Reconciling Indigenous Peoples' Individual and Collective Rights

This book critically assesses categorical divisions between indigenous individual and collective rights regimes embedded in the foundations of international human rights law.

Both conceptual ambiguities and practice-related difficulties arising in vernacularisation processes point to the need of deeper reflection. Internal power struggles, vulnerabilities and intra-group inequalities go unnoticed in that context, leaving persisting forms of neo-colonialism, neo-liberalism and patriarchalism largely untouched. This is to the detriment of groups within indigenous communities such as women, the elderly or young people, alongside intergenerational rights representing considerable intersectional claims and agendas. Integrating legal theoretical, political, socio-legal and anthropological perspectives, this book disentangles indigenous rights frameworks in the particular case of peremptory norms whenever these reflect both individual and collective rights dimensions. Further-reaching conclusions are drawn for groups 'in between', different formations of minority groups demanding rights on their own terms. Particular absolute norms provide insights into such interplay transcending individual and collective frameworks. As one of the founding constitutive elements of indigenous collective frameworks, indigenous peoples' right to prior consultation exemplifies what we could describe as exerting a cumulative, spill-over and transcending effect. Related debates concerning participation and self-determination thereby gain salience in a complex web of players and interests at stake. Self-determination thereby assumes yet another dimension, namely as an umbrella tool of resistance enabling indigenous cosmovisions to materialise in the light of persisting patterns of epistemological oppression.

Using a theoretical approach to close the supposed gap between indigenous rights frameworks informed by empirical insights from Bolivia, the Andes and Latin America, the book sheds light on developments in the African and European human rights systems.

Jessika Eichler is Research Fellow in the Law and Anthropology Department at the Max Planck Institute for Social Anthropology and a Research Associate with trAndeS programme, Institute for Latin American Studies, FU Berlin.

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Reconciling Indigenous Peoples' Individual and Collective Rights

Participation,
Prior Consultation and
Self-Determination in Latin America

Jessika Eichler

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To Leni,
the dog in a cat's body,
who cheered me up on rainy days,
who provided warmth and endurance on cold days,
who inspired me with her stubbornness and curiosity each and every day.

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1 Introduction

Discussing individual or subgroup rights in indigenous collective contexts necessarily requires us to engage with a few ethical ‘pre-considerations’ that stem from potential (mis)use of the coming reflections. First, understanding individual or subgroup rights in collective contexts does not legitimise prioritising one over the other. Especially in indigenous collective regimes, individual rights infringements might seem to legitimise abolishing collective rights altogether, providing a comfortable answer for duty bearers to distract from group-based obligations. Contentious issues including participatory mechanisms in the extractive and infrastructure sectors provide ample evidence of such situation where collective processes have been proven difficult to be reflected in laws and policies. Human rights advocates might thus legitimately fear the larger consequences of practice-based limits to recently established indigenous peoples’ rights regimes. At the same time, it needs to be wondered if individual rights concerns can possibly be ignored if we consider the underlying premises of indigenous rights regimes, and the entanglement of individual needs, vulnerabilities, marginalisation, exclusion and inequalities with the ones being inherent to collective regimes. If we would further disentangle this: where would individuality and collectivity start and end? Are we dealing with an individual woman or women as a group, are her claims specific to be a woman or involve claims that apply to all based on their position and needs as human beings? This could concern gender-based violence that is intrinsically related to her position and often status in particular contexts. Similarly, children do demonstrate vulnerable positions and specific needs that are characteristic and common to them as children going beyond violations of civil or political, economic, social and cultural or based on forms of discrimination. So, do we understand a person X and her or his claims as one categorical dimension in relation to indigenous peoples as collectivity, or do we understand her as a subject and her claims as part of women’s rights more generally in contrast to or in conciliation with indigenous claims? The third question promises particular attractiveness as different group-based claims enter into negotiation, confrontation or reconciliation. Both regimes look back at solid legal history in international human rights law whereas their interaction is often avoided by interpreting mechanisms. The coming debates will thus evolve around the second question understanding individual rights as

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referring to groups without a legal collective character such as indigenous rights regimes, yet, with sharing characteristics including women, children, older persons and other minorities; they shall be termed ‘group-based’ rights to avoid conceptual confusion.

This very conceptual divide between group-based and indigenous collective rights needs further elaborations constituting the core debates throughout this piece which could have implications for the interactions of such rights categories in human rights law and respective mechanisms, the understanding of alleged conflicts of rights and further reaching impacts for the individuals, groups and communities claiming such rights. Apart from implications for human rights as applicable to all more generally, group-based rights allow for complementary or distinguished protection for minority groups. As elaborated in the following paragraphs, a specific focus will be placed on participatory rights and prior consultation as exemplifying the interplay between the two or multiple human rights regimes while shedding light on other potential interplays. The aim of this piece does not consist in contributing to conceptual issues of existing group-based or indigenous collective rights regimes; that is, indigenous collective regimes or group-based rights are not disentangled or reconceptualised as such. However, a basic understanding needs to be conveyed, its legal categories require clarification from the very beginning. Indigenous collective rights are generally defined in existing international law including ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries and more recently in the UN Declaration on the Rights of Indigenous Peoples which are further interpreted by monitoring bodies and specialised human rights mechanisms (see Chapter 3 for further insights). Group-based rights could be understood as falling within a more pluralistic mandate, not being limited to a single rights holder group. Yet, certain demarcations could be drawn in comparison to legal regimes applicable to all including *inter alia* the prohibition of torture, right to life, right to participation, right to due process, right to health and to work. Such rights as applicable to all are often termed basic rights, fundamental rights and minimum entitlements for all human beings that are characterised by a certain prior status in conceptual and temporal ways.ⁱ This *a priori* status and fundamental underpinning of rights applicable to all *vis-à-vis* other rights and legal regimes is out of question; it is accepted as universal fundament of the approach to be developed in this piece. By assuming the latter as universal and possibly more important than other rights, the present discussion on other categories of rights is not devalued as suggested elsewhere.ⁱⁱ Group-based rights are by their very definition group-specific and granted based on the specific needs, vulnerabilities and special position compared to society at large or groups that are not disadvantaged or marginalised by their very affiliation or as constituent part of such rights holder group. In that sense, the special position of the regime adds to undoubtedly underlying universally applicable rights that are not questioned or positioned in comparative disadvantage by the following debates. It could also be argued that specific fundamental or *a priori* rights underline the proposed framework which itself digs deeper into debates on which framework – in this case individual and

group-based or collective rights – came first, give legitimacy or fundamentals to the other or in some way condition the existence and materialisation or realisation of the other. Conversely, it must be admitted that basic rights as proposed by human rights theories underline the right to life, survival and subsistence,ⁱⁱⁱ which form the very basis of indigenous collective claims, particularly regarding participation in affairs that are of direct concern to them.

Existing references in respective instruments illustrate such particular positions of group-specific rights: this includes both substantive and procedural provisions, however, the nature of such rights and the particular place they assume in comparison with rights applicable to all can be found in the preambular paragraphs of respective sub-group rights instruments. In the case of women, this encompasses continued forms of extensive discrimination based on belonging to women as a group; unequal treatment materialising in many facets including political, social economic and cultural life; dimension touching upon other human rights claims; and broader implications of unequal treatment on the prosperity of society and the family. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) further indicates and traces broader developments affecting humanity at large, yet with a detrimental impact on women's lives: this concerns conditions of poverty that jeopardise particularly women's access to *inter alia* 'food, health, education, training, opportunities of employment and other needs'. Other larger and long-term developments exerting influence on women's full enjoyment of rights entail 'racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation, domination and interference in the internal affairs of States'. Interestingly, the very intersection with indigenous peoples as rights holder groups demonstrates common claims in that regard; needs emerging out of the latter conditions characterise past and current situations that become most visible and embody most pressing needs in the case of indigenous peoples. Such common needs framework including shared situations of suffering and particularities has given rise to academic debates at this intersection as detailed below. Other sub-group regimes disclose similar unequal positions giving rise to specific human rights claims. In the case of children, special care and safeguards, assistance, care and legal protection underlie the legal framework established in the Convention on the Rights of the Child (CRC). Larger developments including adverse effects such as armed conflict create 'exceptionally difficult conditions' and thereby result in needs of 'special consideration'. Similar to the underlying basis of women's rights, overall living conditions are taken into special consideration and require States to regard so-called developing countries and international co-operation as important venues to improve such conditions. Such reasons also apply to cases of indigenous peoples whose larger situation, living and livelihoods are crucial to understanding resulting rights violations. Development contexts are often invoked for conveying broader pictures of these situations and special needs, thus complementing or pre-conditioning the CRC framework. Finally, a third possible sub-group illustrates special positions vis-à-vis society at large, namely the situation of older people. Especially recent developments showing that people reach an

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advanced age demonstrate the pressing concern of addressing such matters in human rights law. Specific needs are outlined in respective UN Principles for Older Persons stipulating opportunities to participate in and contribute to society; life in dignity and security including being free of exploitation and abuse; family and community care; self-fulfilment and development such as accessing educational, cultural, spiritual and recreational resources; and independence encompassing accessing food, water, shelter, clothing and health care, but also those needs concerning people providing care to older persons. In many ways, such needs intersect with indigenous collective rights establishing new relations with societies attributing new roles in relation to various facets of life concerning civil and political and economic, social and cultural rights alike. While we will explore these intersections and encounters in the following chapters, let us return to the underlying ethics embedded in international human rights regimes dealing with both individual or group-based and collective rights.

Second, relying on individual rights in indigenous collective contexts raises questions on the origins of the regime that has been criticised for being Western and drafted by the few. While taking political dynamics and priorities into account when looking at the categorisation or taxonomy of human rights, especially in terms of the order in which international legal instruments were adopted and the groups of States voting in favour of their adoption, their transcendental, interrelated and indivisible nature seems to suggest an underlying universality. From a normative perspective and when focussing on the Universal Declaration of Human Rights (UDHR, 1948), such universal claims could be made indeed and accommodate human rights in their diversity. Recent specificities in terms of human rights developments, however, do not find expression as such in the Declaration, yet enjoy protection by means of a broader interpretation of existing provisions. If we would, however, include the political dimensions of the regime(s) established, it is to be focussed on the drafters and underlying processes that led to its or their existence. Including rights holders in the very drafting process of the law has become part of participatory rights obligations to take part in decision-making and beyond. The indigenous collective rights regime serves as a prime example in illustrating both negotiating dynamics and the involvement of rights holders attributing legitimacy and representativity to the regime. Given the late adoption of group-rights regimes more generally,¹ following the adoption of the International Bill of Human Rights, similar

1 The first international human rights law covenant included rights applicable to all, in particular civil and political rights (UN International Covenant on Civil and Political Rights, ICCPR), economic, social and cultural rights (UN Covenant on Economic, Social and Cultural Rights, ICESCR), both adopted in 1966 and non-discrimination on ethnic grounds (UN Convention on the Elimination of All Forms of Racial Discrimination, CERD) adopted in 1965 which were later followed by group rights in the form of women's rights (UN Convention on the Elimination of All Forms of Discrimination against Women, CEDAW) adopted in 1979, rights of the child (UN Convention on the Rights of the Child, CRC) or the rights of persons with disabilities (UN Convention on the Rights of Persons with Disabilities) adopted in 2006.

reasoning might be invoked in other collective mechanisms. The particularity of indigenous collective rights has been understood as an attempt to legally deal with the colonial history of the people(s) and societies concerned. Would discussing individual or group-based rights be tantamount to reversing the lengthy struggle of decolonisation in international and regional human rights law? Or, to reverse these logics, would we be doing justice to internal dynamics and individual positions within collective regimes if we were to limit our view on indigenous collective rights? While group rights exist side-by-side in international human rights law and are largely treated as separate issues and regimes by interpreting bodies, they do demonstrate clashes even at normative level. Empirical experience further reveals conflicts between the two or more group-based regimes materialising in needs that are inseparable in practice and only difficult to perceive by the rights holders. If we take on the ground issues and claims back into legal debates, such local complexities are translated and turn into potential conflicts of rights. Based on the substantive claims made, a selection of violations is included and subsequently dealt with by the judicial mechanism in place. To what extent clashes or conflicts of rights with indigenous collective regimes are dealt with or are avoided will be traced in jurisprudential developments. The question to be raised here concerns (1) finding theoretical ways to bridge such conflicts and gaps in academic debates, (2) the extent to which such clashes are dealt with by international human rights law and respective jurisprudential developments allowing for reaching some systematisation or approach, (3) how contributions could be made to find conciliating approaches between the two or more categories of group-based and indigenous peoples' collective rights.

Similar in nature of the argument are any classical debates on divides of human rights between universalism and cultural relativism which demonstrate conceptual clashes which, however, will not be dealt with here. Rather empirical foundations will inform the way human rights are implemented, shaping theoretical conclusions on potential encounters of both group-based and collective dimensions. This does not come without a perspective looking at the actors involved in the implementation process, thus shaping human rights regimes and rights holders who are affected by norms while in turn shaping their realisation. A case study on indigenous peoples' right to prior consultation in the Bolivian Lowlands demonstrated how changes in patterns of participation and decision-making in favour of a stronger female presence in decision-making occurred at community level, yet, failed to be noticed in the prior consultation processes which were based on international human rights standards. Such changes had been caused by hotter seasons that had impacted on harvesting and consequential labour situations in the community which made male community members leave the communities for seeking employment elsewhere, and women had filled posts in local assemblies that had previously been taken by men. Such changing dynamics were not demonstrated in the prior consultation negotiations where participation in terms of attendance and ways of shaping the process were male dominated. Reasons for such failed virtuous cycle of translating human rights developments into other decision-making levels cannot, of course, be

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translated in causal ways to global human rights regimes, yet relate to different agendas driven by a panoply of players involved in the decision-making processes and being attributed powers to assume such roles. Considering such mechanisms in understanding group and collective rights encounters prove to be crucial to unveil the interiors of such claims disentangling the significance of both decision-making agents around collective ‘black boxes’ and difficulties of realising rights within the black box.

If we were to turn back to the first question on theoretical ways to address encounters and bridge gaps and potential conflicts of individual or group-based rights and indigenous collective rights in respective academic debates, a number of remarks need to be made. While existing debates, if at all, engage with questions of group-based rights in indigenous collective contexts, the interactions between the two regimes are hardly observed. This is only the case where women’s rights enter into conflict with indigenous collective rights in, for instance, justice mechanisms^{iv} without explicitly contributing to theoretical debates on the divide. Debates on participatory rights evolve around non-violence regarding women’s rights issues in indigenous collective contexts.^v This comes with a number of theoretical implications if we were to put specific emphasis on the materialisation of such group-based in indigenous collective contexts. First, in many cases the emphasis on violence is based on assumptions of patriarchal indigenous societies that by their very nature would allow discriminatory conduct and violence to exist. If we would disregard the ethical implications and further reaching conclusions based on these claims, the collective rights context would somehow be treated in isolation. Interestingly, collective rights regimes themselves exert considerable influence on the way individual or group-based rights are pronounced on the ground and, in that sense, cannot be regarded a neutral undertaking.^{vi} Some lawyers might fear such conclusions would undermine indigenous collective regimes as a whole, yet differentiation as to theoretical frameworks and their implementation in practice allows us to leave its normative foundations out of scope and touch. Questioning collective rights regimes based on their (alleged) failing reflection of communal interests or the common good is not discussed here.^{vii} While considering that local communities are not regarded as representing a common good in generalised terms,^{viii} such realities are not subject of the debates leaving the collective dimension largely untouched. Second, limiting group-based rights to non-violence also suggests wider implications on the nature of obligations concerned: this would primarily concern negative obligations in the sense of establishing rights protection that prohibits interference with a person’s or group’s dignity and personal integrity without necessarily requiring additional steps to be taken on the part of duty bearers. The overall respect, protect, fulfil framework in international human rights law might thereby play a somewhat marginal role. A holistic understanding with the aim of doing justice to a theoretical debate on collective and/versus group-based encounters, however, requires us to engage with claims of different nature going beyond negative obligations, yet without excluding such claims. Other debates have shed light on the overall functions of articulating group-based rights

within the wider indigenous collective framework such as their association with 'broader struggles against inequality, poverty, racism and discrimination'.^{ix} In this case, we will focus on the very encounters going beyond its functions or discussions of non-violence.

In understanding the theoretical interactions between the two or multiple regimes, views differ as to their commensurability: approaches vary from considering the two incompatible^x to understanding the two as coexisting and reinforcing each other,^{xi} in the latter sense the enjoyment of collective participatory rights under the umbrella of collective self-determination is regarded as essential for the implementation of collective rights more generally.^{xii} However, it is enhanced here that such very interactions bring forward a few insights shedding light on potential conciliation and positive entanglements that could help to see past, current and future cases from a different perspective. It is further argued that the very approach embracing a fusion of legal, political and anthropological studies lends itself in a particular way to deal with group-based and indigenous collective rights encounters. While empirical and theoretical debates may sometimes be seen as categorical divides, the two are considered as entering compatible spheres. This is the case where the former informs the latter, that is where theory is based on on-the-ground findings including but also going beyond jurisprudence. In that sense, an anthropological approach helps to contextualise and provide evidence on such theoretical debates, outcomes and also reflections that are raised in legal debates surrounding claims that exist side-by-side ever since their adoption and since their encounters in practice. At the same time, interpretations over what prevails under what circumstances differ depending on the particularities of the cases, but also general interpretative approaches adopted by respective tribunals, monitoring mechanisms or other judicial, in some cases quasi-judicial instances. Such interpretations may also differ within institutional frameworks and enter into reconcilable, but also contrasting debates in terms of how collective versus group-based claims are dealt with in actual cases. In that sense, interpretations issued by mechanisms or instances with different thematic or regional mandates may not streamline interpretations on how group-based and indigenous collective frameworks interact and are dealt with by the respective interpretative bodies.

Contributing to debates on indigenous collective rights and other group-based rights might be desirable from a theoretical perspective indeed and helpful for practitioners, yet, substantive claims differ to such an extent which would complicate deriving any general conclusions from the following debates and issues. While the latter is not ruled out from the very beginning, the overall outreach and scope of the findings needs to be treated in a differentiated manner. It will thus be focussed on one of the most pressing issues for indigenous peoples which, as a consequence, has found its way in a very prominent way into both regional and international human rights mechanisms, namely indigenous peoples' right to participate in and be consulted on matters that affect their (other) rights. As academic debates and contributions on indigenous collective and other group-based encounters in terms of participatory rights are limited, if not

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non-existent, encounters regarding other substantive claims similarly inform the theoretical reflections and empirical basis in this case, albeit in a way that allows to differentiate the claims in terms of their very nature and specific rights that are addressed. Conversely, insights on participatory rights help us to understand their further reaching implications, if implemented, on other rights. Indeed, it could be argued that participatory rights and prior consultation assume a so-called umbrella dimension since decision-making with impacts on indigenous peoples commonly involves aspects that enable rights holder groups to enjoy cultural life including living, maintaining and developing traditions, so-called *usos y costumbres* ('habits and customs'), not being impeded in enjoying access to water, sanitation and hygiene among others.

Indeed, international human rights law reveals the strong connectedness between all rights: specifically, the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993 identified human rights as being universal, indivisible, interdependent and interrelated. Similarly, regional human rights systems have established close links, particularly regarding prior consultation, cultural identity, freedom of thought and expression, right to life, personal integrity and personal liberty and other political, economic, social and cultural rights in the *Saramaka decision* as pronounced by the Inter-American Court of Human Rights in 2012. Conversely, different positions exist in terms of the outreach or extent to which consultation and other participatory rights materialise in practice. Especially in politically loaded and economically decisive contexts, such rights potentially enter sensitive issues limiting the territorial and sovereignty-related powers of the State. It is thus repeatedly discussed if indigenous peoples' participation would be tantamount to veto rights that could ultimately (arguably unilaterally) prevent or halt projects executed on indigenous peoples' territories. To avoid such forms of collective self-determination other than its purely cultural forms, international instruments contain clauses that limit rights to the extent that State's territorial integrity or sovereignty would be at stake.

Similar indicators can be drawn from the very form of free, prior and informed consent (FPIC) which differs from consultation in the way indigenous peoples would have an ultimate say on the respective decision(s). The two concepts and rights are often confused and equated. While their theoretical legal nature differs to a significant extent, their practical implication could be regarded as approximations in some cases. Namely, consultation requires indigenous peoples to merely participate in the decision-making process without any final commitment whereas consent would prescribe some form of final commitment, overall objective to be reached and say in the ultimate result of the process. However, consultation processes require rights holder(s) (communities) to enter genuine dialogues respecting the principle of good faith which would be contrary to treating consultation processes as merely legitimising tools with pre-decided end results. In a similar way, consent often functions as a tiny piece of the puzzle which finalises a process that is based on rights holders genuine participation and inclusion in the final agreement. International human rights law has established a sort of middle

way conciliating the two positions: consent is understood as an objective to be reached in any prior consultation process affecting indigenous peoples in terms of its administrative, judicial or other measures; exceptions reserving consent to be legally binding are limited to forced relocation, the disposal of hazardous materials and military activities to be executed on indigenous peoples' territories. Such debates including contradictions and tensions of both theoretical and practical nature have come into existence within prior consultation and participation regimes and continue to be challenges in indigenous collective rights regimes. Yet, an extensive literature on prior consultation and consent has emerged in theory^{xiii} and practice, the latter including a panoply of lessons learnt,^{xiv} implementation experience^{xv} and gaps in implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIPS),^{xvi} all suggesting a comprehensive picture on the topic. By contrast, encounters, confrontations and reconciliations with other group-based and individual rights in the area of indigenous collective rights (and prior consultation) come with new challenges, questions to be raised and venues to be explored.

This piece approaches these questions initiating with theoretical debates on dichotomies and other encounters between the two regimes including other group dimensions. Existing academic frameworks are contrasted and categorised to provide an entry point into reflections on individual and indigenous collective rights. In the following, a third perspective is proposed to breach the conceptual gaps and conflicts between the two and by way of further deepening such conceptual encounters in the specific case of substantive claims being distinguished based on the absolute or non-derogable nature of rights. It is shown how specific rights transcend the two frameworks and show possibilities to emerge on one side of the spectrum to be increased, reinforced or strengthened on the other side. In the middle of the two opposing sides of the spectrum, different subgroup or minority rights are identified, allowing us to observe how specific rights materialise for specific groups being both constituent of individuals and being affiliated with or belonging to indigenous collectivities at large. These groups exemplifying unobserved phenomena in the indigenous collective framework deserve further attention to understand specific legal implications for group rights enjoyment and to shed light on the encounters between different human rights frameworks in practice, such as reconciling individual or group rights and indigenous collective rights in practice. Therefore, different group rights will serve as illustrations in the following chapters exemplifying implementation of legal regimes in practice and their theoretical implications on such encounters which could, in turn, be taken up by practitioners. By way of initiating such closer look into the internal mechanisms of indigenous collective rights, existing jurisprudence as developed by international human rights bodies will show how group rights are approached under the indigenous collective umbrella in the very context of prior consultation and participation in decision-making. The following chapters evolve around jurisprudential and other human rights developments regarding specific groups in relation to indigenous collective rights. Aforementioned groups including particularly women, children and youth, and elderly are dealt

with in separate chapters to show how the two regimes encounter each other paying due regard to substantive and peremptory norms. Indigenous women exemplify the most observed subgroup in collective contexts yet demonstrating regularly reoccurring contentious situations where indigenous collective rights are discussed. The child and youth as vulnerable age groups similarly deserve attention: missing access to collective decision-making mechanisms, representative mandates and being subjected to long-term impacts caused by extractive and other projects reveal their difficult position. The elderly as traditional knowledge authorities and transmissioners potentially disappear where new collective voices are formed. Collective negotiating spaces are themselves characterised by negotiations of positions affecting elders in particular based on unequal access to such spaces and positions. All mentioned groups or minorities under the indigenous collective umbrella are then introduced to a meta level where jurisprudential and other developments find their way into a new conceptual framework. In such concluding chapter, the earlier proposed framework is re-introduced to detail its implications for the groups or minorities observed in the preceding chapters and to gain a deeper understanding of how the regimes find reconciliation in theoretical reflections and potentially in practice-oriented fields.

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