collective rights (see, for example, article 8). In this paper, we are concerned with collective rights and do not consider individual rights or the overlap or relationship between individual and collective rights. For more on that, see ibid; Cindy L Holder and Jeff J Corntassel, 'Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights' (2002) 24 Human Rights Quarterly 126.

[8] Dalee Sambo Dorough, 'The Significance of the Declaration on the Rights of Indigenous Peoples and Its Future Implementation' [2009] IWGIA document 264.

The collective nature of Indigenous participation rights is expressly recognised in Articles 18 and 19 of the UNDRIP, which provide:

> Article 18
>
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> Article 19
>
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[9]

The Expert Mechanism on the Rights of Indigenous Peoples has, over a number of thematic reports, suggested interpretations of the participatory rights of Indigenous Peoples as a collective right.[10] In its 2011 Advice no 2 on *Indigenous Peoples and the right to participate in decision-making*, the Expert Mechanism stated that,

> The right to participate in public affairs has conventionally been understood as a civil and political right of the individual. In the context of indigenous peoples, however,

[9] UNGA Res A/RES/61/295 Declaration on the Rights of Indigenous Peoples (adopted on 12 September 2007). For a critical analysis of this Declaration, including on the extent to which it can be said to protect collective Indigenous rights, see Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 European Journal of International Law 141.

[10] The Expert Mechanism on the Rights of Indigenous Peoples is an advisory body, established to provide the Human Rights Council with advice on the rights of Indigenous Peoples and in assisting member states to achieve the goals set under the UNDRIP. Its interpretations, clarifications and suggestions are not binding although designed to promote the protection of Indigenous rights in terms of UN Human Rights Council Resolution 33/25 (September 2016).

> the right also takes on a collective aspect, implying a right of the group as a people to exercise decision-making authority.[11]

The Expert Mechanism made a stronger statement of the collective nature of the right in its 2018 *Study on free, prior and informed consent: a human rights-based approach*:

> [Rights to] free, prior and informed consent […] cannot be held or exercised by individual members of an indigenous community […] To 'individualize' these rights would frustrate the purpose they are supposed to achieve.[12]

What this means is that Indigenous Peoples' participatory rights are collective in the sense that it is Peoples who ought to have a say and be heard in law and administrative decision-making processes, and it is Peoples - and not just individual members of Indigenous communities - who have the standing to raise questions, make statements, give or withhold consent, enter into benefit sharing agreements and so on. The way that the UNDRIP envisage this happening is through Indigenous Peoples' own institutions of representation. These representatives are spokespersons for their communities.

Spokesperson speech is therefore integral to the realisation of collective Indigenous rights to participation. However, just what it takes for an individual to be a spokesperson for a group is not clearly spelled out in the UNDRIP, or in commentaries on its provisions. This is, at least in part, deliberate. Ensuring that Indigenous Peoples are able to speak through their own chosen representatives, in accordance with their own political traditions, means that the

[11] Expert Mechanism on the Rights of Indigenous Peoples, 'Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making' (United Nations Human Rights Council 2011) A/HRC/18/42 para 5.
[12] Expert Mechanism on the Rights of Indigenous Peoples, 'Free, Prior and Informed Consent: A Human Rights-Based Approach' (United Nations Human Rights Council 2018) A/HRC/39/62 para 13.

law should not be overly prescriptive about who these representatives are or how they should speak on behalf of the affected community.[13]

In the rest of this paper we will argue that it is nonetheless important to have a clear conception of what it takes for an individual to speak for a group as its true spokesperson, and to distinguish this from other notions of "group representation." This is critically important, we argue, because it enables us to identify circumstances in which Peoples are *denied* a proper say in consultation processes.

Distinguishing collective Speech from other kinds of representational Speech

Collective speech is a means by which Indigenous Peoples are able to have their say in participatory processes.[14] It is also through collective speech that Indigenous Peoples express their interests, objections, insights, demands and other views and positions in relation to a proposed activity that will affect them. Collective speech is not, however, the only way through which one might gather information about the views and positions of an Indigenous community. One could find out what a community's views are by, for example, asking someone with insight and knowledge about these views. Indigenous Peoples might be spoken about in a number of different ways and while this speech may represent them – in the sense of reflecting their view or opinions or sharing information about the community – a problem

[13] This is not to suggest that Indigenous political traditions are not at all shaped by external legal or political considerations or that Indigenous political traditions can or should not evolve in response to national and international law. Indigenous legal and political traditions are not fixed or stuck, but evolve and change. In the context of colonialism, many Indigenous traditions were forced to change, sometimes to internalize colonial practices of racism and sexism. Kiera L Ladner, 'Gendering Decolonisation, Decolonising Gender' (2009) 13 Australian Indigenous Law Review 62; Kyle P Whyte, 'Indigenous Science (Fiction) for the Anthropocene: Ancestral Dystopias and Fantasies of Climate Change Crises' (2018) 1 Environment and Planning E: Nature and Space 224. Indigenous political and legal traditions continue to change and evolve, sometimes through rediscovering pre-colonial practices and sometimes through adopting new standards or approaches. Recognising Indigenous political traditions is understood in this paper as compatible with recognising that those traditions are not necessarily determined by history or that they have an unchanging nature.

[14] UNDRIP, Article 18.

arises when this sort of representative speech is mistaken for the collective speech of the community.

To speak for a group, as its spokesperson, is to perform *speech acts* in the group's name. Speech acts are acts that are typically performed through the use of language – acts such as promising, apologising, stating, consenting, bequeathing, etc.[15] When acts like these are performed by a spokesperson in the name of a group, the acts in question are properly ascribable to the group, rather than to the spokesperson. For example, when a company spokesperson says "We apologise unreservedly for our failure to count emissions" this is the company's apology, not the spokesperson's personal apology. This means that any normative consequences associated with the speech acts being performed are consequences that fall upon the group, rather than the spokesperson. When a spokesperson speaks for a group, this can be counted as the group's own speech. In the context of Indigenous rights to participation, the collective nature of the right means that it is the community's own speech that is called for.

This sense of speaking for a group can and should be distinguished from three other phenomena that are sometimes also associated with "group representation" or "being a spokesperson" but which do not amount to collective speech in the sense demanded by Indigenous participatory rights. These are: (a) speaking about a group, (b) speaking as a group member, and (c) speaking in behalf of a group.

(a)To *speak about a group* is simply to say things of the group - to characterise it, to describe its practices, etc. This is "group representation" in a rather minimal sense. In principle any speaker can speak about any group, but, crucially, doing so does not make the

[15] JL Austin, *How to Do Things with Words* (Harvard University Press 1962); John R Searle, *Speech Acts: An Essay in the Philosophy of Language*, vol 626 (Cambridge University Press 1969); Kent Bach and Robert M Harnish, *Linguistic Communication and Speech Acts* (Cambridge: MIT Press 1979).

group answerable for what is said. A group that is spoken about is part of the conversation but only as the subject of conversation - it is not a conversational participant with a say of its own.

Decision-making processes often involve various people being called upon to speak about the groups who should be consulted. For example, international environmental law and many states require environmental impact assessments to be conducted prior to certain kinds of environmental and development decision-making.[16] These assessments include information gathering processes to identify and measure different kinds of possible impacts, including through surveys by scientists, anthropologists, land-surveyors and others.[17] These assessors are often called on to provide information about affected communities (some of which might be gathered through interviews with members of the affected community).While gathering this kind of information about the affected community might be essential to ensure informed decision-making based on proper assessment (including for the community itself), it does not amount to the affected community participating in consultation through its representative institutions. When someone speaks about a group, this is not the same as the group having its say.

(b)To *speak as a group member* is to articulate a distinctive social perspective associated with membership in a particular group. This is different from simply speaking about a group – it is expressing, rather than merely stating or reporting, the character or outlook of the group in question. To speak as a group member one must not only occupy the social position of a group member, but one's speech must purport to capture something about

[16] United Nations Convention on Biological Diversity Adopted 5 June 1992 Article 14; Secretariat of the Convention on Biological Diversity, 'Akwé:Kon Guidelines' (2004).
[17] For more on assessments and what they should include in the context of development on Indigenous land, see Secretariat of the Convention on Biological Diversity (n 15). For a discussion of how Indigenous Peoples are silenced in assessment processes, see Dina Lupin Townsend, 'Silencing, Consultation and Indigenous Descriptions of the World' (2019) 10 Journal of Human Rights and the Environment 193.

that social position. Importantly, however, this also does not rise to the level of the group's own speech; someone who speaks as a group member does so in their own name, and no-one else - neither other group members nor the group itself - is made answerable by what they say.

In decision-making processes affecting Indigenous Peoples, it may also be crucial to call on individuals to speak as group members. Due to their social position, group members may be able to provide particular insights into the experiences or perspective of the group that are not available to external parties. For example, prior to engaging in consultation with an Indigenous People, it may be necessary for state or industry representatives to ask community members about the views, practices and resources of the community. Understanding how the community wants to be provided with information or how representatives are appointed might be information that can be provided by a member of the community with insight into the experiences or perspectives of different parts of the community. Nevertheless, it is important to recognise that simply being a group member does not qualify an individual as a genuine group spokesperson – someone who is in a position to perform speech acts that can be counted as the group's own speech. This means that when decision-making processes involve individuals speaking as group members - even when they are talking about the collective views or values of the group - this does not amount to consultation with the group in accordance with the collective rights of Indigenous Peoples.

(c)Last, to speak *in behalf of a group* is to represent and promote (what one takes to be) the group's best interests.[18] This is group representation in the sense of advocacy. Someone can take on the role of speaking in a group's behalf without the group authorising them to do so. Again, it is important to distinguish a speaker seeking to serve the interests of

[18] Note that speaking *in behalf* of a group should be distinguished from speaking *on behalf* of a group. The latter (speaking *on behalf* of a group) is equivalent to what we call "speaking for a group".

a group from that of the group itself having a say. When someone speaks in behalf of a group they do speak "for" the group, but only in the sense of "for the sake of" the group – not in the sense of their being the group's designated spokesperson.

In the context of Indigenous rights matters, civil society organisations often speak in behalf of Indigenous Peoples, including in consultation processes. It is not uncommon, for example, for civil society organisations to participate in consultation processes on new developments or legislation, especially when those organisations have extensive experience of working with the affected Indigenous Peoples or expertise in negotiating with the state. In poorly planned consultation processes - where consultation meetings take place in locations or at times that make it difficult for the affected community representatives to attend - often civil society organisations may be the only ones raising concerns or stating the interests of the affected community. While civil society participation in these cases may play an important role both in advocating for the affected community, it is important to note that this still falls short of these organisations speaking for the group. Specifically, so long as these organisations are not authorised by the group to speak in the group's name, the acts they perform are not properly counted as the group's own speech acts.[19] Hence, this too does not constitute proper consultation with the affected community in accordance with their collective rights.

The key difference between these three kinds of representation and what we call speaking for a group is that none of these involve speech that should be counted as the group's own speech. To speak for a group, in the sense we want to focus on here, is clearly

[19] Sharon Venne describes a number of cases in which NGOs claimed or tried to speak for Indigenous Peoples in the drafting of the UNDRIP. In her discussion, Venne also reveals the ways states tried to compel Indigenous Peoples into forming or cooperating with NGOs, again to prevent them from speaking as nations. See Sharon Venne, 'NGOs, Indigenous Peoples and the United Nations' in Aziz Choudry and Dip Kapoor (eds), *NGOization: Complicity, contradictions and prospects* (Zed Books 2013).

distinct from speaking about a group, speaking as a group member, and speaking in a group's behalf. In each of these cases, important information may be gathered about an affected community's needs, attitudes or interests, but gathering information about a community does not amount to consulting with that community. The right to participation is not just a means for decision-makers to collect data or information about those affected by a decision, which might be done through any of these other kinds of representational speech. Rather it is a right for affected Indigenous communities to have a say in processes of decision-making - a right for affected communities to speak for themselves and to have their speech heard and taken into account in decision-making processes.[20]

Distinguishing spokesperson speech from these other phenomena is important because, all too often, these other phenomena are treated as sufficient for the purposes of consultation or they are taken as the speech of the affected community itself. It is important, then, to understand what it takes for someone to act as spokesperson and thereby to *speak for a group*. In the next section, we explore this more closely, by examining what conditions must be met in order for an individual to speak for a group.

The conditions for (and complexities of) Spokesperson Speech

In the previous section, we stated that spokesperson speech - or speaking on behalf of a group - is a distinctive kind of phenomenon, one that can be distinguished from other kinds of representative speech, specifically cases where someone speaks about, in the interests of, or as a member of the group. Claims of various kinds can be made about or in the interests of the affected community, but in each of these cases the community is not answerable for what is said about or for them. Rather, it is the speaker (the assessor, group member or CSO) who

[20] See our Dina Lupin and Leo Townsend, 'The Right to Consultation Is a Right to Be Heard' in Dina Lupin (ed), *A Research Agenda for Human Rights and the Environment* (Edward Elgar).

is bound by their speech. Were an anthropologist or impact assessor to claim that the community was in favour of a particular development, for example, the community would be perfectly within its rights to disagree with such a statement without having gone back on its word. What is distinctive when someone speaks *for a group* is that they perform acts that are properly ascribable to the group itself – acts that normatively commit the group in various ways.

What does it take to speak for a group in this sense? In our view, two conditions are essential:[21] first, the spokesperson must be authorised by the group to speak in their name; second, the spokesperson must discharge this function knowingly and willingly. We consider each of these, and the challenges and complexity associated with each, in turn.

The Spokesperson must be authorised by the Group

First, group representation requires group authorisation.[22] The same applies, of course, to the case of speaking for another individual, for instance, as a legal representative. The power to represent another, whether an individual or a group, must originate in the party being represented[23] - it must be something granted to the spokesperson by the one spoken for.[24] This is part of the reason why the phenomena we distinguished above – speaking about a group, speaking as a group member, and speaking in a group's behalf – are not identifiable with speaking for a group, since they do not require group authorisation. Someone who purports to speak for a group but in fact lacks the group's authorisation is a bogus

[21] We have argued elsewhere [Leo Townsend and Dina Lupin, 'Representation and Epistemic Violence' (2021) 29 International Journal of Philosophical Studies 577] that a third condition is required, namely uptake by the audience. For the purposes of this paper, however, which is focused on the requirements of the collective right to participation, we see a lack of uptake as a barrier to participation rather than a barrier to collective speech.
[22] Jennifer Lackey, 'Group Assertion' (2018) 83 Erkenntnis 21; Kirk Ludwig, 'Proxy Agency in Collective Action' (2014) 48 Noûs 75; Adolf Reinach and John Crosby, *The Apriori Foundations of the Civil Law: Along with the Lecture" Concerning Phenomenology"*, vol 8 (Walter de Gruyter 2013).
[23] There are some very particular exceptions to this, usually relating to the capacity of the person being represented.
[24] Reinach and Crosby (n 21).

spokesperson – an imposter. Once it is established that someone purporting to speak for a group in fact lacks the needed authority, it is therein established that their words do not bind the group in any meaningful way.

Attainment and constraint of Authorisation

Beyond this basic point, the issue of authorisation becomes somewhat more complex, as there are various issues concerning how the authority to speak for a group is attained, and how it can be constrained.

To begin with attainment, it is clear that sometimes the authority to speak for a group is given to an individual via a formal, institutionalised process – such as a process of recruitment, appointment or election. In other cases, however, groups may have other systems of designating those who speak for them; for example, in certain groups it may be that community elders are recognised by custom as spokespersons. Moreover, there are cases in which no established procedure or custom exists to determine who is empowered to speak for a group, and yet an individual can acquire the authorisation needed to speak for the group "on the fly." That is, the would-be spokesperson speaks *as if* they were authorised, and, through receiving the post hoc acceptance of the group in whose name they speak, they acquire that very authority.

It is worth noting, too, that the authority to speak for a group can be and typically is constrained in various ways. Spokespersons are seldom if ever empowered to speak for the relevant group in a fully general way – i.e., in all circumstances, and on all matters. Rather, the authority to speak for a group is usually circumscribed, in the sense that it is restricted to certain matters and exercised only in designated fora, and even then only when certain preparatory conditions are met (e.g., when the wider group has made a decision, and given

the spokesperson a mandate). In short, being an authorised spokesperson does not amount to a general license to speak for the group, and this means that parties who consult with groups must be sensitive the various ways in which the authority of group spokespersons is constrained.

The Spokesperson must speak for the Group willingly and knowingly

Beyond the requirement that the spokesperson must be authorised by the group in whose name they speak, it is also necessary that the spokesperson knows that they are speaking for the group, and does so willingly. Someone who is simply treated as a group spokesperson, without knowing that they are or without intending to speak in the name of a group, cannot be said to speak for the group in any meaningful sense.[25] Even an authorised spokesperson does not always speak in their capacity as a spokesperson, and the speech acts they perform in their personal capacity (i.e., when speaking in their own name, not the name of the group) cannot be properly attributed to the group, as acts for which the group is answerable.

The basic requirement that spokespersons act knowingly and willingly does not mean that the spokesperson must always freely enter or volunteer for the role of spokesperson. The role of a group spokesperson may sometimes be imposed on certain individuals by dint of their status in a community, or because of their particular expertise, or even in virtue of the way they are perceived by those outside the community. In these cases the mantle of group spokesperson may be a burden, and those tasked with speaking for the groups may do so with reluctance. Nevertheless, as long as the spokesperson knows that the spokesperson role is

[25] Not everyone accepts this – for example, Wendy Salkin has recently argued that informal political representatives can speak for wider groups without doing so willingly or knowingly. In our view, however, Salkin is led to this view in part by failing to adequately distinguish speaking for a group from speaking as group member. See Salkin, W. (2021). The conscription of informal political representatives. *Journal of Political Philosophy*, *29*(4), 429-455.

imposed on them, and accepts that role (even if only reluctantly), then they satisfy the second condition of spokesperson speech.

Importantly, speaking for a group requires both authorisation and a willing, knowing spokesperson. While someone may claim to speak for others, whether or not they do in fact speak for others depends on whether they are authorised by the group to do so. Equally, an individual may have the authority to speak for a group but may not wish to, instead wanting to speak for themselves. In both of these cases, spokesperson speech fails and the group cannot be said to have spoken.

The complexities of spokesperson speech in the context of Indigenous collective rights to participation

Indigenous Peoples' collective Rights and authorisation of Spokespersons

The requirement of authorisation is recognised – or at least, suggested – in the wording of the UNDRIP. The UNDRIP specifies that Indigenous peoples must be consulted "through their own representative institutions" in accordance with their own processes (whether these are long-standing political traditions or developed in response to the need for consultation in any particular case). As the Expert Mechanism has interpreted it, "Indigenous peoples should control the process by which representativeness is determined".[26] In 2018, the Expert Mechanism added to this interpretation:

> Indigenous peoples should have the freedom to be represented as traditionally required under their own laws, customs and protocols.... Indigenous peoples should determine how and which of their own institutions and leaders represent them. They

[26] Expert Mechanism on the Rights of Indigenous Peoples (n 10) para 7.

should therefore enjoy the freedom to resolve internal representation issues without interference.[27]

This means that cases where an outsider - the consulting state or developer - attempts to impose systems of authorisation onto the affected community or appoint their own spokespersons, do not meet the authorisation requirement. Equally, in cases in which impact assessors or consultants are appointed to inform a particular decision-making process, and authorised to do so by the state or developer, they can, at best, speak about the affected community but cannot act as spokespersons, speaking for the community. The spokesperson authorisation process is one that is internal to the community and while it may enable engagement with outsiders, it cannot itself be dictated or executed by these outsiders. Both the state and Indigenous Peoples have their own, internal processes of authorisation and decision-making. States are no more free to appoint representatives for Indigenous Peoples than Indigenous Peoples are free to make decisions about the authorisation of different civil servants within state bodies. Each party (the state and the community) gets to make internal decisions about how they will engage and communicate with the other.

It is worth noting, however, that in many contexts of Indigenous participation, this internal/external distinction is far from simple. Over many centuries, systems of colonial rule in much of the world sought to undermine and re-constitute Indigenous governance structures, often replacing Indigenous political systems with colonial decision-making bodies. Under South Africa's apartheid government, for example, the traditional leaders of Indigenous South African communities were removed and communities were reorganised according to ethnic criteria identified by the apartheid state. A number of Bantustans (pseudo-national homelands) were created under the authority of 'tribal chiefs', accountable not to

[27] Expert Mechanism on the Rights of Indigenous Peoples (n 11) para 20.

their communities but to the apartheid state.[28] While the end of apartheid spelled the end of the Bantustan system, many of the chiefs and tribal governance structures remain today, holding significant political and legal power (and, it has been argued, remain aligned to the State – now under the African National Congress – rather than their communities).[29]

Similarly, Bonita Lawrence and Kim Anderson have pointed to the ways in which Indigenous governance structures in Canada entrench colonial systems of rule.[30] While they are recognised as political authorities by both the Canadian government and some Indigenous people, they are not seen by all Indigenous Peoples as representative institutions appointed in accordance with Indigenous traditional law. In particular, Lawrence and Anderson argue that these institutions do not represent Indigenous women and were established, in no small part, to exclude women from Indigenous governance.

> We know that colonial governments historically refused to negotiate with Indigenous women, accepting only male representatives when discussing terms of relationship. They then actively disempowered women by attacking the clan systems and other forms of female representation, and by making it illegal for Indian women in Canada to take part in the band councils that replaced traditional Indigenous governments. The legacy of the Indian Act, in the form of all-male representation, has shaped the nation to nation discourse since then.[31]

In these contexts, there are many complex questions that arise about the legitimacy of some governance structures and sources of authority. Suggesting that states can and should simply

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[28] SK Khunou, 'Traditional Leadership and Independent Bantustans of South Africa: Some Milestones of Transformative Constitutionalism beyond Apartheid' (2009) 12 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 82.
[29] Daniel De Kadt and Horacio A Larreguy, 'Agents of the Regime? Traditional Leaders and Electoral Politics in South Africa' (2018) 80 The Journal of Politics 382.
[30] Bonita Lawrence and Kim Anderson, 'Introduction to" Indigenous Women: The State of Our Nations"' (2005) 29 Atlantis: Critical Studies in Gender, Culture & Social Justice 1.
[31] ibid 1.

stay out of the internal decision-making processes of some affected communities does little to address the fact that the border between internal and external appointment of representatives has been set (or blurred) by centuries of oppressive and interventionist rule.

While the UNDRIP is not prescriptive in regard to how representatives are chosen, there may be factors beyond the recognition of Indigenous political and legal traditions that influence the appointment of spokespersons. The degree to which Indigenous institutions (as with most political institutions) are inclusive may have far-reaching impacts on who is authorised to speak for the community and what they are authorised to say. Rauna Kuokkanen, for example, has argued that divisions in communities about how land should be used or cared for are often gendered and that consultation processes with male-dominated traditional leadership bodies make no space for Indigenous women's voices or views.[32] Kiera Ladner argues that while many Indigenous traditions are women-centered, Indigenous political cultures have sometimes internalised the racism and sexism imported through colonial rule.[33] As a result, the Expert Mechanism has argued that 'All parties should ensure representation from women, children, youth and persons with disabilities.'[34] Indigenous political traditions may need to change to ensure that spokespersons actually represent the community. The requirement that states recognise Indigenous political and legal practices and traditions, and that spokespersons are appointed in accordance with those traditions, does not exclude the recognition that those traditions change and may need to change further to address exclusions or practices of discrimination. What the UNDRIP does exclude, however, is the external

[32] Rauna Kuokkanen, *Restructuring Relations: Indigenous Self-Determination, Governance, and Gender* (Oxford University Press 2019).
[33] Ladner (n 12) 63; Joyce Green, *Making Space for Indigenous Feminism, 2nd Edition* (Fernwood Publishing 2020).
[34] Expert Mechanism on the Rights of Indigenous Peoples (n 11) para 23.

imposition of representatives onto the community, even if this is for the purpose of ensuring inclusion.[35]

Even where the line between internal and external decision-making is clear, communities may have no mechanisms for appointing a spokesperson or speaking collectively, or there may be deep divisions about who gets to speak for the community or who gets to authorise spokespersons in consultation processes. For communities with settled and accepted governance structures, and a clear system for appointing spokespersons, consultation processes themselves can be very politically disruptive, especially when they relate to deeply divisive issues such as land-use or resource extraction.

All this points to the complexity of spokesperson authorisation but it does not remove the requirement that a spokesperson be authorised in order to speak for a community in a consultation process. Where a community is divided and unable to agree about who to authorise, the state or developer cannot claim to have consulted with the community by talking to different factions or by choosing their own representative to speak for the group.[37] Equally, the state cannot deny the authority of an authorised spokesperson on the basis that the institution is not representative enough of women, children, youth or persons with disabilities (no more than an Indigenous community could deny the authority of a civil servant on the basis that the state administration is insufficiently inclusive and representative).[38] This is not to suggest that there is no possibility for engagement between states and Indigenous Peoples about representative inclusivity and, in many cases, states

[35] This is also true for corporations and other parties states may need to consult. In South Africa, for example, research has found that only 36% of board positions in the Top 40 companies are held by women and only 5 are chaired by women. As with Indigenous Peoples, addressing gender inequality in corporations is critical, but the fact that a company board is not gender inclusive would not entitle the state to replace its board with another one and only speak with the state-created board. See https://justshare.org.za/media/news/still-not-enough-women-leaders-in-big-companies/ accessed on 30 October 2024.
[37] Mbeche (n 4).
[38] This connects to Engle's argument about the subservience of individual rights to collective rights. See Engle (n 8).

should be held responsible for the colonial causes of exclusion and inequality in Indigenous political institutions. What this responsibility might look like, and how exclusions and inequalities might be addressed, is a conversation that would need to include Indigenous women, even if they are not represented in existing political institutions. However, as James Anaya has argued, this does not change Indigenous rights to have their own spokespersons and decision-making bodies recognised:

> The Special Rapporteur notes cases in which companies and States have bypassed indigenous peoples' own leadership and decision-making structures out of misguided attempts to ensure broad community support. Where indigenous peoples are concerned, however, international standards require engagement with them through the representatives determined by them and with due regard for their own decision-making processes. Doing so is the best way of ensuring broad community support. Indigenous peoples should be encouraged to include appropriate gender balance within their representative and decision-making institutions. However, such gender balance should not be dictated or imposed upon indigenous peoples by States or companies, anymore than indigenous peoples should impose gender balance on them.[39]

When a state refuses to recognise the duly authorised spokesperson of a community - even on grounds the state considers legitimate or rights based - it silences the community and denies it its right to consultation.

Another issue that arises in consultation processes relates to the extent of the authorisation. As we indicated above, a spokesperson might be authorised to speak on behalf

[39] S James Anaya, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples on Extractive Industries and Indigenous Peoples' (2015) 32 Ariz. J. Int'l & Comp. L. 109, 130. See also S James Anaya, 'International Human Rights and Indigenous Peoples: The Move toward the Multicultural State' (2004) 21 Arizona Journal of International and Comparative Law 13.

of a group, but only in limited contexts or in relation to particular matters. The fact that an individual is a community leader or traditional authority does not mean they have a general license to speak for the community; instead, the authority to speak for a group is typically restricted to certain issues and certain fora, and only exercisable once certain preparatory conditions are met.[40] For example, in a recent case, Indigenous communities challenged an authorisation given to Shell to conduct seismic surveys of the coast of the country, including on the basis that Shell had not consulted with the affected communities.[41] Shell noted as part of its approach to consultation that it met with a number of traditional monarchs and their senior advisors. The Court found that Shell simply assumed that these monarchs spoke for their subjects, despite the fact that this only possible once community consensus is reached:

> Shell considered it adequate to speak only to the 'Kings' of communities and to assume that those Kings spoke for their subjects. The applicants contended that Shell's way of engagement in this regard derives from the colonial and apartheid eras. Communities, such as the Amadiba community, have strict rules about consultation that emphasise the importance of seeking consensus. This is part of their customary law and avoids the imposition of top-down decision-making.[42]

In this case, the consulting party failed to show due sensitivity to the way in which the authority of community spokespersons was constrained. Although the traditional monarchs were traditional authorities and political leaders in some of the affected communities, they

[40] See, for example, the discussion in Leo Townsend and Dina Lupin Townsend, 'Consultation, Consent, and the Silencing of Indigenous Communities' (2020) 37 Journal of Applied Philosophy 781.
[41] *Founding Affidavit of Reinford Sinegugu Zukulu in the matter of Sustaining the Wild Coast and Others v Minister of Mineral Resources and Energy and others* (High Court of South Africa (Eastern Cape Division)).
[42] *Sustaining the Wild Coast NPC and others v Minister of Mineral Resources and Energy and Others* (2021) 6 SA 589 (High Court of South Africa (Eastern Cape Division, Grahamstown)) [25].

were not authorised to speak for the communities in question until certain conditions were met.[43]

Indigenous collective rights and the willing, knowingly Spokesperson

While the requirement that a speaker must willingly and knowingly speak for others might seem simpler than the requirement for authorisation, there are many consultative contexts where individuals have been thrown unwillingly, or unwittingly, into the role of a spokesperson and have been treated as speaking for their community (or for Indigenous Peoples more broadly), sometimes despite their best efforts to avoid such a role.[44]

While we have sought to draw a clean conceptual distinction between 'speaking as a member of a group' and 'speaking for the group', in practice this distinction may be less than clear to both consultors and speakers, especially when the speaker might hold an official role in a community (such as a community leader or traditional authority). In these cases, the speaker may intend to speak as a representative member of the community without intending to speak as a spokesperson for the community.

Indigenous activists and scholars have recorded a significant number of cases in which those tasked with consulting a community simply select individuals they believe to speak for the group and treat them as spokesperson.[45] These individuals might be community leaders, or descriptive representatives (who are taken, by the consultants, to be typical of the

[43] We discuss another example of this in Townsend and Townsend (n 38)..
[44] Elizabeth Ganter's research reveals a number of exemples of the ways in which Indigenous bureaucrats are expected to speak for Aboriginal Peoples, including for communities with which they have no connection. See Elizabeth Ganter, *Reluctant Representatives* (ANU Press 2016). See also Leo Townsend and Dina Lupin, 'Representation and Epistemic Violence' (2021) 29 International Journal of Philosophical Studies 577.
[45] See for example, Emmanuel O Nuesiri, 'Feigning Democracy: Performing Representation in the UN-REDD Funded Nigeria-REDD Programme' (2017) 15 Conservation and Society 384; 'The Shiwiar Nation of Ecuador Raises Its Voice Against Oil Drilling in Its Territory | Amazon Watch' (10 July 2018) <https://amazonwatch.org/news/2018/0709-the-shiwiar-nation-of-ecuador-raises-its-voice-against-oil-drilling-in-its-territory> accessed 31 March 2023; Ipereg Ayu Munduruku, 'Statement of the Munduruku People We are against mining and prospecting on indigenous land.' (*Movimento Ipereg Ayu*, 27 September 2019) <https://movimentoiperegayu.wordpress.com/2019/09/27/statement-of-the-munduruku-people-we-are-against-mining-and-prospecting-on-indigenous-land/> accessed 31 March 2023.

larger group)[46] or simply people available at a moment convenient to the consultant. In each case, they are treated as though they were authorised representatives, and the consultants see their duty to consult the community as having been fulfilled by virtue of their speaking to these individuals. While these individuals lack authority from the community, they are also often not aware that they are being treated as spokespersons. As a result, they may endeavour to engage meaningfully with the consultant in another capacity - they may seek to speak for themselves, or they might try to speak about the community. Their speech, however, is not treated as that of an individual speaking for themselves or as a group member, but rather as the voice of the community. In these cases, neither the community nor the individual are consulted or get to have their say. The community loses their opportunity to speak because they are taken to already be spoken for (someone else's speech is counted as the community's), and the individual cannot speak as they intend to (their speech is not attributed to them, speaking in their own name, but rather is taken as the speech of the community).[47]

Conclusion

What implications does the foregoing discussion have for law and policy concerning Indigenous collective participatory right? We have seen that international law on Indigenous rights to participation tends to be non-prescriptive, allowing states and Indigenous Peoples to make rules and design processes appropriate to particular contexts. This approach emphasises the importance of respecting and recognising Indigenous Peoples' own representative organisations and ensuring Indigenous Peoples can speak as a community in accordance with their own political systems and traditions of organisation and practice, making decisions in accordance with their own internal political decision-making processes. This is an approach

[46] Mbeche (n 4).
[47] For more on this, see Leo Townsend and Dina Lupin, 'Representation and Epistemic Violence' (2021) 29 International Journal of Philosophical Studies 577.

that respects and recognises Indigenous representative organisations, ensuring Indigenous Peoples can speak as a community in accordance with their own political systems and traditions of organization and practice.

While this non-prescriptive approach is crucial, it brings with it a particular risk. That is, states may exploit this lack of specific rules to design processes of participation in ways that favour state interests rather than ensuring Indigenous Peoples' meaningful and genuine inclusion in participatory decision-making. A failure to lay out even the most minimal conditions of collective speech makes it more likely that failures of consultation will occur – either innocently or by design – including through the conflation of speaking about a community, speaking as a community member or speaking in behalf of a community with speaking for a community.

By way of conclusion, then, we propose that the following obligations should be recognised as incumbent upon the state to ensure that Indigenous Peoples can have their collective say.

First, participation processes need to be designed (collaboratively, led by Indigenous Peoples) in ways that recognise that *speaking for a* community is a distinct phenomenon. Decision-making processes may include and require other kinds of representative speech. As discussed above, it may be appropriate for states, developers or Indigenous Peoples to ask various outsiders (assessors, surveyors, local government officials and so forth) to speak about a community to inform a consultation and decision-making process. Equally, there may be circumstances in a decision-making process when members of a community might be called on to speak as members, to say something about the social perspective or outlook of the community, again to inform such a process without counting as collective participation in the process. Last, there may be times when speech *in behalf* of a community could be called for by the parties. While these kinds of speech might be part of a participation process, they

should not be allowed to substitute for the collective speech and participation of the community. As a result, the design of the participation process should stipulate when these are required, why they are required and explicitly recognise that they do not amount to Indigenous Peoples' collective participation. When these other kinds of speech are called for, this should be with the full awareness of agreement of the affected community.

Second, states must recognise the authorised, willing and knowing spokesperson as speaking for the community and should treat the speech of the spokesperson as that of the community. This means that (a) states should not appoint their own representatives to attempt to speak for the community or in anyway interfere in the internal decision-making and authorisation processes of the affected community, and (b) that states should not deny the authority of authorised spokespersons, treating them as speaking for themselves rather than for the community. Without interfering, influencing or intervening, states should facilitate, enable and, when needed and desired by the community, finance the internal, political decision-making processes of Indigenous Peoples. This includes allowing for the time such decision-making processes might require.

Third, states must ascertain that they are indeed speaking with an authorised and willing spokesperson. As we have discussed, this is often complicated. While some communities have clear and accessible information in place – such as community protocols[48] – others may have to create processes in response to the need to participate or may have

[48] A number of Indigenous communities across the world have adopted protocols of various kinds to stipulate how they will be consulted. The Mo' otz Kuxtal Guidelines to the Convention on Biological Diversity defines community protocols as "a broad array of expressions, articulations, rules and practices generated by communities to set out how they expect other stakeholders to engage with them. They may reference customary as well as national or international laws to affirm their rights to be approached according to a certain set of standards." Secretariat of the Convention on Biological Diversity, 'Mo' Otz Kuxtal Voluntary Guidelines for the Development of Mechanisms, Legislation or Other Appropriate Initiatives to Ensure the "Prior and Informed Consent", "Free, Prior and Informed Consent" or "Approval and Involvement", Depending on National Circumstances, of Indigenous Peoples and Local Communities for Accessing Their Knowledge, Innovations and Practices, for Fair and Equitable Sharing of Benefits Arising from the Use of Their Knowledge, Innovations and Practices Relevant for the Conservation and Sustainable Use of Biological Diversity, And for Reporting and Preventing Unlawful Appropriation of Traditional Knowledge.' (CBD Guideline Series, 2019) para 19.

processes of authorisation that do not allow for external verification or enquiry. Where conflict within communities mean there is no authorised spokesperson (or multiple people who claim to be authorised, but are only authorised by factions of the community), consultation will not be able to happen until there is resolution.

These three obligations form part of the responsibilities of states in their engagement with Indigenous Peoples in the course of consultation processes. Only when these obligations are fulfilled are Indigenous Peoples properly empowered to speak for themselves through their representatives in the ways demanded by ILO169 and the UNDRIP.