The Participation Principle and the Dialectic of Sovereignty-Sharing

*George K. Foster**

ABSTRACT

States around the world are ceding authority to international institutions, devolving powers to lower-level political subdivisions, and granting forms of autonomy to Indigenous peoples and other minority groups. At the same time, states are increasingly offering groups and individuals "participation rights": opportunities to participate in sovereign prerogatives without exercising control. These opportunities range from providing input into environmental decision-making, to collaborating with law enforcement in community policing programs, to receiving a share of natural-resource revenues. This Article contends that all of these developments represent a dividing up of the collection of rights known as sovereignty, and that participation rights reflect an emerging international norm that considers these rights essential to the legitimate exercise of governmental authority. This Article also argues that the international and domestic forms of sovereignty-sharing stimulate one another in a dialectical process. This helps explain how power allocations and participatory avenues have changed so rapidly in recent decades—and sometimes in ways that states never could have anticipated.

CONTENTS

INTRODUCTION 1011

I. HISTORICAL CONCEPTIONS OF SOVEREIGNTY AND THE DEBATE OVER ITS CURRENT STATUS 1015

A. Westphalian Sovereignty 1015

B. Challenges to Westphalian Assumptions 1017

1. Developments at the International Level 1018

* Professor of Law, Lewis & Clark Law School. The Author would like to thank Lisa Benjamin, Curtis Bradley, and Laurence Helfer for their feedback on prior drafts. He would also like to thank everyone who provided research assistance, including Wendy Hitchcock, John Mayer, Akriti Bhargava, Brett Miller, Adriana Gomez, and Amreen Bhasin.

2. Developments at the Domestic Level 1020
C. The Implications of Recent Events for Sovereignty 1022

II. THE PROLIFERATION OF PARTICIPATION RIGHTS AND THEIR ESSENTIAL ROLE IN THE LEGITIMATE EXERCISE OF SOVEREIGN AUTHORITY 1024
A. The Participation Principle at the International Level 1025
1. Early Documents: The UDHR, the ICCPR, the American Convention, and the African Charter 1025
2. 1986–1992: Elaborating the Principle in the Contexts of Development, the Environment, and Vulnerable Groups 1028
a. The UN Declaration on the Right to Development 1029
b. The Indigenous and Tribal Peoples Convention 1030
c. The Espoo Convention 1031
d. The Earth Summit Documents 1032
3. Subsequent Articulations in International Instruments, Guidelines, and Human Rights Court Decisions 1034
a. Indigenous Rights Authority 1035
b. International Environmental Law 1037
c. Extension of Participation Requirements to Other Aspects of Governance and to Non-State Actors 1038
d. A New Frontier in Participation: International Economic Law 1041
e. Multilayered Participation 1043
B. The Participation Principle in Domestic Laws and Regulations 1044
1. Voting Rights 1045
2. Public Participation in Environmental Decision-Making and Enforcement 1045
3. Affirmative Consultation Rights 1047
4. Benefit-Sharing Rights 1048
5. Other Opportunities 1050
C. The Participation Principle as an Emerging International Norm or Meta-Norm 1052
D. Participation Rights as Aspects of Sovereignty 1054

III. THE DIALECTIC OF HORIZONTAL AND VERTICAL SOVEREIGNTY-SHARING 1056
A. International Agreements and Organizations that Require or Encourage Domestic Power-Sharing and Participation 1057
B. Domestic Power-Sharing or Participation that Stimulates or Transmutes into International Authority 1060

C. The Value of Tracing the Dialectic and Viewing It Through a Sovereignty-Sharing Lens 1062

CONCLUSION 1064

INTRODUCTION

Sovereignty is in flux. For centuries, national states have been considered "sovereign" under international law, meaning that within their own territories they are supreme over all other authorities and free from outside interference.[1] Yet this classical view of sovereignty no longer matches reality. In recent decades, national states have ceded aspects of their authority to international legal regimes and institutions, from investment treaties that limit their leeway to regulate foreign investors to human rights systems that constrain their treatment of their own populations.[2] National states have also increasingly transferred authority to subnational actors, whether by devolving regulatory powers to lower level political subdivisions or granting new forms of autonomy to Indigenous peoples and other minority groups.[3]

---

1. HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 8 (1977) (defining sovereignty as both "supremacy over all other authorities within [the state's] territory and population" and the state's "independence of outside authorities"); ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 26 (1995) ("Traditionally, sovereignty has signified the complete autonomy of the state to act as it chooses, without legal limitation by any superior entity.").

2. Robert Jennings, *Sovereignty and International Law*, *in* STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 27, 31 (Gerard Kreijen, Marcel Brus, Jorri Duursma, Elizabeth De Vos & John Dugard eds., 2002) ("[M]ost, if not indeed all, sovereign governments nowadays have very seriously limited choices in the exercise of their supposedly sovereign competence, because their theoretically important areas for decisions are much restricted and hemmed in by treaties, [and] by customary international law . . . ."); YULIA LEVASHOVA, THE RIGHT OF STATES TO REGULATE IN INTERNATIONAL INVESTMENT LAW: THE SEARCH FOR BALANCE BETWEEN PUBLIC INTEREST AND FAIR AND EQUITABLE TREATMENT 45 (2019) ("[T]he right to regulate is limited by a state's obligations under international law, such as the obligation to provide fair and equitable treatment under an IIA [International Investment Agreement].").

3. *See, e.g.*, WORLD BANK GRP., EVALUATION OF THE WORLD BANK GROUP ENGAGEMENT ON STRENGTHENING SUBNATIONAL GOVERNMENTS 1 (2018) ("Decentralization has been at the center of the public policy reform agenda all over the world . . . translat[ing] into an assignment of public functions from national to subnational governments . . . ."); Shawkat Alam & Abdullah Al Faruque, *From Sovereignty to Self-Determination: Emergence of Collective Rights of Indigenous Peoples in Natural Resources Management*, 32 GEO. ENV'T L. REV. 59, 74 (2019) ("[T]he prevailing trend is towards granting autonomy to indigenous peoples in matters relating to their own internal and local affairs . . . .").

Many scholars take these developments as evidence that sovereignty is waning,[4] or even that the nation-state itself is becoming obsolete.[5] Others see sovereignty as alive and well and simply in a process of transformation. In particular, some scholars contend that sovereignty has gone from a monolith of authority in the hands of the national state to something that can be divided both horizontally and vertically and exercised even by non-state actors.[6]

The present Article embraces this latter view but builds on existing scholarly accounts by offering new insights into several aspects of sovereignty's ongoing transformation. It makes two principal claims.

First, not only is sovereignty divisible on both the international and domestic planes but it is also increasingly divided into what I will refer to as "governance rights" and "participation rights." I define governance rights as those that entitle the right holder to exercise control over aspects of governance, such as imposing taxes, adopting or interpreting laws, punishing crimes, authorizing development activities, and controlling natural resources.[7] Participation rights, by contrast, are opportunities for groups and individuals to participate in governance functions like these without exercising control. Examples include the right to vote in elections; the right to provide input into environmental decision-making; the right to enforce laws on behalf of the public; the right to collaborate with law

---

4. Thomas C. Heller & Abraham D. Sofaer, *Sovereignty: The Practitioners' Perspective*, *in* PROBLEMATIC SOVEREIGNTY 24, 39 (Stephen D. Krasner ed., 2001) ("[A] widespread perception exists that sovereignty, when understood as autonomous and effective control over national territories, is on the wane.").

5. Nathan Witkin, *A State of the People: The Shift of Sovereignty from Territory to Citizens*, 27 TRANSNAT'L L. & CONTEMP. PROBS. 33, 43 (2017) ("[S]ome argue that state sovereignty can no longer be delineated with rigid territorial boundaries—going so far as predicting the end of sovereignty and the death of the modern nation-state." (footnotes omitted)).

6. *See, e.g.*, Samantha Besson, *Sovereignty*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 82 (2011) ("The division of sovereignty can be vertical or horizontal, depending on whether it takes place among distinct political entities such as two States or between a State and the EU, or whether it takes place within a single political entity according to territorial or other federal divisions or according to distinct political functions."); John W. Head, *Addressing Global Challenges Through Pluralistic Sovereignty: A Critique of State Sovereignty as a Centerpiece of International Law*, 67 U. KAN. L. REV. 727, 784 (2019) (arguing that sovereignty has become more pluralistic both in the sharing of authority over specific territories and "in the realization that multiple types of authorities (not just so-called 'nation-states' . . .) can naturally and legitimately exercise sovereignty").

7. Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 829 (1999) ("By virtue of its sovereign powers, a state may enact laws, levy taxes, regulate commerce, imprison criminals, and conduct all other functions commonly associated with government."); Petra Gümplová, *Sovereignty Over Natural Resources – A Normative Reinterpretation*, 9 GLOB. CONSTITUTIONALISM 7, 17 (2020) (asserting that under international law states have a right to control "all natural wealth, resources, and economic activities on, above, and below the[ir] territories" as "a key prerogative attached to state sovereignty").

enforcement in a community-policing program; and the right to receive a share of benefits from state-owned resources.[8]

Participation rights' status as elements of sovereignty flows logically from the notion of "popular sovereignty," which holds that the state derives its sovereignty from the people.[9] I posit that the people of a state are not mere passive repositories of sovereignty but active participants in it. Indeed, the international community is increasingly recognizing that peoples, groups, and individuals should have opportunities to participate meaningfully in governance and in state-controlled benefits: a concept I will call the "Participation Principle."[10] This Article will demonstrate that this principle is already widely reflected in domestic laws and regulations, as well as in international instruments, standards, and human rights court decisions—all of which either create participation rights or call for their creation.[11] This authority evinces a growing consensus that participation rights are not merely desirable but to some extent obligatory, as the operational element of popular sovereignty.

Second, not only is sovereignty increasingly divided into governance and participation rights but the horizontal and vertical forms of sovereignty-sharing stimulate one another in a dialectical relationship. For example, states may commit through an instrument—such as the African

---

8. Examples of all such rights are provided *infra* Part II.

9. The concept of popular sovereignty can be traced to John Locke and Jean-Jacques Rousseau. They argued that sovereignty originates in the people, who confer authority on the state through a social contract. Hallie Ludsin, *Returning Sovereignty to the People*, 46 VAND. J. TRANSNAT'L L. 97, 115–18 (2013) (summarizing the views of these theorists).

10. As discussed in greater detail *infra* Section II.C, the asserted principle is a unifying theme that underlies a variety of participation requirements that are sometimes asserted to be actual or emerging norms of international law in isolation. *See, e.g.,* Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1, 40 (1989) ("A substantial argument can be made in favor of the existence of a customary law obligation to accord citizens the right to participate in political governance, although the specific contours of the obligation are debatable."); Carl Bruch, *Charting New Waters: Public Involvement in the Management of International Watercourses*, 31 ENV'T. L. REP. NEWS & ANALYSIS 11389 (2001) (arguing that "public participation in environmental matters may be said to be a norm of customary international law"); Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law*, 10 NW U. J. INT'L HUM. RTS. 54, 84 (2011) (arguing that a customary international norm is developing that requires states to consult in good faith with Indigenous peoples prior to exploiting resources within their territories); Elisa Morgera, *The Need for an International Legal Concept of Fair and Equitable Benefit Sharing*, 27 EUR. J. INT'L L. 353, 353–54, 363 (2016) (identifying international authority providing for states to ensure that stakeholders "participate in" or "share in" benefits derived from various activities, such as the exploitation of genetic resources or traditional knowledge, natural resource use, and the fight against climate change); *id.* at 383 (discussing the possibility that this authority reflects an emerging international customary norm or general principle of law).

11. *See infra* Part II.

Charter on Human and Peoples' Rights[12] (African Charter) or the Indigenous and Tribal Peoples Convention[13]—to grant certain collective rights to subnational peoples.[14] This is a form of horizontal sovereignty-sharing because states are agreeing with one another what they may and may not do within their own territories.[15] Yet it results in vertical sovereignty-sharing to the extent that the rights in question contemplate self-government or participation opportunities for subnational actors.[16] In some cases, the instrument expressly calls for such shared authority or participation, but in other cases it comes to be interpreted as doing so only later: a result that may take states by surprise.[17]

Stimulus for new forms of sovereignty-sharing can also flow in the other direction. For example, if states allow individuals or groups to participate in their domestic governance processes in a given way, then states' positive experience with these interactions may prompt them to adopt new participatory frameworks at the international level.[18] In addition, the granting of a particular right to subnational actors may become sufficiently pervasive that the practice achieves the status of a general principle of law or a customary international norm. In that event,

---

12. African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986) [hereinafter African Charter].

13. Convention (No. 169) Concerning Indigenous and Tribal People in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 (entered into force Sept. 5, 1991) [hereinafter Indigenous and Tribal Peoples Convention].

14. *See* Ctr. for Minority Rts. Dev. (Kenya) & Minority Rts. Grp. Int'l on behalf of Endorois Welfare Council v. Kenya, No. 276/2003, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 155–62 (Feb. 4, 2010) [hereinafter Endorois Case] (finding that the Endorois people of Kenya constitute a "people" within the meaning of the African Charter); *id.* ¶ 267 (noting a prior ruling that "a people inhabiting a specific region within a state can claim the protection of" the Charter); Indigenous and Tribal Peoples Convention, *supra* note 13, art. 1 (defining the "peoples" covered by the Convention).

15. *See* Wolf Mannens, *Shared Sovereignty? Minority Claims and the Effectiveness of State Authority*, *in* STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 145, 146–47 (Gerard Kreijen, Marcel Brus, Jorri Duursma, Elizabeth De Vos & John Dugard eds., 2002) (explaining that human rights regimes have resulted in shared sovereignty in the sense that the international community collectively regulates to some extent relations between minority groups and states); Ludsin, *supra* note 9, at 105 ("States increasingly have been ceding aspects of their sovereignty to international organizations, such as the United Nations and the World Trade Organization, and to regional bodies, such as the African Union and the European Union . . . . These organizations essentially serve as a superior authority over states in agreed-upon matters.").

16. *See* Endorois Case, *supra* note 14, ¶¶ 268–81 (holding that the African Charter gives the Endorois people a right to freely dispose of their wealth and natural resources and a right to development, which includes a right to be consulted about any development projects on its land and to receive a share of benefits from the state); *see also infra* Section II.A.2.b (cataloging governance and participation rights in the Indigenous and Tribal Peoples Convention).

17. *See infra* Section III.A (discussing human rights instruments that international bodies have interpreted more expansively over time).

18. *See infra* Section III.B (discussing this phenomenon with regard to rights to participate in environmental impact assessment processes).

even states that have not agreed to adopt the practice are arguably bound to employ it.[19]

Sovereignty-sharing thus gives rise to a feedback loop that results in perpetual pressure on states to share authority, influence, and benefits more extensively. This pressure helps explain how power allocations and participatory avenues have changed so rapidly in recent decades—and sometimes in ways that states never could have anticipated.

Part I of this Article will provide a historical overview of the concept of sovereignty, developments that have challenged classical notions, and competing scholarly accounts of the implications. Part II will build on this literature by developing the contentions that (1) contemporary sovereignty is divided into governance and participation rights; (2) the latter are required to some extent by an emerging international norm; and (3) these twin halves of sovereignty must come together for the legitimate exercise of governmental authority. Part III will then show that horizontal and vertical sovereignty-sharing influence one another in a dialectical process, which has already resulted in rapid change and promises further transformation going forward.

I. HISTORICAL CONCEPTIONS OF SOVEREIGNTY AND THE DEBATE OVER ITS CURRENT STATUS

A. Westphalian Sovereignty

In the first modern account of sovereignty written in 1561, Jean Bodin described sovereignty as absolute and perpetual power inherent in the state, free from any internal or external restriction.[20] He used the term "*souveraineté*" to refer to the concept when writing in French, and the terms "*summum imperium*" (supreme command) or "*summa potestas*" (supreme power) when translating his works into Latin.[21] Other early

19. For example, some have argued that states' practice of consulting with Indigenous peoples in connection with development activities has reached such a status. *See* Michelle Biddulph & Dwight Newman, *A Contextualized Account of General Principles of International Law*, 26 PACE INT'L L. REV. 286, 337–41 (2014) (discussing the concepts of general principles and customary norms and observing that the Inter-American Court of Human Rights has held that an obligation to consult Indigenous peoples is now a general principle of law).

20. Besson, *supra* note 6, ¶ 16 ("Bodin's sovereign authority cannot by definition be subject to any rule or restriction; sovereignty amounts to the absolute and perpetual power of the Republic."); Kent McNeil, *Sovereignty and Indigenous Peoples in North America*, 22 U.C. DAVIS J. INT'L L. & POL'Y 81, 88–89 (2016) (Bodin's notion of sovereignty "envisaged a world of equal, independent political units, each with absolute authority within its territorial limits and not subject to any external temporal power").

21. EDWARD KEENE, INTERNATIONAL POLITICAL THOUGHT: AN HISTORICAL INTRODUCTION 103 (2005); James B. Collins, *'County Republicans' and the Concept of Active Citizenship in Sixteenth-Century Poland and France*, *in* CITIZENSHIP AND IDENTITY IN A MULTINATIONAL COMMONWEALTH 228 (Karin Friedrich & Barbara Pendzich eds., 2008).

modern scholars used the same Latin terms when writing about sovereignty, including Hugo Grotius in the 1620s[22] and Thomas Hobbes in the 1660s.[23]

By employing the adjective *summa* or *summum*, these authors sought to convey that the sovereign was not simply one authority among many within its territory but the ultimate authority.[24] By doing so, they distinguished their conception of sovereignty from that which had prevailed in earlier times.[25] During the medieval period, each noble had been considered "sovereign" within his or her domain, and monarchs had not always been able to count on obedience from those below them in the feudal system.[26] In addition, the supranational church had claimed supremacy over secular monarchs throughout the period.[27] Bodin and his successors viewed such pluralistic and overlapping authority as a threat to order and stability and devised their theory of sovereignty in repudiation of it.[28]

These theorists' conception of sovereignty came to be known as "Westphalian" sovereignty, after the 1648 Peace of Westphalia that ended the Wars of Religion in Europe and ushered in the modern system of international relations.[29] Westphalian sovereignty functioned to promote

---

22. Benjamin Straumann, *Early Modern Sovereignty and Its Limits*, 16 THEORETICAL INQUIRIES L. 423, 424 (2015).

23. Michael Silverthorne, *Political Terms in the Latin of Thomas Hobbes*, 2 INT'L J. CLASSICAL TRADITION 499, 506 (1996); Sandra Field, *Hobbes and the Question of Power*, 52 J. HIST. PHIL. 61, 68 (2014).

24. Field, *supra* note 23.

25. JORGE E. NÚÑEZ, SOVEREIGNTY CONFLICTS AND INTERNATIONAL LAW AND POLITICS: A DISTRIBUTIVE JUSTICE ISSUE 28 (2017) (describing Bodin's theory of sovereignty as a response to the perceived disorder of earlier times, when "Western Europe had a struggle between church and state, [and] principalities and other societal organizations were fighting for power").

26. FRANCESCO MAIOLO, MEDIEVAL SOVEREIGNTY: MARSILIUS OF PADUA AND BARTOLUS OF SAXOFERRATO 28–29 (2007) (explaining that medieval sovereignty contemplated a "rich variety of relationships of super- and subordination existing within the hierarchical order of society . . . a plurality of powers); *id.* at 81–82 (quoting a 1283 French law commentary by Philippe de Rémi de Beaumanoir, asserting that "each baron is sovereign within his barony like the king is sovereign in his kingdom"); Andrew Bodiford, *Cities in International Law: Reclaiming Rights as Global Custom*, 23 CUNY L. REV. 1, 10 (2020) ("The typical medieval European state structure featured a king or queen, a supranational church, lesser nobility like dukes and counts with a degree of sovereignty over their demesnes . . . .").

27. Bodiford, *supra* note 26 , at 11 ("[A] state's control over all lands within its borders was not exclusive and the state's monopoly over legitimate authority within its borders was not internationally recognized. This is most obvious when considering the enormous power and property of the medieval European church.").

28. W.J. STANKIEWICZ, IN DEFENSE OF SOVEREIGNTY 10 (1969) (noting that Bodin and other classical theorists felt that "order demands a power structure with a head (or supreme decision-maker) able to make ultimate decisions"); McNeil, *supra* note 20, at 88 (Bodin's version of sovereignty sought to ensure order and stability).

29. Mustafa Aijazuddin, *Protection of Religious and Ethnic Minorities Before the Genocide Convention*, 16 LOY. U. CHI. INT'L L. REV. 145, 157 (2020) (describing the Peace of Westphalia's role

peaceful relations by discouraging states from intervening in the internal affairs of other states.[30] Yet Westphalian sovereignty was also sometimes invoked as justification for absolute monarchies, or for coercive efforts by national states to centralize power in themselves at the expense of provincial and local authorities.[31] Moreover, colonial powers sought to rely on the Westphalian version of sovereignty to excuse their subjugation of peoples outside of Europe.[32] These powers reasoned that if leaders they encountered could not impose their will on their communities in the way that the monarchs of Europe could, then these leaders were not truly sovereign and need not be accorded the rights of sovereignty.[33]

The Westphalian conception of sovereignty became so firmly entrenched that sovereignty was sometimes still being described in absolutist terms well into the twentieth century. For example, former U.S. Secretary of State Robert Lansing defined sovereignty in 1921 as "the power to do all things without accountability"[34] and to "compel the obedience . . . of every individual composing the political state and within the territorial state."[35]

B. Challenges to Westphalian Assumptions

The association of sovereignty with a dominant and unfettered national state has become increasingly untenable over the last seventy-five years. National states have ceded much of their power to subnational and

---

in ending the Wars of Religion and giving rise to "the modern system and concept of State sovereignty").

30. Anna Spain, *Deciding to Intervene*, 51 HOUS. L. REV. 847, 895–97 (2014) (discussing the role of Westphalian sovereignty and its norm of non-intervention in promoting peaceful relations).

31. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 866–67 (1990) (Bodin's and Hobbes's conception of sovereignty "became a convenient supplementary secular slogan for the various absolute monarchies of the time"); Bodiford, *supra* note 26, at 2 (explaining that Westphalian states absorbed smaller entities into "the unified nation state with its concentration of power into the metropolitan center, all at the expense of the sovereignty that small regional powers traditionally held").

32. McNeil, *supra* note 20, at 82 ("European nation-states proceeded to colonize North America by making grandiose territorial claims . . . as though the continent was juridically vacant and the Indigenous peoples living there did not have sovereignty.").

33. *Id.* at 92–93 (noting the absence of a supreme authority among the indigenous peoples of North America "lay behind the nineteenth and twentieth century view that these peoples were not sovereign states in the post-Westphalian, European sense"); Michael J. Kelly, *Political Downsizing: The Re-Emergence of Self-Determination, and the Movement Toward Smaller, Ethnically Homogenous States*, 47 DRAKE L. REV. 209, 240 (1999) (explaining that European powers sought impose their absolutist understanding of sovereignty "on cultures that had historically operated on systems, albeit undemocratic, of delineated degrees of sovereignty").

34. ROBERT LANSING, NOTES ON SOVEREIGNTY: FROM THE STANDPOINT OF THE STATE AND OF THE WORLD 3 (1921). For a detailed discussion of Lansing's views on sovereignty, see Head, *supra* note 6, at 776–79.

35. LANSING, *supra* note 34, at 7.

supranational actors, and power has become more diffuse within national states themselves, undermining core assumptions of Westphalian sovereignty.

1. Developments at the International Level

Many of the challenges to Westphalian sovereignty can be traced to the aftermath of World War II. The international community reacted to the horrors of that conflict by adopting a series of instruments that recognized a panoply of human rights, including the Universal Declaration of Human Rights[36] and the two International Covenants.[37] These instruments significantly restricted states' freedom of action within their territories—a phenomenon in tension with Westphalian sovereignty.[38]

In fact, certain instruments recognized sovereignty as residing not exclusively in states but also in *peoples*. The United Nations Charter[39] and both International Covenants[40] provide that peoples enjoy a right to self-determination, a core right of sovereignty.[41] This reflects an embrace of popular sovereignty: the idea that a state's authority derives from the people within its territory and depends on the consent of the governed.[42] Moreover, some human rights instruments have been interpreted as acknowledging that even *sub*national peoples hold a right to self-

36. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

37. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, art. 1, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR]; *see also* OFF. HIGH COMM'R FOR HUMAN RIGHTS, THE INTERNATIONAL BILL OF HUMAN RIGHTS, FACT SHEET NO. 2 (Rev. 1) (June 1996) (summarizing the rights announced in the UDHR, ICCPR, and ICESCR).

38. *See* Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 33 (1996) (explaining that since World War II "an international law of human rights has penetrated the once impermeable state entity and now addresses the condition of human rights within every state"); Alfred van Staden & Hans Vollaard, *The Erosion of State Sovereignty: Towards a Post-Territorial World?*, *in* STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 165, 171–72 (Gerard Kreijen, Marcel Brus, Jorri Duursma, Elizebth De Vos & John Dugard eds., 2002) ("[T]he classical notion of sovereignty is further challenged by the belief that the legitimacy of the exercise of political authority by national governments is dependent on respect for human rights.").

39. U.N., Charter of the United Nations, arts. 1(2) & 55, Oct. 24, 1945, 1 U.N.T.S. 16 [hereinafter UN Charter] (asserting that a core purpose of the United Nations is to ensure "respect for the principle of equal rights and self-determination of peoples").

40. ICCPR, *supra* note 37, art. 1(1) ("All peoples have the right of self-determination."); ICESCR, *supra* note 37, art. 1(1) (same).

41. Besson, *supra* note 6, ¶ 118 (listing self-determination among the rights traditionally associated with sovereignty).

42. Reisman, *supra* note 31, at 867 (discussing the emergence and widespread embrace of the concept of popular sovereignty); Besson, *supra* note 6, ¶ 83 (explaining that there has been a "shift in the subject of sovereignty post-1945: peoples have become the subjects of modern international sovereignty").

determination, albeit a version short of a right to independence.[43] This interpretation raises the prospect of subnational actors having claims to sovereignty that compete with those of the state—a notion anathema to Westphalian sovereignty.[44]

During the post-World War II era, states also formed multiple international bodies capable of creating or interpreting law in ways that are binding upon states in their domestic affairs.[45] States created some of these bodies to interpret and apply the above-referenced human rights instruments,[46] while other bodies focused on issues such as trade,[47] investment,[48] and regional integration.[49] The European Union is the most extreme example. It sets rules on such core aspects of member states' internal governance as how products are to be marketed within the state's territory,[50] who is entitled to live and work within the state,[51] and rights of

43. James Crawford, *The Right of Self-Determination in International Law: Its Development and Future*, *in* PEOPLES' RIGHTS 7, 31–38 (Philip Alston ed., 2001) (noting that the right of self-determination is often interpreted as contemplating a right of subnational peoples to determine their own "internal political status," but not to secede).

44. Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age*, 32 STAN. J. INT'L L. 255, 260 (1996) (discussing the "internal conflict between state rights to self-determination, and the rights of minorities within states to dismember or challenge the state in the name of another competing norm of self-determination").

45. *See, e.g.*, Julian Ku & John Yoo, *Globalization and Sovereignty*, 31 BERKELEY J. INT'L L. 210, 218 (2013) ("Nation-states establish [international organizations] to resolve interstate disputes, administer technical standards, create fora to discuss policies, or settle various other issues."); Noam Zamir & Paul Barker, *The Trans-Pacific Partnership Agreement and States' Right to Regulate under International Investment Law*, 45 DENV. J. INT'L L. & POL'Y 205, 210 (2017) (explaining that investment tribunals "scrutinise the sovereign conduct of the executive, legislative, or judicial branches of host States to assess compliance with the standards of protection" in a treaty).

46. Ricardo Pereira & Orla Gough, *Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law*, 14 MELBOURNE J. INT'L L. 451, 473–79 (2014) (discussing the roles and jurisprudence of the Inter-American and African human rights bodies).

47. *See generally* Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247 (2004) (examining the lawmaking role of World Trade Organization panels and Appellate Body).

48. *See generally* Zamir & Barker, *supra* note 45, at 210 (discussing the adjudicatory authority of investor-state dispute settlement tribunals).

49. *See generally* Heller & Sofaer, *supra* note 4, at 35–36 ("The most significant delegations of power by states to international bodies are those conferred on the European Community (EC) and other European institutions," which make law "supreme within its areas of authority.").

50. *See, e.g.*, Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein (Cassis de Dijon), 1979 E.C.R. 649 (striking down German legal restrictions on the marketing of liqueurs in German territory).

51. Angela M. Banks, *Bringing Culture Back: Immigrants' Citizenship Rights in the Twenty-First Century*, 57 SANTA CLARA L. REV. 315, 345–46 (2017) (summarizing EU rules that grant individuals rights to live and work in EU member states under some circumstances).

employees.[52] States have also created international organizations like the International Monetary Fund (IMF) and the World Bank. These banks sometimes use their financial leverage to pressure states into adopting domestic policy measures that these states would not otherwise be inclined to adopt.[53] The roles of all of these bodies are inherently in tension with the Westphalian notion that states are free to govern their own territories without outside interference.[54]

2. Developments at the Domestic Level

Other challenges to Westphalian assumptions result from events in states' domestic arenas, which have made governmental authority less centralized.

In recent decades, national states have devolved massive amounts of authority and revenues to provincial or local governments, transforming domestic governance structures around the world.[55] Many states have also granted forms of autonomy to Indigenous peoples or regions populated primarily by minority groups, either as part of a broader decentralization framework or in standalone autonomy arrangements.[56] Lower-level

52. Carole A. Scott, *Money Talks: The Influence of Economic Power on the Employment Laws and Policies in the United States and France*, 7 SAN DIEGO INT'L L.J. 341, 349–50 (2006) (listing EU employment law directives that establish protections for employees).

53. Mark J. Wolff, *Failure of the International Monetary Fund & World Bank to Achieve Integral Development: A Critical Historical Assessment of Bretton Woods Institutions Policies, Structures and Governance*, 41 SYRACUSE J. INT'L L. & COM. 71 (2013) (discussing states' creation of these institutions and conditions that these bodies impose on borrower states, including mandates to privatize state-owned industries, reduce spending, and adjust interest rates).

54. van Staden & Vollaard, *supra* note 38, at 172 ("[C]onstraints on the sovereignty of States are not only imposed by external forces but also by the States themselves when they fatefully and voluntarily shrank their own power by creating supranational institutions entrusted with the authority to make binding decisions.").

55. *See, e.g.*, Andrés Rodríguez-Pose & Nicholas Gill, *The Global Trend Towards Devolution and Its Implications*, 21 ENV'T & PLAN. 333, 338 (2003) ("The process of devolution operates through transfers of authority and resources. Subnational governments across the globe currently enjoy greater authority and powers than they did a few decades ago. The trend is widespread."); Jonathan Rodden, *Comparative Federalism and Decentralization: On Meaning and Measurement*, 36 COMPAR. POL. 481, 481 (2004) ("The basic structure of governance is being transformed in countries around the world as authority and resources migrate from central to subnational governments."); EZRA KARMEL, DECENTRALISING GOVERNMENT: WHAT YOU NEED TO KNOW 1 (June 2017) ("Governments around the world have transferred significant fiscal, political and administrative responsibilities to sub-national levels of government and semi-autonomous organisations.").

56. *See* Yash Ghai, *Autonomy as a Strategy for Diffusing Conflict*, *in* INTERNATIONAL CONFLICT RESOLUTION AFTER THE COLD WAR 483, 484–85 (Paul C. Stern & Daniel Druckman eds., 2000) (summarizing different types of autonomy arrangements); Mohammad Agus Yusoff, Athamabawa Sarjoon & Mat Ali Hassan, *Decentralization as a Tool for Ethnic Diversity Accommodation: A Conceptual Analysis*, 9 J. POL. & L. 55, 59 (2016) (explaining that decentralization reforms have been used "for accommodating diverse ethnic groups in a larger political system where differences prevail in terms of socio-cultural, economic conditions and political differences and claiming for more autonomy").

authorities also sometimes perform functions that the national state still claims as its own prerogative, such as when states or cities in the United States adopt policies in tension with federal immigration rules or when they worked to implement the Paris Climate Agreement after the Trump Administration repudiated that agreement.[57]

Meanwhile, power has become less concentrated even within central governments themselves: a phenomenon that Anne-Marie Slaughter refers to as "disaggregation."[58] She explains that courts, regulatory agencies, and other component parts within national states now engage directly with their counterparts in other countries, sometimes independently of the foreign ministry or other organs that once held a monopoly on foreign relations.[59]

To be sure, even before World War II some national states divided their functions among distinct branches or agencies, and countries like the United States and Switzerland have long had federal systems in which the national state lacks supreme authority over certain subject matters.[60] Yet the profusion of decentralization and autonomy regimes and the increasing disaggregation of the national state have made authority more diffuse than ever. Contemporary domestic power structures are thus a far cry from the concentration of authority in central organs of government that Bodin and other early theorists saw as the hallmark of sovereignty.[61]

---

57. *See* Bodiford, *supra* note 26, at 26–27 (discussing California's negotiation of an agreement with China to cooperate on climate change after President Trump withdrew from the Paris Climate Agreement, and describing it as an example of a measure that "conflicts with the sovereign state's national policies and deals with a category of decision-making over which the national government traditionally claims a monopoly"); *id.* at 34–35 (discussing the sanctuary city movement in the United States).

58. *See* Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 GOV'T & OPPOSITION 159, 186 (2004).

59. *Id.* (noting that sovereign functions of national states are now carried out in the international system by the likes of "regulatory agencies, ministries, courts, [and] legislatures" that engage and form networks with their correspondent parts in other countries).

60. Hari M. Osofsky & Hannah J. Wiseman, *Hybrid Energy Governance*, 2014 U. ILL. L. REV. 1, 62 (2014) (explaining that the U.S. system of government, "with its separation of power, checks and balances, and federalist structure," was designed to avoid "too much consolidation of authority"); Paolo Dardanelli & Sean Mueller, *Dynamic De/Centralization in Switzerland, 1848–2010*, 49 PUBLIUS 1, 138, 144–46 (2017) (discussing the creation of the federal system in Switzerland and historical limits on the powers of the central government).

61. LEON SHELEFF, THE FUTURE OF TRADITION: CUSTOMARY LAW, COMMON LAW AND LEGAL PLURALISM 57 (1999) (observing that classical Westphalian sovereignty envisioned "the source of authority stemming from the state as such, focused on its central organs of government"); McNeil, *supra* note 20, at 88 ("According to Bodin, a political community needs a supreme authority—a sovereign—that can impose its will on all members of the community . . . .").

C. The Implications of Recent Events for Sovereignty

The foregoing developments make clear that key Westphalian assumptions are no longer tenable. Yet how exactly sovereignty has changed—and whether the concept even has any continuing relevance—are matters of vigorous ongoing debate.

As noted in the Introduction, some scholars interpret these events as signaling the growing obsolescence of sovereignty or even of the nation-state itself.[62] Others do not question the viability of the nation-state but assert that sovereignty has become "illusory" or "empty" as a legal principle,[63] or is now violated so routinely that it has become largely fictitious: what Stephen Krasner terms "organized hypocrisy."[64] Krasner asserts, for example, that it is a violation of state sovereignty if the IMF requires a state to modify its internal power structures or spending policies as a condition of receiving a loan.[65] Similarly, critics of investment treaties often describe the restrictions imposed by those treaties as affronts to state sovereignty.[66]

Others take a different view, contending that when a state agrees to treaties or other arrangements that limit its discretion or confer authority on other actors, the state is not abrogating its sovereignty but exercising it.[67] Some go a step further, asserting that not only are such arrangements

---

62. In addition to the authorities cited in the Introduction, see Jennings, *supra* note 2, at 34 ("It has become fashionable to believe that the emergence of new and powerful actors on the international scene . . . must have resulted in a corresponding diminution of the significance and power of the sovereign State.").

63. *See, e.g.*, PHILIP ALLOTT, THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE 178 (2002) ("[T]he evolution of the reality of social organisation across the human world has made the idea of 'sovereignty' into an anachronism and an illusion . . . ."); Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 40, 51, 63–64 (2003) (asserting that sovereignty has become a "comparatively empty and unhelpful idea").

64. STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 7–9 (1999) ("Violations of Westphalian sovereignty have occurred through both voluntary agreements and the use of coercion. . . . The multiple pressures on rulers have led to a decoupling between the norm of autonomy and actual practice. . . . Organized hypocrisy is the normal state of affairs.").

65. *Id.* at 144–48 (summarizing the lending practices of the IMF and other international financial institutions, and concluding that they violate borrower states' sovereignty because to receive an infusion of capital these states must compromise their domestic autonomy).

66. Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 720 (2014) ("The argument has been formulated . . . that arbitration awards [under investment treaties] are affronts to sovereignty, that they threaten the right of self-determination . . . ."); Jennifer Bird-Pollan, *The Sovereign Right to Tax: How Bilateral Investment Treaties Threaten Sovereignty*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 107, 109 (2018) (asserting that investment treaties threaten not only the sovereignty of countries whose taxing authority is curtailed by the treaty, but ultimately "all sovereign authority to tax").

67. *See* James Crawford, *Sovereignty as a Legal Value*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 117, 124 (James Crawford & Martti Koskenniemi eds., 2012) ("[S]overeignty plays a central role in treaty-making. States are free to decide whether or not to become parties to

consistent with state sovereignty, but they represent a dividing up or *sharing* of that sovereignty.[68] The literature uses a variety of terms to express this notion: not only "sharing" but also "pooling," "disaggregation," or "delegation" of sovereignty.[69] However, I will use the term "sovereignty-sharing" as an umbrella term to cover any scenario in which prerogatives of sovereignty are allocated among more than one actor.

Scholars have identified sovereignty-sharing, in one form or another, at all possible levels: the law-making functions of supranational bodies,[70] the separation of functions within national states,[71] transfers of power to provincial and local authorities,[72] and forms of self-government exercised by Indigenous and other subnational peoples.[73] In fact, Leon Sheleff argued that it is a form of sovereignty-sharing if a national state simply leaves local groups alone, such as when it permits Indigenous or traditional peoples to maintain their own customs without absorbing them into larger state frameworks.[74]

Sheleff's observation highlights an irony in the notion that the increasing accommodation of subnational actors signals a transformation

---

treaties . . . ."); Brower & Blanchard, *supra* note 66, at 749 ("[Investment] arbitrators decide only whether an investor is entitled to compensation because a state breached an obligation it undertook—in an exercise of its sovereign capacity—by concluding a treaty."); S.S. Wimbledon (U.K. v. Japan), Judgment, 1923 P.C.I.J. (Ser. A) No. 1, at 15, 25 (Aug. 17) ("The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty.").

68. Heller & Sofaer, *supra* note 4, at 39 ("[S]cholars widely contend that sovereignty has been and will continue to be changed and shared . . . ."); Kathleen Claussen & Timothy Nichol, *Reconstructing Sovereignty: The Impact of Norms, Practices and Rhetoric*, 10 BOLOGNA CTR. J. INT'L AFFS. 21, 26 (2007) (collecting scholarship).

69. Claussen & Nichol, *supra* note 68 (summarizing different terminology used in the literature).

70. Crawford, *supra* note 67, at 132 (describing the European Union as a pooling of sovereignty); Ku & Yoo, *supra* note 45, at 210 (discussing the phenomena of nation-states "delegating authority to international organizations" and being bound by the law they create); Zamir & Barker, *supra* note 44 ("By entering into [investment treaties], States consent to delegate some of their sovereignty to an international tribunal . . . .").

71. *See* Slaughter, *supra* note 58 (explaining that the disaggregation of national states has resulted in their component government institutions each exercising "a measure of sovereignty").

72. *See, e.g.*, James D. Wilets, *A Unified Theory of International Law, the State, and the Individual: Transnational Legal Harmonization in the Context of Economic and Legal Globalization*, 31 U. PA. J. INT'L L. 753, 819 (2010) (noting that in many countries lawmaking power is "flowing downward to the local level with respect to issues of local concern").

73. *See, e.g.*, Patrick Thornberry, *Ethnic Dimensions of International Human Rights*, *in* A HUMAN RIGHTS: AN AGENDA FOR THE 21ST CENTURY 355, 376 (Angela Hegarty & Siobhan Leonard eds., 1999) ("It has been widely observed that sovereignty is leaking out from the State in two directions—towards supranational organisations and to sub-State or sub-national groups. Sovereignty is less concentrated than before and more amorphous.").

74. SHELEFF, *supra* note 61, at 6 (asserting that if a state allows tribal peoples to maintain their own customs rather than absorbing them within larger state frameworks, the state is thereby "shar[ing] its rule-making and rule-enforcing power" with these communities).

of sovereignty. While from one perspective the growing rights of Indigenous peoples and other actors can be considered a departure from classical notions of sovereignty, from another perspective these rights reflect forms of sovereignty that have existed all along. In that sense, what may appear to be "new" dimensions of sovereignty are new only in the way that the Americas were a "New" World: from the perspective of those late to realizing their existence.

That being said, there is no question that sovereignty *as understood in international law* is evolving and is becoming less monolithic than it once was asserted to be. The analysis that follows seeks to build upon the existing literature by offering further insights into how the international legal norm of sovereignty is changing and, in particular, how sovereignty is being shared and how different forms of sovereignty-sharing interact with one another.

II. THE PROLIFERATION OF PARTICIPATION RIGHTS AND THEIR ESSENTIAL ROLE IN THE LEGITIMATE EXERCISE OF SOVEREIGN AUTHORITY

Sovereignty is sometimes described as a collection of "rights" held by the state. As characterized by Samantha Besson:

> Among sovereignty rights, one usually finds listed the following rights: plenary territorial and personal jurisdiction within one's territorial boundaries; the presumption of legality of one's sovereign acts; constitutional and organizational autonomy including self-determination; and the protection of one's *domaine réservé* [or freedom from external interference].[75]

Within these rights, the state's plenary jurisdiction over persons and territory includes the authority to prescribe and enforce laws to govern conduct within the state's territory, as well as control over natural resources.[76] As already discussed, states regularly divide up and share this jurisdiction and other rights of sovereignty, such as when they sign treaties that limit their regulatory discretion, confer adjudicatory power on

75. Besson, *supra* note 6, ¶ 118; *see also id.* ¶ 122 (explaining that the protection of a state's *domaine réservé* refers to "freedom from external interference and intervention").

76. Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 123 (2010) ("Territorial jurisdiction connotes the application of legal rules within territorial space, and it is the most widely accepted source of a nation-state's authority to make, enforce, and adjudicate legal rules."); Adeno Addis, *The Thin State in Thick Globalism: Sovereignty in the Information Age*, 37 VAND. J. TRANSNAT'L L. 1, 37 (2004) ("One of the elements that has traditionally been viewed as constitutive of sovereignty under international law and political theory is the state's capacity to have control over the natural resources found within its territorial jurisdiction.").

international tribunals, or grant subnational authorities control over aspects of governance.

Yet the carving up of sovereignty is not limited to the extension of governance rights to new actors. I submit that states also share sovereignty by creating "participation rights": opportunities to choose the officials who will wield governance rights, take part directly in the processes of governance, or receive a share of state resources. The discussion that follows will show how states are creating such opportunities in unprecedented ways and at an accelerating rate, both internationally and domestically. This phenomenon reflects a growing acceptance not only of popular sovereignty but more specifically of the Participation Principle and its premise that participation rights are essential to the legitimate exercise of governmental authority.

A. The Participation Principle at the International Level

The international community's embrace of the Participation Principle is reflected in a wide range of international instruments, standards, and human rights court decisions, which have emerged in stages from the immediate aftermath of World War II to the present.

1. Early Documents: The UDHR, the ICCPR, the American Convention, and the African Charter

An embryonic version of the Participation Principle is expressed in the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948.[77] Article 21 of the Declaration proclaims:

> (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
>
> (2) Everyone has the right of equal access to public service in his country.
>
> (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.[78]

This shows that as early as 1948 the international community identified the vital importance of public participation in governance and access to state benefits, and also recognized that governmental authority depends on the will of the people.

---

77. UDHR, *supra* note 36.

78. *Id.* art. 21.

Article 21 of the UDHR has been echoed closely in several subsequent human rights instruments. These instruments include the International Covenant for Civil and Political Rights (ICCPR), adopted in 1966 and eventually signed by nearly all states;[79] the American Convention on Human Rights (American Convention), adopted in 1969 and ratified by twenty-five countries;[80] and the African Charter, adopted in 1983 and ratified by fifty-three countries.[81] Each of these instruments recognizes essentially the same rights as Article 21 of the UDHR, with only minor differences in wording.[82]

In addition to enshrining the foregoing rights, the ICCPR and the African Charter both articulate certain rights of "peoples." In particular, they provide that peoples have a right to self-determination, which includes the subsidiary rights to decide their own political status, determine their own development priorities, and freely dispose of their natural wealth and resources.[83] The African Charter adds yet another right: a right of peoples to a general satisfactory environment favorable to their development.[84]

It is a matter of debate whether the term "peoples" in these instruments refers only to the entire populations of states, or also includes subnational peoples, such as the Québécois of Canada or the Endorois of Kenya.[85] Yet there is growing support for the proposition that subnational

---

79. ICCPR, *supra* note 37. For state signatures and ratifications, see *Status of Ratification Interactive Dashboard: International Covenant on Civil and Political Rights*, U.N. OFF. HIGH COMM'R HUM. RTS., http://indicators.ohchr.org [https://perma.cc/LY9K-MCAM].

80. American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention]. For state signatures and ratifications, see *American Convention on Human Rights*, ORG. OF AM. STATES, https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm [https://perma.cc/Y2DQ-E4VM].

81. African Charter, *supra* note 12. For state signatures and ratifications, see *Ratification Table: African Charter on Human and Peoples' Rights*, AFR. COMM'N ON HUM. & PEOPLES' RTS., https://www.achpr.org/ratificationtable?id=49 [https://perma.cc/QKU9-ZVB2].

82. See ICCPR, *supra* note 37, art. 25 (every citizen has the right to "take part in the conduct of public affairs, directly or through freely chosen representatives"; "vote and to be elected at genuine periodic elections"; and "have access, on general terms of equality, to public service"); American Convention, *supra* note 80, art. 23 (identical to ICCPR art. 25); African Charter, *supra* note 12, art. 13 (asserting that every citizen has the right to "participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law"; and to have equal access to public service and public property).

83. ICCPR, *supra* note 37, art. 1; African Charter, *supra* note 12, arts. 20, 21.

84. African Charter, *supra* note 12, art. 24.

85. *See* David Wippman, *International Law and Ethnic Conflict on Cyprus*, 31 TEX. INT'L L.J. 141, 170 (1996) ("[S]cholars have debated whether subnational groups within recognized states could also constitute 'peoples' entitled to claim self-determination."); Glen Anderson, *A Post-Millennial Inquiry into the United Nations Law of Self-Determination: A Right to Unilateral Non-Colonial Secession?*, 49 VAND. J. TRANSNAT'L L. 1183, 1249–52 (2016) (discussing claims to self-determination by the peoples of Québec and Scotland); Endorois Case, *supra* note 14, ¶¶ 146–47

peoples enjoy at least a limited right to self-determination, which is short of a right to independence.[86] What this "internal" version of self-determination involves is unsettled, but possibilities range from autonomy or self-government—governance rights—to meaningful participation in governance and state-controlled benefits—participation rights.[87]

As the discussion above shows, all four of these pivotal early documents recognize some version of the Participation Principle. Namely, each enshrines a right of citizens to participate in governance either directly or indirectly, as well as a right to access state services or property. Two of these instruments also articulate rights held collectively by subnational peoples that likewise confer participation opportunities, if not also the prospect of *controlling* aspects of governance.[88]

The inclusion of these rights of individuals and peoples in the UDHR and the ICCPR is particularly significant because both are widely regarded as expressing customary international law, at least in large part.[89] Although some argue that the language requiring free and fair elections is ignored too often to qualify as a customary norm,[90] the other rights stand on firmer ground.[91] As examined below, the international community has endorsed

---

(noting disagreement over whether the Endorois are a "people" within the meaning of the ICCPR and the African Charter).

86. Geoff Gilbert, *Autonomy and Minority Groups: A Right in International Law*?, 35 CORNELL INT'L L.J. 307, 325 n.84 (2002) (collecting authority expressing the view that all peoples within the state have a right to internal self-determination); DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 285 (2002) (presenting evidence of state practice reflecting a right to internal self-determination).

87. RAIČ, *supra* note 86, at 237–39 (noting that most scholars support the view that internal self-determination denotes participation in decision-making, "ranging from direct participation in the central decision-making processes of the State, to federalism and other forms of political autonomy"); *see also* Endorois Case, *supra* note 14 (holding that the Endorois and other subnational peoples have rights to be consulted in connection with decision-making processes and share in the benefits of development activities).

88. ICCPR, *supra* note 37, art. 1; African Charter, *supra* note 12, arts. 20, 21.

89. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMPAR. L. 287, 317–51 (1996) (collecting scholarly works and statements by states and international organizations reflecting the view that the UDHR expresses customary international law in whole or in substantial part).

90. Crawford, *supra* note 67, at 130 ("We are far from having a democratic guarantee. Article 25 of the International Covenant of Civil and Political Rights . . . . is a pale shadow of such a guarantee."); Alvin Y.H. Cheung, *Road to Nowhere: Hong Kong's Democratization and China's Obligations Under Public International Law*, 40 BROOK. J. INT'L L. 465, 524 (2015) ("[I]t is doubtful that a right to democracy *per se*—as formulated in Article 21(3) of the UDHR or otherwise—has attained the status of customary international law.").

91. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 97 (2nd ed. 2004) (explaining that self-determination, as expressed in Article 1 of the ICCPR, is "widely acknowledged to be a principle of customary international law and even *jus cogens*, a peremptory norm"); Ludsin, *supra* note 9, at 114–15 (arguing that the UDHR's language on popular sovereignty and the ICCPR's on self-determination reflect customary international norms); Damrosch, *supra* note 10, at 40-41

these rights in myriad ways since the adoption of these early instruments, strengthening their claim to being part of customary international law.

2. 1986–1992: Elaborating the Principle in the Contexts of Development, the Environment, and Vulnerable Groups

Not long after the adoption of the African Charter, a flurry of drafting activity occurred in a six-year period that resulted in a series of instruments addressing public participation in governance. These instruments included the UN Declaration on the Right to Development,[92] the Indigenous and Tribal Peoples Convention,[93] the Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention),[94] and a collection of documents signed at the Earth Summit in Rio de Janeiro.[95] These documents went beyond their predecessors by calling for specific forms of participation in connection with development and the environment, as well as enhanced participation rights for vulnerable and marginalized groups.

It was no coincidence that these instruments emerged when they did. By the late 1980s, the international community was beginning to understand the serious environmental and social costs of unchecked development, and the inequitable manner in which the benefits of development are often distributed.[96] States were also coming to appreciate the unique vulnerabilities of Indigenous and traditional communities to impacts of development,[97] as well as the inestimable value of their traditional knowledge and genetic resources, which, once lost, could never be replaced.[98] Participation rights on the part of these communities and other stakeholders were seen as vital to confronting the growing challenges to the planet and to global society.

(collecting evidence in favor of a customary international law right to participate in political governance that does not necessarily require free and fair elections).

92. G.A. Res. 41/128, Declaration on the Right to Development (Dec. 4, 1986) [hereinafter UNDRD].

93. Indigenous and Tribal Peoples Convention, *supra* note 13.

94. Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 1989 U.N.T.S. 309 (entered into force Sept. 10, 1997) [hereinafter Espoo Convention].

95. *See infra* Section II.A.2.d and the sources cited therein.

96. World Comm'n on Env't and Dev., Report of the World Commission on Environment and Development: Our Common Future, ch. 1, ¶ 47, U.N. Doc. A/42/427 (1987) (addressing an urgent call by the UN General Assembly for an international agenda for a new approach to economic development, which should integrate development with resource conservation and provide "adequate livelihoods and equitable access to resources" to all).

97. *Id*. ch. 4, ¶¶ 70–78.

98. *Id*. ch. 4, ¶ 74.

a. The UN Declaration on the Right to Development

The first document created during this fertile period was the UN Declaration on the Right to Development,[99] adopted by the UN General Assembly in 1986 by a vote of 146 to 1.[100] The Declaration was a product of a movement within developing countries to achieve a "New International Economic Order" (NIEO): a set of reforms intended to ensure their sovereignty over natural resources and promote a more even distribution of income and development among states.[101] Toward that end, the Declaration calls for "[s]ustained action . . . to promote more rapid development of developing countries,"[102] in addition to endorsing other goals of the NIEO movement.[103] Significantly, however, the Declaration also addresses participatory rights of individuals and distributional equity *within* states.

Specifically, the Declaration provides that states have a duty to formulate policies that promote individuals' "active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom."[104] This language reflects a concern raised in a report by UN Special Rapporteur Raúl Ferrero in the lead up to the Declaration's adoption:

> [T]here would be no real point in restructuring the international order for the benefit of the developing countries if the fruits of that reform did not prove beneficial to the vast majorities whose needs are the greatest . . . ; in other words, greater *internal* distributional justice must be achieved in the developing countries so that the ultimate beneficiaries of the drive for a new world order will be the people themselves.[105]

---

99. UNDRD, *supra* note 91.

100. U.N. OFF. HIGH COMM'R FOR HUMAN RTS., FREQUENTLY ASKED QUESTIONS ON THE RIGHT TO DEVELOPMENT 17 (2016).

101. *See* ISABELLA D. BUNN, THE RIGHT TO DEVELOPMENT AND INTERNATIONAL ECONOMIC LAW: LEGAL AND MORAL DIMENSIONS 36–37 (2012) (discussing the NIEO movement and its connection to the Declaration); Anne Orford, *Globalization and the Right to Development*, *in* PEOPLE'S RIGHTS 127, 131 (Philip Alston ed., 2001).

102. UNDRD, *supra* note 9192, art. 4(2).

103. *See* UNDRD, *supra* note 91, art. 3(3) (calling on states to "promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States"); *id.* art. 1(2) (asserting that the right to develop requires respect for sovereignty over natural wealth and resources).

104. *Id.* art. 2(3) (emphasis added).

105. Raúl Ferrero (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection on Minorities), *The New International Economic Order and the Promotion of Human Rights*, ¶ 152, UN. Doc. E/CN.4/Sub.2/1983/24/Rev.1 (1986) (emphasis added). For the influence of Ferrero's report on the UNDRD, see BUNN, *supra* note 100, at 39.

Ferrero also highlighted a tendency of some governments to devote state resources to purposes that do not meaningfully benefit the people, such as military spending.[106] Accordingly, in calling on states to adopt policies to promote individuals' participation in development and in the fair distribution of its benefits, the General Assembly contemplated, at least in part, an equitable sharing of state resources.

Finally, the Declaration underscores that special efforts may be needed to overcome barriers to participation in development and its benefits. It does so by calling for effective measures "to ensure that women have an active role in the development process," and to otherwise address "social injustices."[107]

b. The Indigenous and Tribal Peoples Convention

The Indigenous and Tribal Peoples Convention, adopted in 1989 under the auspices of the International Labor Organization,[108] echoes and elaborates upon themes of the UN Declaration on the Right to Development in the specific context of Indigenous and tribal peoples.

Among the rights enshrined in the Convention are some that arguably constitute governance rights. One of these is a right of Indigenous and tribal peoples "to decide their own priorities for the process of development . . . and to exercise *control*, to the extent possible, over their own economic, social and cultural development."[109] This language suggests not mere participation in development-related decisions, but actual control. The Convention also establishes a right of Indigenous and tribal peoples "to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights."[110] This too is arguably a governance right because it gives the people's customs the force of law.

The Convention provides further that when the state retains control over aspects of governance, Indigenous and tribal peoples must be afforded participation rights. The participation rights announced include the right to be consulted by state authorities "whenever consideration is being given to legislative or administrative measures which may affect

106. Ferrero, *supra* note 104 ¶ 271 ("Let us imagine for a moment what it would mean if the huge resources devoted to military ends were used for civilian purposes. How much could be achieved and how many development programmes could be launched?").

107. UNDRD, *supra* note 92, art. 8(1).

108. Indigenous and Tribal Peoples Convention, *supra* note 13.

109. *Id.* art. 7(1) (emphasis added).

110. *Id.* art. 8(2); *see also id.* art. 9(1) ("To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.").

them directly";[111] the right to "freely participate . . . at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them";[112] the right to cooperate in environmental and social impact assessments;[113] the right "to participate in the use, management and conservation of" local natural resources;[114] and the right to "wherever possible participate in the benefits of such activities."[115] Finally, the Convention provides that states should refrain from activities that would require the people's relocation, absent their free and informed consent.[116]

The Convention has been adopted by twenty-three countries,[117] making its governance and participation rights binding obligations for a significant cross-section of the international community.[118]

c. The Espoo Convention

The Espoo Convention, adopted in 1991, identifies specific participation rights that states should accord to affected groups or individuals in a particular context: when states are performing environmental impact assessments (EIAs) in connection with activities likely to have significant adverse transboundary impact.[119] Notably, the Convention requires member states to provide "an opportunity to the public in the areas likely to be affected [by the proposed activity] to participate in relevant environmental impact assessment procedures."[120] The Convention adds that this opportunity shall include a right of "the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity."[121]

---

111. *Id.* art. 6.

112. *Id.*

113. *Id.* art. 7(3)–(4).

114. *Id.* art. 15(1).

115. *Id.* art. 15(2).

116. *Id.* art. 16(2).

117. For a list of ratifications, see Int'l Labour Org., Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169), INT'L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314 [https://perma.cc/VP2C-34RN].

118. The Indigenous and Tribal Peoples Convention does not, however, create an enforcement mechanism for these rights. *See* Jernej Letnar Cernic, *State Obligations Concerning Indigenous Peoples' Rights to Their Ancestral Lands: Lex Imperfecta?*, 28 AM. U. INT'L L. REV. 1129, 1168 (2013) (noting the absence of an enforcement mechanism in the Convention).

119. Espoo Convention, *supra* note 93.

120. *Id.* art. 2(6).

121. *Id.* art. 3(8).

The Espoo Convention has since been ratified by forty-five states and the European Union.[122] As a result, its participation requirements constitute binding international obligations in a band of countries stretching from North America across Europe to Central Asia.[123]

d. The Earth Summit Documents

On the heels of the agreements discussed above, the representatives of 178 countries met in 1992 at the Earth Summit in Rio de Janeiro.[124] There, they adopted an assortment of documents: the Rio Declaration on Environment and Development (the Rio Declaration);[125] Agenda 21;[126] the UN Framework Convention on Climate Change (UNFCCC);[127] the Forest Principles;[128] and the Convention on Biological Diversity[129] (collectively the Earth Summit Documents). These documents together offered the most comprehensive expressions of the Participation Principle yet.

Principle 10 of the Rio Declaration notably calls for public participation in a broad range of environmental matters: access to information, participation in decision-making, and access to judicial and administrative remedies.[130] Principle 22 of the Declaration also reinforces the Indigenous and Tribal Peoples Convention by providing that "Indigenous people and their communities and other local communities have a vital role in environmental management," and that "[s]tates should

---

122. For a list of ratifications, see UN Econ. Comm. for Europe, Convention on Environmental Impact Assessment (EIA) in a Transboundary Context, Status of Ratifications, UN ECON. COMM. FOR EUR., https://unece.org/fileadmin//DAM/env/eia/ratification.htm [https://perma.cc/DUD8-H5SP].

123. *Id.* (see map). The Espoo Convention also establishes a framework to promote compliance, although it is relatively weak because it relies on state willingness to commit to binding dispute resolution. *See* Angela Z. Cassar & Carl E. Bruch, *Transboundary Environmental Impact Assessment in International Watercourse Management*, 12 N.Y.U. ENV'T L.J. 169, 198–99 (2003) ("If a dispute arises between two or more parties regarding the interpretation or application of the Espoo Convention, the Parties are encouraged to negotiate, though they maintain the *option* to submit their dispute to the International Court of Justice or request arbitration." (emphasis added)); Espoo Convention, *supra* note 94, art. 15(2) (explaining that when ratifying the Convention, a party *may* declare in writing that it accepts one of the specified mechanisms for binding dispute resolution).

124. Robert V. Percival, *Global Law and the Environment*, 86 WASH. L. REV. 579, 586 (2011).

125. Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc. A/CONF. 151/5, 31 I.L.M. 874 (1992) [hereinafter Rio Declaration].

126. Agenda 21, U.N. Conference on Environment and Development, U.N. Doc. A/CONF.151/26 (1992) [hereinafter Agenda 21].

127. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 (entered into force March 21, 1994) [hereinafter UNFCCC].

128. U.N. Conference on Environment and Development, June 3–14, 1992, Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, U.N. Doc. A/CONF.151/26 (Vol. III), Annex III (Aug. 14, 1992) [hereinafter Forests Principles].

129. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, 79 (entered into force Dec. 29, 1993) [hereinafter CBD].

130. Rio Declaration, *supra* note 123 at princ. 10.

recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development."[131]

Agenda 21, the framework for implementing the Rio Declaration, sets forth more detailed language on both themes. It advocates specific forms of participation in environmental decision-making and benefit-sharing, as well as affirmative steps to ensure participation by Indigenous communities and other vulnerable groups. It calls in particular for:

- "[I]ncreased local control of resources, local institution-strengthening and capacity-building and greater involvement of non-governmental organizations and local levels of government as delivery mechanisms";[132]
- "[E]mpowerment of local and community groups through the principle of delegating authority, accountability and resources to the most appropriate level";[133]
- "Promoting or establishing grass-roots mechanisms to allow for the sharing of experience and knowledge," and otherwise "[g]iving communities a large measure of participation in the sustainable management and protection of the local natural resources";[134] and
- "[T]he active participation of those affected in the decision-making and implementation process, especially of groups that have, hitherto, often been excluded, such as women, youth, indigenous people and their communities and other local communities."[135]

Another Earth Summit Document, the UNFCCC,[136] mandates public participation in connection with efforts to mitigate climate change. Namely, it provides for the parties to the Convention to promote "public participation in addressing climate change and its effects and developing adequate responses."[137]

The Forest Principles apply the participation concept to forest management. Specifically, Principle 2 urges states to "provide opportunities for the participation of interested parties, including local

131. *Id.* at princ. 22.

132. Agenda 21, *supra* note 125, ¶ 3.4.

133. *Id.* ¶ 3.5.

134. *Id.* ¶ 3.7.

135. *Id.* ¶ 10.10.

136. UNFCCC, *supra* note 126.

137. *Id.* art. 6(a)(iii); *see also id.* art. 4(1)(i) (expressing a commitment of the parties to "encourage the widest participation in this process").

communities and indigenous people, industries, labour, non-governmental organizations and individuals, forest dwellers and women, in the development, implementation and planning of national forest policies."[138] Principle 5 further encourages states to ensure that "[I]ndigenous people, their communities and other communities and forest dwellers . . . have an economic stake in forest use."[139] Principle 12 adds that Indigenous communities should receive an equitable share of the benefits arising from the utilization of Indigenous knowledge.[140]

The Convention on Biological Diversity elaborates upon this latter idea. It provides that traditional knowledge, innovation, and practices shall be utilized only with the approval and involvement of local communities, and upon equitable sharing of benefits.[141] It also asserts that if states make genetic resources available to third parties for commercial purposes, then they should have a mechanism to share the economic benefits fairly and equitably.[142] Significantly, however, the Convention does not create private property rights, but rather recognizes *state sovereignty* over traditional knowledge and genetic resources.[143] Accordingly, the rights called for by the Convention arguably constitute governance rights if domestic law confers control over these matters on local communities and participation rights if it does not.

3. Subsequent Articulations in International Instruments, Guidelines, and Human Rights Court Decisions

Since the whirlwind of drafting activity between 1986 and 1992, numerous international instruments, guidelines, and human rights court decisions have developed the Participation Principle even further. In particular, they amplify language in earlier instruments, call for specific participation rights in connection with aspects of governance not previously addressed, and extend the obligations contemplated by the principle to non-state actors.

---

138. Forest Principles, *supra* note 127, at princ. 2(d).

139. *Id.* at princ. 5(a).

140. *Id.* at princ. 12(d).

141. CBD, *supra* note 128, art. 8(j).

142. *Id.* art. 15(7).

143. *See* Rebecca M. Bratspies, *The New Discovery Doctrine: Some Thoughts on Property Rights and Traditional Knowledge*, 31 AM. INDIAN L. REV. 315, 328 (2007) (noting that the Convention "frames traditional knowledge and biological resources through the lens of state sovereignty, and vests ownership of these resources in the state"); Gurdial Singh Nijar, *Incorporating Traditional Knowledge in an International Regime on Access to Genetic Resources and Benefit Sharing: Problems and Prospects*, 21 EUR. J. INT'L L. 457, 465 (2010) ("Some states claim an overriding ownership right to the genetic resources, referring to it as 'the patrimony of the State.'").

a. Indigenous Rights Authority

Indigenous rights have made particularly dramatic strides. One of the most important developments was the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.[144] That instrument reaffirms the governance and participation rights enshrined in the Indigenous and Tribal Peoples Convention, and also goes beyond them.[145] Among other things, UNDRIP expressly acknowledges Indigenous peoples' right to self-determination,[146] with the caveat that this right contemplates autonomy or self-government,[147] rather than secession.[148]

Although UNDRIP is expressly non-binding, the Declaration achieved near universal support in the UN General Assembly, and the few countries that voted against it have since endorsed it.[149] This suggests that the rights it announces enjoy virtually unanimous support in the international community, at least as a goal toward which states should aspire.[150]

Further, in recent years human rights bodies have read the participation concepts enshrined in UNDRIP and the Indigenous and Tribal Peoples Convention into other human rights instruments and have even expanded upon them. Specifically, the Inter-American Court of Human Rights has held that states may not authorize development activities on the lands of Indigenous or traditional communities without

---

144. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP].

145. *See* George K. Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium Between Economic Development and Indigenous Rights*, 33 MICH. J. INT'L L. 627, 664–65 (2012) (summarizing the rights announced in UNDRIP); SEDFREY M. CANDELARIA, COMPARATIVE ANALYSIS ON THE ILO INDIGENOUS AND TRIBAL PEOPLES CONVENTION NO. 169, UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP), AND INDIGENOUS PEOPLES' RIGHTS ACT (IPRA) OF THE PHILIPPINES 6–61 (2012) (comparing UNDRIP, the Convention, and similar Philippine legislation).

146. *See* UNDRIP, *supra* note 144, art. 3 ("Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

147. *Id.* art. 4 ("Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.").

148. *Id.* art. 46 (asserting that nothing in the Declaration implies a right of any people, group, or person to take any act that would dismember or impair the territorial integrity or political unity of states).

149. Foster, *supra* note 145, at 667–68 (summarizing the votes and abstentions in the General Assembly and subsequent endorsements by the countries that voted against the Declaration).

150. *See* Pereira & Gough, *supra* note 46, at 472 ("Although resolutions of the [UN General Assembly] are not legally binding, in this case the UNDRIP was adopted by so many states with so few objections and abstentions that it might very well attain the status of customary international law."); *see also* UNDRIP, *supra* note 144, pmbl. (asserting that the endorsing states solemnly proclaim the Declaration to be "a standard of achievement to be pursued in a spirit of partnership and mutual respect").

affirmatively consulting with these communities, as well as sharing benefits with them if the activity goes forward.[151] The Court has also held that if the activity would have a serious impact on such a community's lands, resources, or way of life, then the state must secure the community's consent before authorizing it.[152]

The Court has inferred the need to comply with these safeguards from rights and obligations expressed in the American Convention that are not specific to Indigenous or traditional communities. These rights and obligations include the right to property,[153] the right to participate in government,[154] and an obligation of states to promote the progressive development of economic, social, and cultural rights.[155] According to the Court, compliance with the relevant safeguards is essential to fulfilling these requirements in the context of Indigenous and traditional communities, given their unique attachment to the land and natural resources and vulnerability to developmental impacts.[156]

The African Commission on Human and Peoples' Rights has endorsed the same safeguards, grounding them in the African Charter's language on peoples' collective rights to development, natural resources, and a satisfactory environment.[157]

---

151. Saramaka People v. Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 129–33 (Nov. 28, 2007) [hereinafter Saramaka Judgment].

152. *Id.* ¶¶ 134–35; *see also* Saramaka People v. Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 17 (Aug. 12, 2008).

153. Saramaka Judgment, *supra* note 151, ¶ 158 (finding that Suriname's failure to comply with the safeguards was a violation of the right to property set forth in Article 21 of the American Convention).

154. Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 400, ¶ 173 (Feb. 6, 2020) (holding that consultations are necessary to comply with the right to participate in government set forth in Article 23 of the American Convention).

155. *Id.* ¶¶ 287–89 (holding that Argentina violated an obligation to progressively realize rights, as required by Article 26 of the American Convention, by allowing outsiders to engage in logging and livestock grazing on the lands of an Indigenous community, without prior consultation).

156. *See* Saramaka Judgment, *supra* note 151, ¶¶ 82–86.

157. *See* Social & Economic Rights Action Center & Another v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 1–10, 53–58 (May 27, 2002) (holding that Nigeria violated the Ogoni people's rights to resources and to a satisfactory environment by allowing oil operations on their territory without consultations and benefit-sharing); Endorois Case, *supra* note 14, ¶¶ 267–68 (holding that Kenya violated the Endorois people's right to natural resources by failing to share benefits resulting from ruby mining on their territory); *id.* ¶ 291 (holding that Kenya violated the Endorois' right to development by failing to consult with them and secure their free, prior and informed consent); *id.* ¶¶ 297–98 (holding that Kenya failed to comply with the Endorois' right to development by failing to share benefits from the creation of a game reserve).

b. International Environmental Law

International environmental law has also significantly developed further participation rights since the Earth Summit.

For example, the Aarhus Convention, a multilateral agreement adopted in 1998, requires member states to establish a number of public participation opportunities relating to environmental matters.[158] Specifically, members of the public must have access to certain types of information about the environment,[159] opportunities to participate in environmental decision-making,[160] and the ability to access the justice system to enforce environmental laws or their own participation rights.[161] The Aarhus Convention thus effectively converts Principle 10 of the Rio Declaration into binding obligations for its forty-seven member states, while also fleshing out the Rio Declaration's comparatively vague language. [162]

Another example is the establishment of participation requirements relating to REDD+, a climate change mitigation framework under the UNFCCC. REDD+ channels funds from international donors to developing countries to create financial incentives for them to curb deforestation and improve forest management.[163] The parties to the UNFCCC recognize that some conservation efforts could have serious costs for local communities that depend on forests for their livelihood, notwithstanding the obvious ecological benefits to protecting forests.[164] Accordingly, in 2013, the parties adopted the non-binding Cancún Agreements, which call for safeguards to protect forest-dependent communities.[165] Namely, the Cancún Agreements provide that developing

158. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 (entered into force Oct. 30, 2001) [hereinafter Aarhus Convention].

159. *Id.* arts. 4–5.

160. *Id.* arts. 6–8.

161. *Id.* art. 9.

162. Sarah Lamdan, *Beyond FOIA: Improving Access to Environmental Information in the United State*s, 29 GEO. ENV'T L. REV. 481, 502 (2017). For a list of member states see *Status of Ratification,* UNCE, https://unece.org/environment-policy/public-participation/aarhus-convention/status-ratification [https://perma.cc/Z6UF-32BV].

163. *See* Copenhagen Climate Change Conference, *Decisions Report of the Conference of the Parties on Its Fifteenth Session*, at 11, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010) (establishing REDD+); David Takacs, *Environmental Democracy and Forest Carbon (REDD+)*, 44 ENV'T L. 71, 75–76 (2014) (describing the REDD+ framework).

164. Takacs, *supra* note 163, at 77–78 (highlighting the risk that "local people may be barred from using forests to generate profits (e.g. through logging) or to sustain local communities (e.g. through conversion to agricultural land or harvesting trees for building material.)").

165. Cancún Climate Change Conference, *Report of the Conference of the Parties on its Sixteenth Session,* at 2, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011) [hereinafter Cancún Agreements]. The safeguards are set forth in Appendix I. *See also* Takacs, *supra* note 163, at 83–84 (describing the adoption of the safeguards).

country parties should "engage a broad range of stakeholders at the global, regional, national and local levels," and promote "[t]he full and effective participation of relevant stakeholders, in particular indigenous peoples and local communities" when preparing or implementing national action plans for REDD+.[166] Parties should also ensure that their actions consider "the need for sustainable livelihoods of indigenous peoples and local communities and their interdependence on forests in most countries."[167]

Since then, international organizations that provide funding to REDD+ participating countries have developed their own standards to implement the Cancún safeguards.[168] Accordingly, these funding gatekeepers now require participating countries to craft their national action plans to facilitate engagement of forest-dependent communities and benefit-sharing.[169]

Similarly, in 2010, the parties to the Convention on Biological Diversity adopted a protocol strengthening the Convention's participation requirements.[170] Known as the Nagoya Protocol, it requires state parties to adopt legislation to ensure that traditional knowledge associated with genetic resources is accessed only with the prior and informed consent and involvement of the holders of that knowledge.[171] It also requires a domestic legal framework to ensure that benefits arising from traditional knowledge are shared fairly and equitably with the relevant communities.[172]

c. Extension of Participation Requirements to Other Aspects of Governance and to Non-State Actors

Recent decades have also witnessed a variety of international initiatives to promote participation rights in aspects of governance beyond

166. Cancún Agreements, *supra* note 165, app. I, ¶ 2(d).

167. *Id.* at app. I, ¶ 3(e) n.1.

168. *See* UN-REDD PROGRAMME & FOREST CARBON P'SHIP FACILITY, GUIDELINES ON STAKEHOLDER ENGAGEMENT IN REDD+ READINESS WITH A FOCUS ON THE PARTICIPATION OF INDIGENOUS PEOPLES AND OTHER FOREST-DEPENDENT COMMUNITIES (Apr. 20, 2012) (outlining the stakeholder engagement and benefit-sharing framework for United Nations and World Bank REDD+ programs).

169. SÉBASTIEN JODOIN, FOREST PRESERVATION IN A CHANGING CLIMATE: REDD+ AND INDIGENOUS AND COMMUNITY RIGHTS IN INDONESIA AND TANZANIA 52 (2017) (describing requirements for stakeholder engagement established by the World Bank's Forest Carbon Partnership Facility and the UN-REDD Programme).

170. UNITED NATIONS CONVENTION ON BIOLOGICAL DIVERSITY UNITED NATIONS, NAGOYA PROTOCOL ON ACCESS TO GENETIC RESOURCES AND THE FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM THEIR UTILIZATION TO THE CONVENTION ON BIOLOGICAL DIVERSITY (Oct. 29, 2010) [hereinafter Nagoya Protocol].

171. *Id.* art. 7.

172. *Id.* art. 5(5).

development and the environment, as well as to extend participation obligations to non-state actors.

For example, successive UN sustainable development summits have produced outcome documents that not only affirmed the participation goals in the Rio Declaration and Agenda 21, but also extended them to *all* aspects of governance.[173] The most recent of these documents is the 2030 Agenda for Sustainable Development, which announced the Sustainable Development Goals.[174] Goal 16 calls for states to achieve "access to justice for all and build effective, accountable and inclusive institutions at all levels."[175] The associated targets include "effective, accountable and transparent institutions at all levels";[176] "responsive, inclusive, participatory and representative decision-making at all levels";[177] and "public access to information."[178] This language notably encompasses all governmental institutions and decision-making, not only those relating to development and the environment.

Additionally, in 2012, a collection of UN agencies adopted the Voluntary Guidelines on the Responsible Governance of Tenure (Tenure Guidelines).[179] The Tenure Guidelines likewise go beyond environmental protection by seeking to ensure that interested groups and individuals have access to land needed for agriculture, herding, or other purposes that promote food security.[180] Toward that end, the Tenure Guidelines call on states to make stakeholder participation an integral element of state decision-making on issues that may affect land tenure and access[181] and to share benefits derived from state-owned lands, fisheries, and forests.[182] The Tenure Guidelines also call for heightened participation rights for Indigenous peoples commensurate with UNDRIP.[183] Similar language on

---

173. *See, e.g.*, G.A. Res. 66/288, The Future We Want, at 3, (Sept. 11, 2012) (recognizing that "opportunities for people to influence their lives and future, participate in decision-making and voice their concerns are fundamental for sustainable development").

174. G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Oct. 21, 2015).

175. *Id.* at 25.

176. *Id.* (Goal 16.6).

177. *Id.* (Goal 16.7).

178. *Id.* at 26 (Goal 16.10).

179. FOOD & AGRIC. ORG. UNITED NATIONS, VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY (2012) [hereinafter TENURE GUIDELINES].

180. *See id.* at iv. The overarching goal of the Tenure Guidelines are to achieve "food security for all and support the progressive realization of the right to adequate food in the context of national food security." *Id.*

181. *See id.* § 3B(6).

182. *Id.* § 8.6.

183. *Id.* § 9.9.

stakeholder participation is set forth in a different set of guidelines for small-scale fisheries, adopted in 2015 and amended in 2018.[184]

Other non-binding guidelines extend the participation concept to the private sector. Including the private sector is vital because states may leave it to private developers to carry out required consultations with local communities likely to be affected by state-authorized projects,[185] or use developers as the vehicle through which benefits are delivered.[186] Examples of international guidelines calling for businesses to ensure that consultations or benefit-sharing take place include the OECD Guidelines for Multinational Enterprises,[187] the UN Guiding Principles for Business and Human Rights,[188] and the Principles for Responsible Investment in Agriculture and Food Systems.[189]

In the same vein, the International Finance Corporation (IFC)—an arm of the World Bank that offers financing to private clients—now requires its borrowers to respect participation rights. Specifically, IFC standards require that affected communities receive information about any IFC-financed project and its potential impacts, be affirmatively consulted, and in some cases receive a share of benefits.[190] The standards provide further that if the affected communities are Indigenous or practice a

184. FOOD & AGRIC. ORG. UNITED NATIONS, VOLUNTARY GUIDELINES FOR SECURING SUSTAINABLE SMALL-SCALE FISHERIES IN THE CONTEXT OF FOOD SECURITY AND POVERTY ERADICATION §§ 5.15, 5.10 (2nd ed. 2018).

185. *See, e.g.*, Kichwa Indigenous People of Sarayaku v. Ecuador Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 199 (June 27, 2012) ("[T]he State . . . partially and inappropriately delegated its obligation to consult to a private company, thereby failing to comply with . . . its obligation to guarantee the Sarayaku People's right to participation . . . .").

186. *See infra* Section II.B.4.

187. OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011); *see, e.g.*, *id.* at 20 (calling for multinational enterprises to "[e]ngage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities"); *id.* at 42 (urging MNEs to "engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation").

188. UNITED NATIONS HUM. RTS. OFF. HIGH COMM'R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011); *see, e.g.*, *id.* § 18(b) and associated Commentary (calling for businesses to engage in "meaningful consultation with potentially affected groups and other relevant stakeholders" and "seek to understand the concerns of potentially affected stakeholders by consulting them directly").

189. COMM. ON WORLD FOOD SEC., PRINCIPLES FOR RESPONSIBLE INVESTMENT IN AGRICULTURE AND FOOD SYSTEMS (2014); *see, e.g.*, *id.* at princ. 9, ¶ 29 (asserting that responsible investment should include "free, effective, meaningful and informed participation" in decision-making by those directly affected by investment decisions, with particular efforts to promote participation by Indigenous peoples and "the most vulnerable and marginalized").

190. George K. Foster, *Community Participation in Development*, 51 VAND. J. TRANSNAT'L L. 39, 78–79 (2018) (summarizing the participation requirements of the IFC standards).

traditional lifestyle and will experience certain significant impacts, then the project may go forward only with community consent.[191]

d. A New Frontier in Participation: International Economic Law

One area in which participation rights have been slow to develop is international economic law. Although trade and investment agreements call for states to adapt their laws to conform to the agreements' requirements and create tribunals charged with enforcing the parties' obligations, originally these agreements established few or no opportunities for members of the public to participate in these governance functions.[192] Nevertheless, incremental progress toward greater participation began in the 1990s, and such progress has accelerated lately.[193]

The growing emphasis on public participation can be seen in the United States-Canada-Mexico Agreement (USMCA),[194] which replaced the North American Free Trade Agreement[195] in 2020. The USMCA mandates opportunities for members of the public to participate in a variety of environmental matters, including the performance of EIAs[196] and the implementation of the treaty's environmental chapter.[197] It also provides for mechanisms to "enable small businesses to participate in regulatory policy development" relating to such businesses.[198] Further, the parties to the USMCA pledge to create opportunities for small or medium

191. *Id.*

192. Frank Loy, *Public Participation in the World Trade Organization*, *in* THE WTO AND SUSTAINABLE DEVELOPMENT 113, 114–15 (Gary P. Sampson ed., 2005) (explaining that the WTO's initial dearth of participatory opportunities "contributed mightily to the ignorance, suspicion, and hostility that the organization has engendered"); Chris Wold, *Taking Stock: Trade's Environmental Scorecard After Twenty Years of "Trade and Environment*,*"* 45 WAKE FOREST L. REV. 319, 324–26 (2010) (drawing contrast between transparency and participation opportunities available in international environmental law, and those available in international economic law).

193. Wold, *supra* note 192, at 321 (identifying progress in promoting transparency, including the growing practice of making dispute resolution submissions and decisions available).

194. OFF. U.S. TRADE REP., AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES, AND CANADA (Dec. 13, 2019) [hereinafter USMCA].

195. North American Free Trade Agreement, Can.-Mex.-U.S., ch. 17, Dec. 17, 1992, 32 I.L.M. 670 (1993).

196. USMCA, *supra* note 194, art. 24.7 (committing the member states to accord public participation opportunities in connection with the performance of EIAs).

197. *Id.* art. 24.5 (providing for member states to provide information to the public and create opportunities for members of the public to submit questions or comments relating to the implementation of the environmental chapter). The treaty also affirms the importance of public participation and consultation in connection with measures to protect the ozone layer, prevent marine pollution, protect air quality, and conserve biological diversity. *See id.* arts. 24.9, 24.10, 24.11, 24.15.

198. *Id.* art. 15.10(2) ("[E]ach Party shall endeavor to adopt or maintain appropriate mechanisms that consider the effects of regulatory actions on SME service suppliers and that enable small businesses to participate in regulatory policy development.").

sized enterprises (SMEs) and businesses owned by underrepresented groups—including women, Indigenous peoples, youth, and minorities—to participate in trade and investment.[199] This latter commitment arguably reflects the benefit-sharing aspect of the Participation Principle. It does so because the standard way for states to encourage economic activity by particular types of businesses is to grant them subsidies or tax credits,[200] and because market access secured by a treaty is itself a valuable economic benefit.[201] Accordingly, in agreeing to promote participation in trade and investment by SMEs and businesses owned by underrepresented groups, the member states were in effect contemplating the targeted use of state resources to ensure that these entities enjoy the benefits produced by these treaties.[202]

The USMCA also promotes public participation in dispute resolution processes by requiring that the public have access to documents and be able to attend hearings in investor-state dispute settlement (ISDS) proceedings.[203] Further, it provides opportunities for persons or entities who are not parties to an ISDS proceeding to submit *amicus curiae* filings.[204] These participatory avenues have relatively become common in ISDS and WTO dispute resolution proceedings in recent years.[205] As a result, members of the public, Indigenous groups, and others are better able to follow the proceedings and share insights into how the claims at

199. *Id.* art. 25.2(b) ("[E]ach Party shall seek to increase trade and investment opportunities, and in particular shall . . . promote SMEs owned by under-represented groups . . . and promote partnership among these SMEs and their participation in international trade."); *id.* art. 26.1(5)(c) (establishing a Competitiveness Committee, one of whose responsibilities is to make "recommendations aimed at enhancing the participation of SMEs, and enterprises owned by under-represented groups including women, indigenous peoples, youth, and minorities").

200. Ana Teresa Tavares-Lehmann, Perrine Toledano, Lise Johnson & Lisa Sachs, *Introduction*, *in* RETHINKING INVESTMENT INCENTIVES: TRENDS AND POLICY OPTIONS 1, 3–4 (Ana Teresa Tavares-Lehmann, Perrine Toledano, Lise Johnson & Lisa Sachs eds., 2016) (identifying financial incentives used by governments to promote investment, many of which are "tailored to specific investors or types of investors").

201. *See* Chris Brummer, *Regional Integration and Incomplete Club Goods: A Trade Perspective*, 8 CHIC. J. INT'L L. 535, 541 (2008) ("By creating a common market to which members enjoy special preferential access, … members [of regional trade agreements] are able to draw on each other's markets to the advantage of their home state exporters.").

202. The parties have already agreed to one such form of assistance: foregoing tariffs on Indigenous handicraft goods to promote exports by Indigenous artisans. USMCA, *supra* note 19, art. 6.2.

203. *Id.* art. 14.D.8.

204. *Id.* art. 14.D.7(3).

205. Fernando Dias Simões, *Amicus Curiae in the Trans-Pacific Partnership*, 54 AM. BUS. L. J. 161, 167–78 (2017) (discussing the trend toward increasing transparency and the emergence of *amicus curiae* submissions in investment arbitration). *See generally* Theresa Squatrito, *Amicus Curiae Briefs in the WTO DSM: Good or Bad News for Non-State Actor Involvement?*, 17 WORLD TRADE REV. 65 (2018) (same for WTO dispute resolution).

issue could impact their interests, the environment, or the public more generally.[206]

During the USMCA negotiations, Canada pushed for even more extensive participation opportunities. Specifically, Canada sought a committee comprised of Indigenous representatives from all three member states to monitor the implementation of the agreement.[207] A requirement for such a committee was not ultimately adopted, but Canada did secure a general exception providing that nothing in the USMCA shall prevent a member state from enacting measures that it considers necessary to respect its obligations toward Indigenous peoples.[208] Canada insisted on that safeguard to ensure that member states would have leeway to respect Indigenous rights like those enshrined in UNDRIP, without being found liable for breaching treaty obligations.[209] As discussed previously, UNDRIP contemplates extensive governance and participation rights for Indigenous peoples. Accordingly, the USMCA offers protection for these rights, at least to the extent these rights are incorporated into domestic law.[210]

e. Multilayered Participation

The foregoing discussion about trade and investment agreements highlights the multilayered way in which the Participation Principle is now manifesting itself at the international level. States and international organizations are no longer merely adopting international authority that calls for participation rights in *domestic* governance. They are increasingly affording participation opportunities for *international* governance as well,

---

206. Valentina Vadi, *Heritage, Power, and Destiny: The Protection of Indigenous Heritage in International Investment Law and Arbitration*, 50 GEO. WASH. INT'L L. REV. 725, 761–65 (2018) (providing examples of Indigenous groups and NGOs filing amicus submissions in ISDS proceedings); Squatrito, *supra* note 205 (cataloging amicus submissions in WTO cases).

207. Risa Schwartz, *Developing a Trade and Indigenous Peoples Chapter for International Trade Agreements*, *in* INDIGENOUS PEOPLES AND INTERNATIONAL TRADE 248, 265 (John Borrows & Risa Schwartz eds., 2020).

208. USMCA, *supra* note 194, art. 32.5; Schwartz, *supra* note 207, at 264–66 (discussing Canada's role in the inclusion of the provision).

209. Schwartz, *supra* note 207, at 266 ("[T]his new general exception makes it clear to states and foreign investors that USMCA parties are free to meet their legal obligations to Indigenous peoples without concern that such actions may run afoul of trade or investment rules," and that these legal obligations arguably include the rights set forth in UNDRIP); *id.* at 264 (noting that Canada advocated an express reference to UNDRIP in the USMCA).

210. Kevin O'Callaghan, Emilie Bundock & Madison Grist, *USMCA Aims to Protect the Interests of Indigenous Peoples in International Trade*, FASKEN (Oct. 22, 2018), https://www.fasken.com/en/knowledge/2018/10/van-usmca-aims-to-protect-the-interests-of-indigenous-peoples-in-international-trade/ [https://perma.cc/SJG6-W7RS] (explaining that efforts are underway in Canada to formally incorporate UNDRIP into domestic law, so that "obligations under UNDRIP may fall under the protection of the general exception—as legal obligations to Indigenous peoples—even absent any direct reference in the USMCA").

including the drafting and implementation of international authority. Such participation has become particularly common in the areas of international environmental law,[211] sustainable development,[212] and international human rights law.[213] As just seen, it is beginning to be featured in international economic law as well.

In fact, public participation in international governance has become so routine that Nahuel Maisley recently argued that civil society groups already possess a "right to participate in international law-making."[214] He grounds this asserted right in Article 25 of the ICCPR and its language that all citizens have a right to participate in public affairs.[215] Although Article 25 historically has been construed to relate only to domestic governance,[216] the trend that Maisley identifies is a real one. It is part of the wider pattern described in this Article: the international community's increasing embrace of a Participation Principle that requires participation by relevant stakeholders in all or most aspects of governance.

Accordingly, one might say that the Participation Principle now manifests at the international level like a set of Russian nesting dolls. For states or international organizations to create new authority, they typically feel obliged to have public participation in the drafting process. Then the authority they adopt reflects the Participation Principle by calling for the creation of new participation rights. Thereafter, there is usually participation to monitor the implementation of the relevant international authority. Stakeholder involvement is thus viewed as so fundamental that there must be participation upon participation upon participation.

B. The Participation Principle in Domestic Laws and Regulations

The Participation Principle has become just as firmly entrenched within domestic systems worldwide, even if the nature and quality of

---

211. Wold, *supra* note 192, at 325–26 ("Within international environmental regimes . . . environmentalists may obtain official documents, attend meetings of the parties as observers, make interventions on the floor of the meeting, and even participate in direct negotiation of resolutions and other treaty documents.").

212. United Nations Dep't Econ. & Soc. Affs., *Major Groups and Other Stakeholders*, UNITED NATIONS SUSTAINABLE DEVELOPMENT, https://sustainabledevelopment.un.org/majorgroups.html [https://perma.cc/GXC5-METQ] (discussing the role of civil society in the drafting and follow-up of sustainable development commitments, from Agenda 21 to the Sustainable Development Goals).

213. Lillian Aponte Miranda, *Indigenous Peoples as International Lawmakers*, 32 U. PA. J. INT'L L. 203, 232–43 (2010) (describing the extensive role played by Indigenous peoples in the drafting and implementation of Indigenous rights instruments); Nahuel Maisley, *The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making*, 28 EUR. J. INT'L L. 89, 98 (2017) (asserting that civil society has had a voice in every law-making venue in international human rights law).

214. Maisley, *supra* note 213, at 101.

215. *Id.* at 91 (citing ICCPR, *supra* note 37, art. 25).

216. *Id.* (citing authority for this proposition).

participation rights vary from country to country. As discussed in greater detail below, diverse forms of participation have made dramatic gains in recent decades across the spectrum of political systems. Many of the new participation opportunities are precisely the sort contemplated by the ICCPR, the Indigenous and Tribal Peoples Convention, the Rio Declaration, and other authorities highlighted in Part II.A. Others are distinctly original.

1. Voting Rights

One form of participation that has spread rapidly is the opportunity for citizens to play a part in choosing their leaders. At the start of the twentieth century there were only a few democracies in the world,[217] and even as late as 1974 there were still only 39.[218] Yet by 2006, the number of democracies had surpassed the number of autocracies,[219] and Freedom House currently places the tally at 114 to 80 in favor of democracies.[220]

It must be acknowledged that the last decade has witnessed significant backsliding toward authoritarianism in some quarters,[221] and even countries that meet minimum standards of free and fair elections do not necessarily protect other civil liberties.[222] Nevertheless, there is no question that there are many more political systems that feature meaningful voting rights today than there were only a few decades ago.

2. Public Participation in Environmental Decision-Making and Enforcement

In addition to increasing opportunities to help choose the leaders who perform governance roles, alternative forms of participation have been created in many domestic systems. Environmental governance is one area that has seen extensive growth.

For example, more than 100 countries have adopted domestic EIA regimes, which typically provide for some form of public participation in

---

217. Ronald Inglehart & Christian Welzel, *How Development Leads to Democracy: What We Know About Modernization*, FOREIGN AFFS., March/April 2009, at 33, 34 ("At the start of the twentieth century, only a handful of democracies existed, and even they fell short of being full democracies by today's standards.").

218. Amichai Magen, *The Rule of Law and Its Promotion Abroad: Three Problems of Scope*, 45 STAN. J. INT'L L. 51, 67 (2009).

219. *Id.* at 66–67 (discussing Freedom House statistics in 2006).

220. *See* Sarah Repucci, *A Leaderless Struggle for Democracy*, FREEDOM HOUSE (2020), https://freedomhouse.org/report/freedom-world/2020/leaderless-struggle-democracy [https://perma.cc/2CMC-5VK9] (download Excel Data List) (categorizing 114 countries as democracies and 80 as non-democracies).

221. *Id.* (discussing a pattern of reduced rights in many countries),

222. Magen, *supra* note 218, at 67.

the EIA process.[223] Dozens of countries have also adopted mechanisms for public access to the justice system to aid in the enforcement of environmental laws.[224] Some countries took these steps to implement the Aarhus Convention or Principle 10 of the Rio Declaration,[225] while others had already established these mechanisms before adopting those instruments.[226]

Of course, the fact that participation opportunities nominally exist in a country's legal system does not necessarily mean they are faithfully implemented or that they go far enough. Members of the public may incur significant barriers to participating in environmental decision-making, feel unable to share their genuine views, or be manipulated by those in charge of the process.[227] Officials may also fail to give sufficient weight to whatever public input is provided.[228] In addition, there may be severe

223. NEIL CRAIK, THE INTERNATIONAL LAW ON ENVIRONMENTAL IMPACT ASSESSMENT: PROCESS, SUBSTANCE AND INTEGRATION 23 (2008) (describing the proliferation of EIA regimes globally and their typical requirements); *id.* at 31 ("Almost every EIA system includes some form of public participation and consultation.").

224. Jason J. Czarnezki, Lin Yanmei & Cameron F. Field, *Global Environmental Law: Food Safety & China*, 25 GEO. INT'L ENV'T L. REV. 261, 285–86 (2013) (noting that recent innovations in China have increased access to justice and resulted in a series of "ground-breaking environmental public interest cases against both polluters and inactive government agencies that were brought by environmental NGOs on behalf of the public"); George (Rock) Pring & Catherine (Kitty) Pring, *Twenty-First Century Environmental Dispute Resolution: Is There an "ECT" in Your Future?*, 33 J. ENERGY & NAT. RES. L. 10, 10 (2015) (identifying more than 800 specialized environmental courts or tribunals at every level of government and in every major legal system); *id.* at 19 ("The clear trend . . . is to create more open standing for persons or groups with arguable environmental concerns").

225. Pring & Pring, *supra* note 224, at 14–15 (discussing the influence of the Aarhus Convention and Principle 10).

226. Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 904–06 (2002) (discussing the enactment of EIA legislation in the United States in 1969, which inspired similar legislation around the globe); David E. Adelman & Robert L. Glicksman, *Reevaluating Environmental Citizen Suits in Theory and Practice*, 91 U. COLO. L. REV. 385, 393 (2020) ("The creation of broad citizen suit provisions was among the most important innovations in the groundbreaking [U.S.] federal environmental legislation passed in the 1970s.").

227. *See, e.g.*, David W. Case, *The Role of Information in Environmental Justice*, 81 MISS. L.J. 701, 718 (2012) (identifying barriers to participation by low-income and minority communities in in the United States); Sibo Chen, *Power, Apathy, and Failure of Participation: How Local Voices on Environmental Issues Are Muted in a Chinese Rural Context*, SAGE OPEN, January–March 2017, at 1, 3 (2017) (ordinary citizens in China may decline to participate in environmental decision-making processes "as a result of fears of the government's hostility against opposing voices"); Taako Edema George, Kiemo Karatu & Andama Edward, *An Evaluation of the Environmental Impact Assessment Practice in Uganda: Challenges and Opportunities for Achieving Sustainable Development*, 6 HELIYON 1, 6–8 (2020) (identifying concerns including low rates of participation, failure to translate information, and manipulation of participants).

228. *See* Chen, *supra* note 227, at 1.

limits on standing for citizen environmental suits or prohibitive litigation and opportunity costs that deter this form of participation.[229]

Despite these limitations and the need for ongoing reform, the rapid spread of participation rights in environmental governance is impressive. These rights have been widely credited with improving the quality and legitimacy of decision-making and enforcement in places where they have been adopted.[230] As one recent study of public participation in China observed:

> [A] major transformation is underway in China's environmental governance . . . This transformation is vividly demonstrated by formalized public participation measures such as information disclosure and public hearing, flourishing environmental NGOs, and heated online discussions on environmental controversies. For some high-profile cases, . . . public participation in a variety of forms has successfully changed official policies and got the voices of nonstate sectors heard.[231]

3. Affirmative Consultation Rights

A closely related trend is establishing requirements in domestic law for state authorities to affirmatively consult with Indigenous or traditional communities before adopting measures likely to affect them.[232] Again,

---

229. George (Rock) Pring & Catherine (Kitty) Pring, *Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment*, 11 OR. REV. INT'L L. 301, 317–18 (2009) (highlighting barriers to the pursuit of citizen environmental suits in domestic systems around the world, including limits on standing that "exclude important constituencies with a real stake" and high costs such as "court fees; fees for lawyers, experts, and other professionals; the risk of cost-shifting to the losing side[;] . . . risks of countersuits; and lost time, salary, and other opportunities").

230. José Juan González Márquez, *Key Regional Perspectives on Public Participation: Mexico and Central America*, *in* HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT: PUBLIC PARTICIPATION IN THE SUSTAINABLE DEVELOPMENT OF MINING AND ENERGY RESOURCES 629, 649 (Donald N. Zillman, Alastair R. Lucas & George (Rock) Pring eds., 2002) (discussing a mining project in which federal and local authorities in Mexico responded to community input by implementing a number of environmental and social safeguards); Ian E. Cecala & A. Bryan Endres, *Damnesia: An Examination of Public Participation and Evolving Approaches to Hydropower Development in the United States and Brazil*, 55 IDAHO L. REV. 115, 124 (2019) ("[O]pen and meaningful participation mechanisms in the environmental decision making process help foster an informed citizenry, a transparent and accountable government, and overall higher quality decision making related to the environment."); Adam Eckerd & Roy L. Heidelberg, *Administering Public Participation*, 50 AM. REV. PUB. ADMIN. 133, 135 (2020) (noting that public participation in EIA processes "fosters legitimacy" and "can improve social justice outcomes").

231. Chen, *supra* note 227, at 3.

232. DWIGHT G. NEWMAN, REVISITING THE DUTY TO CONSULT ABORIGINAL PEOPLES 154–62 (2014) (surveying domestic legal frameworks around the world that require consultations with Indigenous peoples in various contexts).

these frameworks have sometimes been adopted under international agreements, whereas others have been adopted on the state's own initiative.[233]

A significant limitation of these consultation frameworks is that most do not make the consent of affected communities a condition for adopting the relevant decision.[234] The opposition of Indigenous stakeholders may sometimes prevent state authorities from approving an activity,[235] but not always. It is still all too common for governments to grant outsiders access to lands and resources without the consent of their traditional occupants or users, resulting in commercial activities that can carry serious environmental and social costs.[236] Still, the fact that domestic legal frameworks increasingly mandate consultations indicates that local input is widely viewed as essential to the fairness and legitimacy of decision-making—particularly when the interests of Indigenous or traditional communities are implicated.

4. Benefit-Sharing Rights

States around the world have also adopted a variety of mechanisms for sharing state-controlled benefits with groups and individuals who have a particular stake in the activity from which the benefits are derived.

In some cases, the national state transfers a share of revenues from state-owned natural resources to local authorities where the development activity is taking place or to a community-managed fund.[237] In others, the

---

233. Dwight Newman, Michelle Biddulph & Lorelle Binnion, *Arctic Energy Development and Best Practices on Consultation with Indigenous Peoples*, 32 B.U. INT'L L.J. 449, 471–80 (2014).

234. Chantal Carriere, *Federal Approval of Oil Pipelines and Indigenous Consultations in the United States After Standing Rock and Keystone XL: Lessons from Canada on the Limits of Industry-Indigenous Consultation*, 42 HOUS. J. INT'L L. 321, 385 (2020) ("[T]he Supreme Court of Canada has reiterated that under the duty to consult and accommodate, First Nations do not have a veto right over government action, and there is no duty to agree."); Claudia Iseli, Comment, *The Operationalization of the Principle of Free, Prior and Informed Consent: A Duty to Obtain Consent or Simply a Duty to Consult?*, 38 UCLA J. ENV'T L. & POL'Y 259, 266–70 (2020) (surveying several domestic frameworks for consultation with Indigenous peoples and concluding that most "only impose a duty to consult and not a duty to achieve consent").

235. NEWMAN, *supra* note 232, at 105 ("[E]xperience over the years with the [duty to consult in Canada] does show that it can lead to major modifications to projects or even cancellations of projects that would have unacceptably severe impacts on Aboriginal communities.").

236. Foster, *supra* note 145, at 638–43 (describing multiple development projects that governments around the world authorized without the consent of affected Indigenous communities); *see also* Jochen von Bernstorff, *Who Is Entitled to Cultivate the Land? Sovereignty, Land Resources, and Foreign Investments in Agriculture in International Law*, *in* NATURAL RESOURCES GRABBING: AN INTERNATIONAL LAW PERSPECTIVE 55, 55–56, 71 (Francesca Romanin Jacur, Angelica Bonfanti & Francesco Seatzu eds., 2016) (discussing large-scale, state-approved agricultural investments and how they can adversely affect the land's traditional users).

237. *See* Marie Mazalto, *Governance, Human Rights and Mining in the Democratic Republic of Congo*, *in* MINING IN AFRICA: REGULATION AND DEVELOPMENT 187, 214 (Bonnie Campbell, ed.,

state mandates that resource developers make infrastructure improvements or offer other benefits to local communities as a condition for the state's approval of the project.[238] Another approach is to mandate that developers enter into contracts with impacted communities that provide for benefit-sharing.[239] Under any of these scenarios, the community receives a share of benefits that could otherwise have been claimed by the state or used for other public purposes.

In addition, developing countries participating in the REDD+ program have adopted frameworks providing for a portion of revenues flowing from donors to be used to benefit forest-dependent communities, as required by the international standards described in Part II.A.3.b.[240] Benefits made available under REDD+ have included funding for capacity building, direct payments, training in sustainable livelihoods, and funding for local infrastructure.[241]

Finally, numerous countries have adopted domestic regulatory frameworks to implement the Nagoya Protocol's requirements for consultation and benefit-sharing in connection with the use of traditional knowledge and genetic resources.[242] Success has been limited so far in negotiating agreements that deliver benefits to holders of traditional knowledge, in part because of lingering legal uncertainties and

---

2009) (a mining code in the Democratic Republic of the Congo requires that "40 per cent of mineral royalties must be paid to the province and to the local authority where the projects are developed"); WORLD BANK, MINING FOUNDATIONS, TRUSTS AND FUNDS: A SOURCE BOOK 73–76 (2010) (describing the use of social funds established by the Peruvian state and funded by mining developer contributions); GHAZALA MANSURI & VIJAYENDRA RAO, LOCALIZING DEVELOPMENT: DOES PARTICIPATION WORK? 16 (2013) (discussing the increasing prevalence of community-managed funds derived from state-owned natural resources).

238. HÅVARD HALLAND, MARTIN LOKANC, ARVIND NAIR & SRIDAR PADMANABHAN KANNAN, THE EXTRACTIVE INDUSTRIES SECTOR: ESSENTIALS FOR ECONOMISTS, PUBLIC FINANCE PROFESSIONALS, AND POLICY MAKERS 71 (2015).

239. Kendra E. Dupuy, *Community Development Requirements in Mining Laws*, 1 EXTRACTIVE INDUS. & SOC'Y 200, 200–02 (2014) (describing legislation in a number of countries mandating community-developer agreements).

240. INDON. REDD+ TASK FORCE, REDD+ NATIONAL STRATEGY 32 (2012) (outlining benefit-sharing framework in Indonesia); UN-REDD PROGRAMME, NATIONAL GUIDELINES FOR REDD+ STAKEHOLDER ENGAGEMENT 8, 29 (2016) (describing potential community benefits and the benefit-sharing framework adopted under Kenyan law). Other national action plans are available on the UN-REDD Programme's website at https://www.unredd.net/documents/un-redd-partner-countries-181/national-redd-strategies-1025.html [https://perma.cc/4GSM-KAZV].

241. Kathleen Lawlor, Erin Myers Madeira, Jill Blockhus & David Ganz, *Community Participation and Benefits in REDD+: A Review of Initial Outcomes and Lessons*, 4 FORESTS 296, 305 (2013) (identifying benefits delivered, including jobs, payments, or in-kind contributions to educational systems and infrastructure); THE FORESTS DIALOGUE & INT'L UNION FOR CONSERVATION OF NATURE, COUNTRY OPTIONS FOR REDD+ BENEFIT-SHARING (2014) (describing forms of benefit-sharing pursued by various countries).

242. *See* THE ACCESS AND BENEFIT-SHARING CLEARING-HOUSE, INTERIM NATIONAL REPORT ON THE IMPLEMENTATION OF THE NAGOYA PROTOCOL (country reports detailing domestic legal frameworks adopted pursuant to the Nagoya Protocol).

bureaucratic hurdles in some countries.[243] Nevertheless, there have been some notable achievements, including a recent substantial agreement between the San and Khoi peoples of Southern Africa and the rooibos industry.[244]

5. Other Opportunities

States' domestic systems reflect numerous other mechanisms for members of the public to be involved in aspects of governance beyond those highlighted above. The discussion below provides a sampling of these mechanisms, selected to provide a sense of their diversity.

Some participatory opportunities have roots in longstanding traditions that are specific to the country or region where they are employed. An example is the *majlis* in Saudi Arabia and certain other Arab countries: an open house held periodically by leaders to elicit input from the community and allow citizens to air grievances.[245] Another is the village assembly presided over by traditional leaders in many parts of Africa, in which community members can share information, present complaints, and resolve disputes over access to common resources.[246]

Other participatory mechanisms are of more recent vintage but are already entrenched in legal systems around the world. Among these is the widespread practice of eliciting public input during land use planning. This is often said to enhance the decision-making process's legitimacy and

---

243. *See* Michael Heinrich, Francesca Scotti, Adolfo Andrade-Cetto, Monica Berger-Gonzalez, Javier Echeverría, Fabio Friso, Felipe Garcia-Cardona, Alan Hesketh, Martin Hitziger, Caroline Maake, Matteo Politi, Carmenza Spadafora & Rita Spadafora, *Access and Benefit Sharing Under the Nagoya Protocol—Quo Vadis? Six Latin American Case Studies Assessing Opportunities and Risk*, FRONTIERS IN PHARMACOLOGY, June 8, 2020, at 1 (acknowledging that agreements have been signed in some countries but highlighting factors that have impeded greater collaboration).

244. *See generally* Doris Schroeder, Roger Chennells, Collin Louw, Leana Snyders & Timothy Hodges, *The Rooibos Benefit Sharing Agreement-Breaking New Ground with Respect, Honesty, Fairness, and Care*, 29 CAMBRIDGE Q. HEALTHCARE ETHICS 285, 285 (2020) (discussing the rooibos agreement and describing it as "the biggest benefit sharing agreement between industry and [traditional knowledge] holders since the adoption of the CBD more than a quarter of a century ago").

245. *See* Caroline Montagu, *Civil Society in Saudi Arabia: The Power and Challenges of Association*, CHATHAM HOUSE RSCH. PAPER 24 (2015) ("The *majlis*, or meeting, is the traditional regular open house held by senior members of the community, princes, businessmen, tribal and religious leaders, and some professionals . . . as channels for people to make their views known and to raise suggestions, grievances or other topics.").

246. B.N. Ngwenya & D.L. Kgathi, *Traditional Public Assembly (Kgotla) and Natural Resource Management in Ngamiland, Botswana*, *in* RURAL LIVELIHOODS, RISK AND POLITICAL ECONOMY OF ACCESS TO NATURAL RESOURCES IN THE OKAVANGO DELTA, BOTSWANA 249, 256–57 (D.L. Kgathi, B.N. Ngwenya & M.B.K. Darkoh eds., 2011) (describing the role of the *kgotla* in Botswana and similar village assemblies in other African countries).

effectiveness, even if scholars sometimes argue that more could be done to secure community involvement and utilize the input provided.[247]

Some participatory mechanisms are decidedly ad hoc, like certain televised community consultative forums that Chinese authorities have held in recent years in response to public outcries over controversial governmental decisions.[248] Peking University professors Wang Xixin and Zhang Yongle attribute this phenomenon and other participation initiatives in China to officials' growing awareness that the ruling party must become more responsive to local concerns in order to maintain its legitimacy.[249]

Law enforcement is another aspect of governance in which public participation is sometimes sought and for similar reasons. One example is community policing: an approach to law enforcement that seeks to build a collaborative relationship with the community by developing partnerships with key stakeholders, identifying the most urgent concerns of community members, and working with these community members to develop remedies for those concerns.[250] Law enforcement agencies around the world have experimented with community policing to boost their reputations and improve their performance.[251] Notably, police departments across the United States purported to adopt a community policing model after the Rodney King incident in the 1990s,[252] although some have been

---

247. Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment Two*, 24 STAN. ENV'T L.J. 269, 284 (2005) ("Consensus-based land use planning theory . . . emphasizes bringing together the wide range of stakeholders affected by a particular decision to determine the best acceptable plan by mutual consent."); Michael Pacione, *The Rhetoric and Reality of Public Participation in Planning*, 63 URB. DEV. ISSUES 5, 6 (2019) (noting the use of public participation in land use planning processes in many countries, which is widely viewed "as a key element of local democracy as well as a way to improve the legitimacy of decisions leading to more socially acceptable and sustainable planning outcomes").

248. *See* Wang Xixin & Zhang Yongle, *The Rise of Participatory Governance in China: Empirical Models, Theoretical Framework, and Institutional Analysis*, 13 U. PA. ASIAN L. REV. 24, 35–38, 46–48 (2018).

249. *Id.* at 30–31.

250. DREW DIAMOND & DEIRDRE MEAD WEISS, U.S. DEPT. OF JUSTICE, ADVANCING COMMUNITY POLICING THROUGH COMMUNITY GOVERNANCE, 5–6 (2009) (defining community policing).

251. *See* Lorraine Mazerolle, Sarah Bennet, Jac T. Mengersen Davis, Elise Sargeant & Matthew Manning, *Procedural Justice and Police Legitimacy: A Systematic Review of the Research Evidence*, 9 J. EXPERIMENTAL CRIMINOLOGY 245, 246 (2013) ("Police departments throughout the world are increasingly interested in implementing operational programs that seek to increase police legitimacy."); *id.* at 256 (asserting that the most common approach is to develop "a closer partnership between the police and the community . . . through community-oriented police training, the creation of special community-oriented task forces or foot patrol officers, or the provision of grants for community policing activities.").

252. *See* Jim Newton, *Community-Based Policing Slowly Takes Root at LAPD*, L.A. TIMES (June 21, 1996), https://www.latimes.com/archives/la-xpm-1996-06-21-mn-17128-story.html [https://perma.cc/D8S3-YUZC] (discussing early efforts in Los Angeles to adopt "a philosophy of law enforcement that de-emphasizes arrests in favor of problem solving and community involvement");

accused of subsequently deprioritizing community collaboration until coming under renewed scrutiny after the murder of George Floyd.[253] This latter injustice has generated new pressure on agencies to become more community-oriented while also raising the prospect that some agencies could be defunded or replaced with something altogether different, which the affected communities would control.[254] That such measures have been seriously discussed is stark evidence that state actors risk a legitimacy crisis—and perhaps even a loss of power and resources—if they fail to build trust and collaboration with those most affected by their activities.

C. The Participation Principle as an Emerging International Norm or Meta-Norm

In light of such extensive international and domestic state practice that reflects the Participation Principle in some fashion, it is difficult to escape the conclusion that the principle is an emerging international norm. Alternatively, one might describe it as a "meta-norm," in the sense that it unifies—and has inspired—a set of more specific norms.

The principle's precise contours are debatable, but its central core seems beyond dispute: that states must create *some* means for members of the public to participate in governance, either directly or indirectly.[255] The preceding discussion suggests that further nuances regarding the types of participation required are becoming more accepted over time.

One of these nuances is the notion that states must provide access to information and opportunities to provide meaningful input into aspects of

---

Lonnie T. Brown, Jr., *Different Lyrics, Same Song: Watts, Ferguson, and the Stagnating Effect of the Politics of Law and Order*, 52 HARV. C.R.-C.L. L. REV. 305, 343–44 (2017) (discussing the connection between the public furor over the Rodney King beating and the community policing movement of the 1990s).

253. *See* Kim Hart & Michele Salcedo, *The Return of Community Policing*, AXIOS (June 18, 2020), https://www.axios.com/community-policing-return-george-floyd-e057cb65-b406-498d-a00c-e708b404719f.html [https://perma.cc/ZXV4-HWBK].

254. *See* Zack Budryk, *Biden Highlights Community Policing Amid Calls to Defund Departments*, THE HILL (June 10, 2020), https://thehill.com/homenews/campaign/502064-biden-highlights-community-policing-amid-calls-to-defund-departments [https://perma.cc/BZ9H-6XZ2] (discussing widespread calls to defund police departments in the wake of the George Floyd killing, and then-candidate Joe Biden's alternative proposal to spend $300 million on community policing initiatives); Gabriella Borter, *Minneapolis City Council Resolves to Replace Police with Community-Led Model*, REUTERS (June 12, 2020), https://www.reuters.com/article/us-minneapolis-police-protests-reform/minneapolis-city-council-resolves-to-replace-police-with-community-led-model-idUSKBN23J2W5 [https://perma.cc/35T3-23XD] (reporting that the Minneapolis City Council unanimously passed a resolution "to pursue a community-led public safety system to replace the police department following the death of George Floyd at the hands of the city's police").

255. *See supra* Section II.A.1 for the argument that this central core represents customary international law. *See also* Damrosch, *supra* note 10, at 40 (citing evidence of the existence of such a norm and observing that "Western-style pluralist democracy is only one of a variety of models that states may employ to give their citizens a voice in government").

governance likely to have significance impacts on the environment. In fact, public participation requirements have become so prevalent in environmental law at both the domestic and international levels that some scholars have argued that participation in environmental matters is now required by a customary norm or general principle of law, or that such an obligation is well on the way to materializing.[256]

Another nuance is the proposition that government entities should provide enhanced participation opportunities to individuals and groups that are particularly vulnerable or at risk of marginalization. This notion is particularly well developed with regard to Indigenous and traditional communities, which are already the subject of a number of international obligations specific to such communities, certain of which are sometimes asserted to be coalescing into customary norms or general principles.[257] However, as previously demonstrated, it is increasingly common for states to make special efforts to promote the participation of other groups and individuals as well, including women, youth, and minority groups.

There is also growing support for the idea that states should share benefits within their control in a fair and equitable way. At the most fundamental level there is the admonition in the UDHR and other human rights instruments that all citizens should have equal access to state services or property.[258] Beyond that, the preceding discussion has identified extensive international and domestic authority providing for the sharing of benefits from activities that directly and significantly affect local stakeholders, particularly natural resource extraction and the utilization of traditional knowledge or genetic resources. Some scholars interpret this authority as evidence of yet another nascent customary norm or general principle.[259] While these scholars refer to this putative obligation as one of benefit-*sharing* rather than of benefit-*participation*,

256. *See, e.g.*, Bruch, *supra* note 10, at 11389; Leslie-Anne Duvic-Paoli, *The Status of the Right to Public Participation in International Environmental Law: An Analysis of the Jurisprudence*, 23 Y.B. INT'L. ENVT'L L. 80, 85 (2012) ("[D]espite the fact that the ICJ has not yet recognized the existence of an obligation to include the public in environmental decisions, the right to public participation could be acknowledged later as a general principle of law or as a customary norm.").

257. See *supra* Section II.A.2–3 and *infra* Section III.B.

258. See *supra* Section II.A.1.

259. Riccardo Pavoni, *Biodiversity and Biotechnology: Consolidation and Strains in the Emerging International Legal Regimes*, *in* BIOTECHNOLOGY AND INTERNATIONAL LAW 29, 40–41 (Franco Francioni & Tullio Scovazzi eds., 2006) (highlighting the proliferation of authority calling for benefit-sharing in the context of traditional knowledge and genetic resources and asserting that "the duty of benefit-sharing is steadily emerging as a rule of customary law"); Morgera, *supra* note 10, at 382–83 (identifying a wide range of requirements for benefit-sharing and raising the possibility that the concept "is evolving into a principle that may affect the exercise of states' discretionary powers in relation to the development, interpretation, and application of international law in the absence of an applicable treaty basis").

some international authorities notably do use the term participation.[260] The latter terminology highlights the connection between benefit-sharing and other obligations encompassed by the Participation Principle: each provides the right holder with the ability to participate in matters over which the state has control as a function of state sovereignty.

Finally, it is increasingly inevitable that members of the public will be allowed input into the creation or implementation of international authority, at least when the authority implicates governance functions: a practice that is likewise sometimes argued to reflect a customary norm.[261]

While these various notions may not all be articulated in the same treaties, laws, or other authority, they are closely related and can be viewed as motivated by an overarching concept. Namely, together they stand for the proposition that states should invite the participation of the governed in the prerogatives of sovereignty, and that the form of participation provided should vary depending on the extent of the relevant stakeholder's interest, need, or vulnerability.

Certain of the nuances highlighted above may not yet have crystallized into binding international obligations (beyond treaty commitments), but the clear trend is toward their increasing acceptance by the international community. It stands to reason that recognizing these disparate concepts as related and springing from the same root may speed the acceptance of those aspects that have not yet achieved universality, while also facilitating further scholarly inquiry into the possible existence of a norm or meta-norm of participation. Moreover, if a unifying theme does indeed underlie the multiple obligations identified above, then there is every reason to expect that it will inspire further norm development going forward.

D. Participation Rights as Aspects of Sovereignty

The discussion so far in Part II has suggested that the creation of participation rights is not only widely attested in state practice but reflects a growing sense of legal obligation. States are creating these rights because they believe they are required to do so by international obligations or

---

260. *See* Morgera, *supra* note 10, at 363 (acknowledging the equivalence of the terms "participation" and "sharing" used in different sources); UNDRD, *supra* note 92, art. 2(3) (calling for states to ensure all individuals' "active, free and meaningful *participation* in development and in the fair distribution of the benefits resulting therefrom") (emphasis added); Indigenous and Tribal Peoples' Convention, *supra* note 13, art. 15 (providing that Indigenous and Tribal peoples "shall wherever possible *participate* in the benefits of" natural resource use) (emphasis added); USMCA, *supra* note 194, art. 25.2(b) ("[E]ach Party shall seek to increase trade and investment opportunities, and in particular shall . . . promote SMEs owned by under-represented groups … and their *participation* in trade") (emphasis added).

261. See *supra* Part Section II.A.3.e.

because they perceive these rights as otherwise necessary to secure and legitimate their governmental authority.

This phenomenon must be viewed in light of popular sovereignty. As previously noted, it is widely accepted today that sovereignty is derived from the people, as expressed in Article 21(3) of the UDHR: "The will of the people shall be the basis of the authority of government."[262] Participation rights can be understood as the means by which this concept is operationalized: the mechanism that channels the will of the people and transforms a claim to governmental authority into a governance "right." To put it another way, participation rights—as opposed to governance rights—are *that portion of sovereignty that is reserved in and wielded directly by the people*. Under this conceptual framework, when the people create a state, they do not give it absolute power and fully divest themselves of sovereignty; they reserve the ability to participate in governance and share equitably in state-controlled benefits. The precise form that the people's participation rights take will vary from country to country and even from place to place within a country. These rights may also depend to some extent on state willingness to recognize and respect them. Yet the people can indirectly shape the scope and content of those rights via the influence they have over the state as a result of their participation rights.

Participation rights are thus not merely a limitation on sovereignty, but part and parcel *of* sovereignty, as necessary companions to governance rights. It is this relationship to sovereignty that distinguishes both categories of rights from other rights that may be held by groups or individuals—whether arising under international law or domestic law. Other rights may give the right holder protection against unwanted state action or an affirmative entitlement to state protection, but only governance and participation rights confer access to the state's own sovereign prerogatives.

Participation rights' status as an element of sovereignty is further evident from how closely related they are to governance rights: so much so that they are at times almost indistinguishable. For instance, if a central government grants a local government in a mineral-producing region a dedicated share of state revenues from the mineral's exploitation, the community secures a participation right. However, once the community controls those revenues and can spend them as it chooses, it holds a governance right.

The two types of rights are best seen as elements of a dynamic continuum rather than fully distinct. In this posited continuum, the

262. UDHR, *supra* note 36, art. 21(3).

constituent parts not only interact with one another and are essential to their respective operations, but their location in the continuum can shift as the state's political and legal system evolves—with participation rights potentially transitioning into governance rights or vice versa. For example, an Indigenous people might go from having a right to be consulted about projects to exploit natural resources on its land to securing the right to decide for itself whether or not to develop those resources.[263] Alternatively, a local or provincial government might be granted control over certain extractive activities within its territory but then later have that right withdrawn.[264]

One way of viewing these two categories of rights is as twin facets of sovereignty, like two sides of the same coin. Sovereign authority may take the more prominent position on the obverse of this coin, but the will and involvement of the people must always be present to some extent as the legitimating accompaniment on the reverse. States have learned the hard way that the latter component is essential; without adequate participation rights they are likely to lack popular support and risk uprising or secession.[265] Hence, governance rights without participation rights are like a coin stamped on only one side: illegal tender to be used at one's peril in the marketplace of public sentiment.

III. THE DIALECTIC OF HORIZONTAL AND VERTICAL SOVEREIGNTY-SHARING

Part II demonstrated that participation and governance rights are proliferating on two separate levels as states share their sovereignty in new ways both horizontally and vertically. The discussion that follows will seek to demonstrate that these two forms of sovereignty-sharing interact with and stimulate one another in a dialectical relationship.

---

263. *See* CARLY A. DOKIS, WHERE THE RIVERS MEET: PIPELINES, PARTICIPATORY RESOURCE MANAGEMENT, AND ABORIGINAL-STATE RELATIONS IN THE NORTHWEST TERRITORIES 98 (2015) (discussing the negotiation of Land Claims Agreements between Aboriginal groups and the federal government in Canada, which give the relevant groups ownership over subsurface minerals and require their permission to explore for or exploit those minerals).

264. *See, e.g.*, Boris Verbrugge, *Decentralization, Institutional Ambiguity, and Mineral Resource Conflict in Mindanao, Philippine*s, 67 WORLD DEV. 449, 453–54 (2015) (describing an executive order in the Philippines denying local governments the power to block mining projects, despite a prior grant of authority in national legislation giving them that power).

265. Ludsin, *supra* note 9, at 115 ("Any government that controls the state against the wishes of the people does not receive sovereign authority. It may have the power to enforce its will against the people, but the illegitimate government is not entitled to sovereign rights."); Pranab Bardhan & Dilip Mookherjee, *The Rise of Local Governments: An Overview*, *in* DECENTRALIZATION AND LOCAL GOVERNANCE IN DEVELOPING COUNTRIES: A COMPARATIVE PERSPECTIVE 1, 4 (Pranab Bardhan & Dilip Mookherjee eds., 2006) ("[P]opular participation . . . can promote a sense of autonomy in citizens, enhance social order by promoting the legitimacy of the state, and limit pressures for separatism by diverse regions or ethnic groups.").

This dynamic helps explain the rapid rate of change in the domestic and international systems in recent decades. Moreover, understanding the interplay between international and domestic developments and viewing them through a lens of sovereignty-sharing allows one to reconcile these changes with the concept of state sovereignty and provides insights into how sovereignty is evolving.

A. International Agreements and Organizations that Require or Encourage Domestic Power-Sharing and Participation

Part II highlighted several examples of horizontal sovereignty-sharing: the phenomenon whereby states sign treaties or otherwise establish rules to govern conduct within their respective borders or create supranational bodies and charge them with doing so. In fact, all of the binding authority referenced in Part II—from the ICCPR to the USMCA to the Participation Principle itself—qualify as horizontal sovereignty-sharing under this definition.

The linkage to vertical sovereignty-sharing results from the fact that international agreements, norms, or bodies often require or encourage states to grant new governance or participation rights to subnational actors. Whether the relevant authority calls for the Indigenous peoples of Nicaragua to be afforded forms of self-government, the peoples of Nigeria to have consultation and resource revenue-sharing rights, or the general public in Norway to have input into EIA processes, the national state is being asked to share aspects of sovereignty with actors below it in the domestic hierarchy.

In some cases, the relevant agreement expressly calls for the extension of new governance or participation rights to subnational actors, and so states are presumably well aware that vertical sovereignty-sharing will ensue.[266] In other cases, the agreement makes no such express reference but eventually is *interpreted* as contemplating domestic power-sharing or participation: an outcome that states may not have anticipated.

Consider, for example, Common Article 1 of the International Covenants, which asserts that "peoples" have a right to self-determination.[267] When these Covenants were first adopted, the right to self-determination was generally understood as being held by the entire national populations of states, or by colonial peoples oppressed by foreign domination.[268] It was only later that there came to be widespread

266. For example, the Aarhus Convention expressly calls for members of the public in member states to have rights to participate in environmental decision-making. *See supra* Section II.A.3.b.

267. ICCPR, *supra* note 37, art. 1; ICESCR, *supra* note 37, art. 1.

268. *See* Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 23–24 (1993) ("[A] careful examination of the legislative history of the covenants leads to the conclusion that a restrictive

acceptance that Article 1 contemplates a right of "internal" self-determination for subnational peoples, entitling them to self-government or at least meaningful participation in the national government.[269] As this broader interpretation has taken hold, many subnational peoples have seized on it to advocate for autonomy measures[270] or new international instruments that expressly recognize their right to self-determination.[271] These efforts have been successful in many cases, as demonstrated by the profusion of autonomy arrangements worldwide[272] and UNDRIP's language on Indigenous peoples' right to self-determination.

This shows that when states engage in horizontal sovereignty-sharing (by entering into an international convention with other states), these states may set a series of events in motion that will lead to new forms of vertical-sovereignty-sharing, even if that was not the states' intention. This outcome may become all the more likely if states create international bodies and task them with interpreting international agreements or monitoring their implementation. For example, UN bodies charged with tracking compliance with the International Covenants and other human rights instruments have sometimes encouraged states to grant autonomy to

---

interpretation of the right of self-determination comports with the views of the majority of the states that supported the right."); Helen Quane, *The United Nations and the Evolving Right to Self-Determination*, 47 INT'L & COMPAR. L. Q. 537, 561 (1998) (reviewing the drafting history and concluding: "All that one can state with certainty is that Article 1 applies to peoples organised as States and colonial peoples"); Malgosia Fitzmaurice, *The Question of Indigenous Peoples' Rights: A Time for Reappraisal?*, *in* STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW 349, 357 (Duncan French ed., 2013) (explaining that in the 1960s "the predominant view was that the term 'peoples' in Article 1 was understood as all inhabitants of a State or a colony").

269. *See* the discussion *supra* Section II.A.1; *see also* Gilbert, *supra* note 86, at 327–32 (summarizing the evolving interpretation of self-determination to include an internal aspect applicable to subnational peoples).

270. Simpson, *supra* note 44, at 258–59 (noting that self-determination has been invoked "by, and on behalf of, non-state populations as diverse as the Kurds, the Quebecois, the Basques, the Scots, the Palestinians, the East Timorese, and the Tamils"); JONAS BENS, THE INDIGENOUS PARADOX: RIGHTS, SOVEREIGNTY, AND CULTURE IN THE AMERICAS 13–14 (2020) (discussing how Indigenous rights advocates have harnessed UNDRIP and other international authority to promote domestic reforms).

271. Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U. J. INT'L L. & POL. 189, 238, 217 (2001) (during the drafting of UNDRIP, representatives of Indigenous peoples "proposed incorporation of a version of Article 1(1) of the 1966 Covenants . . . , modified to state expressly that the right of self-determination belonged to indigenous peoples").

272. Edward L. Rubin, *Federalism as a Problem of Governance, Not of Doctrinal Warfare*, 59 ST. LOUIS L.J. 1117, 1124–26 (2015) (describing a multitude of autonomy regimes, from the creation of autonomous regions in places like Scotland, Catalonia and Sicily to frameworks for particular Indigenous groups in Russia, Australia, and the United States).

minority groups or raised questions about the extent to which purported autonomy measures have been implemented.[273]

The Inter-American Court of Human Rights' interpretation of the American Convention as implicitly requiring a variety of participation rights is another example.[274] The signatories to that Convention may not have realized that in agreeing to recognize various general human rights—such as a right of everyone to use and enjoy property—they would ultimately be found to have committed to certain specific safeguards for Indigenous and traditional communities. Yet once the Court reached that interpretation, states were bound to implement these participation rights vertically into their domestic laws.[275]

Similarly, the World Bank and IMF (two organizations created by states via international agreement) have often encouraged or required states to devolve regulatory powers to lower-level political subdivisions[276] or engage in benefit-sharing with local communities.[277] The creation of these bodies is thus yet another example of a decision by states to share authority on the international plane leading indirectly to new sovereignty allocations on the domestic plane.

None of these examples are intended to caution against the creation of international organizations or the signing of human rights agreements. To the contrary, certain power-sharing and participatory arrangements that these actions helped bring about represent vital protections for groups and individuals at risk of discrimination, violence, and other serious threats.[278]

---

273. *See, e.g.*, U.N. OFF. HIGH COMM'R FOR HUMAN RTS., MINORITY RIGHTS: INTERNATIONAL STANDARDS AND GUIDANCE FOR IMPLEMENTATION 41 (2010) (identifying risks of violence, discrimination, and other threats to minority groups and individuals, and observing that "rights, identity and culture can be strengthened through the introduction and promotion of certain forms of self-governance, including territorial or cultural autonomy"); Kelley Loper, *Substantive Equality in International Human Rights Law and its Relevance for the Resolution of Tibetan Autonomy Claims*, 37 N.C. J. INT'L L. 1, 44 (2011) ("When interacting with the Chinese government through the state reporting process, human rights treaty bodies . . . have raised issues related to the implementation of autonomy as well as minority language and education policies.").

274. *See supra* Section II.A.3.a.

275. Ward, *supra* note 10, at 84 ("Within . . . the Inter-American System, respecting the right to consultation requires that States adopt legislation in order to implement indigenous peoples' participation rights.").

276. MANSURI & RAO, *supra* note 238, at 1 (discussing World Bank initiatives to promote and fund decentralization measures); Bardhan & Mookherjee, *supra* note 265, at 17 (asserting that Brazil adopted sweeping decentralization measures under pressure from the World Bank and IMF).

277. *See* MANSURI & RAO, *supra* note 238, at 1 (explaining that the World Bank has sought to "bring villages, urban neighborhoods, or other household groupings into the process of managing development resources without relying on formally constituted local governments"); Dupuy, *supra* note 239, at 209 (asserting that Sierra Leone's decision to adopt new revenue-sharing requirements resulted from pressure from the World Bank and other international organizations).

278. *See* Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439, 450 (1990) ("Sometimes the prosperity of the group and its self-respect are aided by, sometimes they may be impossible to secure without, the group's enjoying political sovereignty over its own affairs.");

Moreover, as argued in greater detail below in Part III.C, granting new authority and influence to subnational actors has benefited states themselves in several ways. Nevertheless, there is no doubt that horizontal sovereignty-sharing has helped nudge states beyond what would otherwise be more conservative tendencies, incrementally producing new vertical arrangements that states might have been reluctant to embrace all at once.

B. Domestic Power-Sharing or Participation that Stimulates or Transmutes into International Authority

As profound of an influence as horizontal sovereignty-sharing can have on states' domestic orders, it represents only one-half of a broader dialectic. Similar stimulation can happen in reverse: when states confer new rights vertically on subnational actors, it can result in even more horizontal sovereignty-sharing.

One way this can occur is if states allow individuals or groups to participate in their sovereign processes in particular ways, and states' positive experience with these arrangements prompts them to adopt parallel frameworks internationally, which call for yet further participation. This happened, for example, when states created domestic EIA regimes featuring public participation, and later the same states adopted international agreements that contained similar participation requirements.

The first such domestic EIA regime was established by the National Environmental Policy Act of 1969 (NEPA) in the United States.[279] This legislation and its implementing regulations made public participation a core part of the EIA process, which soon federal agencies and other entities considered indispensable to the quality and legitimacy of environmental decision-making.[280] NEPA inspired similar EIA regimes around the world,[281] including in the European Union, which by 1985 required all

---

Tina Kempin Reuter, *Dealing with Claims of Ethnic Minorities in International Law*, 24 CONN. J. INT'L L. 201, 228 (2009) (discussing evidence that autonomy can help avert "violent ethnic conflict and gross human rights violations"); Siegfried Wiessner, *Re-Enchanting the World: Indigenous Peoples' Rights as Essential Parts of a Holistic Human Rights Regime*, 15 UCLA J. INT'L L. & FOREIGN AFFS. 239, 286 (2010) (noting that the Inter-American Court of Human Rights "radically re-interpreted the right to property," but that the court's safeguards are essential to address threats to Indigenous peoples' spirituality, traditions, languages, territories, and physical security).

279. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C.); Karkkainen, *supra* note 226, at 948 (describing NEPA as "the world's first statute to insist on comprehensive [EIA]").

280. NAT'L RSCH. COUNCIL, PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENT AND DECISION MAKING 50 (Thomas Dietz & Paul C. Stern eds., 2008) (explaining that federal agencies see public participation "as a means of making their decisions more broadly acceptable to the public").

281. *See* Karkkainen, *supra* note 226, at 948 (discussing the influence of NEPA internationally).

member states to have participatory EIA regimes.[282] Thereafter, countries with NEPA-inspired domestic legislation negotiated multilateral international agreements that likewise required participatory EIAs and even elaborated upon domestic precedent.[283]

Vertical sovereignty-sharing can also transmute into horizontal sovereignty-sharing if the granting of particular rights to subnational actors becomes sufficiently pervasive that the practice achieves the status of a general principle of law or of a customary international norm. The Inter-American Court of Human Rights has asserted, for example, that the practice of consulting with Indigenous communities has become so common that it has achieved the status of a general principle of law.[284] Others contend that the practice has become or is developing into a customary norm.[285] If either is true, then other states may be obliged to comply with the practice even if they have not signed a treaty requiring it.

Similar arguments are sometimes made about the increasingly widespread practice of granting forms of self-government to Indigenous groups and other distinct subnational peoples.[286] Further, it is not beyond the realm of possibility that one day a minimum degree of power-sharing could be recognized as obligatory even beyond the context of subnational peoples, in light of how extensive the trend is for states to devolve authority to lower-level political subdivisions nationwide.

That prospect—together with existing authority attesting to a right of internal self-determination on the part of subnational peoples—shows just how far we have come from Westphalian sovereignty. Not only does sovereignty no longer *require* authority to be concentrated in the national state; in today's world monolithic state authority is arguably not even *allowed*.

---

282. *See* Council Directive 85/337/EEC, art. 6, 1985 O.J. (L 175) (specifying obligations to provide information to the public and opportunities to comment).

283. *See* John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT'L L. 291, 300 (2002) (discussing the Espoo Convention and other international agreements that reflect public participation requirements in preexisting domestic legislation, while going beyond domestic precedent by requiring participation rights for certain foreign nationals).

284. Kichwa Indigenous People of Sarayaku v. Ecuador, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 242, ¶ 164 (June 27, 2012) (holding that "the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law").

285. Ward, *supra* note 10275, at 84 (arguing that an obligation to consult with Indigenous peoples prior to exploring for or exploiting resources within their territories is developing into a customary norm).

286. *See, e.g.*, Wiessner, *supra* note 278, at 277 ("A global review of state practice, combined with the requisite *opinio juris*, has led to the finding of an indigenous people's right to a wide range of autonomy under customary international law.").

C. The Value of Tracing the Dialectic and Viewing It through a Sovereignty-Sharing Lens

That international developments can spur changes at the domestic level and vice versa is not remarkable in and of itself. Yet there is much to be gained from identifying the specific ways in which these interactions occur in the context of governance and participation rights and viewing these phenomena through a sovereignty-sharing lens.

One advantage of this approach is that it helps explain how new governance and participation rights have spread so rapidly in recent years. As previously noted, when states decide to share authority on one level, it triggers pressure to do so in new ways on the other level as well. This pressure gives rise to a cause-effect sequence in which the outputs of the system circle back and become inputs, resulting in new sovereignty allocations at an accelerating rate.

Understanding these interactions also highlights that when states cede aspects of their own authority it often has consequences that they never could have anticipated. To put it metaphorically, when states sign onto international authority, form international organizations, or grant new rights or powers to subnational actors, they create golems that will operate to some extent beyond their control.

Whether these golems produce beneficial or harmful results may depend on the context and on one's perspective. For example, many commentators have characterized investment treaties signed by states as unduly limiting those states' ability to regulate business activity carried out by foreign investors.[287] Others have criticized measures imposed by the IMF as creating excessive social costs and exacerbating—rather than alleviating—economic turmoil.[288] Some have also at times questioned the wisdom of devolving powers to lower-level authorities, which may be corrupt or lack the capacity to manage functions effectively.[289]

Nevertheless, when an international agreement or body encourages change in a domestic system it will often be to promote good governance

---

287. *See, e.g.*, George K. Foster, *Investor-Community Conflicts in Investor-State Dispute Settlement: Rethinking "Reasonable Expectations" and Expecting More from Investors*, 69 AM. U. L. REV. 105, 108–11 (2019) (critiquing a line of cases in investor-state arbitration in which tribunals found states liable for canceling projects in response to public outcries over environmental and social impacts); Barnali Choudhury, *International Investment Law and Noneconomic Issues*, 53 VAND. J. TRANSNAT'L L. 1, 4 (2020) ("[T]he provisions of investment treaties may thwart state efforts to regulate the effects of foreign investment in relation to social goals, such as those relating to human rights protection and the environment.").

288. *See, e.g.*, Wolff, *supra* note 53, at 109–10.

289. *See, e.g.*, Charles Palmer & Stefanie Engel, *For Better or for Worse? Local Impacts of the Decentralization of Indonesia's Forest Sector*, 35 WORLD DEV. 2131, 2136–38 (2007) (asserting that decentralization in Indonesia resulted in an increase in logging, local rent-seeking, corruption, and elite capture).

and respect for human rights—as when states share benefits with local communities or give them a voice in public affairs. Furthermore, as much as states may sometimes regret particular results of the dialectic, they engage in sovereignty-sharing in the first instance because they believe it will be in their own interest. The simple fact is that states can no longer hoard authority as they once attempted to do. They *need* to share sovereignty in some contexts to maintain their legitimacy, reduce separatist pressures, and otherwise respond to economic, social, and political challenges.[290] States may sometimes cede too much authority or fail to incorporate adequate safeguards for the public interest when empowering other actors, but retaining unilateral control is generally not an option in this age of globalization and increasing local assertiveness.

Finally, viewing recent changes in the international and domestic orders in terms of sovereignty-sharing helps reconcile these developments with sovereignty, while providing insights into how sovereignty is changing. This perspective notably calls into question the orthodox position that, by virtue of sovereignty, states have complete discretion to design their own political systems and determine how power is allocated within them.[291] This Article has presented abundant examples of states adjusting their domestic systems in response to international pressures. It has suggested, moreover, that some such adjustments may now be required by customary international law—at least at a general level, with the specifics left to the state. If that proposition is accepted, then these international norms do not violate sovereignty but follow as the natural consequence of states' decisions to share sovereignty in particular ways. Sovereignty must therefore have evolved to allow these external influences, by becoming more malleable, nuanced, and multilayered.

---

290. Bardhan & Mookerjee, *supra* note 265, at 18–32 (surveying decentralization measures in multiple countries in Latin America, Africa, and Asia, and concluding that the dominant motive in a majority of cases was to buttress the legitimacy of the national government or quell separatist tendencies); Catherine Schenk, *The IMF Remains the Lender of Last Resort–Literally*, CHATHAM HOUSE (June 22, 2018), https://www.chathamhouse.org/2018/06/imf-remains-lender-last-resort-literally [https://perma.cc/HF36-CKJL] ("The stigma attached to seeking help from the International Monetary Fund means countries try to avoid it wherever possible. But there are still no better options for struggling emerging markets.").

291. *See, e.g.*, KRASNER, *supra* note 64, at 24 (asserting that rulers are "free to choose the institutions and policies they regard as optimal," and that "sovereignty is violated when external actors influence or determine domestic authority structures"); Gregory H. Fox, *Democracy, Right to, International Protection*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW § 7 (Mar. 2008) (asserting that sovereignty gives states autonomy in designing governmental institutions and a fundamental right to choose and implement their own political, economic and social systems).

CONCLUSION

This Article has sought to build on the existing literature regarding sovereignty by developing two principal claims.

First, sovereignty is more than control over governance and resources; it also consists of opportunities for groups and individuals to participate in sovereign prerogatives short of control. Such participation rights have spread widely in recent decades on both the international and domestic levels, as states have come to view public participation as essential to their legitimacy. The creation of these rights has occurred so extensively, in fact, that certain forms of participation are arguably now required by an emerging international norm or meta-norm—the Participation Principle.

Second, the horizontal and vertical forms of sovereignty-sharing interact with and stimulate one another in a dialectical process. That is, when states share sovereignty on one level it often results in further sovereignty-sharing on the other: a feedback loop that helps account for the rapid rate of change that has occurred in the international and domestic orders.

Going forward, there is every reason to expect that states will continue to cede authority and influence to other actors, and that sovereignty will become ever more pluralistic as a result. Still, this trend does not necessarily mean that large states with powerful central governments will eventually become a thing of the past, as some have suggested. There may always be a role to be played by a coordinating national authority, and distinct subnational peoples and minority groups may continue to find it advantageous in some instances to remain part of a larger national community. These outcomes will become more likely rather than less so if national states continue to give subnational actors control over aspects of governance in which they have a direct and pronounced stake, and meaningful opportunities to participate in the rest.