



# Indigenous Peoples' Rights in Constitutions Assessment Tool



# Indigenous Peoples' Rights in Constitutions Assessment Tool

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Sarrita's Ancestors paintings are layered with dots. Markings made on the land over thousands of years can be seen entangled with patterns covering the land today, such as sand hills, flora and paths made by humans and animals. Beneath the land are the waterways which have been virtually constant over time feeding the land, the flora, fauna and humans. These are the same waterways that supplied our ancestors which are now one with the land.

ISBN: 978-91-7671-324-2(PDF)

DOI: <https://doi.org/10.31752/idea.2020.37>

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# Foreword

The International Working Group for Indigenous Affairs (IWGIA) works for a world where indigenous peoples' voices are heard and their rights are implemented. Since 1968, IWGIA has worked through partnerships with indigenous organizations and international institutions to promote recognition and implementation of the rights of indigenous peoples. The *Indigenous Peoples' Rights in Constitutions Assessment Tool* will meaningfully enable this work by assisting indigenous communities and advocates, as well as allies in the promotion of indigenous rights, to understand the scope and possibilities of promoting international rights and standards through domestic legal recognition.

Through its partnerships and work on capacity-building and advocacy, as well as the yearly documentation and research for compiling *The Indigenous World* publication, IWGIA is well aware of the import of constitutions for protecting indigenous peoples' rights. As a pioneer in defining the sphere of indigenous rights, IWGIA notes the importance of internationally protected rights and standards, but also that to realize true empowerment, equality and access to land and other resources for indigenous peoples, it is critical to protect their rights domestically, in the countries where they reside. Yet before this Assessment Tool, there was no collected or holistic inventory of constitutional practice for protecting indigenous peoples' rights.

To fully enjoy their rights, including to participate in and be consulted on decisions that affect their lives, IWGIA believes that indigenous peoples need platforms that meaningfully operationalize principles and rights such as those of self-determination and autonomy. These, as well as many other indigenous peoples' issues, are complex and often difficult to design and advocate for. This Assessment Tool will help indigenous peoples and other users not only to document the status of their rights in the country in which they reside, but also to engage in evidence-based advocacy for enhancements to the mechanisms and rights in practice.

By documenting the incredible scope and diversity in global comparative practice—spanning constitutions but also laws, peace agreements and innovative institutions—the *Indigenous Peoples' Rights in Constitutions Assessment Tool* supports international and domestic advocacy efforts to help governments and peoples understand good practice and experience in protecting indigenous peoples' rights. The Assessment Tool provides a nuanced user-friendly methodology for approaching complex issues that are often overly politicized, allowing for systematic and evidence-based discussion of these critical and sensitive issues. Furthermore, the format of the Assessment Tool makes these issues accessible to a variety of users with different capacities and perspectives. It also builds clear links between international rights and standards and options for incorporating these into domestic legal frameworks and government structures. In this way, the Assessment Tool can help governments and international experts and organizations understand and advise on these options.

Recognition of indigenous peoples' rights has become increasingly imperative as crises such as climate change and pandemics highlight the continued vulnerability of indigenous peoples and the impact that systemic marginalization and dispossession continue to have on their lives and communities. At a time when it is more important than ever to enable innovative, sustainable and effective protection and promotion of indigenous peoples' rights, International IDEA's Assessment Tool provides all of us dedicated to this issue with an actionable methodology to pursue our work. The Assessment Tool will certainly help IWGIA and the communities it partners with as we work to ensure a world where indigenous peoples can sustain and develop their societies based on their own practices, priorities and visions.

*International Working Group for Indigenous Affairs*

# Preface

The *Indigenous Peoples' Rights in Constitutions Assessment Tool* is a keystone publication which continues International IDEA's work on marginalized peoples and inclusive constitution-building. Its publication in the year of the COVID-19 pandemic is timely. The coronavirus (COVID-19) pandemic poses a grave threat to indigenous peoples around the world. As per a UN Statement, indigenous peoples' traditional lifestyles are a source of their resiliency and can also pose a threat at this time in preventing the spread of the virus (United Nations 2020). Many indigenous communities regularly organize large traditional gatherings to mark special events, for example harvests and coming of age ceremonies, and also live in joint family settings, with close proximity to elders. As the number of COVID-19 infections rises worldwide, data on the rate of infection in indigenous peoples are either not yet available or not yet disaggregated by ethnicity since indigenous groups lack formal recognition from the government. Relevant information about infectious diseases and preventive measures is also not available in indigenous languages.

Although these issues have arisen in the context of the pandemic, they reflect more systematic patterns of discrimination and the ways in which protecting indigenous peoples' rights in domestic legal frameworks can help to address and change these patterns. In this way, the pandemic has highlighted the intersection between constitutional rights and lived realities of indigenous peoples; highlighting, also, the need for this Assessment Tool.

Constitutions set up platforms for better realizing the international rights promised to indigenous peoples in the United Nations Declaration on the Rights of Indigenous Peoples, ILO Convention No. 169 and other instruments. The *Indigenous Peoples' Rights in Constitutions Assessment Tool* showcases the diversity of practice globally in protecting and promoting indigenous rights and presents a user-friendly layout to help people understand constitutional practice broadly, but also to assess the specific framework for indigenous peoples' rights in a country of interest. The methodology is based on International IDEA's *Constitution Assessment for Women's Equality*.

Through its presentation of international standards and comparative good practice examples from constitutions and legislation from Africa, the Americas, Asia and the Pacific, and Europe, the Assessment Tool guides users through an analysis of constitutional language, and also allows for a better understanding of the potentialities of how constitutions can protect and promote indigenous peoples' rights, primarily by seeing how other countries have addressed these issues in their constitutions. The Assessment Tool can be used by indigenous peoples' organizations and advocates for evidence-based advocacy, as well as by state governments and other actors involved in designing and implementing constitutions.

Those involved in shaping constitution-building require access to practical methodologies and relevant comparative knowledge to ensure that constitutions' potential to protect human rights is harnessed. The development and sharing of comparative knowledge about constitution-building is one of International IDEA's key ways of working, and this Assessment Tool draws together this comparative knowledge and expertise, applying it for the first time in a rights-based approach to indigenous peoples' rights.

The Institute has a long record of supporting enhanced inclusive participation and representation in politics, whether by working with members of parliament or elected officials, or with civil society and citizen engagement initiatives at the local and national levels. This Assessment Tool will support International IDEA in expanding and reinforcing this track record.

The *Indigenous Peoples' Rights in Constitutions Assessment Tool* is an invaluable addition to the tools and resources offered by International IDEA to make constitution-building more accessible, more understandable, and ultimately more responsive to all peoples.

*Dr Kevin Casas-Zamora  
Secretary-General  
International IDEA*

# Acknowledgements

We would like to thank everyone who has been involved in the development of the *Indigenous Peoples' Rights in Constitutions Assessment Tool*; it has benefitted hugely from diverse perspectives and inputs.

Thanks especially go to the expert reviewers: Jeremie Gilbert, Sakuntala Kadirgamar and Shireen Morris; and to the indigenous peoples' organizations that helped to test and refine the Assessment Tool, namely: the Lawyers Association for the Human Rights of Nepalese Indigenous Peoples (LAHURNIP) and Indigenous Peoples Partnership (IPP) in Myanmar, as well as to representatives of indigenous communities in Mindanao, the Philippines, who participated in a pilot workshop of the Assessment Tool, co-hosted with the Institute of Autonomy and Governance, in July 2019. These reviews and pilots were critical for ensuring the *Indigenous Peoples' Rights in Constitutions Assessment Tool* was not developed in a vacuum and that it would be truly useful for the stakeholders it is designed for.

At International IDEA, Leena Rikkilä Tamang, Director of International IDEA's Asia and the Pacific programme, provided constant support for this project over the years, believing in its importance from the beginning; Erin Houlihan in the Constitution-Building programme provided invaluable research and inputs; and Lisa Hagman in the Publications team went above and beyond to help see the Assessment Tool through in its current form.

Our designer, Richard van Rooijen, and copy-editor, Sarah Chatwin at Accuracy Matters, took their roles to a new level and have also significantly shaped the *Indigenous Peoples' Rights in Constitutions Assessment Tool* with their expert inputs.

International IDEA is grateful for each and all of your contributions.

# Introduction

The *Indigenous Peoples' Rights in Constitutions Assessment Tool* helps users to analyse a constitution, draft constitution or constitutional amendment from the perspective of indigenous peoples' rights. Using a series of questions, short explanations and example provisions from constitutions around the world, the Assessment Tool guides its users through the text of a constitution and allows for systematic analysis of the language and provisions of a constitutional text to assess how robustly indigenous peoples' rights are reflected in it. It also enables users to make a comparison with other countries, to see how they have addressed these issues in their constitutions and national legislation. The Assessment Tool is structured to enable practical applicability; in providing sample language and comparative practices, it not only allows users to identify and prioritize issues for advocacy or language for a constitutional amendment but also ensures that these efforts are evidence based, providing users with a wealth of examples to draw on for inspiration.

This Assessment Tool is designed for indigenous peoples' rights advocates, as well as those who are engaging in the topic of protection and promotion of the constitutional rights of indigenous peoples for the first time, whether as members of a constituent assembly, constitutional drafters, civil society members, lawyers, judges or concerned individuals. Since the rights of indigenous peoples affect the quality of democracy and society, the Assessment Tool is a resource for all who are interested in better understanding and/or promoting indigenous peoples' rights, and human rights more broadly, through constitution-building.

The Assessment Tool draws on comparative provisions from constitutions in Africa, Asia, Europe, North and Latin America, and Oceania. It provides examples from these regions in order to illustrate practice from a wide selection of countries and from countries whose constitutions may not be as widely studied or accessible as those from Europe and North America. Given that recognizing indigenous peoples in constitutions is a relatively new constitutional trend, examples from legislation are also included in the Assessment Tool to provide more language for comparative analysis.

The questions in the Assessment Tool are informed by the standards contained in international and regional instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the International Labour Organization's Indigenous and Tribal Peoples Convention (ILO Convention 169), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Chapter 1 outlines the reasons why indigenous peoples' rights should be constitutionally protected, and why and when a constitution assessment tool is helpful. Chapter 2 explains the format and structure of the Assessment Tool, and how to use it. Chapter 3 discusses the key concepts that are integral to the Assessment Tool and to indigenous peoples and their relationships with governments. Chapter 4 is the Assessment Tool questionnaire itself, composed of 34 questions divided into 8 sections:

- I. Recognition and citizenship
- II. Right to equality and anti-discrimination
- III. Foundations for indigenous peoples' rights
- IV. Autonomy: Agreement-making and self-government
- V. Consultation, political participation and representation
- VI. Land, territories and natural resources rights
- VII. Right to culture, and social and economic development
- VIII. Protecting and promoting indigenous peoples' rights

The *Indigenous Peoples' Rights in Constitutions Assessment Tool* concludes with a list of references and further reading relating to indigenous peoples' rights, followed by annexes with the text of ILO Convention 169 and UNDRIP.





# **1. Assessing indigenous peoples' rights in constitutions**

## 1.1. Why include indigenous peoples' rights in the constitution?

A constitution articulates a vision that reflects a state's values and history, as well as its aspirational objectives for the future. As the supreme law of a state, the constitution defines its structure and institutions, distributes political power, and recognizes and protects fundamental rights, critically determining the relationship between citizens and governments.<sup>1</sup> Embedding in a constitution recognition of and rights-based protections for specific groups, such as indigenous peoples, can give these groups and their rights enhanced protection. This can be furthered by providing for specialized institutions and processes to deepen the realization of those rights in practice. As Eva Josefsen, Associate Professor at the University of Tromsø, has noted: 'If there's one thing that's important, it's having a legal foundation', which she says 'serves as a much more concrete foundation than any government decision' (Watson and Quince 2018). Indeed, a constitution can provide the strongest foundation of all to ensure that indigenous peoples' rights are protected and promoted.

A constitution can support the advancement of indigenous peoples in political life as well as in economic and social life, as it regulates relations not only between the state and its citizens, but also among individuals, organizations and businesses. Constitutions can contribute to the respect of indigenous peoples' rights in many ways, as this Assessment Tool illustrates, but there are a few ways that should be identified as fundamental:

- Constitutions may include provisions that contain clear and enforceable protection of fundamental human rights, compelling the public authorities to protect and fulfil these rights, and acting as a powerful indication of the state's commitment to indigenous peoples' rights. These could be general human rights—such as non-discrimination and equality—or indigenous-specific rights such as the right to mother-tongue education, the recognition of traditional institutions, and specialized ownership schemes for land and intellectual property.
- Indigenous peoples have a distinct legal status under international law, with a corresponding set of specialized rights. Constitutions can also guarantee, in domestic law, the commitments made by a government in treaties and other agreements. Constitutions, given their binding nature on all citizens including government actors, are particularly important for ensuring legal commitments to the rights and provisions in non-binding international instruments such as UNDRIP. While declarations and treaty ratifications represent commitments to principles and standards, constitutions represent legally enforceable commitments to certain rights and protections at the state level. As such, recognizing indigenous peoples as rights holders in a state's constitution empowers them to hold governments to account over the protection and promotion of their rights.
- Constitutions can provide recognition of indigenous peoples' rights and equality to send a strong signal of a state's values to its people, including to groups that might resist policies that promote indigenous peoples' rights. Recognition of multiple national languages and cultures in the constitution also signals a particular understanding of who constitutes 'the people' of a nation-state.
- The fact that constitutions are more difficult to change than regular laws, and are not subject to the changing policy preferences of politicians and political parties, means that specific provisions to protect and promote indigenous peoples' rights are more effective than statutory law alone.

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<sup>1</sup> For an introduction to constitutions, see *What is a Constitution?* (Bulmer 2014). The complete series of International IDEA Constitution-Building Primers is available at: <<http://www.constitutionnet.org/primers>>. You can view a short video, also entitled 'What is a Constitution?', at <<https://www.idea.int/news-media/media/what-constitution>>.

- Constitutional provisions that protect indigenous peoples' rights have the potential to shape the content of legislation and executive policies, and increase the likelihood of court decisions that are favourable to indigenous peoples' rights. Constitutions declare important legal principles that can be enforced and positively interpreted by courts and the judiciary, as well as by legislatures.
- Constitutions can recognize more than one source of law and can empower different law-makers—for example, by recognizing the use of customary law or the enforceability and validity of historic agreements and treaties, and indigenous peoples' rights to forge new agreements.
- Constitutions can establish institutions and assign them with particular powers—for example, an indigenous peoples commission or a specialized representative or consultative body to promote indigenous peoples' perspectives and rights in governance. The design of political institutions and administrative processes is essential to achieving substantive equality and supporting indigenous peoples' rights. Designing institutions and processes that are accessible to, representative of and responsive to indigenous peoples' lived realities means considering how these processes and institutions may affect and interact with indigenous and non-indigenous populations differently. Examples of such responsive design include electoral systems that facilitate the election of indigenous peoples through their customary practices, judicial appointment mechanisms that facilitate the appointment of indigenous judges, the establishment of independent monitoring bodies such as a commission for the rights of indigenous peoples, and broad rules of standing that promote access to justice for indigenous peoples and other marginalized communities.
- Constitutions can establish new levels of government, sources of autonomy and territorial divisions in a country, allowing for the realization of indigenous peoples' rights to self-determination, autonomy and self-government—for example, by recognizing autonomous areas within a national territory.
- Constitutional recognition of indigenous peoples' identity, specialized rights and processes, and constitutional commitments to equality and non-discrimination, can be transformative. States forged through colonization or conflict often have a history of discrimination, dispossession and exclusion of indigenous peoples. In light of such histories, constitutions can contain provisions intended to provide reparations for this treatment by positively recognizing indigenous peoples and protecting their rights, so as to prevent the recurrence of injustice, discrimination and exclusion. When such provisions, rights and measures are included in a constitution, they can be a way of committing to principles of fairness and inclusion. In states where indigenous peoples are a minority, measures for constitutional recognition and protection of indigenous peoples' rights can be particularly important. They are a way of ensuring that indigenous peoples can prosper as distinct peoples within the state, while still participating equitably in the state's democratic processes and institutions as equal citizens.

## 1.2. Why and when is a constitution assessment tool on indigenous peoples' rights helpful?

Indigenous peoples' rights are complex and multi-faceted, cutting across many different areas that a constitution might address—for example, representation in institutions, land and natural resource rights, and rights to traditional justice institutions and practices. As such, it is not easy to simply ask whether a constitution protects indigenous peoples' rights or not. Rather, a systemic analysis

is needed, to enable assessment of the constitution both holistically and across the many areas that are relevant to indigenous peoples' rights and interests. This Assessment Tool was primarily designed to provide a framework and methodology for such analysis. Assessing a constitution can be relevant at any time in its lifetime, as constitution-building is now 'defined expansively as a long-term and historical process. It is not an event and is not equated with constitution making—the period when a constitution is drafted . . . [it] includes establishing institutions, procedures and rules for constitution making or drafting, giving legal effect to the constitution, and implementation' (Böckenförde, Hedling and Wahiu 2011: 2). As such, it is always critical that citizens understand their constitutions and how well they protect their rights and interests; this understanding provides an important basis for citizen engagement in government processes, and also allows for advocacy for better implementation of the constitution and, in some situations, for constitutional reform.

Constitutions only become a reality for people when they are effectively implemented, so the task of assessing a constitution requires looking beyond the text alone. It also requires examination of the institutions and laws and court decisions that succeed or fail in transforming constitutional commitments into reality. While the Assessment Tool does not address the constitution-building process in its entirety, it prepares indigenous peoples' rights advocates to participate in the process more effectively. The Assessment Tool does this by enabling users to deeply familiarize themselves with the constitution or draft, alerting them to the scope of issues that the constitution may address, informing them about good practice around the world and helping them to identify priorities for change. By knowing what the constitution mandates in terms of indigenous peoples' rights, advocates can better monitor the behaviour and performance of institutions and political actors to make sure that they are respecting the constitution. The Assessment Tool can be used to identify not only those areas that are suitable for constitutional change, but also those areas that might be right for sub-constitutional change over the course of long-term constitution-building. This means that one of the findings noted down in the Findings section when using this Assessment Tool might actually be to pursue a new law or policy rather than to advocate for constitutional reform.

### *Using the Assessment Tool in the context of constitutional reform*

As the internationally recognized right to participation has expanded to encompass constitutional reform, it has become the norm to see increasingly open and participatory constitution-building processes, and these are considered critical to the legitimacy of a new constitution. Constitutional reform, formerly a closed and elite-driven process, is now most often participatory to varying degrees.

In such participatory constitutional reform processes, citizens play a critical role, requiring mechanisms for citizen engagement and education to promote understanding of the key issues and the process itself, often including formal public consultation mechanisms to facilitate citizen input into the content of the new constitution or constitutional amendment. Referendums in which the public can vote to accept or reject the proposed draft constitution or amendment are also increasingly common. These mechanisms, designed to make constitution-building more democratic by involving citizens and democratically elected bodies, have opened spaces for all citizens—including indigenous peoples—to participate. Constitutional reform is not just for constitutional lawyers and high-level politicians: all citizens have a right to participate in how the constitution is made and to have a say in what it contains and how it is implemented. No particular academic degree, political experience or social position is required.

Participatory processes have opened up space for indigenous peoples to engage as elected representatives and political party members, as members of civil society and academia, and as citizens and voters in constitutional reform processes. Around the world, constitutional reform has provided the opportunity to redefine the scope of who is considered a 'citizen' and to advocate for greater inclusion of an expanded understanding of human rights. Marginalized groups, such as lesbian, gay, bisexual, transgender and intersex (LGBTI) peoples, religious and ethnic minorities, women and the economically disadvantaged, have all successfully used the window of opportunity

created by constitutional reform to advocate for constitutional protection of their rights. Indigenous peoples, of course, are also part of these groups, with a constitution being an important indicator of a state's commitment to respect, protect and fulfil the rights of indigenous peoples, and an essential mechanism through which to push for a deepening of these commitments over time. In the case of indigenous peoples, the transformative power of constitutions, when harnessed, can also have a positive impact on reconciliation and transitional justice processes undertaken between governments and indigenous peoples, thereby contributing to state-building processes and enriching the social contract.

Indigenous peoples' rights include the right to be consulted in the development of all plans, laws and decisions that affect them as peoples, which is why ensuring indigenous peoples' participation in constitution-building generally, and in constitutional reform specifically, is very important. All constitutional and legislative measures for the recognition and protection of indigenous peoples' rights should be developed and implemented in negotiated partnership with indigenous peoples with the goal of obtaining their consent in good faith. A participatory approach to constitutional reform, in which indigenous peoples can participate—and influence—the law and decision-making processes of the state, is also a way for them to exercise their right to self-determination (APF and OHCHR 2013: 22). This requires that indigenous peoples are given the respect and agency to make choices that determine their own economic, social and political status. The Special Rapporteur has stated: 'Indigenous peoples succeed in improving their civic rights insofar as they participate democratically in the political process and the affairs of State' (United Nations 2006: para. 15).

Despite having a clear right to participate in constitutional reform, constitutions—and how they affect people's lives—remain difficult to understand for many people, especially for those who have faced historic marginalization. Constitutions can be daunting documents to read, and the impact and consequences of constitutional provisions can be difficult to envision. Without tools to help examine the current constitution, proposed drafts and the possibilities for reform, it is not easy for non-specialists to understand the present constitutional and governance context or to provide substantive inputs to reform processes. This Assessment Tool was developed to help in this process and to help ensure that indigenous peoples are able to advocate for and participate in constitutional reform as the opportunities arise.

# **2. How to use the Assessment Tool**



## 2.1. Getting started

An individual or group can complete the constitution assessment using the Assessment Tool. Working in a group to complete the assessment can be useful in order to discuss complex or confusing issues, such as the meaning of a constitutional provision or draft provision, the scope of a particular issue in a given country, and whether a particular issue is addressed in ordinary law.

In order to use the Assessment Tool, users need a copy of the constitution or draft constitution to be assessed. It may be helpful to have access to any key, relevant pieces of legislation as well—if these laws are not available, users can note down legal research as a follow-up action in the Actions section of the Assessment Tool. The Assessment Tool consists of 34 questions, which are divided into 8 sections based on the issues addressed in most contemporary constitutions. These draw on UNDRIP, the ILO Convention 169 and other core human rights treaties. The Assessment Tool is designed to be flexible: users can either answer all the questions for a comprehensive assessment of a constitution or draft constitution or focus on specific issues. The eight sections are:

- I. Recognition and citizenship
- II. Right to equality and anti-discrimination
- III. Foundations for indigenous peoples' rights
- IV. Autonomy: Agreement-making and self-government
- V. Consultation, political participation and representation
- VI. Land, territories and natural resources rights
- VII. Right to culture, and social and economic development
- VIII. Protecting and promoting indigenous peoples' rights

Skimming through the entire Assessment Tool first—or, at a minimum, the list of questions—is recommended, so as to understand its format and the types of questions in each section. Users can then decide whether to complete all or some of the questions.

Similarly, it is advisable to read through and develop familiarity with the basic structure of the constitutional text under assessment. Pay attention to chapter and section headings to understand how it is organized. Provisions relevant to indigenous peoples' rights can be limited to a general section on rights or indigenous peoples or scattered throughout the constitution.

## 2.2. Structure of the Assessment Tool

It is important to note two critical things about the structure of the Assessment Tool:

1. The order of the sections and questions does not correspond to the importance or significance of the issue. The Assessment Tool is designed broadly to follow the flow of a constitution, recognizing that all constitutions have different structures. Some of the first questions can be considered 'threshold questions' in relation to others—for example, Question 1, 'Does the constitution specifically identify, recognize or define indigenous peoples, including protection of the right to self-identification?' If the answer to this question is 'No', and the constitution does not recognize indigenous peoples at all, then that indicates that the answers to the other questions in the Assessment Tool are likely to be 'No' as well.
2. Many of the questions and issues are inter-related. Topics have been broken down into discrete sections and questions, but this is not meant to deny their intertwined nature,

which should be kept in mind by the user. For example, Question 5 on special measures is fundamental in terms of considering the answer to other questions about representation in government institutions including the legislature and judiciary (e.g. whether there are quotas to guarantee representation). Some questions, specifically, are cross-cutting to all others—for example, the right to self-determination or culture.

### *Sections, questions and explanations*

Each of the eight thematic sections of the Assessment Tool contains a set of questions, and each question addresses one issue or one aspect of the section theme. The box underneath the question, headed ‘Explanation’, details the relevance of the question to indigenous peoples’ rights, from a constitutional perspective, and provides guidance for reading the comparative examples included (see below). If a user is unfamiliar with any of the terms in the explanation, they can consult Chapter 3 on key terms and concepts. The Further reading section at the end of this document also contains links to useful resources.

The questions are framed as requiring a Yes or No answer and should be answered in that way in the first instance, but users should not stop their analysis there. For example, taking Question 1, ‘Does the constitution specifically identify, recognize or define indigenous peoples, including protection of the right to self-identification?’, the initial answer to the question might be ‘No’ but a complete answer might be ‘No, the constitution does not specifically recognize or define indigenous peoples but it does recognize ethnic minorities’. With this complete answer, a user has narrowed in on an actionable advocacy point (i.e. ethnic minority as entry point for pushing for more specific recognition). Another answer could be ‘Yes’, but with the complete answer being ‘Yes, the constitution recognizes indigenous peoples but it does not include the right to self-identification’. The answer and further details should be recorded in the Findings section, with potential advocacy measures elaborated upon in the Actions section.

### *International standards and national examples*

Underneath the Explanation section of each question, a table lists the relevant provisions from international instruments and constitutions around the world that are examples of good practice in addressing the issue at hand. The first column lists the document name, country of origin and date of promulgation.<sup>2</sup> The second column lists the article number (and in some cases the chapter, section or sub-article) of the example provision. The third column lists the text of the example provision and the fourth column includes an explanation of why the particular example was included and what it is meant to demonstrate.

Note that the example standards and provisions are intended to help users understand the issue at hand and how other countries have addressed it in their constitutions and laws. These examples can be sources of inspiration for advocacy but are not necessarily recommendations. Common language has emerged around some issues, such as non-discrimination, and the examples provided in some cases illustrate an established or emerging consensus. However, each country context is unique, and each country’s particular legal framework and societal context must be considered when determining whether (and how) to address a particular issue.

### *Findings and Actions*

There are two blank boxes at the bottom, headed ‘Findings’ and ‘Actions’. Findings is for recording the answer to the question (Y/N and further details), and Actions is the place to develop and elaborate upon potential advocacy actions, as required.

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<sup>2</sup> For example, because the Constitution of Brazil was promulgated in 1988 the Assessment Tool refers to it as ‘Brazil Constitution, 1988’, despite the fact that it has undergone numerous amendments since that time. The text cited will encompass all amendments to date, but is still referred to by date of promulgation.



As the relevant provision(s) in the text under assessment are identified, make a note in the Findings section, including the article number(s) and the text of the provision(s). If there are provisions that are inconsistent or contradictory, these should also be noted in the Findings section. Observations should include analysis of how adequately the constitution addresses the issue(s) raised in each question, and the specific challenges that indigenous peoples face with regard to this issue in the country under examination. A complete answer would begin with the Y/N answer, and then elaborate by identifying: (a) relevant provisions in the constitutional text under assessment; (b) any information about the country context or issue on the ground; and (c) example provisions from other countries or international standards that are relevant to assessing the provision in the constitution under assessment.

The most critical section is Actions. This is the place to give details of evidence-based suggestions for improving the constitutional text under assessment, which can include specific suggestions on language backed up by international standards and comparative good practice from other countries. For constitution-makers and others engaged in processes of constitutional reform, proposed actions might include suggesting a specific provision be included in the constitution. This can help promote adherence to international treaties and conventions to which individual countries are parties. Falling short of constitutional advocacy or reform, there are many actions that could be included in the Actions section for other users of the Assessment Tool, such as civil society organizations and media actors. For example, radio campaigns, research projects to investigate how a particular provision is impacting communities, targeted dialogues with subnational and national officials to push for legislative or policy changes, and even renewed public commitments to indigenous peoples' rights.

Users should also look out for any provisions in the constitution or draft constitution that might be damaging to indigenous peoples' rights, even if they are unrelated to any of the questions. Users should take note of any such provisions, and include suggestions for improving or removing them, as part of completing the Findings and Actions sections.

## 2.3. Important considerations for users

### *Reading the constitution*

Constitutions differ in terms of their scope, content and structure, and the ways in which different systems of government and other institutional design choices are organized. These differences reflect several issues, including, for example, the age of the constitution (e.g. older constitutions tend to be shorter and less detailed), the historic trajectory of the country and relationship to particular constitutional traditions (e.g. past colonial history and legal or institutional conventions), and the outcomes of political settlements (e.g. related to peacebuilding processes or popular reform movements). Some common trends can be identified across constitutions developed during different periods, or waves, of constitution-building. Since the post-World War II era, for example, many countries have expanded constitutional protections of social, economic and cultural rights, while all constitutions developed since 2000 contain some guarantee to sex or gender equality. Yet to understand how a constitution has operated in the past, or how one may perform in the future, the document must be considered as a whole, keeping in mind the role of the judiciary and international legal obligations (among other factors), in influencing interpretation and implementation.

While individual provisions are the building blocks of a constitution, they must all be read together and understood in relation to each other—and in relation to the constitution as a whole. For example, a constitution may include a preamble or directive principles, which frame the state's values and objectives but do not necessarily give rise to specific enforceable rights. Nonetheless, all other parts of the constitution can be read in conjunction with these non-enforceable sections to understand the ultimate objectives of the provisions and pursue their intended implementation and impacts. For example, the legislature can reference these values in developing laws to implement and

fulfil the constitution; and the judiciary can reference them in interpreting the meaning of the law and of the constitutional provisions. As such, when one is reading provisions about the judiciary in the constitution, it is important not to read the text in isolation. Rather, it is helpful to think about how, for example, judicial independence is structured and protected, and who has standing to bring constitutional claims to court, and how the scope of judicial authority to interpret and uphold these connects to other provisions in the constitution, such as the directive principles or human rights.

Besides a holistic reading of the constitution, it is important to note that all constitutions are structured differently. Some, for example, contain a Bill of Rights in which all constitutionalized human rights are listed; others will mention different rights, such as those related to land or political participation, in the relevant sections of a constitution which deal with that topic more broadly. Moreover, sometimes clauses related to rights limitations are part of individual rights provisions, while in other cases there is a 'catch-all' limitation provision. In some constitutions, key rights or institutions expressly require implementing legislation (sometimes called 'by law' provisions), which means the scope of protection and mechanisms for realization will be negotiated in the law-making process.

Specifically, for indigenous peoples, it is important to consider whether indigenous peoples' rights are contained in one article or across many, and how broadly or specifically the rights are framed (and limited and/or balanced with other rights). For example, the Philippines Constitution has only one specific and simple mention of indigenous peoples' rights in the Constitution, which reads: 'The State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development' (Chapter 2, section 22). The rights are not themselves listed in the Constitution but are elaborated upon in national legislation. Nicaragua's Constitution is similar, albeit slightly more detailed in the rights recognized (article 5). Mexico (article 2A) and Bolivia (article 30) also both recognize indigenous peoples' rights in a single article, but these articles are accompanied by a long and highly specific list of such rights. The constitutions of Ecuador and Colombia, in comparison, weave indigenous peoples' rights throughout the constitution in relevant provisions (e.g. addressing rights to tribal courts in provisions sections on the judiciary).

To read a constitution using the Assessment Tool, start by taking key words and phrases from the question, explanation and example provisions to find the relevant section in the constitution or draft constitution under assessment. For example, Question 26 asks, 'Does the constitution recognize indigenous communities' rights to intellectual property ownership over their traditional knowledge and traditional cultural expressions?' The question provides some key phrases such as 'cultural expression' and 'traditional knowledge'; the explanation gives other potential key terms to search for, including 'handicrafts' and 'livelihoods'. Not all constitutions use the same terminology, however, so while a key word search is a useful start, be mindful that other terms may also be used.

It is also helpful to note that, while questions in the Assessment Tool will often relate to a single provision in the constitution, in some cases there may be multiple relevant provisions. For example, Question 8 asks, 'Does the constitution recognize collective rights? If so, is it a general recognition or specific to indigenous peoples?' There might be several provisions related to collective rights in different parts of the constitution—for example, in the preamble, in a provision on cultural rights or in a specific section on the rights of indigenous peoples. All relevant provisions should be noted, along with any institutional structures or principles that are relevant for interpretation, implementation and enforcement.

### *Scope of issues*

The Assessment Tool was designed to focus attention on issues that are fundamental to protecting, promoting and achieving the rights of indigenous peoples around the world. While some of the questions cover issues that are included in many newly written constitutions, most constitutions do not address every issue in the Assessment Tool. Similarly, not every issue in the Assessment Tool will be relevant to every country context and there might be issues in a given country that are not reflected in the Tool. Users should see the Assessment Tool as a way to think creatively about

constitutional options to improve substantive equality with regards to indigenous peoples and to ensure the respect of their rights.

This is why the Assessment Tool is adaptable—users can pick and choose which questions they choose to answer in applying it to their work. Even if an issue is not in the constitution, it is important to think about whether it may be already addressed, or best addressed, through ordinary law, judicial precedent or elsewhere, depending on the country and the nature of its constitution. Not everything should be in a constitution.

Some of the issues raised in the Assessment Tool may seem novel; that is part of the aim of the Assessment Tool, to help users think about issues in a new way—for example, issues that are not always thought of as constitutional. The Assessment Tool aims to inspire creativity, recognizing that constitution-building in its broadest sense is a unique opportunity to change the power relations between indigenous peoples and non-indigenous populations. Pioneering provisions that depart from a country's previous practices can be introduced and a country may be the first in the world to put forward a particular type of provision, paving the way for further innovation. Such ground-breaking changes may be related not only to indigenous peoples' rights, but also to human rights more broadly, the structure of government, constraints on the power of different branches of government, democratic processes such as elections, the creation of new institutions such as independent commissions, and many other issues. The Assessment Tool helps users to think about issues across this broad scope.

### *Looking beyond the constitutional text*

Indigenous peoples' rights advocates know that ensuring the respect of indigenous peoples' rights is much more complex than passing laws or even amending constitutions; it involves shifting the unequal power relations between indigenous peoples and more socially advantaged non-indigenous people in society, which requires changing deep-rooted social attitudes and patterns of behaviour over a long period of time.

Acknowledging this reality does not undermine the significance of the law and the constitution, or the importance of analysing how it could be improved from the perspective of indigenous peoples' rights. However, it highlights the importance of a nuanced appreciation of the political, economic and social context in which the constitution operates, and of the challenges that both indigenous peoples and non-indigenous populations face which might have myriad root causes. The Assessment Tool is meant to provide a methodology for systematic analysis of constitutional text and a link between this text and the lived realities of indigenous peoples; but it is limited in its capacity to capture or describe these lived realities. Rather, the Assessment Tool is meant to help users develop the right questions and think about legal causes, and potential legal solutions, to the challenges they are facing.

## **2.4. How to use the completed assessment**

### *Assessment not judgement*

This Assessment Tool is meant to be relatively objective and should be used like a checklist to guide users through a process of analysing how well indigenous peoples' rights are represented in a constitution. It does not result in a grade for a constitution or suggest that one country's constitution is better than another's. Rather, the effort is to encourage evidence-based scrutiny and advocacy to improve the state's legal and institutional framework from the perspective of indigenous peoples and their rights.

## *Being a constitutional advocate*


The Actions section is meant to assist users in developing a strategy for using the findings.<sup>3</sup> This strategy will depend in part on the user's role within the constitution-building process, be it as an advocate or lawyer, a journalist, a constitution-maker or a concerned citizen. In general, however, the primary objectives will be to develop and communicate the key messages related to the findings. In order to be effective, the messages must be crafted carefully, based on an understanding of the interests and priorities of the target audience(s). These will probably fall into three general categories:

1. key political decision-makers, including political party leaders, members of constitution-making bodies, heads of the committees within these bodies and so on;
2. advocates and influencers, including civil society organizations and the media; and
3. general stakeholders, including the general public, citizens and non-citizens.

The way in which findings are shared with these groups will vary, but the goal and content of the messaging should be clear and consistent. Some potential actions related to disseminating findings from the Assessment Tool include: write a report with a detailed analysis of findings and recommendations, to submit to the relevant constitutional commission and civil society actors; develop policy briefs or overviews with short key messages on specific issues identified in the Assessment Tool for members of political parties and the media; host round-table discussions or presentations with subnational government; and develop social media and traditional media (radio, TV and newspaper) campaigns to target the general public.

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3 For suggestions on how to approach dissemination, see Beetham et al. (2008: 60–67).



# 3. Key terms and concepts

The key terms and concepts below are some of the most critical to understanding the Assessment Tool overall. Other terms are also defined in the explanation sections of questions, as relevant to the questions themselves. The terms and concepts are presented alphabetically.

### *Affirmative action and special measures*

Affirmative action or special measures are related to the concept of ‘formal and substantive equality’ described below. If a state adopts or even mandates the principle of substantive equality, it will be required to have policies and mechanisms to make this a reality.

States can—and, depending on the language of their constitution, may be required to—use affirmative action (also known as positive discrimination or special measures) to accelerate the achievement of substantive equality for indigenous peoples. Such measures include legislative, executive, administrative, budgetary and regulatory instruments, as well as plans, policies, programmes and preferential regimes in areas such as employment, housing, education, culture, representation in government and participation in public life. Examples of such measures include (United Nations Development Group 2009: 13):

- quotas in parliament to increase indigenous peoples’ representation (United Nations 2006: para. 16);
- targeted recruitment of members of indigenous communities to the civil service, military and other state institutions;
- programmes (scholarships or reserved seats) to increase the number of indigenous peoples in university;
- financial assistance for indigenous political candidates;
- programmes that provide incentives to indigenous families to send their children to school;
- allocating funds to improve indigenous peoples’ access to health care; and
- training programmes for indigenous peoples to learn skills to enter the mainstream economy without having to give up traditional livelihoods or handicrafts.

### *Autonomy and self-government*

Autonomy refers to ‘an individual’s legal and practical capacity to make and act upon her own life choices’ (Howard-Hassman 2011: 433). Autonomy involves indigenous peoples’ right to independently determine their own interests, to make choices based on these interests and to realize these choices effectively. Indigenous peoples’ autonomous political, economic and social structures give life to their right to self-determination and allow for meaningful exercise of the right (APF and OHCHR 2013: 20). Indigenous peoples’ rights to autonomy and self-government are reflected throughout UNDRIP, but mostly in articles 3 and 4.<sup>4</sup> Self-government is specifically the right to govern oneself at least in certain affairs or territories. Self-government can be powers-based (as in, the right to self-govern in the area of tourism or natural resource conservation) or territorial, referring to a delineated subnational area over which indigenous peoples can be given the right to govern, though usually subject to the confines of the national constitution.

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<sup>4</sup> These provisions affirm that: ‘Indigenous peoples have the right to self-determination’ and ‘. . . in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs’ (United Nations 2007: articles 3 and 4). See also articles 5, 34 and 39. For more on the right to self-determination autonomy and self-government, see APF and OHCHR (2013: 19 ff).

Even if full autonomy in either of these senses is not recognized, the right to self-determination and consultation means that state policies should not infringe on or impede indigenous peoples' capacity to make and act on choices that affect their lives,<sup>5</sup> especially not through protectionist or paternalistic approaches that assume that the state or non-indigenous populations are in a better position to make choices on behalf of indigenous peoples.

### *Collective rights*

A collective right is a group right granted to a particular community or group—for example, the rights of women, the rights of indigenous peoples or the rights of people living in a disadvantaged region. By provisions of reservation, affirmative action or guarantee of representation in public spheres, the state can provide collective rights to particular communities. Collective rights are a tool to realize substantive equality for all in practice. These rights are recognized in article 1 of UNDRIP.<sup>6</sup> Indigenous peoples have stressed, and continue to stress, the need for recognition of collective rights, as these rights often organize indigenous groups' societies as clans, nations, communities, etc., while most human rights standards were developed with a focus on individuals. For indigenous peoples, collective rights can include the right to hold cultural knowledge, property or traditions as a group as well as the right to collectively exercise autonomy and self-determination.

### *Constitution*

There is no simple definition of a constitution, but there are some shared characteristics and functions that can help shape understandings of what a constitution is and what it does. The 'vast majority of contemporary constitutions describe the basic principles of the state, the structures and processes of government and the fundamental rights of citizens in a higher law that cannot be unilaterally changed by an ordinary legislative act' (Bulmer 2014). From this perspective, a constitution provides the framework within which all institutions, laws, regulations, procedures and public services operate, and the mechanisms through which political participation takes place, rights are protected and public policy is determined. It is an instrument that constitutes, organizes and constrains the government's exercise of power. Beyond this, constitutions can also give life to peoples' aspirations and identities and express their vision of society—for example, by setting out fundamental values and principles and enshrining fundamental rights. Therefore, a constitution operates simultaneously across legal, political and social dimensions and is also a highly symbolic reflection of the values of a state and its peoples.

Constitutions can have many, sometimes competing, functions and purposes across these dimensions—for example, balancing demands to address a country's past and pressures to set aspirational visions for the country's future. While there are certain general and global functions that constitutions perform, constitutional functions also vary significantly according to the context in which a constitution operates. In a society committed to democracy and rule of law, the following is a list of recognized functions that a constitution would likely be intended to perform:

- (a) affirming common values and identities without which there cannot be a political community;
- (b) prescribing rules to determine membership of that community;
- (c) promising physical and emotional security by state monopolization, for legitimate purposes, of the use of force;
- (d) agreeing on the ways in which, and the institutions through which, state power is to be exercised;
- (e) providing for the participation of citizens in affairs of the state, particularly through elections, and other forms of social action;
- (f) protecting rights (which empower citizens as well as limit state action);
- (g) establishing rules for peaceful

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5 For examples of such occurrences, see United Nations (2006: paras 21–24).

6 Article 1 states: 'Indigenous people have the right to full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law' (United Nations 2007).

changes in government; (h) ensuring predictability of state action and security of private transactions through the legal system; (i) establishing procedures for dispute settlement; and (j) providing clear and consensual procedures for change of these fundamental arrangements. (Ghai 2010: 3)

Today, the majority of the world's constitutions are written documents. Exceptions include Israel, New Zealand and the United Kingdom, which organize their constitutional frameworks in different ways (Comparative Constitutions Project 2016). This trend towards written constitutions suggests that, overall, peoples and nations recognize constitutions as an important tool to organize government and society.

### *Constitution-building*

Constitution-building is 'more complex than the process of constitution-making alone'. Understanding constitution-building requires making 'a distinction between the written text that is the constitution and the practices that grow out of and sustain the constitution', and then working to build both (Ghai and Galli 2006: 9). International IDEA defines constitution-building as:

. . . the process whereby a political entity commits itself to the establishment and observance of a system of values and government. Constitution-building stretches over time and involves state as well as non-state organizations. Constitution-building in this sense is almost an evolutionary process of nurturing the text and facilitating the unfolding of its logic and dynamics. (Ghai and Galli 2006: 9)

International IDEA conceptualizes constitution-building, as opposed to the narrower process of constitution-making, as an inclusive, participatory process seeking to combine legal, political and social aspects of state transformation. It arises from elite bargains (often initiated at the peacebuilding table in conflict situations) broadened through the inclusion and participation of diverse factions and groups that come together to (re)define their state and its values. Constitution-building does not conclude with the promulgation of the text of the constitution, but extends further to its implementation, the harmonization of laws, and other efforts to support the transition and give meaningful effect to constitutional provisions. The constitution-building framework recognizes that the constitutional document is not alone sufficient to institutionalize the new constitutional order.

### *Federal and decentralized systems*

In federal and decentralized systems, powers and responsibilities are divided between the national and subnational levels of government. In systems that recognize devolved autonomy or self-government, this could include allocation of formal powers to indigenous peoples' governments or the governments of autonomous areas, in addition to other subnational units. A constitution will usually state which powers are allocated to each level and may indicate that unspecified powers are the domain of either level ('residual'). When deciding which issues are primarily the domain of the national or subnational level, constitution drafters should think about which level has the capacity to most effectively address the issue at hand, and whether the issue applies to the entire country or is territorially specific. Generally, the national level of government has greater revenue-raising ability, and therefore more resources for service delivery, including services that are key to equal rights for indigenous peoples, such as health care and education. However, local-level government may be more responsive to the needs of the communities it serves. Constitutions may specify principles that will guide the distribution of powers between the different levels of government<sup>7</sup> or identify

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<sup>7</sup> See Constitution of Sudan 2005, article 25(c): 'The following principles shall guide the devolution and distribution of powers between all levels of government: . . . (c) acknowledgement of the role of the State in the promotion of the welfare of the people and protection of their human rights and fundamental freedoms.'



the objectives of subnational levels of government in order to guide the distribution of powers and responsibilities.<sup>8</sup> These principles or objectives may relate to the state's role in protecting and fulfilling the rights of the people and the provision of services.

As a right, and also as best practice, indigenous peoples should be given the right to self-government and to regional autonomy; however, relations between indigenous peoples and the government, and duties to provide rights and services to indigenous peoples, are often 'assigned' to one level or another of a government. Whichever level of government is assigned this competency can write, and usually execute, laws related to indigenous peoples. There is no single way of addressing this issue (see Question 28 in Chapter 4). Practice suggests that most countries list indigenous peoples' affairs as a national/central government competency. This is based on the idea that indigenous peoples' rights should not vary across the country, and that the powers associated with realizing fundamental rights may be more effectively safeguarded at the national level.

### *Formal and substantive equality*

Formal equality is a key principle that refers to the equal treatment of peoples before the law. This type of equality is addressed in constitutions with provisions that (a) prohibit discrimination on the basis of pertaining to indigenous or other identities (non-discrimination provisions); and (b) state that indigenous and non-indigenous citizens are equal before the law (equality provisions). As such, the right to equality is closely tied to a prohibition on (or right to be free from) discrimination. Formal equality is important in the context of exercising many rights, such as the right to free speech and to due process (fair and equal legal procedure). For example, if a person is accused of committing a crime, they deserve equal access to a fair trial, regardless of whether they are indigenous or non-indigenous.

#### **What is discrimination?**

... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to the personal characteristics of the individual or group which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classified.

*Source:* Interpreted in Supreme Court of Canada, *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143

The concept of substantive equality moves beyond formal equality to acknowledge past discrimination and the political, economic and social barriers that indigenous peoples face in accessing opportunities, exercising their rights and making decisions that impact on their lives. Rules and policies that promote substantive equality will consider the context and circumstances of a group, and tailor the rule in a way that brings that group to a more equal starting point. Substantive equality focuses on the outcomes that result from specific rules and policies, and acknowledges differences between individuals and groups, in particular with regard to systemic marginalization, exclusion and dispossession. Substantive equality looks at historical marginalization or mistreatment, and recognizes that history has left certain groups at an unfair starting point—for example, policies that uphold substantive equality acknowledge the barriers that indigenous peoples have faced in

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8 See Constitution of South Africa 1996, article 152: '1. The objects of local government are: (a) to provide democratic and accountable government for local communities; (b) to ensure the provision of services to communities in a sustainable manner; (c) to promote social and economic development; (d) to promote a safe and healthy environment; and (e) to encourage the involvement of communities and community organizations in the matters of local government. 2. A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).'

becoming educated (i.e. language), moving ahead in private workplaces and advancing in political positions of authority, and do something to address these barriers, such as reserving a certain number of positions for indigenous peoples in educational and government institutions.

By taking into account the lived realities of indigenous peoples, substantive equality aims for equal access to opportunities and equality of outcomes and is therefore a more comprehensive notion of equality than formal equality. When a group does not experience substantive equality, formal equal treatment before the law does not necessarily result in similar outcomes, because that group is already starting from a position of inequality and therefore is not able to access or take advantage of opportunities in the same way. For example, a university may treat indigenous peoples and non-indigenous people equally and have the same set of admission standards, but if indigenous applicants have more limited opportunities to attend and excel in primary and secondary school than non-indigenous ones, indigenous applicants will be in a disadvantaged position when they apply to university and will probably not be accepted at the same rate as non-indigenous applicants.

In addition to unequal outcomes, formal equal treatment before the law may actually harm indigenous peoples and further contribute to their inequality. With reference to the above example, if indigenous peoples are not able to attend university at the same rate as non-indigenous people, then they may not be able to secure stable employment, making them vulnerable to poverty and to worse health and social outcomes. Further, they may be unable to provide for their own children's education if they have limited financial resources, thereby reinforcing the cycle of inequality and marginalization.

Indigenous peoples are frequently in an unequal position relative to non-indigenous people in political, economic and social life due to a number of factors related to direct and indirect discrimination.<sup>9</sup> These include: conscious and unconscious bias and stereotyping about indigenous peoples' abilities (including a lack of regard for indigenous peoples' capacity as legitimate decision-makers in public life); structural disadvantage in the form of discriminatory laws, policies, programmes and their administration; and traditional and cultural attitudes that assign unequal status to indigenous peoples.

The relevance and impact of these factors vary by context. These forms of discrimination interact to limit the opportunities and resources available to indigenous peoples and undermine their ability to take and act on decisions. Discrimination against indigenous peoples can also intersect with additional forms of discrimination based on other features such as religion, age, sexual orientation, gender identity, economic status and disability to deepen the disadvantage that indigenous peoples face, creating more barriers to their equality and enjoyment of rights. This dynamic of intersecting forms of discrimination is referred to as multiple discrimination.

Substantive equality recognizes the historical, economic and political differences between indigenous peoples and non-indigenous populations and seeks to expand—rather than limit—opportunities and choice for indigenous peoples in the context of these differences. For more explanations on substantive equality with regards to indigenous peoples, see Question 5 in Chapter 4.

### *Free prior informed consent (FPIC)*

When governments make policies and laws or undertake projects that could affect indigenous peoples (such as the use of sacred sites for road construction or national park delineation, or the promulgation of a new constitution or state-language policy), they have an obligation to obtain free, prior and informed consent (FPIC) from indigenous peoples, through their chosen representatives. More than just an obligation to simply provide information or consult, this right entails an honest, open negotiation with indigenous peoples in good faith, without pressures (free), before the activity begins or the policy is implemented (prior), with all, up-to-date information available (informed). 'Consent' means that all parties involved in this negotiation process will be equal and that the indigenous groups' traditional decision-making processes must be allowed to be used (Working Group on Indigenous Populations

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<sup>9</sup> Indirect discrimination occurs when a policy, attitude or behaviour is not explicitly discriminatory, but the outcome negatively affects indigenous peoples. For example, an employer may have a job requirement that applies to both indigenous peoples and non-indigenous people, but is more difficult for indigenous peoples to meet. When there is no justifiable reason for the requirement, it would constitute indirect discrimination.

2005: para. 56). The requirement that consent from concerned indigenous peoples is obtained prior to the use of ancestral land and natural resources is provided for by ILO Convention 169 (ILO 1989: articles 6 and 16) and in UNDRIP (United Nations 2007: articles 10, 11, 19, 28, 29, 32). FPIC also applies to use and copyright of traditional knowledge and skills (International IDEA 2014: 48), and to the use of traditional indigenous medicines and knowledge. FPIC also means that indigenous peoples should be involved in the design, development, implementation, monitoring and evaluation of all programmes, policies and legislation that affect them (Australian Human Rights Commission 2010: 25)—importantly, this extends to constitutions and any constitutional reform.

### *Human rights*

The core international human rights treaties, which include the ICERD (United Nations 1965), the ICCPR (United Nations 1966a) and the ICESCR (United Nations 1966b), as well as the Universal Declaration of Human Rights (UDHR; United Nations 1948), contain the fundamental rights that are respected, protected and recognized as forming the body of international human rights.<sup>10</sup> Indigenous peoples should have access to all of these rights without discrimination. In addition to these core human rights, there are rights that are recognized internationally as belonging to different groups or sectors of society—for example, women’s rights, labour rights, children’s rights and, of course, the rights of indigenous peoples. It is critical that members of all of these groups are provided with all rights to which they might be entitled on the basis of their identity. This might mean that an indigenous woman or child has slightly different rights from an indigenous man.

International human rights are defined and protected in international law (see below). States can strengthen their commitment to human rights by integrating these in a national constitution and in national law and policies. Any individual person should be entitled to all the human rights promised to citizens of their state, as well as to all the relevant rights included in treaties to which the state has signed on. Country practice varies as to whether international human rights are directly enforceable in national courts of law (see Question 32 in Chapter 4).

### *Indigenous peoples*

Indigenous peoples’ representatives in international legal forums have usually been against the adoption of a strict, universal, international definition of ‘indigenous peoples’; rather, they have stressed the ‘desire and the right of each indigenous people to define themselves’ (APF and OHCHR 2013: 6). There is therefore no universal, legally binding definition of ‘indigenous peoples’, but there are certain criteria that are commonly used across the globe to help in the identification process. The ILO Convention 169 uses a practical approach to the issue of definition and provides objective and subjective criteria for identifying the peoples concerned (see ILO 1989: article 1). These criteria can be summarized as follows (ILO n.d.):

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10 The other core international human rights treaties are the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the International Convention for the Protection of All Peoples from Enforced Disappearance; and the Convention on the Rights of Persons with Disabilities.

	<b>Subjective criteria</b>	<b>Objective criteria</b>
<b>Indigenous peoples</b>	Self-identification as belonging to an indigenous people	Descent from populations, who inhabited the country or geographical region at the time of conquest, colonization or establishment of present state boundaries.  They retain some or all of their own social, economic, cultural and political institutions, irrespective of their legal status.
<b>Tribal peoples</b>	Self-identification as belonging to an indigenous people	Their social, cultural and economic conditions distinguish them from other sections of the national community.  Their status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.

The Martínez Cobo Study,<sup>11</sup> by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, also proposed a working definition (Martínez Cobo 1987: para. 379):

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

The report also explains that (Martínez Cobo 1987: para. 380):

This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

- (a) Occupation of ancestral lands, or at least of part of them;
- (b) Common ancestry with the original occupants of these lands;
- (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle;
- (d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);

11 A turning point in the study of discrimination against indigenous populations came in 1970, when the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities recommended that a study be made on discrimination against indigenous peoples. To undertake this study, a Special Rapporteur, José R. Martínez Cobo, from Ecuador, was appointed. His final report was submitted to the Sub-Commission from 1981 to 1984 (see United Nations 2014), and his conclusions and recommendations, published in 1987 (Martínez Cobo 1987), 'are an important milestone in United Nations consideration of the human rights problems facing indigenous peoples' (United Nations 1997a).

- (e) Residence in certain parts of the country, or in certain regions of the world;
- (f) Other relevant factors.

Finally, the Chairperson-Rapporteur of the United Nations' Working Group on Indigenous Populations, Erica-Irene A. Daes, designated some 'factors which modern international organizations and legal experts (including indigenous legal experts and members of the academic family) have considered relevant to the understanding of the concept of "indigenous"' (United Nations 1996b: para. 69):

- (a) Priority in time, with respect to the occupation and use of a specific territory;
- (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- (c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
- (d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.

The Chairperson-Rapporteur, however, underlined the fact that these 'factors do not, and cannot, constitute an inclusive or comprehensive definition' (United Nations 1996b: para. 70), noting elsewhere that 'indigenous peoples have suffered from definitions imposed by others' (United Nations 1995: para. 6), in addition to often not being recognized at all. Indigenous peoples should participate in the development of any definition used to identify them and should have the right to opt in or out of identifying with the definition.

### *International law*

Although constitutions are sovereign documents, the law of every country is embedded in a system of international law. International and regional human rights treaties, their associated oversight bodies, and international and regional courts or other adjudication mechanisms form the basis of the global human rights regime. The constitution must be aligned with a state's international obligations, which are contained in the treaties it has signed. Additionally, there are sources of 'soft law' or non-binding non-treaty obligations—such as United Nations declarations and resolutions, statements, principles and codes of conduct—which form part of the global rights regime, which also should be considered when assessing a constitution.

The issues addressed in the Assessment Tool are rooted in international law and the international standards included per question are meant to help users in developing a rights-based approach to their advocacy actions.

### *Legal pluralism and customary laws*

A complicating factor when examining constitutions from the perspective of indigenous peoples' rights is legal pluralism: when a country recognizes multiple systems of law. Legal pluralism is practised in many countries where, in addition to state laws, other legal systems such as customary law and/or religious law are also recognized and applied. For example, in some countries family issues, such as marriage, divorce, child custody and inheritance, are adjudicated according to religious or customary law and practice, which may operate in parallel to, be distinct from, or be incorporated into state law and judicial systems. In some countries, individual members of the indigenous community may be able to choose which legal system applies (for example, regarding marriage), while in other countries they may not have a choice. Most often, customary or indigenous

peoples' legal systems only apply to group members, but in some situations, they may also apply to non-group members.

In some contexts, legal pluralism also means that there are multiple sources of law, and a specific religion may be one source of law in addition to the state. It may also be the case that religion is considered to be the source of all law, such that even state law-makers must consider religious law when enacting legislation.

The Assessment Tool includes questions that address customary law in the constitution, since these types of legal systems can have a profound impact on indigenous peoples. Moreover, the recognition by governments of indigenous peoples' institutions or quasi-judicial authority and customary laws can provide guidance on their right to self-determination (United Nations General Assembly 2009: paras 78–82). The Special Rapporteur has explained:

The new pluralist constitutionalism underscores the recognition of indigenous peoples as political subjects, not merely as objects of policies dictated by others; a change in the identity of the nation State, that is now recognized as multi-ethnic and multicultural; the individual and collective right to one's own identity; and the recognition of legal pluralism. (United Nations 2006: para. 9)

Customary legal systems may also be indigenous peoples' first (or only) recourse to justice, especially in rural areas. Therefore, in assessing the constitution of a country that practices legal pluralism, it is important to understand the place of religious and customary law relative to the constitution. For example, with regard to the hierarchy of laws, it is important to consider whether the constitution has the status of supreme law, above all other legal systems and establishing principles by which all other legal systems must abide, or whether it functions in parallel with (or will be a subsidiary to) other legal systems. It is also important to have at least a basic understanding of the position and scope of the recognized plural legal systems with regard to key indigenous peoples' rights issues, and how indigenous peoples are affected by different systems of law.

The Special Rapporteur has underlined that it is important to establish mechanisms for the effective recognition of legal pluralism, so that national law and indigenous or customary law can exist side by side, and so that courts can render rulings and decisions favourable to indigenous peoples without creating too many inconsistencies between jurisdictions, and while reconciling and balancing these rights with others, such as the rights of women (United Nations 2006: paras 31–39). Conflicts of laws and the resulting confusion could cause violations of indigenous peoples' rights (United Nations 2006: para. 45), but it is important to honestly recognize that 'there are often difficulties regarding the effective recognition of indigenous law, even in those countries where legal pluralism is officially recognized' (United Nations 2006: para. 37).

### *Right to self-determination*

A fundamental principle of international law and the central right in UNDRIP, self-determination can be defined as '(a) the act or power of making one's own decisions and determining one's own political status; or (b) the state of being free from the control or power of another. The right to self-determination is a fundamental tenet of international law, influencing relationships between states and amongst the subunits and peoples who make up those states' (Cats-Baril 2018: 1). The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, in their common article 1 (para. 1), provide that: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development' (United Nations 1966a, 1966b). The International Court of Justice (1975: para. 59) has defined self-determination as the need to pay regard to the freely expressed will of peoples.

The internationally recognized right to self-determination has two dimensions—internal and external. Internal refers to the exercise of self-determination within an existing state; external refers to the right of peoples to define their place within the international community. The UN Committee on the Elimination of Racial Discrimination's General Recommendation No. 21, on the right to self-determination, is critical in defining these two dimensions. It defines internal self-determination as the rights 'of all peoples to pursue freely their economic, social and cultural development without outside interference; linked with the right of every citizen to take part in the conduct of public affairs at any level' (United Nations 1996a).

In 2007, a specific right to internal self-determination for indigenous peoples was codified in article 3 of the UN Declaration on the Rights of Indigenous Peoples. 'Practices for implementing this right are still evolving but have included autonomy arrangements, the recognition of collective rights to language and culture, and the right to free prior informed consent and consultation' (Cats-Baril 2018: 3). Exercise of the indigenous right to self-determination is constrained by the national constitution and usually limited insofar as the exercise should not contravene the rights of other communities. Self-determination is a collective right for indigenous peoples that protects their autonomy to govern their affairs and to participate meaningfully in the decisions affecting them. An explicit link between indigenous peoples' right to self-determination and autonomy is made in UNDRIP article 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' (United Nations 2007). This does not equate to a right to independent statehood but, at a minimum, represents a right to devolved autonomy and self-government arrangements, as well as the entitlement to meaningful representation in decisions and processes that affect indigenous peoples and their rights.

Governments, in recognizing this right, must recognize the collective and group identities of indigenous peoples (nations, language groups, clans, family alliances, etc.) and enter into relationships with them in good faith and on the basis of equality, respect and dignity. Exercising the right to self-determination means, for example, local self-government through community-controlled councils, having ownership over traditional lands and territories and choosing how to use and develop them, control of the provision of basic services such as health services, and the legal recognition of group identities and rights including through constitutional recognition. Importantly, these rights mean little unless indigenous peoples are guaranteed resources and funding from governments to effectively exercise self-government (United Nations General Assembly 2011: para. 78).

### *Rights and the role of the state*

Under international human rights law, states have the responsibility to respect, protect and fulfil human rights. Of course, states also have a duty to respect all rights recognized and provided for in a national constitution. This is not only a duty to refrain from hurtful actions but also an affirmative responsibility to protect and fulfil rights. Courts and/or other bodies of unbiased judicial authority should be established and made accessible to people so that they are able to challenge violations of their rights. Institutions should have policies for mainstreaming rights in all government services, and government actors should be trained on these rights. Beyond these protections, the state can take positive actions (see also Affirmative action and special measures), such as enacting legislation, policies and programmes and establishing institutions that are capable of recognizing indigenous peoples' unequal position in society and seek to eliminate the discriminatory practices and beliefs at the root of this and to proactively address its negative consequences.

### *Rights holders*

The concept of being a rights holder is about the status of the unit being recognized as a rights holder before the state government and other institutions as relevant. A rights holder can be an individual, a collective or group, or a corporation. Being a rights holder allows the individual or collective to make legitimate claims against the state and other actors that can then be held legally

accountable for violations of rights holders' rights. Exactly who is the rights holder and who is the 'duty bearer' (individual or institution responsible for protecting and providing for the rights) depends on the law in question. For example, a state can be a duty bearer under international law or constitutional law; constitutions, and sometimes legislation, can also establish duties on private actors such as corporations and even horizontal duty bearing between individuals. The exact rights a rights holder has is also dependent on the law. The law bestows the rights holder with rights, for example: rights to private property, freedom of speech, or in some countries, a right to food or housing. Certain human rights are increasingly recognized as universal, meaning they belong to all human beings. By extension, this makes all human beings rights holders.

Importantly, through this universalization, being recognized as a rights holder has become a way of recognizing human dignity. The rights holder does not have to approach the state or other duty bearer to ask a favour. Rather, a right is an entitlement and a platform upon which the rights holder can bring a legitimate claim for violations of its rights. The rights holder can approach the duty bearer with confidence and as an equal to fight for accountability.

In this Assessment Tool, the concept of whether collectives are recognized as rights holders is important (see Question 8). Indigenous peoples' rights are often collective in nature, meaning that the rights holder for indigenous peoples' rights is also collective—the community, nationality, tribe, or peoples in question. In that way, an indigenous individual can have individual rights (such as freedom of expression) but may also be entitled to additional collective rights, for example to communal land ownership, by way of membership in the collective.

### *Role of the judiciary*

The judiciary plays a crucial role in protecting the rights of indigenous peoples (see, for example, United Nations 2006: paras 36 and 42). The courts interpret constitutions, domestic legislation and international human rights standards but they are also 'instrumental in resolving conflicts between laws, non-enforcement of those laws, and measures taken by the authorities that are at variance with the forms and jeopardize the rights of indigenous peoples and communities' (United Nations 2006: para. 89).

In order to fulfil its role effectively, the judiciary must be impartial, non-partisan and free of political interference and pressure. Its independence must therefore be guaranteed and protected in the constitution. Other important aspects of its independence include: processes for the appointment, removal and promotion of judges; public proceedings; the budget of the judiciary; liability of judges; and the interaction of the executive and legislature with the judiciary. An independent judiciary is better able to resist political or popular pressure that would make it difficult for the judiciary to protect minority groups; if the judiciary and its decisions are subject to censorship from other branches of government or powerful interests, it is less likely to be able to make progressive decisions on issues of social justice which the political elite may see as threatening or against their vested interests.

### *Self-identification*

UNDRIP proclaims in its preamble that 'indigenous peoples are equal to all other peoples' and affirms 'the right of all peoples to be different, to consider themselves different, and to be respected as such' (United Nations 2007). The Martínez Cobo Study for the UN Sub-Commission on the Prevention of Discrimination of Minorities considers self-identification as an essential element of its definition of indigenous peoples and links it to the concept of self-determination as follows (Martínez Cobo 1987: paras 381–82): 'On an individual basis, an indigenous person is one who belongs to these indigenous peoples through self-identification as indigenous (group consciousness) and is recognized and accepted by the group as one of its members (acceptance by the group). This



preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.’

### *State vs. nation*

For the purposes of the Assessment Tool, the term ‘state’ is used to refer to a ‘country’. A state is defined as an internationally-recognized independent territory with its own associated governing institutions and a citizenry. In accordance with this definition, France, Indonesia, Nepal, Peru and the United States of America are all examples of ‘states’. A nation, on the other hand, is defined as a group of people who are connected to one another by history, culture, language, territory or identity. Historically, the term ‘nation’ has been used to describe indigenous peoples and ‘indigenous nationalities’, as well as other ethnic and minority groups. For example, the Navajo Nation in the United States of America. A state can be multinational insofar as its citizenry is made up of diverse nations (or groups of peoples).

### *Territories, land and natural resources*

Land, natural resources and territorial rights are usually seen as essential rights for indigenous peoples, based on prior occupation of the land and territories and the significance of these and natural resources to indigenous peoples. Sometimes these rights come in the form of ‘first (user) rights’, meaning that indigenous peoples ‘are entitled to be the first beneficiary from the harnessing of natural resources and other local resources available in their own territory’ (International IDEA 2014: 47). First rights are also sometimes referred to as the right to country, particularly in the Australian context.

Rights to territories, land and natural resources are detailed in articles 25 and 26 of UNDRIP (United Nations 2007). Article 25 states that indigenous peoples ‘have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard’, while article 26 states:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

This includes the rights to the actual land, territories and waters, but also to their resources (animals, vegetation, minerals, etc.). Article 27 of UNDRIP outlines the obligations of governments in fulfilling these rights: they should establish and implement impartial, open and transparent processes to give due recognition and adjudicate the rights to lands, territories and resources. That same article also states that indigenous peoples have the right to participate in these processes.

### *Treaties and agreements*

Treaties are legally binding agreements or arrangements signed between one or more sovereign powers. In the process of historic colonization and dispossession of indigenous peoples from their lands and territories, many historic treaties were signed that in themselves serve as evidence that indigenous peoples were regarded as sovereign actors, if not equal ones. A cross-cutting feature of treaty-making is therefore the principle of reciprocity, ‘this is also borne out by the understanding which various Indigenous parties to treaties perpetuate regarding the basic nature of the treaty

relationship' (United Nations 1999: para. 67). If historic treaties were signed between indigenous peoples and state governments, UNDRIP holds that they should be recognized as legally binding and efforts should be made to realize any commitments made to indigenous peoples in these treaties. To comply with the United Nations, the following documents can be considered when treaties and agreements are referenced in this Assessment Tool: '1) treaties concluded between States and Indigenous peoples; 2) agreements made between States or other entities and Indigenous peoples; 3) other constructive arrangements arrived at with the participation of the Indigenous peoples concerned; [and] 4) treaties concluded between States containing provisions affecting Indigenous peoples as third parties...' (United Nations 1999: para. 37).



# **4. Indigenous Peoples' Rights in Constitutions Assessment Tool**

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# **I. Recognition and citizenship**

**Questions 1–3**

# Recognition and citizenship



## **Does the constitution specifically identify, recognize or define indigenous peoples, including protection of the right to self-identification?**

### EXPLANATION

As a precondition for the recognition and implementation of any of the rights discussed in this tool, it is beneficial for indigenous peoples to be explicitly recognized and/or 'defined' as peoples within the constitution. Constitutions often include protections for or recognition of minority and/or marginalized groups, and sometimes it is presumed that indigenous peoples fall into this category; however, for indigenous peoples' rights to be respected it is important that indigenous peoples' unique identity is recognized through a distinct legal status. Recognition of indigenous identity entitles indigenous peoples to a certain set of rights that are distinct from general minority rights. If a detailed definition of indigenous peoples is not included in the constitution, this can also be addressed through legislation, which could include more detailed criteria for defining who is indigenous. Regardless of where indigenous peoples are defined, it is important that the legal framework also defines a clear process for how indigenous individuals and groups can practically obtain formal recognition from the state, or documentation of the same.

Definitions of indigenous peoples should be contextualized and developed through consultations with indigenous peoples themselves. Definitions should be designed so as not to be over-inclusive (for example, by including other minority groups) or under-inclusive (for example, by excluding certain indigenous peoples). While definitions will vary based on context, some common 'objective' elements of the definition, in line with international standards, are: historical continuity with pre-invasion and/or pre-colonial societies that developed on their territories; distinctiveness; non-dominance; and a determination to preserve, develop and transmit to future generations their ancestral territories and identity as peoples, in accordance with their own cultural patterns, social institutions and legal system (Martínez Cobo 1987; see Sections VI and VII for further detail on these topics). Additionally, definitions of indigenous peoples often include references to a special relationship or strong link to territories and natural resources, distinct social, economic or political systems, and distinct languages, cultures and beliefs.

It is critical that indigenous peoples' right to self-identification is reflected in the definition and that indigenous peoples cannot be so labelled without their consent as stated in ILO Convention 169 (ILO 1989: article 1(2)). Although there is no single definition of 'indigenous peoples', ILO Convention 169 promotes the principle of self-identification: that indigenous peoples and individuals have the right to be part of an indigenous community or nation in accordance with the traditions and customs of that particular community or nation. As such, indigenous peoples should have the right to self-identify as indigenous, and individuals should also have the right to consider themselves indigenous or not. That includes, therefore, a right to opt out of one's indigenous identity.



INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>ILO Convention 169</b> 1989</p>	<p>Article 1(1) and 1(2)</p>	<p>1. This Convention applies to: (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.</p> <p>2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.</p>	<p><i>Provides sample language on criteria and common characteristics that can be used to define indigenous peoples</i></p> <p><i>Recognizes self-identification as one fundamental criterion</i></p>
<p><b>UNDRIP</b> 2007</p>	<p>Article 9</p>	<p>Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.</p>	<p><i>Provides for indigenous peoples' right to belong to a community or nation, without discrimination</i></p>
<p><b>Bolivia Constitution</b> 2009</p>	<p>Article 30(I)</p>	<p>I. A nation and rural native indigenous people consists of every human collective that shares a cultural identity, language, historic tradition, institutions, territory and world view, whose existence predates the Spanish colonial invasion.</p>	<p><i>Provides list of 'objective' criteria for defining indigenous peoples</i></p>
<p><b>Mexican Constitution</b> 1917</p>	<p>Article 2</p>	<p>The Mexican Nation . . . has its roots in its indigenous peoples, comprising those who have descended from the people who inhabited the present territory of the country at the beginning of the colonization and who have preserved at least partially their own social, economic, cultural, and political institutions. The awareness of their indigenous identity shall be an essential criterion in determining to whom the provisions on indigenous peoples apply.</p> <p>Communities of indigenous people are those which constitute a social, economic, and cultural unit, are situated in a territory, and have their own authorities in accordance with their traditions and customs.</p>	<p><i>Provides sample criteria by which to define who is indigenous, including 'awareness of their indigenous identity' on behalf of individuals (recognizing a right to self-identification)</i></p>
<p><b>Paraguay Constitution</b> 1992</p>	<p>Article 62</p>	<p>This Constitution recognizes the existence of indigenous peoples, defined as cultural groups prior to the formation and organization of the Paraguayan state.</p>	<p><i>Recognizes and includes basic definition of indigenous peoples (pre-state existence)</i></p>

<b>Peru Constitution 1993</b>	Article 89	The rural and native communities have legal existence and are corporate entities. ... The State respects the cultural identity of the rural and native communities.	<i>Recognizes the legal existence of indigenous peoples and communities as corporate entities (legal implications regarding collective rights, see Question 8) and calls on the state to respect this identity</i>
<b>Venezuela Constitution 1999</b>	Article 126	Native peoples, as cultures with ancestral roots, are part of the Nation, the State and the Venezuelan people, which is one, sovereign and indivisible.	<i>Recognizes indigenous peoples as part of the state (with corresponding obligation to respect 'integrity' of the nation)</i>
<b>Canada, Constitution Act 1982</b>	Part II (Rights of the Aboriginal Peoples of Canada), section 35(2)	(2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada.	<i>Provides specific indigenous tribes with constitutional recognition as indigenous (aboriginal) peoples</i>
<b>Canada, Nunavut Land Claims Agreement Act 1993</b>	Article 35 (Enrolment)	35.1.1 This Article: (a) recognizes that Inuit are best able to define who is an Inuk for the purposes of this Agreement; (b) guarantees that the Inuit of the Nunavut Settlement Area will be recognized according to their own understanding of themselves, and that Inuit shall determine who is an Inuk for the purposes of this Agreement, and entitled to be enrolled under the Agreement.	<i>Recognizes full right to self-identification</i>
<b>Finland, Act on the Sámi Parliament 1995</b>	Chapter 1, section 3	<i>Definition of a Sámi</i> For the purpose of this Act, a Sámi means a person who considers himself a Sámi, provided: (1) That he himself or at least one of his parents or grandparents has learnt Sámi as his first language; (2) That he is a descendant of a person who has been entered in a land, taxation or population register as a mountain, forest or fishing Lapp; or (3) That at least one of his parents has or could have been registered as an elector for an election to the Sámi Delegation or the Sámi Parliament.	<i>Combines objective criteria and subjective self-identification to define indigenous peoples (Sámi)</i>
<b>Nepal, National Foundation for Development of Indigenous Nationalities Act 2002</b>	Article 2(a)	'Indigenous nationalities' means a tribe or community as mentioned in the schedule having its own mother language and traditional rites and customs, distinct cultural identity, distinct social structure and written or unwritten history.	<i>Provides definition of indigenous peoples with objective standards (criteria)</i>

#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

# Recognition and citizenship



## **Does the constitution recognize the state as multicultural, multinational or multi-ethnic, or promote the values of diversity and inclusivity in other ways?**

### EXPLANATION

Some constitutions include symbolic declarations that seek to articulate and define ‘the people’ who make up a state. A vision of ‘the people’ may be laid out in the preamble—the introductory section of the constitution—which can include a description of: the history of the constitution, the values and aspirations of the people, the nature of the state, and the authority under which the constitution is created. Honouring diversity, human dignity and social equality can be particularly important in post-conflict contexts or in countries with a background of historic marginalization and/or social exclusion.

Such symbolic provisions, while not necessarily binding in a court, articulate the state’s commitment to the values it describes, and are intended to guide the legislature, executive and judiciary. Preambles and directive principles can be referenced by the legislature or judiciary to guide the interpretation of other parts of the constitution. In this way, they can be entry points for further advocacy. While providing such an entry point, this version of recognition is weaker than that explained in Question 1 on specific recognition and definition of indigenous peoples as parts of the national population.

While symbolically recognizing the value of diversity in society can be critical for how the rest of the constitution streamlines indigenous peoples’ rights and manages diversity, it is often not a sufficient basis for providing robust protection to indigenous peoples’ rights and interests. It is important that the specific identity and rights of indigenous peoples, and the state’s commitment to ensuring the protection of such rights, are protected in a constitution. Symbolic acknowledgement and honouring of diversity can be fortified by recognizing equality before the law and prohibiting discrimination, or by the recognition of certain rights, such as the right to social justice, as constitutional rights.

INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>Bolivia Constitution</b> 2009</p>	<p>Preamble and article</p>	<p>Preamble We, the Bolivian people, of plural composition, from the depths of history, inspired by the struggles of the past, by the anti-colonial indigenous uprising, and in independence, by the popular struggles of liberation, by the indigenous, social and labor marches, by the water and October wars, by the struggles for land and territory, construct a new State in memory of our martyrs. A State based on respect and equality for all, on principles of sovereignty, dignity, interdependence, solidarity, harmony, and equity in the distribution and redistribution of the social wealth, where the search for a good life predominates; based on respect for the economic, social, juridical, political and cultural pluralism of the inhabitants of this land; and on collective coexistence with access to water, work, education, health and housing for all. Article 3 The Bolivian nation is formed by all Bolivians, the native indigenous nations and peoples, and the inter-cultural and Afro-Bolivian communities that, together, constitute the Bolivian people.</p>	<p><i>References the ‘plural composition’ of the national population, as well as the indigenous uprising and indigenous marches as a contribution to society</i></p> <p><i>Describes the concept of ‘collective co-existence’ as underlying state vision</i></p> <p><i>Recognizes indigenous nations and peoples as part of ‘the Bolivian people’</i></p>
<p><b>Fiji Constitution</b> 2013</p>	<p>Preamble</p>	<p>WE, THE PEOPLE OF FIJI, RECOGNISING the indigenous people or the iTaukei, their ownership of iTaukei lands, their unique culture, customs, traditions and language; RECOGNISING the indigenous people or the Rotuman from the island of Rotuma, their ownership of Rotuman lands, their unique culture, customs, traditions and language; RECOGNISING the descendants of the indentured labourers from British India and the Pacific Islands, their culture, customs, traditions and language; and RECOGNISING the descendants of the settlers and immigrants to Fiji, their culture, customs, traditions and language, DECLARE that we are all Fijians united by common and equal citizenry; RECOGNISE the Constitution as the supreme law of our country that provides the framework for the conduct of Government and all Fijians; COMMIT ourselves to the recognition and protection of human rights, and respect for human dignity; DECLARE our commitment to justice, national sovereignty and security, social and economic wellbeing, and safeguarding our environment, HEREBY ESTABLISH THIS CONSTITUTION FOR THE REPUBLIC OF FIJI.</p>	<p><i>Recognizes various indigenous peoples and their distinct cultures and histories, but all as equal in citizenry and part of the Fijian people</i></p>
<p><b>Guatemala Constitution</b> 1985</p>	<p>Article 66</p>	<p>Guatemala is made up of various ethnic groups among which are native groups of Mayan descent. The State recognizes, respects, and promotes their form of life, customs, traditions, forms of social organization, the wearing of Indian dress by men and women, their languages, and dialects.</p>	<p><i>Recognizes indigenous peoples and the fact that they are part of Guatemalan population</i></p>
<p><b>Mexican Constitution</b> 1917</p>	<p>Article 2</p>	<p>The Mexican Nation is one [única] and indivisible. The Nation has a multicultural composition which has its roots in its indigenous peoples . . .</p>	<p><i>Acknowledges multicultural composition and existence of indigenous peoples as foundations of state</i></p>

<p><b>Nepal Constitution</b> 2015</p>	<p>Preamble</p>	<p>Protecting and promoting social and cultural solidarity, tolerance and harmony, and unity in diversity by recognizing the multi-ethnic, multi-lingual, multi-religious, multi-cultural and diverse regional characteristics, resolving to build an egalitarian society founded on the proportional inclusive and participatory principles . . .</p>	<p><i>Recognizes the multi-ethnic, multilingual, multireligious, multicultural character of the state and commits to build society based on equality and inclusion</i></p>
<p><b>United States Constitution</b> 1789</p>	<p>Preamble</p>	<p>We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.</p>	<p><i>Presents a broad view of ‘we the people’ which could be interpreted inclusively, without specific mention of diversity or groups that constitute the citizenry</i></p>
<p><b>The Philippines, Indigenous Peoples’ Rights Act</b> 1997</p>	<p>Section 31</p>	<p>Recognition of Cultural Diversity. — The State shall endeavour to have the dignity and diversity of the cultures, traditions, histories and aspirations of the ICCs/IPs [indigenous cultural communities/indigenous peoples] appropriately reflected in all forms of education, public information and cultural-educational exchange. Consequently, the State shall take effective measures, in consultation with ICCs/IPs concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among ICCs/IPs and all segments of society. Furthermore, the Government shall take effective measures to ensure that the State-owned media duly reflect indigenous cultural diversity. The State shall likewise ensure the participation of appropriate indigenous leaders in schools, communities and international cooperative undertakings like festivals, conferences, seminars and workshops to promote and enhance their distinctive heritage and values.</p>	<p><i>Recognizes cultural diversity and the dignity of all groups and calls for specific actions to ensure that this diversity is honoured, including in the (state-owned) media</i></p>

#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

# Recognition and citizenship



## Does the constitution ensure national citizenship for indigenous peoples and include a guarantee that claiming indigenous identity will not impact on the right to national citizenship?

### EXPLANATION

Equal conditions of citizenship allow individuals to fully claim the rights and protections that are granted to citizens, and to participate fully in public life. Indigenous peoples should be guaranteed not only the right to self-identify as indigenous but also that this will not negatively impact on their right to national citizenship. The right to citizenship of a state is often accompanied by many rights, including the right to vote and the right to hold a passport or other form of identification which brings with it freedom of movement. Being a citizen establishes an individual as a rights-holder with regards to the state/government. See Question 6 on ensuring that special indigenous peoples' rights are seen as an addition to, rather than a replacement of, the fundamental rights promised to all citizens.

Bolivia provides a good practice example by going a step further on this issue and ensuring that indigenous peoples have the right to have their indigenous/tribal identity recognized on their official citizenship documents, including passports.

### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<b>UNDRIP</b> 2007	Articles 6 and 33(1)	<p>Article 6 Every indigenous individual has the right to a nationality</p> <p>Article 33 1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.</p>	<i>Provides international standards for indigenous citizenship including that indigenous peoples have a right to nationality and that identifying as indigenous will not impact on an individual's ability to obtain such nationality</i>
<b>Bolivia Constitution</b> 2009	Article 30(II, 3)	That the cultural identity of each member, if he or she so desires, be inscribed together with Bolivian citizenship in his identity card, passport and other identification documents that have legal validity.	<i>Provides the right to have indigenous identity included on national identification papers</i>
<b>Ecuador Constitution</b> 2008	Article 6(2)	Ecuadorian nationality is a political and legal bond between individuals and the State, without detriment to their belonging to any of the other indigenous nations that coexist in plurinational Ecuador.	<i>Recognizes that the bond of citizenship exists regardless of individuals belonging to indigenous nations in plurinational Ecuador</i>
<b>Uganda Constitution</b> 1995	Chapter 3 (Citizenship), article 10	<p>The following persons shall be citizens of Uganda by birth-</p> <p>a. every person born in Uganda one of whose parents or grandparents is or was a member of any of the indigenous communities existing and residing within the borders of Uganda as at the first day of February, 1926 and set out in the Third Schedule to this Constitution . . .</p>	<i>Defines citizens expressly to include peoples whose ancestors belonged to indigenous communities</i>



#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*



**II. Right to  
equality  
and anti-  
discrimination**

**Questions 4–5**

## Right to equality and anti-discrimination



### **Does the constitution guarantee equality before the law and prohibit discrimination? If so, is ethnic, racial or cultural identity recognized as one of multiple prohibited grounds for discrimination?**

#### EXPLANATION

Promising all groups and individuals the right to equality before the law and prohibiting discrimination is a central promise of most democratic societies and a feature of many constitutions; it is the premise behind the concept of ‘blind justice’. The International Convention on the Elimination of All Forms of Racial Discrimination defines ‘racial discrimination’ as: ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’ (United Nations 1965: article 1(1)). In accordance with this definition, all peoples should enjoy equal access to rights and protections without preference or prejudice based on their identity.

Indigenous peoples have multiple characteristics, identities and beliefs that may make them vulnerable to discrimination and unfair treatment. One of the defining features of indigenous peoples is the fact that they have cultures, traditions, languages and practices that are distinct from those found in other (often majority) segments of the population. The right to maintain this distinctness in the absence of discrimination and adverse treatment is key for indigenous peoples.

*Grounds for discrimination:* Blanket anti-discrimination clauses can go far in protecting indigenous peoples from harmful treatment based on their identity; however, anti-discrimination clauses can also be more detailed and list the specific grounds upon which discrimination is prohibited, such as gender or race. This can provide greater protection for indigenous groups by guiding implementation of the anti-discrimination clause to ensure that it is applied to identity-based discrimination. Specific protection against discrimination based on ethnic origins or cultural identity, or caste in some societies (terminology is context dependent), signal that the state is diverse and that this diversity is to be protected not attacked. Also, recognizing multiple grounds for discrimination gives more space for recognition of ‘multiple discrimination’ or ‘intersectionality’ when an individual or group faces exponential discrimination on more than one ground—for example, for being poor and of marginalized race, or being indigenous and a woman, or indigenous and a youth. If multiple grounds for discrimination are recognized, it is also important to check whether this list is written so as to be exclusive or whether it is open to including additional non-specified grounds in the future. Identities and rights evolve over time and a non-exhaustive or non-exclusive list will enable more flexibility and responsiveness in constitutional implementation.

*Intent or impact?* Another feature to look for in equality and anti-discrimination clauses is whether they prohibit actions that have a discriminatory impact (or effect), whether or not these actions were inspired by discriminatory intent (or purpose). Some constitutions will be silent on this issue, and it can be decided upon by courts and other actors based on their mandates and discretion in the future.

If intention (purpose) is not required, a law or government action can be considered discriminatory if it will negatively impact on indigenous peoples’ recognition, enjoyment or exercise of their rights and freedoms on equal footing with other members of the population. This point is critical, as an apparently neutral law or policy (that is, one that does not appear to discriminate on its face) may still have a discriminatory impact. Under a broad prohibition of discrimination, indigenous peoples would have the right to recourse to the courts, ombudsman, human rights/equality committee, etc., to overturn laws and policies that can be proven to have a discriminatory impact, even if discriminatory intent cannot be proven. At times, even provisions of the constitution may

inadvertently discriminate against indigenous peoples—for example, certain required qualifications for public office might have a discriminatory impact on indigenous peoples who might not have had equal historic opportunities to achieve these qualifications—and a provision that protects against inadvertent discrimination allows for challenging these sorts of provisions.

#### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<b>ILO Convention 169</b> 1989	Article 3(1)	1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.	<i>Provides that indigenous peoples should be able to avail themselves of rights and related protections without discrimination</i>
<b>UNDRIP</b> 2007	Articles 2 and 22	<p>Article 2 Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.</p> <p>Article 22 1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration. 2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.</p>	<p><i>Recognizes the right to be free from discrimination</i></p> <p><i>Recognizes people facing multiple discrimination, and the need to protect vulnerable, minority-within-minority populations</i></p>
<b>Colombia Constitution</b> 1991	Article 13	All individuals are born free and equal before the law, shall receive equal protection and treatment from the authorities, and shall enjoy the same rights, freedoms, and opportunities without any discrimination on account of gender, race, national or family origin, language, religion, political opinion, or philosophy.	<p><i>Makes explicit link between equality before the law and the right to enjoy the same free from discrimination</i></p> <p><i>Recognizes multiple grounds for discrimination</i></p>
<b>Fiji Constitution</b> 2013	Chapter 2 (Bill of Rights), article 26(3)	<p>3. A person must not be unfairly discriminated against, directly or indirectly on the grounds of his or her-</p> <p>a. actual or supposed personal characteristics or circumstances, including race, culture, ethnic or social origin, colour, place of origin, sex, gender, sexual orientation, gender identity and expression, birth, primary language, economic or social or health status, disability, age, religion, conscience, marital status or pregnancy; or</p> <p>b. opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others, or on any other grounds prohibited by this Constitution.</p>	<p><i>Includes mention of ‘actual or supposed’ identity as prohibited grounds for discrimination, broader to encompass stereotyping and degrading assumptions, as well as mistaken identity (i.e. ignorance of real identity not a defence)</i></p> <p><i>Recognizes multiple grounds for discrimination</i></p>

<b>Nepal Constitution</b> 2015	Articles 18(2) and 18(3)	(2) No discrimination shall be made in the application of general laws on grounds of origin, religion, race, caste, tribe, sex, physical condition, condition of health, marital status, pregnancy, economic condition, language or region, ideology or on similar grounds. (3) The State shall not discriminate citizens on grounds of origin, religion, race, caste, tribe, sex, economic condition, language, region, ideology or on similar other grounds.	<i>Prohibits discrimination on multiple grounds</i>
<b>Somalia Constitution</b> 2012	Article 11(2)	(2) Discrimination is deemed to occur if the effect of an action impairs or restricts a person's rights, even if the actor did not intend this effect.	<i>Defines discrimination in terms of the effect of an action, not purpose (intent not required)</i>
<b>Venezuela Constitution</b> 1999	Article 21(1)	All persons are equal before the law, and, consequently: 1. No discrimination based on race, sex, creed or social standing shall be permitted, nor, in general, any discrimination with the intent or effect of nullifying or encroaching upon the recognition, enjoyment or exercise, on equal terms, of the rights and liberties of every individual.	<i>Defines discrimination in terms of the effect of an action, not purpose (intent not required)</i>
<b>Canada, Constitution Act</b> 1982	Part I (Canadian Charter of Rights and Freedoms), section 15(1)	(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	<i>Promises equality before the law without discrimination</i>  <i>Recognizes multiple grounds for discrimination</i>
<b>The Philippines, Indigenous Peoples' Rights Act</b> 1997	Section 23	Freedom from Discrimination and Right to Equal Opportunity and Treatment. — It shall be the right of the ICCs/IPs [indigenous cultural communities/indigenous peoples] to be free from any form of discrimination, with respect to recruitment and conditions of employment . . .  Towards this end, the State shall, within the framework of national laws and regulations, and in cooperation with the ICCs/IPs concerned, adopt special measures to ensure the effective protection with regard to the recruitment and conditions of employment of persons belonging to these communities, to the extent that they are not effectively protected by laws applicable to workers in general.	<i>Recognizes freedom from discrimination in context of employment and calls for special measures to promote substantive equality of opportunity</i>

#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Right to equality and anti-discrimination



### **Does the constitution allow for or mandate special measures aimed at achieving substantive equality for indigenous peoples?**

#### EXPLANATION

This question is linked to Question 4 about the right to equality and anti-discrimination, the concept of which has been challenged in recent years by a greater understanding of and commitment to the principle of substantive equality. The distinction between formal and substantive equality (see Chapter 3 on key terms and concepts) is widely recognized and, while equality before the law can be a sufficient basis for advocating for formal equality, substantive equality often cannot be realized without special policies to ‘level the playing field’ (Arneson 2015). Often, commitments to formal and substantive equality work together. For example, in Canada’s constitutional provisions: section 15(1) provides a commitment to formal equality, and section 15(2) includes a proviso that makes space for special measures geared towards achieving substantive equality. The Supreme Court of Canada has found that: ‘Sections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. Section 15(1) is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds. This is one way of combating discrimination. However, governments may also wish to combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the Charter preserves the right of governments to implement such programs, without fear of challenge under s. 15(1)’ (Supreme Court of Canada 2008: paragraph 16). This shows the importance of having explicit allowances for substantive equality and special measures in the constitution—it preserves the rights of governments to undertake progressive measures without fear of challenge from strict advocates of formal equality.

While some may criticize special measures as being a violation of the democratic norm of equality before the law, or representing a type of discrimination all its own, the constitution can explicitly carve out space to allow for these kinds of special measures, also known as affirmative action or positive discrimination policies. In recognizing substantive equality or affirmative action explicitly, the constitution may mandate or allow for preferential treatment for indigenous peoples in education, employment, political participation, economic life and other areas. An explicit commitment to the principle of substantive equality in a constitution can make room for special measures, if not explicitly calling for them; such provisions can protect special measures from being struck down as unconstitutional for violating a principle of formal equality.

Efforts to achieve substantive equality require that the real differences in social, economic and political circumstances between indigenous peoples and members of non-indigenous communities are acknowledged and addressed. Because indigenous peoples face particular barriers in political, economic and social life, and extreme historic marginalization, the right to formal equality is often insufficient in and of itself to guarantee substantive equality in all spheres of life. Indigenous peoples have been subject to historic prejudice, dispossession, marginalization and discrimination in most countries around the world. The historic treatment of indigenous peoples has often resulted in a tiered system, in which the capacities and opportunities of indigenous peoples in the health, economic, education, professional and political spheres are lesser than those belonging to majority segments of the national populations. Indigenous peoples often require the state to enact proactive/positive discrimination (i.e. special measures) to ensure that their right to equality is meaningfully enjoyed.

The international community has held that special measures and affirmative action policies should be specific (not over-inclusive or under-inclusive), time bound and tailored to address the historic harm they are intended to mitigate. Special measures can be phrased as a right (guaranteed) or a suggestion or can merely be permitted. The Human Rights Committee of the United Nations, in interpreting the International Covenant on Civil and Political Rights (ICCPR), has stated that ‘as long as [special measures] are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27 [minority rights], they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria’ (United Nations 1994: article 6.2).

#### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>ILO Convention 169</b> 1989</p>	<p>Articles 2 and 20</p>	<p>Article 2 1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity. 2. Such action shall include measures for: (a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population; (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions; (c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life. Article 20 1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.</p>	<p><i>Puts an affirmative duty on governments to develop policies for indigenous peoples, in consultation with indigenous peoples, to ensure that they are benefiting equally from rights and opportunities</i></p> <p><i>Specifically calls for special measures for employment for indigenous peoples</i></p>
<p><b>Bangladesh Constitution</b> 1972</p>	<p>Part III, article 28</p>	<p>1. The State shall not discriminate against any citizen on ground only of religion, race, caste, sex or place of birth. ... 4. Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.</p>	<p><i>Provides specific permission for government to make special provisions for vulnerable groups</i></p>



<p><b>Ecuador Constitution</b> 2008</p>	<p>Article 57</p>	<p>2. To not be the target of racism or any form of discrimination based on their origin or ethnic or cultural identity. 3. To recognition, reparation and compensation for community groups affected by racism, xenophobia and other related forms of intolerance and discrimination.</p>	<p><i>Recognizes freedom from discrimination as one of many collective rights of indigenous peoples</i></p> <p><i>Recognizes right to compensation and reparation from discrimination suffered, which could be a basis for special measures</i></p>
<p><b>India Constitution</b> 1949</p>	<p>Articles 15 and 16</p>	<p>Article 15 1. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. ... 4. Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. 5. Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.</p> <p>Article 16 1. There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. ... 4. Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. 4A. Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the States, are not adequately represented in the services under the State.</p>	<p><i>Makes space for positive discrimination in the name of 'advancement' of certain groups</i></p> <p><i>Mentions particularly the right to 'special provisions' in the education sector and in public employment</i></p>
<p><b>Mexico Constitution</b> 1917</p>	<p>Article 2(B)</p>	<p>Government will promote equal opportunities for indigenous peoples and eliminate discriminatory practices by establishing institutions and policies that will be designed and operated in conjunction with indigenous peoples themselves. [Specific measures to be taken delineated in rest of article.]</p>	<p><i>Commits government to eliminate discriminatory practices to promote substantive equality of indigenous peoples</i></p>

<b>Nepal Constitution</b> 2015	Article 18(3)	(3) The State shall not discriminate citizens on grounds of origin, religion, race, caste, tribe, sex, economic condition, language, region, ideology or on similar other grounds. Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or development of the citizens including the socially or culturally backward women, Dalit, indigenous people, indigenous nationalities, Madhesi, Tharu, Muslim, oppressed class, Pichhada class, minorities, the marginalized, farmers, laborers, youths, children, senior citizens, gender and sexual minorities, persons with disabilities, persons in pregnancy, incapacitated or helpless, backward region and indigent Khas Arya.	<i>Defines discrimination in terms of the effect of an action, not purpose (intent not required)</i>
<b>South Africa Constitution</b> 1996	Section 9(2)	2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.	<i>Gives government permission to design measures to redress historic discrimination and recognizes this is necessary for equal enjoyment of rights and freedoms</i>
<b>Canada, Constitution Act</b> 1982	Part I (Canadian Charter of Rights and Freedoms), section 15(1) and (2)	(1) Equality before and under law and equal protection and benefit of law Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Affirmative action programs Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	<i>Recognizes right to formal equality with proviso that a right to equality will not be the grounds for striking down programmes targeting disadvantaged groups</i>

**FINDINGS**

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

**ACTIONS**

*Suggested advocacy and other follow-on actions to address or disseminate findings.*



**III. Foundations  
for indigenous  
peoples' rights**

**Questions 6–9**

## Foundations for indigenous peoples’ rights



### Does the constitution recognize indigenous peoples’ rights as additional to, and not a replacement of, the fundamental rights guaranteed to all citizens?

#### EXPLANATION

Indigenous peoples, separate from any particular guarantees of their specialized rights as recognized by international law, should be guaranteed collectively and individually the rights promised to all other members of society under national and international law. These include fundamental rights, most importantly for indigenous peoples the right to freedom of expression, religion and association, and the right to equality and non-discrimination. The guarantee of all rights is part of a commitment to ‘equality before the law’ (see Question 4).

For the purposes of this question, the main consideration is whether indigenous peoples’ (or other) specialized rights are seen to complement other rights guaranteed to indigenous peoples as citizens of a given country. Indigenous peoples’ rights should not be seen as a replacement of other human rights, but as an addition to them. An indigenous individual should not experience discrimination when seeking the protection and enforcement of human rights promised to other citizens.

In general, rights schemes should not be used to undermine one another. This is particularly true for indigenous peoples’ rights where there might be multiple sources of governing law, including—for example—treaties signed between indigenous peoples and governments. These treaties should not be used as a basis to deny indigenous peoples the rights contained in the constitution and other national legislation.

#### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<b>ILO Convention 169</b> 1989	Articles 3(1) and 4(3)	<p>Article 3 1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.</p> <p>Article 4 3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.</p>	<i>Protects indigenous peoples’ right to enjoy all international human rights and guarantees that general citizenship rights will not be impacted by special measures for indigenous peoples</i>
<b>UNDRIP</b> 2007	Article 1	Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.	<i>Emphasizes indigenous peoples’ right to enjoyment of all international human rights</i>

<b>Bolivia Constitution</b> 2009	Article 13	I. The rights recognized in this Constitution are inviolable, universal, inter-dependent, indivisible and progressive. The State has the duty to promote, protect and respect them. II. The rights declared in this Constitution shall not be understood to deny other rights that are not enumerated. III. The classification of the rights established in this Constitution does not determine any hierarchy or superiority of some rights over others.	<i>Recognizes that all rights are on an equal footing (no hierarchy of rights)</i>  <i>Prohibits one right being used to nullify another</i>
<b>Nicaragua Constitution</b> 2014	Article 5	The State recognizes the existence of the indigenous peoples . . . who enjoy the rights, duties and guarantees designated in the Constitution.	<i>Promises indigenous peoples all rights and guarantees in the constitution</i>
<b>Serbia Constitution</b> 2006	Article 75	Persons belonging to national minorities shall be guaranteed special individual or collective rights in addition to the rights guaranteed to all citizens by the Constitution.	<i>Recognizes that special rights are an addition to rights guaranteed to all citizens</i>
<b>Canada, Constitution Act</b> 1982	Part I (Canadian Charter of Rights and Freedoms), section 25	The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.	<i>Ensures that current agreements do not negatively impact on agreements from the past (interaction of constitutional rights with treaty rights)</i>
<b>New Zealand, Treaty of Waitangi</b> 1840	Article 3	In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.	<i>Promises indigenous peoples of New Zealand the same rights and privileges of all (at that time, British) citizens</i>

#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Foundations for indigenous peoples' rights



### Does the constitution recognize indigenous peoples' right to self-determination as a foundation for other indigenous peoples' rights?

#### EXPLANATION

Under international law, indigenous peoples have a distinct right to self-determination, which serves as a foundation for other indigenous peoples' rights. As such, self-determination is a cross-cutting issue in this Assessment Tool. Giving explicit recognition to indigenous peoples' right to self-determination in a national constitution can be a platform for the realization of many other indigenous peoples' rights.

As explained in Chapter 3 on key terms and concepts, self-determination has internal and external dimensions. While all peoples have a recognized right to self-determination under international law, indigenous peoples' special right to internal self-determination was first recognized in UNDRIP. While ILO Convention 169 recognizes indigenous peoples' right 'to determine and develop priorities and strategies for exercising their right to development . . . to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions' (ILO 1989: article 23), it falls short of recognizing indigenous peoples' right to self-determination.

UNDRIP, however, explicitly recognizes indigenous peoples' right to self-determination as a foundational right; it underlies all of the rights of indigenous peoples, particularly those to consultation, participation and autonomy. For example, the right to internal self-determination implies that peoples have the right to participate in the democratic process of governance and to manage and direct their economic, social and cultural development strategies. The implementation of the right to self-determination is intrinsic to the implementation of other rights and to ensuring that these are implemented in a non-paternalistic way.

Historically, indigenous peoples around the world were recognized as wards of the state, perceived and treated as though they were incapable of governing themselves. Their ability to function as autonomous societies was effectively denied. Indigenous cultures, languages, and traditional practices and institutions were disallowed or degraded as part of forceful assimilation, and in some cases wiped out, in the promotion of other cultures. Treating indigenous peoples as wards, or as though they lack the ability to self-govern, is harmful and disrespectful, and falls short of the international standards mandating equal treatment of indigenous peoples. Indigenous peoples' right to self-determination counteracts these practices and can allow for indigenous communities to fight back against cultural assimilation and to promote their own vision and desires for their peoples' future.

The indigenous right to self-determination implies that indigenous peoples should have autonomy in promoting, developing and maintaining their institutional structures and distinctive customs, spirituality, traditions, procedures and practices, including judicial systems or customs. Their rights should be protected in a way that is founded on respect for the dignity of their identities, cultures, traditions and languages. Self-determination also implies that indigenous peoples have the right to make choices about how to balance their cultures and traditions with economic development: the right to self-determination also gives way to indigenous peoples' right to determine their own development priorities, particularly concerning their land and natural resources.

Importantly, the indigenous right to self-determination does not include the external element of secession; this is made clear in UNDRIP: 'Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any



action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States' (United Nations 2007: article 46(1)). It is not uncommon to see similar language in constitutions that recognize some form of self-determination, but maintain a commitment to the territorial integrity of the state.

INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<b>United Nations</b> 1996	Annex VIII, B, page 125, para. 9	9. In respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, i.e. the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, governments are to represent the whole population without distinction as to race, colour, descent or national or ethnic origin.	<i>Defines internal self-determination</i>
<b>UNDRIP</b> 2007	Articles 3 and 4	Article 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. Article 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.	<i>Recognizes indigenous peoples' specific right to self-determination and its implications for political participation and also economic, social and cultural rights, as well as links to self-government and autonomy</i>
<b>Bolivia Constitution</b> 2009	Articles 2 and 30 (II, 4)	Article 2 Given the pre-colonial existence of nations and rural native indigenous peoples and their ancestral control of their territories, their free determination, consisting of the right to autonomy, self-government, their culture, recognition of their institutions, and the consolidation of their territorial entities, is guaranteed within the framework of the unity of the State, in accordance with this Constitution and the law.  Article 30 II. . . . indigenous peoples enjoy the following rights: . . . . 4. To self-determination and territoriality.	<i>Recognizes indigenous peoples' right to self-determination and links this to right to autonomy, culture, recognition of institutions, etc.</i>  <i>Demonstrates foundational status of self-determination</i>

<p><b>Ecuador Constitution</b> 2008</p>	<p>Articles 57 and 96</p>	<p>Article 57 The territories of the peoples living in voluntary isolation are an irreducible and intangible ancestral possession and all forms of extractive activities shall be forbidden there. The State shall adopt measures to guarantee their lives, enforce respect for self-determination and the will to remain in isolation and to ensure observance of their rights. The violation of these rights shall constitute a crime of ethnocide, which shall be classified as such by law</p> <p>Article 96 All forms of organizing society are recognized as an expression of the people’s sovereignty to develop processes of self-determination and to influence public decisions and policymaking and for social monitoring of all levels of government, as well as public and private institutions that provide public services. Organizations can be articulated at different levels to build up citizen power and its forms of expression; they must guarantee internal democracy, the rotation of power of their leaders, and accountability.</p>	<p><i>Recognizes self-determination, but seems to be limited to certain indigenous groups</i></p> <p><i>Recognizes self-determination as collective action to influence policy</i></p>
<p><b>Mexico Constitution</b> 1917</p>	<p>Article 2</p>	<p>The right of indigenous peoples to self-determination shall be exercised within a constitutional framework of autonomy that ensures national unity. The indigenous peoples and communities shall be recognized in the constitutions and laws of the federal entities, which shall take into consideration, in addition to the general principles established in the previous paragraphs of this article, ethno-linguistic criteria and physical location.</p> <p>A. This Constitution recognizes and guarantees the right of indigenous peoples and communities to self-determination and, as a result, their autonomy with regard to:</p> <p>...</p> <p>The constitutions and laws of the federal entities shall establish the characteristic elements of self-determination and autonomy which best correspond to the circumstances and aspirations of the indigenous people in each entity, as well as the rules on the recognition of the indigenous communities as entities of public interest.</p>	<p><i>Explicitly recognizes indigenous peoples’ right to internal self-determination, along with guarantee of enforcement</i></p>
<p><b>South Africa Constitution</b> 1996</p>	<p>Section 235</p>	<p>The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.</p>	<p><i>Expresses difference between national self-determination and the right to self-determination of any communities with common cultural heritage</i></p>

**FINDINGS**

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

**ACTIONS**

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

# Foundations for indigenous peoples' rights



## Does the constitution recognize collective rights? If so, is it a general recognition or specific to indigenous peoples?

### EXPLANATION

Indigenous peoples tend to have a collective or communal identity; their individual identity is tied to the identity of their community. In advance of the promulgation of UNDRIP, one indigenous peoples' advocate stated: 'The concept of indigenous peoples' collective rights is of paramount importance. It is the establishment of rights of peoples as groups, and not merely the recognition of individual rights, which is one of the most important purposes of this Declaration. Without this, the Declaration cannot adequately protect our most basic interests. This must not be compromised' (United Nations Sub-Commission 1989). As such, it is fundamental for indigenous peoples that the concept of collectives as rights holders, if not specific communal rights for indigenous peoples, are included in the constitution. International law specific to indigenous peoples has developed around the assumption that indigenous communities, as collective wholes, can make claims of governments to be respected and given necessary political space to develop themselves in accordance with their collectively held values and worldview.

While the constitution may guarantee rights, such as the fundamental right to freedom of expression, to all peoples, some of these rights may fail to represent the quality of the right as it pertains to the community as a collective. Therefore, indigenous peoples often advocate for recognition of collective, in addition to individual, rights. Collective rights can apply to property (land and intellectual), natural resource management, language, self-determination, special measures/affirmative action and the preservation of 'cultural integrity' or distinctiveness. A constitution could provide general recognition for collectives as rights holders, or specific recognition to indigenous peoples as being able to claim collective ownership or rights in specific areas such as land or intellectual property.

### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<b>ILO Convention 169</b> 1989	Article 13(1)	In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.	<i>Recognizes the importance of 'collective aspects' of indigenous culture, particularly vis-à-vis land rights</i>
<b>UNDRIP</b> 2007	Preamble and article 7(2)	Preamble Recognizing and reaffirming . . . that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.  Article 7(2) Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples.	<i>Recognizes indigenous peoples' rights as being held by 'collectives' or communities as a whole</i>
<b>Angola Constitution</b> 2010	Section 1 (Title)	Individual and Collective Rights and Freedoms	<i>Chapter heading clearly recognizes that rights are both individual and collective</i>

<p><b>Brazil Constitution 1988</b></p>	<p>Article 134</p>	<p>The Public Defender's Office is a permanent institution, essential to the State's jurisdiction function, and it shall be fundamentally responsible, as an expression and instrument of the democratic regime, for legal orientation, the promotion of human rights, and the integral and gratuitous defense, at all levels, judicial and extrajudicial, of individual and collective rights of the needy, as set out in art. 5, LXXXIV.</p>	<p><i>Gives clear mandate to Public Defender's Office to protect both individual and collective rights to promote enforcement</i></p>
<p><b>Ecuador Constitution 2008</b></p>	<p>Articles 11(1), 57, 58, 59, 257 and 403</p>	<p>Article 11 The exercise of rights shall be governed by the following principles: (1) Rights can be exercised, promoted and enforced individually or collectively before competent authorities; these authorities shall guarantee their enforcement.</p> <p>Article 57 Indigenous communes, communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments, the following collective rights: . . .The State shall guarantee the enforcement of these collective rights without any discrimination, in conditions of equality and equity between men and women.</p> <p>Article 58 To build up their identity, culture, traditions and rights, the collective rights of the Afro-Ecuadorian people are recognized, as set forth in the Constitution, the law, and human rights agreements, conventions, declarations and other international instruments.</p> <p>Article 59 The collective rights of the coastal back-country people (montubios) are recognized to guarantee their process of integral, sustainable and durable human development, the policies and strategies for their progress and their forms of societal management, on the basis of knowledge about their reality and respect for their culture, identity, and own vision, in accordance with the law.</p> <p>Article 257 Within the framework of political-administrative organization, indigenous or Afro-Ecuadorian territorial districts may be formed. These shall have jurisdiction over the respective autonomous territorial government and shall be governed by the principles of interculturalism and plurinationalism, and in accordance with collective rights.</p> <p>Article 403 The State shall not make commitments to cooperation agreements or accords that include clauses that undermine the conservation and sustainable management of biodiversity, human health, collective rights and rights of nature.</p>	<p><i>Protects exercise and enforcement of collective rights specifically for indigenous peoples, Afro-Ecuadorian people, and the montubios</i></p> <p><i>Gives option to raise rights individually or collectively</i></p> <p><i>Prohibits the state from contracting into agreements that violate collective rights</i></p>

<b>Guatemala Constitution</b> 1985	Article 67	The lands of the cooperatives, native communities, or any other forms of communal possession or collective of agrarian ownership, as well as the family heritage and popular housing will enjoy the special protection of the State, preferential credit and technical assistance, which may guarantee their ownership and development in order to insure an improved quality of life to all inhabitants.	<i>Recognizes communal possession of land</i>
<b>Serbia Constitution</b> 2006	Article 75	Persons belonging to national minorities shall be guaranteed special individual or collective rights in addition to the rights guaranteed to all citizens by the Constitution.	<i>Provides strong language about exercising collective rights although not specific to indigenous peoples (for all national minorities)</i>
<b>Venezuela Constitution</b> 1999	Articles 119 and 124	Article 119 The State recognizes the existence of native peoples and communities, their social, political and economic organization, their cultures, practices and customs, languages and religions, as well as their habitat and original rights to the lands they ancestrally and traditionally occupy, and which are necessary to develop and guarantee their way of life. It shall be the responsibility of the National Executive, with the participation of the native peoples, to demarcate and guarantee the right to collective ownership of their lands, which shall be inalienable, not subject to the law of limitations or distraint, and nontransferable, in accordance with this Constitution and the law. Article 124 Collective intellectual property rights in the knowledge, technologies and innovations of native peoples are guaranteed and protected. Any activity relating to genetic resources and the knowledge associated with the same, shall pursue collective benefits. The registry of patents on this ancestral knowledge and these resources is prohibited.	<i>Recognizes specific collective rights to land and intellectual property for indigenous communities</i>
<b>New Zealand, Treaty of Waitangi</b> 1840	Article 2	Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.	<i>Allows for collective land ownership (as well as individual)</i>

#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

# Foundations for indigenous peoples' rights



## **Does the constitution provide for how fundamental citizen and human rights, including equality before the law and protections for women and other inter-sectionally vulnerable groups, should be reconciled with indigenous peoples' rights?**

### EXPLANATION

Recognizing indigenous peoples' rights in a constitution does not come without complications. There are many instances where indigenous peoples' rights might come into conflict with other constitutional rights. In protecting indigenous peoples' rights to practise traditional governance or justice mechanisms, for example, a state may inadvertently be protecting a system that allows for corporal punishment or a governing custom that excludes youth or women. As such, a constitution's prohibition on discrimination may conflict, in practice, with some indigenous customs and systems wherein women and men are treated differently, such as in land tenure systems or leadership succession. In these instances, either one right or another has to be limited—for example, either the fundamental constitutional right to equal participation in government for all people (regardless of gender or age), or the constitutional right for indigenous peoples to exercise self-government and traditional practices, which might be considered exclusive of women or youth.

It is important that a constitution provides a mechanism to reconcile rights and liberties that may otherwise come into conflict with one another or be functionally incompatible in practice. This is done in different ways, including by empowering the courts to balance rights; or through express commitments that indigenous peoples' rights will be limited to the extent that they don't conflict with other constitutional rights; or by exempting indigenous communities from certain rights standards by allowing for self-government rights on issues such as family law, for example, to take precedent. The issue is often expressly addressed in constitutions with regard to indigenous and customary rights compared with constitutional rights to equality, non-discrimination and other substantive guarantees such as rights to due process, life and liberty.

A rule for reconciling rights is particularly important from the perspective of intersectionality of identities. An intersectional approach to human rights recognizes that people's lived experience is mediated by their multiple identities, including, for example, race, class, ethnicity, membership of an indigenous community, national origin, sexual orientation, gender, age, citizenship, geopolitical context and health. A normative assessment of different approaches to balancing these issues and identities in practice depends on the country context and the specific intersectional identities at issue. The situation of indigenous women in particular should be specifically considered in this analysis. Indigenous women often face multiple forms of discrimination, both within the wider state system and in relation to male members of their indigenous community. Therefore, it is important to consider how a constitution approaches the need to ensure that their fundamental rights (e.g. to equality, non-discrimination, participation) are not compromised by recognition of indigenous peoples' rights.



INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>Bolivia Constitution</b> 2009</p>	<p>Articles 190 and 210(I)</p>	<p>Article 190 I. The nations and native indigenous rural peoples shall exercise their jurisdictional functions and competency through their authorities, and shall apply their own principles, cultural values, norms and procedures. II. The rural native indigenous jurisdiction respects the right to life, the right to defense and other rights and guarantees established in this Constitution. Article 210 I. The organization and functioning of the organizations of the nations, rural native indigenous peoples, and citizen associations and political parties must be democratic.</p>	<p><i>Limits the exercise of indigenous jurisdiction and customary practices to the extent that they do not comply with constitutional rights</i></p> <p><i>Allows for indigenous organizations to be established but mandates that they be ‘democratic’ in practice</i></p>
<p><b>Colombia Constitution</b> 1991</p>	<p>Article 246</p>	<p>The authorities of the indigenous [Indian] peoples may exercise their jurisdictional functions within their territorial jurisdiction in accordance with their own laws and procedures as long as these are not contrary to the Constitution and the laws of the Republic.</p>	<p><i>Limits exercise of indigenous territorial self-government to within the constitution and national laws</i></p>
<p><b>Ecuador Constitution</b> 2008</p>	<p>Articles 57 and 171</p>	<p>Indigenous communes, communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments, the following collective rights: ... 10. To create, develop, apply and practice their own legal system or common law, which cannot infringe constitutional rights, especially those of women, children and adolescents. ... The State shall guarantee the enforcement of these collective rights without any discrimination, in conditions of equality and equity between men and women.</p> <p>Article 171 The authorities of the indigenous communities, peoples, and nations shall perform jurisdictional duties, on the basis of their ancestral traditions and their own system of law, within their own territories, with a guarantee for the participation of, and decision-making by, women. The authorities shall apply their own standards and procedures for the settlement of internal disputes, as long as they are not contrary to the Constitution and human rights enshrined in international instruments.</p> <p>The State shall guarantee that the decisions of indigenous jurisdiction are observed by public institutions and authorities. These decisions shall be subject to monitoring of their constitutionality. The law shall establish the mechanisms for coordination and cooperation between indigenous jurisdiction and regular jurisdiction.</p>	<p><i>Allows for indigenous customary law but only to the extent it does not infringe on the Constitution and other human rights agreements</i></p> <p><i>Expressly mentions indigenous peoples’ rights will be implemented to promote equality and equity between men and women (recognizes risk of intersectional discrimination)</i></p> <p><i>Mandates that self-government should include women’s participation in decision-making</i></p> <p><i>Declares that internal disputes will be settled by customary practice so long as there is no conflict with the constitution and international human rights</i></p> <p><i>Guarantees that decisions of indigenous peoples’ institutions and authorities are subject to review for constitutionality</i></p>

<p><b>Kenya Constitution</b> 2010</p>	<p>Articles 2(4) and 24(4)</p>	<p>Article 2(4) (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.</p> <p>Article 24(4) (4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.</p>	<p><i>Emphasizes the supremacy of the constitution whereby any law in contradiction with the constitution will be invalidated but allows for some qualification in the application of Muslim law by Kadhis' courts in personal matters</i></p>
<p><b>South Africa Constitution</b> 1996</p>	<p>Section 30</p>	<p>Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.</p>	<p><i>Provides more general rights limitations, i.e. freedom of expression limited by Bill of Rights</i></p>
<p><b>Canada, Constitution Act</b> 1982</p>	<p>Part II (Rights of the Aboriginal Peoples of Canada), section 35(4)</p>	<p>(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.</p>	<p><i>Protects gender equality in the realization of indigenous peoples' rights</i></p>
<p><b>South Sudan, Local Government Act</b> 2009</p>	<p>Section 98(3)</p>	<p>(3) In deciding cases, the Customary Law Courts shall, inter alia apply the following principles:</p> <p>(a) justice shall be done to all, irrespective of social, economic and political status, race, nationality, gender, age, religion, creed or belief;</p> <p>(b) justice shall neither be delayed nor denied;</p> <p>(c) adequate compensation shall be awarded to victims of wrongs;</p> <p>(d) voluntary mediation and reconciliation agreements between parties shall be recognized and enforced; and</p> <p>(e) substantive justice shall be administered without due regard to technicalities.</p>	<p><i>Empowers Customary Law Courts at the local level to reconcile different rights within the administration of customary law, including by mandating the application of the principles of non-discrimination and due process (regarding no delays or denials of justice and the right to effective remedy)</i></p>

#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*



**IV. Autonomy:  
Agreement-  
making and self-  
government**

**Questions 10–12**

## Autonomy: Agreement-making and self-government



### **Does the constitution honour historic and future agreement-making or treaty arrangements between indigenous peoples and the state in a way that validates the inherent sovereignty (autonomy) of indigenous peoples?**

#### EXPLANATION

Relations between indigenous peoples and the governments of states in which they live often have a legal and/or historical foundation in treaties, agreements and other formal arrangements. A primary example is the Treaty of Waitangi in New Zealand, cited throughout this Assessment Tool. Many such agreements date back centuries to the early colonial era, and were historically understood as a matter of international law, as agreements signed by two equal and sovereign powers/peoples. Today, this legal construction has changed somewhat with the rise of the state and related processes to 'domesticate' relationships between state governments and indigenous peoples. Despite these shifts in legal and normative understanding, such agreements constitute an important aspect of the right to self-determination and remain a highly important tool to protect indigenous peoples' rights and (re)negotiate relations with the state as the modern context demands. Moreover, such treaties and agreements carry important symbolic, diplomatic and normative value and represent a basis for strengthened partnership with the state, including in some cases reconciliation for historic dispossession and marginalization. Under UNDRIP, indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with states or their successors, and to have states honour and respect such treaties, as well as the right to enter into new agreements as sovereign actors. This occurs in many different ways around the world, but compliance and implementation of these agreements remains challenging. The United Nations has urged for broad and innovative interpretations of treaties and treaty-making (United Nations 1999).

Historic treaties can be an important basis for shaping the way in which a state incorporates indigenous peoples into its overarching governance framework. Unfortunately, the history of most modern states is based on these processes, where indigenous peoples 'are, even if only formally, placed under a State structure which incorporates national, social and cultural characteristics alien to theirs' (Martínez Cobo 1972). If historic treaties are relied upon as a show of respect for indigenous peoples' sovereignty, this can form a strong basis for modern state-building efforts and minimize the chances of repeating violent assimilation and dispossession.

It is fairly rare for constitutions to expressly recognize historic treaties or to guarantee the right of indigenous communities to enter into new treaties or other agreements with the state or other parties, particularly as two co-equal sovereign entities. Key exceptions include, for example, the United States and Canada (although the United States has since reinterpreted relevant constitutional provisions and retreated from key treaty obligations over time). Canada takes a rather progressive approach to treaty-making and, on the basis of section 35 of the Constitution, has preserved modern-day treaty rights. In 1973, the Supreme Court of Canada recognized Aboriginal rights for the first time, in its decision *Calder et al. v. Attorney-General of British Columbia*. This decision led to the development of the Comprehensive Land Claims Policy and the first modern treaty-signing in Canada in 1975, the James Bay and Northern Québec Agreement. Since then, Canada has signed approximately 25 new treaties that form the basis of the relationship between Canada and its 97 recognized indigenous communities. Treaties in Canada have provided for: 'Indigenous ownership over 600,000 km<sup>2</sup> of land, capital transfers of over \$3.2 billion, protection of traditional ways of life, access to resource development opportunities, participation in land and resources management decisions, certainty with respect to land rights in round 40% of Canada's land mass [and] associated self-government rights and political recognition' (Government of Canada 2018). Canada has also

begun a process of ‘bilateral mechanisms’, through which new memorandums of understanding and accords are negotiated and signed between the Canadian Government and indigenous nations—for example, the Canada–Metis Nation Accord and the Memorandum of Understanding between the Prime Minister and the National Chief of the Assembly of First Nations (Government of Canada 2020).

In New Zealand, the substance of key historical treaties remains enforceable to the extent that they have been domesticated through the legislature by including the Treaty of Waitangi in law. The establishment of the Waitangi Tribunal (discussed more in Question 27) has ensured that indigenous peoples can bring claims against the government in relation to ongoing violations of these historic rights. In Australia, law-makers and indigenous peoples have long considered forms of constitutional recognition and the potential utility of treaties to regulate state–indigenous peoples’ relations. Denmark also recognizes Greenland’s indigenous self-government to enter into new transnational contracts in the areas of its competency, according to the constitution and prevailing law.

The variety of approaches and limited comparative constitutional frameworks specific to this right mean that the issue may be addressed sub-constitutionally through legislation or in related policies that incorporate historic treaties. In many cases, however, the process and nature of such recognition may require further awareness-raising at the local level, data gathering, research and advocacy to better understand the current status of historic treaties within the country under assessment and whether a modern treaty or other constructive arrangement is a viable instrument through which to strengthen state–indigenous peoples relations and the exercise of self-determination.

#### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>UNDRIP</b> 2007</p>	<p>Articles 36 and 37(1)</p>	<p>Article 36 1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders. 2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.</p> <p>Article 37 1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.</p>	<p><i>Recognizes indigenous peoples’ right to enter into transnational contracts and cooperation agreements as sovereign actors</i></p> <p><i>Provides indigenous peoples with the right to recognition of existing treaties</i></p>
<p><b>Bolivia Constitution</b> 2009</p>	<p>Article 304(l, 17)</p>	<p>I. The rural native indigenous autonomies shall exercise the following exclusive authorities: ... 17. To promote and sign agreements of cooperation with other towns and public and private entities.</p>	<p><i>Recognizes indigenous peoples’ right to promote and sign agreements of cooperation with private and public entities</i></p>

<p><b>United States Constitution</b> 1789</p>	<p>Article VI</p>	<p>This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.</p>	<p><i>Article VI was originally interpreted to mean that the United States Government adopted and sanctioned previous treaties with the Indian nations, implicitly recognizing their agreement-making powers and sovereignty. The Indian Appropriation Act of 1871, however, provided a new interpretation of Article VI changing the legal status of nations and tribes and denying them recognition as 'independent' peoples under international law. The Supreme Court has upheld this position, highlighting the importance of constitutional interpretation and the role of the courts and legislatures in that process, particularly for common law jurisdictions</i></p>
<p><b>Canada, Constitution Act</b> 1982</p>	<p>Part II (Rights of the Aboriginal Peoples of Canada), section 35</p>	<p>(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.</p>	<p><i>Recognizes all existing treaty rights but has also been interpreted by the courts as providing an on-going right to negotiation of agreements between indigenous areas and the government</i></p>
<p><b>New Zealand, Treaty of Waitangi Act</b> 1975</p>	<p>Title, preamble and article 3</p>	<p>Title An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty. Preamble Whereas on 6 February 1840 a Treaty was entered into at Waitangi between Her late Majesty Queen Victoria and the Maori people of New Zealand: And whereas the text of the Treaty in the English language differs from the text of the Treaty in the Maori language: And whereas it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles. Article 3 This Act shall bind the Crown.</p>	<p><i>Binds the crown to treaty obligations agreed to in 1840</i>  <i>Integrates Treaty of Waitangi into New Zealand's constitutional framework</i>  <i>Makes clear that principles are binding on government going forward (serial settlements and agreements allowed for)</i></p>

**Greenland,  
Act on  
Greenland Self-  
Government  
2009**

Preamble and  
article 12

Preamble

Recognising that the people of Greenland is a people pursuant to international law with the right of self-determination, the Act is based on a wish to foster equality and mutual respect in the partnership between Denmark and Greenland. Accordingly, the Act is based on an agreement between Naalakkersuisut [Greenland Government] and the Danish Government as equal partners.

Article 12

(1) Naalakkersuisut may, on behalf of the Realm, negotiate and conclude agreements under international law with foreign states and international organisations, including administrative agreements which exclusively concern Greenland and entirely relate to fields of responsibility taken over.

(2) Agreements under international law which exclusively concern Greenland and the Faroe Islands and entirely relate to fields of responsibility taken over may, subject to decision by Naalakkersuisut as well as the Faroe Islands Landsstyre [Government of the Faroes], be negotiated and concluded jointly on behalf of the Realm by Naalakkersuisut and the Faroe Islands Landsstyre.

(3) Agreements under international law concluded pursuant to subsection (1) or subsection (2) may be terminated according to the same provisions.

(4) Agreements under international law affecting the defence and security policy as well as agreements under international law which are to apply to Denmark, or which are negotiated within an international organisation of which the Kingdom of Denmark is a member shall be negotiated and concluded according to the rules laid down in section 13.

(5) Naalakkersuisut shall inform the Government of negotiations under consideration before these are initiated and of the development of the negotiations before agreements under international law are concluded or terminated. A more detailed framework for the cooperation in accordance with this provision shall be determined after negotiation between Naalakkersuisut and the Government.

*Links recognition of the agreement between Denmark and Greenland to the right to self-determination and recognizes Greenland's sovereignty by including mention of mutual respect as an equal partner*

*Recognizes that the Greenland Government has the right to enter into international agreements that solely affect Greenland in the competencies devolved as part of the home rule arrangement with Denmark*



**FINDINGS**

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

**ACTIONS**

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

# Autonomy: Agreement-making and self-government



## Does the constitution recognize indigenous peoples' rights to autonomy and self-government, territorial or otherwise?

### EXPLANATION

The rights to autonomy and self-government are connected to the right to self-determination. As self-determining communities, indigenous peoples should be provided with the necessary structural authority and means to allow for the exercise of traditional governance practices within their ancestral territories and among their communities, as well as to be able to make decisions about how those practices will be taken forward and how their communities will develop in the future. Autonomy and self-government can be non-territorial or territorial, and often overlap.

#### *Non-territorial self-government and autonomy*

Non-territorial self-government and autonomy refers to the designation of specific areas of autonomy or authority, otherwise known as 'competencies', over which indigenous peoples can exercise self-government in the spirit of self-determination. Many questions in this Assessment Tool look in more detail at what particular areas of governance, or competencies of law and policy, indigenous peoples are given autonomy or self-governing rights over (e.g. land and natural resource use, language, education, health care), but constitutional protection of at least the principle and the possibility of autonomy and self-government is a critical entry point for indigenous peoples, which can then help to define the exact contours and scope of this autonomy over time. Non-territorial autonomy can exist alongside territorial autonomy. So, for example, in the Greenland Self-Government Act, Greenland is given territorial self-governing rights but the Act also specifies the precise issue areas or 'authorities' that Greenland can exercise autonomy over.

To ensure autonomous functions are realized, autonomy in name should be complemented with a meaningful devolution of specific and significant powers and with guarantees of financing, provided for either by the state government as a grant or share of the national budget or by devolving powers of taxation or other resource mobilization to indigenous peoples. So, if indigenous peoples are given autonomy to run their own schools or courts, for example, then they will also need financing to do this and complementary powers to hire staff or civil servants for these institutions. The details of what authorities and powers will be devolved to autonomous communities or indigenous peoples for their self-government can be provided within legislation if it is not specified in the constitution, as was done in the Greenland Self-Government Act. These powers should be identified and defined in consultation with indigenous peoples, in line with free, prior and informed consent (FPIC).

#### *Territorial self-government and autonomy*

Territorial self-government and autonomy may be operationalized through the establishment of autonomous regions in areas where indigenous communities are concentrated geographically. In analysing the provision of autonomous regions, it is important to consider the type of status afforded to such regions—whether they are another tier of government in a federal decentralized system, or some other special form. It is also important to determine whether or not the authorities of the regions, and any provisions on intergovernmental relations between self-governing territories or autonomous communities and branches and levels of state governments, have been clearly defined.

A constitution can establish autonomous regions or provide criteria for, or a basis upon which, these regions can be recognized in the future; these procedures must include indigenous peoples and their own chosen representatives and be designed in line with the principle of obtaining indigenous peoples' free, prior and informed consent, as well as with respect for indigenous peoples' rights to land, territories and natural resources (see Section VI of this chapter) and self-determination.

INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>UNDRIP</b> 2007</p>	<p>Article 4</p>	<p>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.</p>	<p><i>Protecting the right to autonomy or self-government and to financing these functions as part of self-determination</i></p>
<p><b>Bolivia Constitution</b> 2009</p>	<p>Article 304</p>	<p>I. The rural native indigenous autonomies shall exercise the following exclusive authorities:</p> <ol style="list-style-type: none"> <li>1. To elaborate their Statute for the exercise of their autonomy pursuant to the Constitution and the law.</li> <li>...</li> <li>12. To create and administer fees, certificates and special contributions in the area of its jurisdiction in accordance with the law.</li> <li>13. Administrate the taxes within its authority in the area of its jurisdiction.</li> <li>14. To elaborate, approve and execute its programs of operation and its budget.</li> <li>15. Planning and management of territorial occupation.</li> <li>16. Housing, town planning and redistribution of population in accordance with the cultural practices in the area of its jurisdiction.</li> <li>17. To promote and sign agreements of cooperation with other towns and public and private entities.</li> <li>18. Maintenance and administration of its micro-irrigation systems.</li> <li>19. Stimulation and development of productive activity.</li> <li>20. Construction, maintenance and administration of the infrastructure necessary for development in its jurisdiction.</li> <li>...</li> </ol> <p>II. The rural native indigenous villages can exercise the following shared authority:</p> <ol style="list-style-type: none"> <li>1. International exchanges within the framework of the foreign policy of the State.</li> <li>2. Participation and control in the use of grains.</li> <li>...</li> </ol> <p>III. The rural native indigenous autonomies may exercise the following concurrent authority:</p> <ol style="list-style-type: none"> <li>1. Organization, planning and execution of health policy in their jurisdiction.</li> <li>2. Organization, planning and execution of plans, programs and projects related to education, science, technology and research, within the framework of State legislation.</li> <li>3. Conservation of forestry resources, biodiversity and the environment.</li> <li>4. Irrigation systems, hydraulic resources, sources of water and energy, within the framework of State policy, within their territory.</li> <li>5. Construction of micro-irrigation systems.</li> <li>6. Construction of local and communal roads.</li> <li>7. Promotion of the building of productive infrastructure.</li> <li>8. Promotion and stimulation of agriculture and raising of livestock.</li> <li>9. Control and socio-environmental monitoring of the activities of hydrocarbon and mining activities carried out in their jurisdiction.</li> <li>10. Systems of financial control and administration of assets and services.</li> </ol>	<p><i>Identifies competencies over which indigenous communities have exclusive authority (autonomy) and concurrent authority—examples of non-territorial autonomy</i></p>

<p><b>Colombia Constitution</b> 1991</p>	<p>Articles 287 and 330</p>	<p>Article 287 Territorial entities enjoy autonomy for the management of their interests within the limits of the Constitution and the relevant statute. By virtue of this they shall have the following rights: 1. To govern themselves under their own authorities.</p> <p>Article 330 In accordance with the Constitution and the laws, the indigenous territories will be governed by the councils formed and regulated according to the uses and customs of their communities and will exercise the following functions: 1. Oversee the application of the legal regulations concerning the uses of the land and settlement of their territories. 2. Design the policies, plans and programs of economic and social development within their territory, in accordance with the National Development Plan. 3. Promote public investments in their territories and oversee their appropriate implementation. 4. Collect and distribute their funds. 5. Oversee the conservation of natural resources. 6. Coordinate the programs and projects promoted by the different communities in their territory. 7. Cooperate with the maintenance of the public order within their territory in accordance with the instructions and provisions of the national government. 8. Represent the territories before the national government and the other entities in which they are integrated; and 9. Other matters stipulated by the Constitution and the law.</p>	<p><i>Allows territorially self-governing 'entities' to enjoy autonomy and provides specific right to self-government</i></p> <p><i>Establishes indigenous councils with specific functions and authorities, including in the areas of land and natural resources</i></p>
<p><b>Finland Constitution</b> 1999</p>	<p>Section 121</p>	<p>Provisions on self-government in administrative areas larger than a municipality are laid down by an Act. In their native region, the Sami have linguistic and cultural self-government, as provided by an Act.</p>	<p><i>Provides for Sami linguistic and cultural self-government in native regions, but holds that this will be regulated in more detail by law</i></p>
<p><b>Nicaragua Constitution</b> 2014</p>	<p>Article 181</p>	<p>The State shall organize by means of a law the regime of autonomy for the indigenous peoples and ethnic communities of the Atlantic Coast, which shall have to contain, among other rules: the functions of their government organs, their relation with the Executive and Legislative Power and with the municipalities, and the exercise of their rights. This law shall require for its approval and reform the majority established for the amendment of constitutional laws. ... The members of the Regional Autonomous Councils of the Atlantic Coast can lose their condition for the reasons and procedures established by law.</p>	<p><i>Mandates the state to establish a system of autonomy for indigenous peoples and ethnic communities and states that the system should respect the right to self-government with executive and legislative powers</i></p> <p><i>Allows for autonomous status to be revoked</i></p>

<p><b>Panama Constitution</b> 1904* and 1972</p>	<p>Article 5</p>	<p>The territory of the Panamanian State is divided politically into Provinces, these, in turn, into Districts and the Districts into Boroughs.</p> <p>Other political divisions may be created by law, either to be subject to special rules, or for reasons of administrative convenience or public service.</p>	<p><i>Allows generally for the creation of specialized political divisions by law, which has been used to establish the Guna Yala self-governing territory under Law No. 16 (1953). The Law defines the specific scope of self-government rights in Guna Yala</i></p> <p><i>* Note: Article 5 is carried over from older constitutions, like the 1904 Constitution, which first recognized Guna Yala. Subsequent constitutions and arrangements for autonomy have provided continued protection for this commitment to recognizing autonomous regions in Panama</i></p>
<p><b>The Philippines Constitution</b> 1987</p>	<p>Article X, section 15</p>	<p>There shall be created autonomous regions in Muslim Mindanao and in the Cordilleras consisting of provinces, cities, municipalities, and geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines.</p>	<p><i>Creates autonomous territorial regions within the framework of national sovereignty, including in Cordillera region with its majority indigenous peoples' population</i></p>
<p><b>Bangladesh, Chittagong Hill Tracts Regional Council Act</b> 1998</p>	<p>Entire law, specifically article 22</p>	<p>Functions of the Council: a) Overall supervision and coordination of all development activities under the Hill District Councils and all other matters entrusted to them: Provided that if the Regional Council, during supervision and coordination under this section, has any dispute on a matter with a hill district council or with more than one hill district council, then the decision of the Regional Council, under this Act, shall be final. b) Supervision and coordination of the local councils including municipalities; c) Overall supervision and coordination of the Chittagong Hill Tracts Development Board set up under the Chittagong Hill Tracts Development Board Ordinance, 1976 (LXXVII of 1976); d) Supervision and coordination of the general administration of the hill districts, law and order and development; e) Supervision and coordination of tribal traditions, practices etc. and social justice; f) Issuing licenses for setting up heavy industries in hill districts in keeping with the National Industrial Policy. g) To conduct disaster management and relief work and co-ordinating of NGO activities.</p>	<p><i>Creates Chittagong Hill Tracts Regional Government as part of peace agreement in Bangladesh to honour indigenous peoples' right to self-government, particularly in development areas, in the Chittagong Hill Tracts</i></p>

<p><b>The Philippines, Indigenous Peoples' Rights Act</b> 1997</p>	<p>Sections 13 and 14</p>	<p>SECTION 13. Self-Governance. — The State recognizes the inherent right of ICCs/IPs [indigenous cultural communities/indigenous peoples] to self-governance and self-determination and respects the integrity of their values, practices and institutions. Consequently, the State shall guarantee the right of ICCs/IPs to freely pursue their economic, social and cultural development.</p> <p>SECTION 14. Support for Autonomous Regions. — The State shall continue to strengthen and support the autonomous regions created under the Constitution as they may require or need. The State shall likewise encourage other ICCs/IPs not included or outside Muslim Mindanao and the Cordilleras to use the form and content of their ways of life as may be compatible with the fundamental rights defined in the Constitution of the Republic of the Philippines and other internationally recognized human rights.</p>	<p><i>Recognizes self-government and self-determination as inherent rights of indigenous peoples and calls on government to provide support to autonomous regions as needed</i></p>
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**FINDINGS**

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

**ACTIONS**

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Autonomy: Agreement-making and self-government



### **Does the constitution entitle indigenous peoples to maintain and apply their customary laws and dispute resolution processes in their territories?**

#### EXPLANATION

The constitution can recognize indigenous peoples' authority to self-govern in different issue areas, authorities or competencies as seen in Question 11. One of the important specific competencies that is perhaps most frequently addressed in constitutions is indigenous peoples' right to continue to implement traditional dispute resolution processes and customary laws. This is in many ways tied to the fundamental question of whether the state recognizes legal pluralism (see Chapter 3 on key terms and concepts), or a variety of bases for law. Many indigenous justice and dispute resolution practices emerge from traditions and norms that are radically different from those that define state-made or 'formal' justice in host states—for example, reparative versus retributive, individual versus collective, or authoritative versus participatory forms of justice. Whatever these traditions are, applying one's own laws and dispute resolution practices is central to other indigenous peoples' rights, such as their right to continue cultural and traditional practices and institutions and their right to rely on traditional land tenure systems.

Customary law should not be applied to any non-indigenous person in the community, and even individual indigenous peoples should be allowed to opt in or out of these customary systems. This is part of ensuring other human rights are not violated in the application of customary law, which should be bound by international human rights norms governing the administration of justice (especially criminal justice due process rights and rights against corporal punishments). It is not uncommon to see language limiting indigenous peoples' right to apply customary law and practice on the basis of international human rights—a specific examination of these reconciliations can be found in Question 9.

It can be beneficial for the constitution, or relevant legislation, to define how tribal, traditional, customary and/or indigenous justice systems interact with the broader state-made or 'formal' justice system. In terms of jurisdiction, many constitutions limit the application of traditional dispute resolution mechanisms and customary law to family/personal status issues, civil disputes and/or minor criminal infractions. Sometimes, interactions between state and traditional justice systems can create legal ambiguity, leading to deprivation of legal rights among litigants. This is more common in situations where state and traditional systems have overlapping jurisdictions, or where traditional systems must not contradict other constitutional rights and there is limited awareness of these rights and obligations among traditional leaders.

The terms 'traditional justice', 'indigenous justice' and 'customary justice' are often conflated, but there are important distinctions between these systems and their historical development. Traditional justice is a broad, overarching category. A system is 'traditional' if it has been practised for a long period of time—generally extending to the pre-colonial era—and has evolved with society. It is not imported from the outside (i.e. through colonial governments). Customary justice is similarly rooted in a long and evolving history. However, 'customary law' was often defined and used by colonial rulers as a governance tool, and therefore the content of customary law in some countries is deeply influenced by colonial experiences. It is not necessarily endogenous to a people or area. Indigenous justice, by comparison, is often synonymous with 'traditional' justice in that it is rooted in the specific historical experiences and traditions of a particular people or area, and pre-dates European colonialization. Although 'traditional' and 'indigenous' justice can be used interchangeably, in some countries, particularly in Central and Latin America, the term 'indigenous justice' refers to the traditions of particular ethnic groups who lived in the area prior to colonialization, whereas



‘traditional’ or ‘customary’ justice can be applied to other ethnic or tribal groups with a less lengthy history of physical presence. In constitutional terms, the selected terminology should be based on the particular histories of the various peoples within the state, as well as historical experiences with colonialism, if any. In all cases, rules and practices are usually unwritten and passed down through oral tradition, although some countries have attempted to codify traditional/customary/indigenous law.

#### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>ILO Convention 169</b> 1989</p>	<p>Articles 8(1), 8(2) and 9</p>	<p>Article 8 1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws. 2. These peoples shall have the right 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. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.</p> <p>Article 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. (2) The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.</p>	<p><i>Recognizes indigenous peoples’ right to retain own customs and institutions, particularly with regard to penal matters</i></p>
<p><b>Bolivia Constitution</b> 2009</p>	<p>Article 192</p>	<p>I. Each public authority or person shall obey the decisions of the rural native indigenous jurisdiction. II. To secure compliance with the decisions of the rural native indigenous jurisdiction, its authorities may request the support of the competent bodies of the State. III. The State shall promote and strengthen rural native indigenous justice. The law of Jurisdictional Demarcation shall determine the mechanisms of coordination and cooperation between rural native indigenous jurisdiction and ordinary jurisdiction and agro-environmental jurisdiction and all the recognized constitutional jurisdictions.</p>	<p><i>Establishes rural native indigenous jurisdictions and calls for coordination with state mechanisms and jurisdictions</i></p>
<p><b>Colombia Constitution</b> 1991</p>	<p>Article 246</p>	<p>The authorities of the indigenous [Indian] peoples may exercise their jurisdictional functions within their territorial jurisdiction in accordance with their own laws and procedures as long as these are not contrary to the Constitution and the laws of the Republic. An Act shall establish the forms of coordination of this special jurisdiction with the national judicial system.</p>	<p><i>Allows indigenous peoples to exercise legal jurisdiction within their territories so long as there is no conflict with national laws and the Constitution</i></p> <p><i>Calls for establishment of coordination mechanism with national justice system</i></p>

<p><b>Ecuador Constitution 2008</b></p>	<p>Article 171</p>	<p>Authorities of the indigenous peoples will exercise judicial functions, applying norms and procedures for the solution of internal conflicts in accordance with their customs or customary law, whenever they are not contradictory to the Constitution and the laws. The law will make those functions compatible with those of the judicial national system.</p>	<p><i>Holds indigenous authorities to include exercising judicial functions and applying norms and procedures as per indigenous custom</i></p>
<p><b>The Philippines, Indigenous Peoples' Rights Act 1997</b></p>	<p>Sections 15 and 65</p>	<p>SECTION 15. Justice System, Conflict Resolution Institutions, and Peace Building Processes. — The ICCs/IPs [indigenous cultural communities/ indigenous peoples] shall have the right to use their own commonly accepted justice systems, conflict resolution institutions, peace building processes or mechanisms and other customary laws and practices within their respective communities and as may be compatible with the national legal system and with internationally recognized human rights.</p> <p>SECTION 65. Primacy of Customary Laws and Practices.—When disputes involve ICCs/IPs, customary laws and practices shall be used to resolve the dispute.</p>	<p><i>Protects indigenous peoples' right to use their own commonly accepted justice systems and customary laws to the extent compatible with national law and international human rights</i></p>

**South Sudan, Local Government Act 2009**

Sections 95, 96, 97 and 98

Section 95. Functions and Duties of the Customary Law Council

- (1) The Customary Law Council shall protect, promote and preserve the traditions, customs, cultures, values and norms of the communities.
- (2) The Customary Law Council shall regulate, maintain, monitor and ensure proper administration of customary law.

Section 96. Authority of the Customary Law Council

- (1) The authority of the Customary Law Council shall be derived from the customs and traditions of the people of the County . . .
- (2) The Customary Law Council shall be responsible for the selection, recruitment, and training of the Customary Law Courts staff and the maintenance of professional standards . . .
- (3) The Customary Law Council shall ensure women participation by at least twenty-five percent membership.
- (4) The Customary Law Council shall ensure that the freedoms and rights enshrined in the Constitution are upheld and respected in the Customary Law Courts.

Section 97. Establishment of Customary Law Courts

- (1) There shall be established Customary Law Courts . . .

. . .

- (2) The Local Government Authority shall ensure adequate representation of women in the Customary Law Courts.

Section 98. Competences of Customary Law Courts

- (1) The Customary Law Courts shall have judicial competence to adjudicate on customary disputes and make judgements in accordance with the customs, traditions, norms and ethics of the communities.
- (2) A Customary Law Court shall not have the competence to adjudicate on criminal cases except those criminal cases with a customary interface.
- (3) In deciding cases, the Customary Law Courts shall, inter alia apply the following principles:
  - (a) justice shall be done to all, irrespective of social, economic and political status, race, nationality, gender, age, religion, creed or belief;
  - (b) justice shall neither be delayed nor denied;
  - (c) adequate compensation shall be awarded to victims of wrongs;
  - (d) voluntary mediation and reconciliation agreements between parties shall be recognized and enforced; and
  - (e) substantive justice shall be administered without due regard to technicalities.

*Establishes Customary Law Council with specific duty to help preserve and ensure proper administration of customary law at the local level in compliance with the constitution*

*Establishes Customary Law Courts and regulates what type of cases can be heard in them (excludes criminal cases), as well as providing specific guidance as to how to balance and ensure other human rights protections are respected in the administration of customary law*

#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*



**V. Consultation,  
political**

**participation and  
representation**

**Questions 13—17**

## Consultation, political participation and representation



### **Does the constitution protect indigenous peoples' right to consultation through their own chosen representatives by formally recognizing indigenous peoples' organizations or otherwise establishing a specialized consultative mechanism between indigenous peoples and the government?**

#### EXPLANATION

Indigenous peoples, by virtue and extension of their right to self-determination (see Question 7), have a right to be consulted through their own chosen representatives and bodies. In the past, in fulfilling the duty to consult, states and private actors would often select for themselves the members of the indigenous communities that they wished to consult. These individuals were not necessarily recognized leaders within the indigenous communities they were purported to represent, nor did they necessarily have the authority to offer consent on behalf of these communities. To prevent this behaviour, indigenous peoples' right to consultation has evolved over time to ensure that consultation occurs through mechanisms, individuals and processes that are based on indigenous peoples' own cultural and governance practices.

Constitutionally, the right to consultation can be protected in several different ways:

- General recognition of indigenous peoples' right to be consulted can be included in a constitution—preferably—in accordance with the objective of obtaining indigenous peoples' free, prior and informed consent (FPIC) as called for by UNDRIP. Specific examples of this can be found in Question 20 on natural resources.
- A constitution can recognize and empower existing indigenous peoples' traditional organizations (IPOs) or other indigenous government structures, mandating the national government to consult with these bodies/governments on issues that affect them or their territories. These organizations should be established by indigenous peoples with the mandate of representing their community or communities with respect to their unique rights and interests.
- Constitutions can also establish new or aggregate mechanisms, such as Vanuatu's Malvatumauri or National Council of Chiefs where indigenous leaders choose a subset of leaders to represent them. This can also occur at a regional level and have a territorial nature, as seen in Bangladesh with the Chittagong Hill Tracts Regional Council.
- Other countries such as Finland and Norway have established alternate Sami parliaments that not only exercise self-government functions, but also serve as formal consultative mechanisms to represent Sami issues at the national level and to liaise with the national parliament. These can be extremely effective, as Eva Josefsen, Associate Professor of at the University of Tromsø, has observed on the Norwegian Sami Parliament: 'It doesn't just advise. It debates, it forwards claims and it demands answers from the Norwegian government' (Watson and Quince 2018).

A distinction is required here between the institutions and mechanisms contemplated in this question and those in Question 27 on indigenous peoples' commissions and ministries of indigenous peoples' affairs. The institutions discussed in Question 27 are state institutions that generally have a mandate to look after, monitor and even take action on indigenous affairs, but these remain government institutions, usually made up of politically appointed commissioners, ministers and bureaucrats who may or may not be of indigenous descent and whose appointment is usually managed by the state and not by indigenous peoples. A modern sub-constitutional example of how to make the institutions considered in Question 27 into consultative mechanisms is provided by the Greenland Committee in the Danish Parliament, the Folketinget. The Committee includes the two representatives in the Folketinget that are directly elected from Greenland (see Question 14), and representatives from all other parties in Parliament. The Committee provides a forum for the Greenland representatives to

raise awareness of Greenland issues and discuss bills and motions that apply to Greenland or have a significance to Greenland with other members of Parliament before the bills or motions are sent to the floor (see The Danish Parliament n.d., for more information).

INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>ILO Convention 169</b> 1989</p>	<p>Article 6(1a)</p>	<p>1. In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.</p>	<p><i>Establishes right to consultation through representative institutions whenever legislative or administrative matters are having an impact on indigenous peoples</i></p>
<p><b>UNDRIP</b> 2007</p>	<p>Article 19</p>	<p>States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.</p>	<p><i>Enhances right to consultation to be about consent (FPIC), by requiring the government to consult in good faith with indigenous peoples through their own representative institutions on legislative or administrative measures</i></p>
<p><b>Ecuador Constitution</b> 2008</p>	<p>Article 57</p>	<p>Indigenous communes, communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments, the following collective rights: ... (15) To build and uphold organizations that represent them, in a context of pluralism and cultural, political, and organizational diversity. The State shall recognize and promote all forms of expression and organization.</p>	<p><i>Provides legal recognition to indigenous peoples and their organizations</i></p>
<p><b>Peru Constitution</b> 1993</p>	<p>Article 89</p>	<p>The rural and native communities have legal existence and are corporate entities.</p>	<p><i>Recognizes indigenous peoples' collective legal existence as corporate entities (able to contract, etc.)</i></p>

<p><b>Vanuatu Constitution</b> 1980</p>	<p>Chapter 5, articles 29–32</p>	<p>Article 529 1. The Malvatumauri Council of Chiefs shall be composed of custom chiefs elected by their peers sitting in District Councils of Chiefs. 2. The Council shall make its own rules of procedure. 3. The Council shall hold at least one meeting a year. Further meetings may be held at the request of the Council, Parliament, or the Government. 4. During the first sitting following its election the Council shall elect its President.</p> <p>Article 530 1. The Malvatumauri Council of Chiefs has a general competence to discuss all matters relating to land, custom and tradition and may make recommendations for the preservation and promotion of ni-Vanuatu culture and languages. 2. The Council must be consulted on any question, particularly any question relating to land, tradition and custom, in connection with any bill before Parliament.</p> <p>Article 531 Parliament shall by law provide for the organisation of the Malvatumauri Council of Chiefs and in particular for the role of chiefs at the village, island and district level.</p> <p>Article 532 1. No member of the Malvatumauri Council of Chiefs may be arrested, detained, prosecuted or proceeded against in respect of opinions given or votes cast by him in the Council in the exercise of his office. 2. No member may, during a session of the Council or of one of its committees, be arrested or prosecuted for any offence, except with the authorisation of the Council in exceptional circumstances.</p>	<p><i>Establishes specialized council to represent indigenous peoples</i></p>
<p><b>Canada, Inuit Nation, Inuit Nunangat Declaration on Inuit-Crown Partnership*</b> 2017</p>	<p>Whole Declaration</p>	<p>Whereas Inuit are an Indigenous rights-holding people under the Constitution. It is on the basis of this special relationship that Inuit are entering into a bilateral partnership with the Government of Canada to take action on shared priorities;</p> <p>Whereas the Government of Canada has committed to renewing the Inuit-Crown relationship based on the recognition of rights, respect, co-operation, and partnership as part of its broader goal of achieving reconciliation between the federal government and Indigenous peoples. The creation of the Inuit-Crown Partnership Committee, and the development of its joint terms of reference, is an important step in this direction.</p>	<p><i>Establishes the Inuit-Crown Partnership Committee for direct consultation between the Government of Canada and the Inuit nation and its chosen representatives</i></p> <p><i>* Note: formed on the basis of recognition of section 35 treaty rights and of indigenous peoples as sovereign nations with capacity to enter into legal and political agreements (see Question 10)</i></p>





<p><b>Norway, Sami Act</b> 1987</p>	<p>Sections 2.1, 2.3 and 2.4</p>	<p>§ 2-1. The business and authority of the Sameting [Sami Parliament]. The business of the Sameting is any matter that in the view of the parliament particularly affects the Sami people. § 2-3. Method of election, time of election and electoral term. Election to the Sameting is by direct ballot. § 2-4. Constituencies and distribution of seats. At elections to the Sameting three members with alternates are to be elected from each of the following constituencies: [List of 13 constituencies]</p>	<p><i>Establishes the Sami Parliament as a parallel legislative institution to advise national parliament and exercise self-government—it has a relatively strong mandate compared with other Sami parliaments</i></p>
<p><b>US State of Maine House of Representatives, House Rules</b> 2018</p>	<p>Rule 525, Penobscot Nation and Passamaquoddy Tribe</p>	<p>The member of the Penobscot Nation, the member of the Houlton Band of Maliseet Indians and the member of the Passamaquoddy Tribe elected or appointed to represent their people at the biennial session of the Legislature must be granted seats on the floor of the House of Representatives; be granted, by consent of the Speaker, the privilege of speaking on pending legislation; must be appointed to sit with joint standing committees as nonvoting members during the committees' deliberations; and be granted such other rights and privileges as may from time to time be voted by the House of Representatives. In reports from committees on which a tribal member serves, the position of the member must be noted and included. The names of the member of the Penobscot Nation, the member of the Houlton Band of Maliseet Indians and the member of the Passamaquoddy Tribe elected or appointed to represent their people at the biennial session of the Legislature must be included on the roll call board for purposes of electronically recording their attendance only.</p>	<p><i>Guarantees indigenous peoples' chosen representatives seats on the floor of the State of Maine House of Representatives* during its biennial session and the privilege to speak on pending legislation and participate in Committee Hearings as a way of ensuring their consultation on policies of importance</i></p> <p><i>* Note: Maine is one of the 50 states in the United States of America. It has its own institutions and this provision applies to its House of Representatives (not the United States House of Representatives as a whole)</i></p>

**FINDINGS**

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

**ACTIONS**

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Consultation, political participation and representation



### **Does the constitution recognize and provide an electoral mechanism for ensuring indigenous peoples' right to political participation and representation, particularly in the state legislature?**

#### EXPLANATION

The right to political participation and representation is a fundamental right of all human beings, based on the International Covenant on Civil and Political Rights (United Nations 1966a). When it comes to indigenous peoples, this right is enhanced by its ties to self-determination; in defining internal self-determination, the Committee on the Elimination of Racial Discrimination stated: 'The right to self-determination of peoples has an internal aspect, i.e. the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, governments are to represent the whole population without distinction as to race, colour, descent or national or ethnic origin' (United Nations 1996a: 125, para. 9). Often, rights to political participation are interpreted to be fulfilled by processes of indirect participation, for example through the election of one's own chosen representative. While examples contemplated above in Question 13 on consultative mechanisms represent a parallel indigenous governance tract that intersects with mainstream government institutions and also serve to elevate indigenous peoples' voice in politics, examples in this question are about the guaranteed participation of indigenous peoples and their chosen representatives in mainstream government bodies.

Recognizing the importance of indigenous peoples' participation and representation in political processes and all branches of government (legislative, executive and judicial, as well as in independent commissions) expresses a critical value and creates the legal space for political dialogue, laws and policies within the primary institutions of the state. While the specialized mechanisms for consultation (see Question 13) provide one means of participation, indigenous peoples should also be guaranteed participation through representation in mainstream government bodies, especially law-making ones like a legislature. Indigenous peoples should be effectively present in all areas of law and policymaking to ensure that their experiences, concerns and the interests of their communities are represented in the laws and policies that affect them as citizens. In federal or decentralized systems, it is important that measures to ensure indigenous peoples' political participation apply at every level of government.

Special electoral measures are a common method for ensuring indigenous peoples' equitable participation and representation in bodies such as the national parliament, sometimes based on the principle of proportional representation. Special measures can come in different forms; there might be reserved seats in the parliament for indigenous peoples' representatives who can be elected in a separate constituency; or political parties might be required to fill a quota of the seats they win with candidates from marginalized backgrounds; or the electoral system can be structured in such a way so as to promote and/or require the inclusion of indigenous candidates on party lists (usually through proportional representation races). Additional methods, such as the promotion of indigenous peoples' own elective traditions and the establishment of special indigenous peoples' constituencies, may assist in ensuring participation in line with indigenous peoples' right to apply their own norms and standards for choosing formal representatives of their communities.<sup>12</sup>

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<sup>12</sup> The principles of electoral system design, including proportionality, could be included in the constitution, but details about the electoral system may be defined more in legislation. It is not necessarily wise to include very specific provisions about electoral systems in a constitution, as amendments may be required in accordance with changing political circumstances and practical implementation challenges.

Just having representation in the legislature does not necessarily guarantee meaningful participation of indigenous peoples' representatives. While outside the scope of constitutions, it is important to look also at legislation and formal and informal rules of procedures that regulate issues such as party whips, committee or caucus formation, and minority vetoes, to truly understand the scope and platforms provided for elected representatives to voice their opinions and serve as meaningful guardians of their constituencies' interests. Special measures and affirmative action policies are often critiqued for not addressing this issue of meaningful representation, which is why it is important to look at how these measures interact with other laws and policies that govern the behaviour of the state.

#### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>ILO Convention 169</b> 1989</p>	<p>Article 6(1b)</p>	<p>1. In applying the provisions of this Convention, governments shall: ... (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.</p>	<p><i>Puts a positive obligation on state signatories to establish means for the free and equitable participation of indigenous peoples in all levels of decision-making</i></p>
<p><b>UNDRIP</b> 2007</p>	<p>Articles 5 and 18</p>	<p>Article 5 Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.</p> <p>Article 18 Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.</p>	<p><i>Ensures that indigenous peoples' right to their own institutions does not inhibit their right to participate in state institutions</i></p> <p><i>Recognizes indigenous peoples' right to participate in decision-making on matters that impact on their rights, through representatives chosen in accordance with their own procedures</i></p>
<p><b>Bolivia Constitution</b> 2009</p>	<p>Articles 147(II) and (III), 210(III) and 211</p>	<p>Article 147 II. Proportional participation of the nations and rural native indigenous peoples shall be guaranteed in the election of members of the assembly. III. The law shall define the special districts of the rural native indigenous peoples, in which population density and geographical continuity shall not be considered as conditional criteria.</p> <p>Article 210 III. The nations and rural native indigenous peoples may elect their candidates according to their own democratic communitarian norms.</p> <p>Article 211 I. The nations and rural native indigenous peoples may elect their political representatives whenever required, in accordance with their own forms of election. II. The Electoral Organ shall assure that the norms of those peoples and nations will be complied with strictly in the elections of authorities, representatives and candidates of the nations and rural native indigenous peoples, using their own norms and procedures.</p>	<p><i>Calls for proportional participation of indigenous peoples in the national assembly based on defining special districts for indigenous peoples; elections for political representatives are to follow traditional indigenous practices</i></p>

<p><b>Burundi Constitution</b> 2005</p>	<p>Article 168</p>	<p>The elections of deputies occur following the ballot of bloc lists by proportional representation. These lists must have a multiethnic character and take into account the balance between men and women. For three candidates registered on a list, only two can belong to the same ethnic group, and at least one of three must be a woman.</p>	<p><i>Calls for proportional representation through the use of bloc lists and requirement that these be 'multiethnic'</i></p>
<p><b>Colombia Constitution</b> 1991</p>	<p>Article 171</p>	<p>The Senate of the Republic will be composed of one hundred (100) members elected in one nationwide constituency.</p> <p>There will be an additional two (2) senators elected in a special national constituency for indigenous communities.</p> <p>...</p> <p>The system of electoral quotient will apply to the special constituency for the election of senators by indigenous communities.</p> <p>The representatives of the indigenous communities who aspire to become members of the Senate of the Republic must have exercised a position of traditional authority in their respective community or have been leaders of an indigenous organization, which qualification will be verified by a certificate from the respective organization, endorsed by the Minister of the Government.</p>	<p><i>Guarantees seats in the national Senate for indigenous peoples who are recognized leaders in their communities</i></p>
<p><b>Denmark Constitution</b> 1953</p>	<p>Article 28</p>	<p>The Folketing shall consist of one assembly of not more than one hundred and seventy-nine Members, of whom two Members shall be elected on the Faeroe Islands, and two Members in Greenland.</p>	<p><i>Guarantees Greenland and the Faeroe Islands two members each in the Danish Parliament, to be elected by their own constituencies</i></p>
<p><b>Nepal Constitution</b> 2015</p>	<p>Articles 84(2) and 176(6)</p>	<p>Article 84 (2) The Federal law shall provide that, in fielding candidacy by political parties for the election to the House of Representatives under the proportional electoral system, representation shall be ensured on the basis of a closed list also from women, Dalit, indigenous peoples, Khas Arya, Madhesi, Tharu, Muslims and backward regions, on the basis of population. In so fielding candidacy, regard shall also be had to geography and territorial balance.</p> <p>Article 176 (6) The Federal law shall provide that, in fielding candidacy by political parties for the election to the State Assembly under the proportional 116 electoral system, representation shall be ensured on the basis of a closed list also from women, Dalit, indigenous, indigenous nationalities, Khas Arya, Madhesi, Tharu, Muslims and backward regions, minority communities, on the basis of population. In so fielding candidacy, regard shall also be had to geographical balance of the concerned State.</p>	<p><i>Guarantees proportional representation for all groups, including indigenous peoples</i></p>

<b>Uganda Constitution</b> 1995	Fifth Schedule: Regional Governments, article 2(2)	The composition of a regional assembly shall be prescribed by Act of Parliament and shall consist of- ... (d.) representatives of indigenous cultural interests in areas where there is a traditional or cultural leader, nominated by the traditional or cultural leader but not exceeding fifteen per cent of the members of the regional assembly.	<i>Mandates that regional assemblies include representatives of indigenous communities (no more than 15%)</i>
<b>Venezuela Constitution</b> 1999	Article 125	Native peoples have the right to participate in politics. The State shall guarantee native representation in the National Assembly and the deliberating organs of federal and local entities with a native population, in accordance with law.	<i>Recognizes indigenous peoples' right to participate in politics and guarantees indigenous peoples' representation in law-making bodies at national, federal and some local levels</i>
<b>Zimbabwe Constitution</b> 2013	Article 120(1a) and (1b)	1. The Senate consists of eighty Senators, of whom-- a. six are elected from each of the provinces into which Zimbabwe is divided, by a system of proportional representation conforming with subsection (2); b. sixteen are chiefs, of whom two are elected by the provincial assembly of Chiefs from each of the provinces, other than the metropolitan provinces, into which Zimbabwe is divided.	<i>Guarantees seats in the national Senate (legislature) for chiefs</i>
<b>New Zealand, Maori Representation Act</b> 1867	Articles 3 and 6	Article 3 3. . . . there shall be four members of the said House [House of Representatives] who shall be elected under the provisions of this Act to represent therein the inhabitants of the Colony of the Maori race.  Article 6 6. Such members shall be chosen respectively from amongst and by the votes of the Maoris inhabiting each of the said districts.	<i>Holds that there will be a minimum of four Maori representatives in the New Zealand Parliament</i>
<b>The Philippines, Bangsamoro Organic Law</b> 2018	Article VII, section 8	Section 8. Election for Reserved Seats for Non-Moro Indigenous People. Notwithstanding the immediately preceding sections, reserved seats for non-Moro indigenous peoples, such as Tedyary, Lambangian, Dulangan Manobo, B'laan, and Higaonon, shall adhere to their customary laws and indigenous processes based on the following: (a) Primacy of customary laws and practices; (b) Primacy of consensus building; (c) Acceptability to the community; (d) Inclusivity and full participation; (e) Representation of the collective interests and aspirations of non-Moro indigenous peoples; (f) Sustainability and strengthening of indigenous political structures; (g) Track record and capability; and (h) Gender equality.	<i>Provides that indigenous peoples will be allowed to apply their own election/selection practices to choose the representatives that will fill quota seats in Bangsamoro Parliament</i>

<p><b>US State of Maine House of Representatives, House Rules 2018</b></p>	<p>Rule 525, Penobscot Nation and Passamaquoddy Tribe</p>	<p>The member of the Penobscot Nation, the member of the Houlton Band of Maliseet Indians and the member of the Passamaquoddy Tribe elected or appointed to represent their people at the biennial session of the Legislature must be granted seats on the floor of the House of Representatives; be granted, by consent of the Speaker, the privilege of speaking on pending legislation; must be appointed to sit with joint standing committees as nonvoting members during the committees' deliberations; and be granted such other rights and privileges as may from time to time be voted by the House of Representatives. In reports from committees on which a tribal member serves, the position of the member must be noted and included. The names of the member of the Penobscot Nation, the member of the Houlton Band of Maliseet Indians and the member of the Passamaquoddy Tribe elected or appointed to represent their people at the biennial session of the Legislature must be included on the roll call board for purposes of electronically recording their attendance only.</p>	<p><i>Representatives of indigenous peoples' nations/tribes can be elected or appointed directly by these communities and must be given a seat on the floor of the House of Representatives*</i></p> <p><i>* Note: Maine is one of the 50 states in the United States of America. It has its own institutions and this provision applies to its House of Representatives (not to the national House of Representatives of the United States as a whole)</i></p>
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#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Consultation, political participation and representation



### Does the constitution provide mechanisms to promote indigenous peoples' representation in the executive branch of government?

#### EXPLANATION

Full equality means that indigenous peoples can (and, in fact, do) rise to the executive level as heads of state, heads of government and members of the cabinet. In parliamentary and semi-presidential systems, cabinet members are appointed from among sitting legislators, and political party seniority and other dynamics affect the selection process. Therefore, the representation of indigenous peoples in the legislature and in the leadership of parties is critical as a threshold for progressing through political ranks in the executive branch. A general provision that expresses the principle and value of equality in the appointment of executive officers and cabinet ministers can help to overcome discrimination and bias in the selection process.

Since indigenous peoples' self-government rights often include the ability to execute laws in their territories (at least in certain competency areas—see Question 11 on autonomy and self-government), best practice is to empower the executive functions of indigenous peoples' own institutions, at least at the local level. As such, this question is more focused on ensuring that indigenous peoples are provided with equitable chances to serve in the executive branch of the state government.

#### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<b>Bolivia Constitution</b> 2009	Articles 172 and 209	<p>Article 172 (22) To designate the Ministers of State, respecting the Pluri-National character of the country and gender equity in the composition of the ministerial cabinet.</p> <p>Article 209 The candidates for public elected posts, with the exception of the elected positions of the Judicial Organ and the Pluri-National Constitutional Court (Tribunal Constitucional Plurinacional), shall be proposed by the organizations of the nations and rural native indigenous peoples, citizen associations and political parties, in equal conditions and pursuant to the law.</p>	<p><i>Calls for ministerial cabinet to be representative of the plurinational composition of the country</i></p> <p><i>Holds that all elected posts will be filled with candidates proposed by indigenous peoples, among other groups</i></p>
<b>Ecuador Constitution</b> 2008	Article 65	The State shall promote equality with respect to the representation of women and men in publicly appointed or elected office, in its executive and decision-making institutions, and political parties and movements. As for candidacies in multi-person elections, their participation shall be respected by rotation of power and sequencing. The State shall adopt affirmative action measures to guarantee the participation of discriminated sectors.	<i>Obligates the state to promote substantive (gender) equality in representation for all elected offices including executive and decision-making institutions through establishing affirmative action measures for 'discriminated sectors' and rotating positions of power</i>
<b>Uganda Constitution</b> 1995	Fifth Schedule, article 4(2a)	2. A person shall not be qualified to be elected a regional chairperson unless- a. he or she is a citizen of Uganda by birth as defined in article 10 of this Constitution and one of whose parents or grandparents is or was resident in the region and a member of the indigenous communities existing and residing within the borders of the region as at the first day of February, 1926.	<i>Membership of an indigenous community of the region in question is required to run for the constitutional office of regional chairperson (executive)</i>

#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Consultation, political participation and representation



### **Does the constitution ensure indigenous peoples' representation in the judicial branch is accounted for and that judicial appointment mechanisms, especially those to the supreme or constitutional courts, facilitate the inclusion of indigenous peoples?**

#### EXPLANATION

In order to achieve legal equality, indigenous peoples must be represented at all levels of the judiciary and in different types of courts. All judges bring unique life experiences, which, to a certain degree, colour their judgements. The interpretation of law must not be limited to one segment of the population—judges from indigenous and other marginalized communities bring a different perspective to court, which can assist with legal interpretation. This is especially true in post-conflict societies, after the promulgation of a new constitution, or after the restructuring of the judiciary. Inclusion in the judiciary can help ensure greater sensitivity to indigenous peoples' issues, and compliance with indigenous peoples' right to participate in all organs of the state on equal footing with other segments of the population.

Mechanisms for judicial appointments can impact on the diversity of nominees and appointees. Generally, a formal process for the identification of qualified nominees that involves more than one branch of government is more likely to yield a diverse pool of nominees than one where members of the executive or other institutions can make unilateral appointments based on preferences. A non-partisan judicial commission or committee to nominate judges can broaden the pool of nominees considered for positions in the judiciary. It is important that this commission is itself representative of the diversity of the country and of a diversity of experience in the legal profession (in addition to the judiciary, judicial service commission members could be drawn from practising lawyers, academics, representatives of the public, members of the legislature, etc.). In order to be appointed to the highest court, indigenous peoples must also have opportunities to serve as judges on lower courts and build a record of service. Recruitment to the constitutional court on the basis of seniority in the legal community may otherwise further disadvantage indigenous peoples who have historically been unable to access this community; for more on this see Question 4 on anti-discrimination (impact versus intent discussion) and Chapter 3 on key terms and concepts for details on substantive versus formal equality.

INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>Bolivia Constitution</b> 2009</p>	<p>Article 182(VI), 197(I) and 206(V)</p>	<p>Article 182 VI. In order to become a Magistrate of the Supreme Court of Justice one must meet the following requirements: satisfy the general requisites established for public servants; be thirty years of age; have a law degree; have honestly and ethically performed judicial functions, practiced as a lawyer or have been a university professor for eight years; and not have been sanctioned with dismissal by the Council of Magistrates. The determination of merit shall take into account performance as a native authority under its system of justice.</p> <p>Article 197 I. The Pluri-National Constitutional Court shall consist of Judges elected on the basis of plurinationality, with representation from the ordinary system and the rural native indigenous system.</p> <p>Article 206 V. The Departmental Legislative Assemblies or the Departmental Councils shall select, by two thirds votes of their members present, a list of candidates for each one of the voting members of the Departmental Electoral Courts. The Chamber of Deputies (Camara de Diputados) shall, by two third votes of the members present, elect from the lists the members of the Departmental Electoral Courts, guaranteeing that at least one of its members belong to the nations and rural native indigenous peoples of the Department.</p>	<p><i>Requires that in assessing qualifications for a Supreme Court judgeship, experience in 'native authority' (indigenous system of justice) should be accounted for</i></p> <p><i>Calls for mixed composition of the court on the basis of 'plurinationality' with representation from both customary and ordinary legal systems</i></p> <p><i>Calls for indigenous peoples' representation on the Departmental Electoral Courts</i></p>
<p><b>Burundi Constitution</b> 2005</p>	<p>Article 213</p>	<p>The judicial power is structured to reflect in its composition the whole population.</p> <p>The procedures of recruitment and appointment in the judicial corps imperatively obey the concern of promoting regional, ethnic, and gender balances.</p> <p>The Magistrature includes at most 60% Hutu and at most 40% Tutsi. A minimum of 30% of women is guaranteed.</p>	<p><i>Provides that judiciary should reflect composition of the national population and that recruitment and appointments will be made to promote ethnic balances (exact proportions prescribed)</i></p>
<p><b>South Africa Constitution</b> 1996</p>	<p>Section 174(2)</p>	<p>2. The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.</p>	<p><i>Mandates consideration of diversity in appointing judges</i></p>
<p><b>Vanuatu Constitution</b> 1980</p>	<p>Article 48(1)</p>	<p>1. The Judicial Service Commission shall consist of the Minister responsible for justice, as Chairman, the Chief Justice, the Chairman of the Public Service Commission, and a representative of the Malvatumaauri Council of Chiefs appointed by the Council.</p>	<p><i>Includes guaranteed representative of the indigenous Malvatumaauri Council in the Judicial Service Commission for appointing and overseeing judges</i></p>

#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Consultation, political participation and representation



### Does the constitution guarantee or facilitate the recruitment or appointment of indigenous peoples to civil service positions, independent bodies and the military?

#### EXPLANATION

Some constitutions indicate that all bodies of the state should reflect a country's diversity. Sometimes this is limited to representative institutions such as the legislature (discussed in Question 14) but ideally the principle of proportional representation should also be extended to the selection of non-elected, administrative government actors recruited to positions in the civil service, security institutions and other independent bodies (such as ombudsmen and human rights commissions). These institutions are often the backbone of the state, responsible for interacting with citizens and also administering government processes and services. As such, it is critical that a state recognizes that at least the principle of valuing diversity or proportional representation will be considered in appointments.

Stronger language could re-evaluate the criteria established for appointment or recruitment. For example, criteria that only focus on merit or competency may appear neutral, but are likely to disadvantage indigenous peoples due to historic inequalities and marginalization. The principle of substantive equality and special measures (discussed in Question 5 and Chapter 3 on key terms and concepts) also applies here.

#### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<b>ILO Convention 169 1989</b>	Article 6(1b)	1. In applying the provisions of this Convention, governments shall: ... (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.	<i>Holds that the right to free and equitable participation extends to administrative and non-elected institutions of the state</i>
<b>Ecuador Constitution 2008</b>	Article 57	Indigenous communes, communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments, the following collective rights: ... (16) To participate by means of their representatives in the official organizations established by law to draw up public policies concerning them, as well as design and decide their priorities in the plans and projects of the State.	<i>Guarantees indigenous peoples' participation through representation in official state bodies established by law</i>

<p><b>India Constitution</b> 1949</p>	<p>Article 16</p>	<p>1. There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.</p> <p>2. No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.</p> <p>3. Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.</p> <p>...</p> <p>4A. Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the States, are not adequately represented in the services under the State.</p>	<p><i>Ensures equal opportunity employment without discrimination in the state but allows for special measures to ensure substantive equality in government appointments</i></p>
<p><b>Nepal Constitution</b> 2015</p>	<p>Articles 267(3) and 285(2)</p>	<p>Article 267</p> <p>3. Entry of women, Dalit, indigenous people, indigenous nationalities, Khas Arya, Madhesi, Tharu, Pichhada class and backward region citizens into the Nepal Army shall, on the basis of principles of equality and inclusion, be ensured by the Federal law.</p> <p>Article 285</p> <p>2. Positions in the Federal civil service as well as all Federal government services shall be filled through competitive examinations, on the basis of open and proportional inclusive principle.</p>	<p><i>Applies the principles of equality and inclusion to the military and of proportional inclusion to civil service recruitment</i></p>
<p><b>Canada, Canadian Human Rights Act</b> 1977</p>	<p>Articles 3(1) and 7</p>	<p>Article 3</p> <p>1. For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.</p> <p>Article 7</p> <p>7. It is a discriminatory practice, directly or indirectly,</p> <p>(a) to refuse to employ or continue to employ any individual, or</p> <p>(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.</p>	<p><i>Prohibits discrimination in recruitment to state employment</i></p>



#### FINDINGS

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#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*



**VI. Land,  
territories and  
natural resources  
rights**

**Questions 18–20**

## Land, territories and natural resources rights



### **Does the constitution recognize the special relationship between indigenous peoples and land, including by protecting collective ownership rights over ancestral lands and territories and establishing high burdens for dispossessing indigenous peoples of their lands?**

#### EXPLANATION

Indigenous peoples have a special connection to land, which encompasses but extends much beyond notions of property and possession in many countries' legal systems. Indigenous peoples' relationship with land is recognized and protected in ILO Convention 169 and UNDRIP. The right of indigenous peoples to protect their lands, determine priorities for their usage, and promote their agricultural and other land management practices are all interconnected and founded on indigenous peoples' right to self-determination.

As recognized by the Inter-American Court of Human Rights: 'For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations' (Inter-American Court of Human Rights 2001: para. 149). As such, land rights are deeply tied to indigenous peoples' right to culture, identity and self-determination (see Questions 7 and 21). Land is a symbol of sovereignty and much more for indigenous peoples. Some of the most significant challenges faced by indigenous peoples are those deriving from pressures on their lands, territories and natural resources. Ancestral lands are intricately tied to the cultural survival of indigenous peoples, and the general promotion of their rights to continue to exist as distinct entities.

In another case, the Inter-American Court of Human Rights recognized that: 'The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because they form part of their worldview, of their religiousness, and consequently, of their cultural identity' (2006: para. 118). The Court went on to say that the pragmatic implications of this cultural reality were that:

120. Likewise, this Court considers that indigenous communities might have a collective understanding of the concepts of property and possession, in the sense that ownership of the land 'is not centered on an individual but rather on the group and its community.' This notion of ownership and possession of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention....

128. The following conclusions are drawn from the foregoing: 1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title; 2) traditional possession entitles indigenous people to demand official recognition and registration of property title; 3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and 4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights. (Inter-American Court of Human Rights 2006)

This decision is important as it recognizes that protecting indigenous peoples' right to land and territories requires looking beyond state-sanctioned titles and notions of property. In addition to

standard property rights, constitutional recognition of the relationship between indigenous peoples and their lands can help to promote better policies that are in line with international standards on indigenous peoples' right to land, territories and natural resources. Indigenous peoples' rights to these lands should include ownership rights (title) and the practical ability to maintain the lands on subsistence means (i.e. tax exemptions from the government). Collective rights to lands, territories, and resources are equivalent to individual property rights in a non-indigenous context. To the extent possible, indigenous practices and histories around land ownership and management should be protected.

As with all indigenous peoples' rights, collective rights should be considered in relation to ancestral lands (see Question 8). Collective land ownership carries extreme significance for indigenous peoples, and is tied to recognition of ancestral lands and territories. Collective ownership can also provide a basis for the implementation of other rights, including autonomy and benefit-sharing for infrastructure development and natural resource use projects (see Question 19).

Furthermore, given indigenous peoples' special relationship with the land, they suffer disproportionately from forced evictions. Policies should be implemented with the purpose of placing a significant burden on the state to demonstrate justification in displacing indigenous peoples from their lands; sometimes this burden can be higher than that applied to the evictions of non-indigenous communities. Any justified displacement under eminent domain or other circumstances should result in fair compensation to the affected indigenous peoples.

Lastly, as UNDRIP highlights, there is a historic issue with militaries occupying, using and/or entering indigenous territories without consent from indigenous groups. This amounts to a violation of self-determination and autonomy rights, as well as representing a broader issue of understanding the sovereignty of indigenous lands. UNDRIP states: '1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned. 2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities' (United Nations 2007: article 30). While there is not a lot of constitutional practice on this, it is an important issue for consideration.

INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>Committee on Economic, Social, and Cultural Rights, General Comment No. 21</b> 21 December 2009</p>	<p>Part IIE, article 7, para. 36</p>	<p>States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories, and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.</p>	<p><i>Recognizes link between indigenous peoples' right to self-determination and indigenous peoples' land rights</i></p>
<p><b>ILO Convention 169</b> 1989</p>	<p>Articles 13 and 14</p>	<p>Article 13 1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship. 2. The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.</p> <p>Article 14 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect. 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession. 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.</p>	<p><i>Calls on governments to respect special importance of land and territories to indigenous peoples and sets out conditions for ownership and possession over lands, as well as procedures for establishing the same</i></p>

<p><b>UNDRIP</b> 2007</p>	<p>Articles 25–29</p>	<p><b>Article 25</b> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.</p> <p><b>Article 26</b> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.</p> <p><b>Article 27</b> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.</p> <p><b>Article 28</b> 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.</p> <p><b>Article 29</b> 1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination. 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.</p>	<p><i>Recognizes indigenous peoples' right to maintain and strengthen their relationship with lands traditionally owned and occupied</i></p> <p><i>Establishes higher bar for justifying relocation of indigenous peoples and mandates compensation</i></p> <p><i>Prohibits disposition of hazardous materials on indigenous peoples' territories</i></p>
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<b>Argentina Constitution</b> 1994	Article 75(17)	The Congress shall have power: ... 17. ... ... to recognize the legal standing of their communities, and the possession and community property over lands they have traditionally occupied, and to regulate the transfer of other lands fit and sufficient for human development – none of which may be alienable, conveyable or susceptible to encumbrances or attachments.	<i>Recognizes possession of community properties based on traditional occupation</i>
<b>Brazil Constitution</b> 1988	Articles 231(1), (2) and (5)	Article 231 The social organization, customs, languages, creeds and traditions of Indians are recognized, as well as their original rights to the lands they traditionally occupy. The Union has the responsibility to delineate these lands and to protect and ensure respect for all their property. (1) Lands traditionally occupied by Indians are those on which they live on a permanent basis, those used for their productive activities, those indispensable for the preservation of environmental resources necessary for their well-being and those necessary for their physical and cultural reproduction, according to their uses, customs and traditions. (2) The lands traditionally occupied by Indians are destined for their permanent possession, and they shall be entitled to the exclusive usufruct of the riches of the soil, rivers and lakes existing thereon. ... (5) Removal of indigenous groups from their lands is prohibited except by referendum of the National Congress, in the event of a catastrophe or epidemic that places the population at risk or in the interest of national sovereignty, after deliberation of the National Congress, guaranteeing, under all circumstances, immediate return as soon as the risk ceases.	<i>Defines traditional lands of indigenous communities and protects them for their 'permanent possession'; establishes high burden for displacing indigenous peoples from their lands</i>
<b>Colombia Constitution</b> 1991	Article 329	The configuration of the indigenous [Indian] territorial entities shall be drawn subject to the provisions of the Institutional Act of Territorial Planning, and their delimitation shall be effected by the national government with the participation of the representatives of the indigenous communities following the plan of the Commission of Territorial Planning. The safeguards that apply relate to collective property which may not be sold.	<i>Promises indigenous peoples the right to participate in the identification of their territories</i>  <i>Provides safeguards against selling collective property</i>
<b>Paraguay Constitution</b> 1992	Article 64	The indigenous peoples have [the] right to communal ownership of the land in [an] extension and quality sufficient for the preservation and the development of their particular forms of lifestyles. The State will provide them gratuitously with these lands, which will be non-seizable, indivisible, non-transferrable, imprescriptible, not susceptible to guarantee contractual obligations nor to be leased; likewise, they will be exempt from taxes. The removal or transfer of [the indigenous peoples] from their habitat without their express consent is prohibited.	<i>Protects collective land ownership and provides for land tax exemptions on indigenous territories</i>  <i>Prohibits government contracting on indigenous territories and requires indigenous peoples' consent before removal or transfer from lands and territories</i>

<p><b>Peru Constitution</b> 1993</p>	<p>Article 89</p>	<p>The rural and native communities . . . are autonomous in their organization, community work, and the use and free disposal of their lands, as well as in the economic and administrative aspects within the framework provided by law. The ownership of their lands may not be prescribed, except in the case of abandonment described in the preceding article.</p>	<p><i>Prevents the state from regulating indigenous land ownership</i></p>
<p><b>Uganda Constitution</b> 1995</p>	<p>Article 237(3) and (4)</p>	<p>3. Land in Uganda shall be owned in accordance with the following land tenure systems-</p> <ul style="list-style-type: none"> <li>a. customary;</li> <li>b. freehold;</li> <li>c. mailo; and</li> <li>d. leasehold.</li> </ul> <p>4. On the coming into force of this Constitution-</p> <ul style="list-style-type: none"> <li>a. all Uganda citizens owning land under customary tenure may acquire certificates of ownership in a manner prescribed by Parliament; and</li> <li>b. land under customary tenure may be converted to freehold land ownership by registration.</li> </ul>	<p><i>Recognizes customary land tenure system</i></p> <p><i>Ensures that all citizens with customary tenure can acquire certificates of ownership from the State</i></p>
<p><b>The Philippines, Indigenous Peoples' Rights Act</b> 1997</p>	<p>Sections 7 and 8</p>	<p>SECTION 7. Rights to Ancestral Domains. — The rights of ownership and possession of ICCs/IPs [indigenous cultural communities/indigenous peoples] to their ancestral domains shall be recognized and protected. Such rights shall include:</p> <ul style="list-style-type: none"> <li>a) Right of Ownership. — The right to claim ownership over lands, bodies of water traditionally and actually occupied by ICCs/IPs, sacred places, traditional hunting and fishing grounds, and all improvements made by them at any time within the domains;</li> <li>b) Right to Develop Lands and Natural Resources. — Subject to Section 56 hereof, right to develop, control and use lands and territories traditionally occupied, owned, or used; to manage and conserve natural resources within the territories and uphold the responsibilities for future generations; to benefit and share the profits from allocation and utilization of the natural resources found therein; the right to negotiate the terms and conditions for the exploration of natural resources in the areas for the purpose of ensuring ecological, environmental protection and the conservation measures, pursuant to national and customary laws; the right to an informed and intelligent participation in the formulation and implementation of any project, government or private, that will affect or impact upon the ancestral domains and to receive just and fair compensation for any damages which they may sustain as a result of the project; and the right to effective measures by the government to prevent any interference with, alienation and encroachment upon these rights;</li> <li>c) Right to Stay in the Territories. — The right to stay in the territory and not to be removed therefrom. No ICCs/IPs will be relocated without their free and prior informed consent, nor through any means other than eminent domain. Where relocation is considered necessary as an exceptional measure, such relocation shall take place only with the free</li> </ul>	<p><i>Provides comprehensive protection of ancestral domain and indigenous peoples' land including right to ownership, right to develop land and natural resources and to benefit from the same, and a right to remain on their land with higher burdens placed for displacement and alienation</i></p>



and prior informed consent of the ICCs/ IPs concerned and whenever possible, they shall be guaranteed the right to return to their ancestral domains, as soon as the grounds for relocation cease to exist. When such return is not possible, as determined by agreement or through appropriate procedures, ICCs/IPs shall be provided in all possible cases with lands of quality and legal status at least equal to that of the land previously occupied by them, suitable to provide for their present needs and future development. Persons thus relocated shall likewise be fully compensated for any resulting loss or injury;

d) Right in Case of Displacement. — In case displacement occurs as a result of natural catastrophes, the State shall endeavor to resettle the displaced ICCs/IPs in suitable areas where they can have temporary life support systems: Provided, That the displaced ICCs/IPs shall have the right to return to their abandoned lands until such time that the normalcy and safety of such lands shall be determined: Provided, further, That should their ancestral domain cease to exist and normalcy and safety of the previous settlements are not possible, displaced ICCs/IPs shall enjoy security of tenure over lands to which they have been resettled: Provided, furthermore, That basic services and livelihood shall be provided to them to ensure that their needs are adequately addressed.

...

SECTION 8. Rights to Ancestral Lands. — The right of ownership and possession of the ICCs/IPs to their ancestral lands shall be recognized and protected.

a) Right to transfer land/property. — Such right shall include the right to transfer land or property rights to/among members of the same ICCs/IPs, subject to customary laws and traditions of the community concerned.

b) Right to Redemption. — In cases where it is shown that the transfer of land/property rights by virtue of any agreement or devise, to a non-member of the concerned ICCs/IPs is tainted by the vitiated consent of the ICCs/IPs, or is transferred for an unconscionable consideration or price, the transferor ICC/IP shall have the right to redeem the same within a period not exceeding fifteen (15) years from the date of transfer.

<p><b>New Zealand, Treaty of Waitangi</b> 1840</p>	<p>Article 2</p>	<p>Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.</p>	<p><i>Guarantees indigenous peoples of New Zealand their land rights, while reserving the government's right to claim land— although only for a price negotiated between the indigenous groups and the government</i></p>
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#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

# Land, territories and natural resources rights



## Does the constitution afford indigenous peoples special rights to natural resources within/on/under their lands and territories? Does the constitution call for benefit-sharing with indigenous peoples for natural resource-related activities carried out on their land?

### EXPLANATION

Like land, natural resources are significantly tied to indigenous peoples’ cultures, practices and traditions, as well as often to their subsistence and livelihood. Recognizing this relationship, as well as indigenous peoples’ pre-existence on territories that contain natural resources which are valuable in the modern economy, can help to ensure that indigenous peoples are able to choose between and balance traditional and economic uses of their natural resources. This is deeply tied to indigenous peoples’ right to (internal) self-determination, and their correlated right to determine their own development priorities. Indigenous peoples should fundamentally have the choice as to what extent and in what way they would like to engage in development; they should be enabled to weigh the benefits and consequences of development projects and have final authority over consenting to these projects.

Constitutional protection on this issue ranges from basic recognition of the importance of natural resources to indigenous peoples, to first user rights to resources on/in their land and territories; to prohibiting governments from issuing contracts for resource extraction on indigenous land, sometimes entirely and sometimes without the consent of the communities. Standards for consent—derived from international law—are discussed in Question 20. It is important to look closely at the wording in these provisions. If indigenous peoples are given rights to natural resource use, is it exclusive use? Do they have to be involved in the process of determining the use? Is the use limited to certain resources (above or below surface)? What are the requirements for consultation and consent? Is consultation required, or merely advised as in the case of Colombia? If the government does maintain control over contracting, extraction or other natural resource-dependent industries on indigenous land, international standards urge benefit-sharing to ensure that indigenous peoples’ lives and economies benefit equitably from the activities. Correlated issues include whether indigenous peoples and their organizations are given legal status to contract with third parties or not.

### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>ILO Convention 169</b> 1989</p>	<p>Article 15</p>	<p>1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.</p>	<p><i>Calls for special safeguarding of rights to natural resources on their lands and rights to participate in the use, management and conservation of these resources</i></p> <p><i>Requires consultation, benefit sharing and/or fair compensation when State does have rights to extract natural resources on indigenous peoples’ lands</i></p>
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<p><b>UNDRIP</b> 2007</p>	<p>Article 32</p>	<p>1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.</p> <p>...</p> <p>3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.</p>	<p><i>Provides indigenous peoples with the right to determine their own development priorities as well as strategies for the use of their lands or other resources</i></p> <p><i>Mandates fair and just redress for any activities that do occur</i></p>
<p><b>Argentina Constitution</b> 1994</p>	<p>Article 75(17)</p>	<p>The Congress shall have power:</p> <p>...</p> <p>17. ...</p> <p>... To assure [indigenous peoples'] participation in the related administration of their natural resources and of other interests affecting them.</p>	<p><i>Mandates government to ensure indigenous peoples' participation in 'administration' of natural resources</i></p>
<p><b>Bolivia Constitution</b> 2009</p>	<p>Articles 30, 352, 353 and 403</p>	<p>Article 30</p> <p>II. In the framework of the unity of the State, and in accordance with this Constitution, the nations and rural native indigenous peoples enjoy the following rights:</p> <p>...</p> <p>15. To be consulted by appropriate procedures, in particular through their institutions, each time legislative or administrative measures may be foreseen to affect them. In this framework, the right to prior obligatory consultation by the State with respect to the exploitation of non-renewable natural resources in the territory they inhabit shall be respected and guaranteed, in good faith and upon agreement.</p> <p>16. To participate in the benefits of the exploitation of natural resources in their territory.</p> <p>17. To autonomous indigenous territorial management, and to the exclusive use and exploitation of renewable natural resources existing in their territory without prejudice to the legitimate rights acquired by third parties.</p> <p>Article 352</p> <p>The exploitation of natural resources in a determined territory shall be subject to a process of consultation with the affected population, called by the State, which shall be free, prior in time and informed. Citizen participation is guaranteed in the process of the management of the environment, and the conservation of ecosystems shall be promoted, in accordance with the Constitution and the law. In the nations and rural native indigenous peoples, the consultation will be carried out with respect given to their own norms and procedures.</p> <p>Article 353</p> <p>The Bolivian people shall have equitable access to the benefits which come from the use of all the natural resources. Priority participation shall be assigned to the territories where these resources are found, and to the nations and rural native indigenous peoples.</p>	<p><i>Recognizes indigenous peoples' exclusive rights to use the natural resources on their land and requires consultation with own institutions before exploitation or other activities</i></p> <p><i>Promises benefit-sharing, both specific to indigenous peoples, and to all peoples of Bolivia</i></p>

		<p>Article 403 The integrity of rural native indigenous territory is recognized, which includes the right to land, to the use and exclusive exploitation of the renewable natural resources under conditions determined by law, to prior and informed consultation, to participation in the benefits of the exploitation of the non-renewable natural resources that are found in their territory, to the authority to apply their own norms, administered by their structures of representation, and to define their development pursuant to their own cultural criteria and principles of harmonious coexistence with nature. The rural native indigenous territories may be composed of communities.</p>	
<b>Brazil Constitution</b> 1988	Article 231	(3) Utilization of water resources, including their energy potential, and prospecting and mining of mineral wealth on indigenous lands may only be done with the authorization of the National Congress, after hearing from the communities involved, which shall be assured of participation in the results of the mining, as provided by law.	<i>Requires that the National Congress consult indigenous peoples before issuing approvals for using water resources or other mineral wealth on their lands</i>
<b>Colombia Constitution</b> 1991	Articles 330 and 334	<p>Article 330 In accordance with the Constitution and the statutes, the indigenous territories shall be governed by the councils formed and regulated according to the uses and customs of their communities and shall exercise the following functions: ... 5. Oversee the conservation of natural resources. The exploitation of the natural resources in the indigenous territories shall be done without impairing the cultural, social, and economic integrity of the indigenous communities. In the decisions adopted with respect to said exploitation, the government shall encourage the participation of the representatives of the respective communities.</p> <p>Article 334 . . . By mandate of an Act, the state shall intervene in the exploitation of natural resources, land use, the production, distribution, use, and consumption of goods, and in the public and private services in order to rationalize the economy with the purpose of achieving, at the national and regional level and within the framework of fiscal sustainability, the improvement of the quality of life of the inhabitants, the equitable distribution of opportunities, and the benefits of development and conservation of a healthy environment.</p>	<p><i>Gives indigenous peoples the right to oversee the conservation of natural resources on their territories</i></p> <p><i>Directs that any exploitation must be done without harming the 'integrity' of indigenous communities; participation is 'encouraged' but not required</i></p> <p><i>Gives state the right to intervene in the development of natural resources</i></p>
<b>Kenya Constitution</b> 2010	Article 69(1a)	(1) The State shall- (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.	<i>General benefit-sharing provision</i>

<p><b>Mexico Constitution</b> 1917</p>	<p>Article 2(A)</p>	<p>This Constitution recognizes and protects the indigenous peoples' right to self-determination and, consequently, the right to autonomy, so that they can:</p> <p>...</p> <p>VI. Attain with preferential use of the natural resources of the sites inhabited by their indigenous communities, except for the strategic resources defined by this Constitution. The foregoing rights shall be exercised respecting the forms of property ownership and land possession established in this Constitution and in the laws on the matter as well as respecting third parties' rights. To achieve these goals, indigenous communities may form partnerships under the terms established by the Law.</p>	<p><i>Protects indigenous peoples' preferential use of natural resources, linking this explicitly to self-determination and autonomy</i></p> <p><i>Allows indigenous peoples to act as legal entity in forming partnerships for natural resource use</i></p>
<p><b>Nepal Constitution</b> 2015</p>	<p>Article 59(4) and (5)</p>	<p>4. The federation, province and the local level entity shall have to make arrangements for equitable distribution of the benefits from the development of natural resources. A certain portion of such benefit, royalty, services or objects, shall have to be distributed in areas affected by projects and to the local communities as provided for by law.</p> <p>5. When the federal, provincial and local level entity utilize natural resources, they shall have to give priority to local communities to make certain percentage of investment if they wish to do that in view of the nature and percentage in the investment.</p>	<p><i>Ensures benefit-sharing for 'local communities' for natural resource use and related financial benefits</i></p>
<p><b>Nicaragua Constitution</b> 2014</p>	<p>Article 180</p>	<p>The State guarantees these communities [of the Caribbean Coast] the benefits of their natural resources, the effectiveness of their forms of communal property and the free election of their authorities and representatives.</p>	<p><i>Guarantees indigenous/ autonomous communities in Nicaragua the right to benefits from their natural resources</i></p>
<p><b>The Philippines Constitution</b> 1987</p>	<p>Article X, section 20 (Autonomous Regions)</p>	<p>Within its territorial jurisdiction and subject to the provisions of this Constitution and national laws, the organic act of autonomous regions shall provide for legislative powers over:</p> <p>...</p> <p>3. Ancestral domain and natural resources.</p>	<p><i>Gives autonomous regions authority over ancestral domain and natural resource use</i></p> <p><i>Note: Not specific to indigenous peoples, although Cordillera Region (majority indigenous area) is one of the autonomous regions named in the Constitution to which this provision applies</i></p>

#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Land, territories and natural resources rights



### **Does the constitution obligate the government to consult in good faith with indigenous peoples or to seek their free, prior and informed consent (FPIC) before implementing development projects and other policies that have an impact on indigenous lands, territories, rights and resources?**

#### EXPLANATION

International standards obligate governments to obtain indigenous peoples' free, prior and informed consent (FPIC) before implementing laws, projects and policies where their rights and the preservation of their cultural resources (including lands, territories and resources), especially those associated with their way of life and survival as distinct cultures and peoples, may be at risk. An enforceable commitment to FPIC is of the utmost importance in ensuring the protection of indigenous peoples' rights to lands and natural resources, as well as more broadly to self-determination and autonomy. Increasingly, states are being pushed to adopt practices that go beyond mere consultation. For example, the African Commission on Human and Peoples' Rights held in relation to the Endorois indigenous territory in Kenya that for 'any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions' (African Commission on Human and Peoples' Rights 2003: para. 291).

The first component, free, suggests that indigenous peoples are truly allowed autonomy in decision-making and in providing their consent. This encompasses fair bargaining procedures, dignified dialogue and a prohibition on the use of force, whether physical or social. Prior means that indigenous peoples' consent must be obtained from the earliest phases of conceptualizing a development programme that has an impact on their lands. The consent certainly must be obtained prior to any implementation, and ideally prior to approval of the project. Informed requires that, in giving their consent, indigenous peoples have access to all relevant information on potential benefits as well as potential negative impacts. This requirement respects the right of indigenous communities to determine their own development priorities by ensuring that they are given the opportunity to make the best decision for their community, in light of all the circumstances. The exact length of time and information provided for the process will vary depending on context. The final component—consent—suggests that, in the case of impacts on land, territories and natural resources, the government must go beyond mere consultation to give indigenous communities the final say on projects that affect them and these resources. The broad right to consultation, along with the right to FPIC, should apply to government plans, policies, laws and legislation that affect indigenous peoples, with FPIC being binding in the case of impact on land or natural resources.

FPIC as a concept is relatively new under international law, so there are few constitutions that include it in full form. Other constitutions use the language of FPIC, but fall short of protecting an indigenous right to consent, instead applying free, prior and informed requirements to consultative processes, grounded in a separate right to consultation in matters that affect them (see ILO Convention 169). Some interpretations of international indigenous peoples' rights hold that consultation is required for all laws and policies that affect indigenous peoples, whereas FPIC is required when these touch on land, territories and natural resources (see Question 13 on consultation). Indigenous activists, on the other hand, promote a broader understanding of FPIC, holding that it should be applied across all issues and institutions that affect indigenous peoples and not be limited to land- and resource-related decisions.



INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>ILO Convention 169</b> 1989</p>	<p>Article 15</p>	<p>2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.</p>	<p><i>Prior to UNDRIP, the standard was ‘consultation’ as set by ILO Convention 169. UNDRIP pushed this concept forward by requiring consent in the case of activities that have an impact on land and natural resources</i></p>
<p><b>UNDRIP</b> 2007</p>	<p>Article 32(2)</p>	<p>2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.</p>	<p><i>Requires consultation with indigenous communities through their own representative institutions with the aim of obtaining free, prior and informed consent</i></p>
<p><b>Bolivia Constitution</b> 2009</p>	<p>Article 352</p>	<p>Article 352 The exploitation of natural resources in a determined territory shall be subject to a process of consultation with the affected population, called by the State, which shall be free, prior in time and informed. Citizen participation is guaranteed in the process of the management of the environment, and the conservation of ecosystems shall be promoted, in accordance with the Constitution and the law. In the nations and rural native indigenous peoples, the consultation will be carried out with respect given to their own norms and procedures.</p>	<p><i>Requires free, prior and informed ‘consultation’ and participation in processes of development</i>  <i>Indicates that consultations with indigenous peoples should follow their own norms and procedures</i></p>
<p><b>Venezuela Constitution</b> 1999</p>	<p>Article 120</p>	<p>Exploitation by the State of the natural resources in native habitats shall be carried out without harming the cultural, social and economic integrity of such habitats, and likewise subject to prior information and consultation with the native communities concerned. Profits from such exploitation by the native peoples are subject to the Constitution and the law.</p>	<p><i>Requires prior information and consultation with indigenous communities</i></p>

<p><b>Canada, Nunavut Land Claims Agreement Act</b> 1993</p>	<p>Preamble</p>	<p>WHEREAS Her Majesty the Queen in right of Canada and the Inuit of the Nunavut Settlement Area have negotiated an Agreement based on and reflecting the following objectives: to provide for certainty and clarity of rights to ownership and use of lands and resources and of rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources, including the offshore, to provide Inuit with wildlife harvesting rights and rights to participate in decision-making concerning wildlife harvesting, to provide Inuit with financial compensation and means of participating in economic opportunities, to encourage self-reliance and the cultural and social well-being of Inuit.</p>	<p><i>Guarantees Inuit participation in decision-making around the use, management and conservation of all resources on the territory over which they have aboriginal title. Specifically:</i></p> <ul style="list-style-type: none"> <li>• <i>equal representation with the government on new wildlife management, resource management and environmental boards;</i></li> <li>• <i>title to approximately 350,000 km<sup>2</sup> of land, of which, 35,257 km<sup>2</sup> includes mineral rights;</i></li> <li>• <i>the right to harvest wildlife on lands and waters throughout Nunavut;</i></li> <li>• <i>a share of federal government royalties from oil, gas and mineral development on crown lands;</i></li> <li>• <i>the right to negotiate with industry for economic and social benefits from the development of non-renewable resources on Inuit owned lands;</i></li> <li>• <i>the creation of three federally funded national parks;</i></li> <li>• <i>capital transfer payments of CAD 1.9 billion over 15 years and a CAD 13 million Training Trust Fund for the establishment of the Government of Nunavut.</i></li> </ul>
<p><b>The Philippines, Indigenous Peoples' Rights Act</b> 1997</p>	<p>Section 3(g)</p>	<p>Free and Prior Informed Consent — as used in this Act shall mean the consensus of all members of the ICCs/IPs [indigenous cultural communities/indigenous peoples] to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.</p>	<p><i>Defines FPIC in definitional section of law and then applies in a number of circumstances and articles, most significantly those dealing with land and intellectual property rights</i></p>

#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*



**VII. Right to  
culture, and  
social and  
economic  
development**

Questions 21–26

## Right to culture, and social and economic development



### Does the constitution protect indigenous peoples' rights to maintain and develop their cultures, cultural identities and practices, and have them respected?

#### EXPLANATION

Indigenous peoples are often viewed as and even referred to as 'cultures', which testifies to the level of importance that cultural practices and products are afforded in indigenous communities. Constitutions can explicitly recognize and honour the existence of indigenous cultures and include provisions calling for the protection and promotion of these cultures (or cultural heritages) in a dignified manner. Interestingly, this right expands across time, meaning that it encompasses a right to recognition and respect for historic practices and knowledge, but also a right to live out cultural practices in the present and continue to do so in the future, thereby also encompassing a right to pass culture forward to next generations.

The right to indigenous culture applies to customary activities, the management of ancestral lands, territories and natural resources, governance institutions and practices, livelihoods, arts, religious beliefs and practices, and languages. In international jurisprudence, aspects of culture have been defined broadly to apply to a wide range of rights, including family practices, language, traditional medicines and judicial systems. In this way, the right to culture is cross-cutting throughout many of the issues considered in this Assessment Tool, and also deeply supported by the right to self-determination.

The right to culture for indigenous peoples is particularly important and has been given special recognition and reinforcement in international law. Significantly, taking account of histories of dispossession, indigenous peoples' right to culture is extended to include a right against cultural assimilation or other practices and policies that effectively degrade or destroy indigenous cultures (see UNDRIP article 8 in table below).

A right to culture can also encourage courts to take cultural practices into consideration when considering the cases of ethnic groups and indigenous peoples. For example, the UN Human Rights Committee opined in interpreting France's 'right to family' (in the case of *Hopu and Bessert v. France*) that the term 'family' should 'be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term "family" in a specific situation' (United Nations 1997b: para. 10.3).

#### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<b>ILO Convention 169</b> 1989	Article 2	1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity. 2. Such action shall include measures for: ... (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions.	<i>Places responsibility on government to develop special measures to promote the realization of the economic, social and cultural rights of indigenous peoples including with respect to cultural identity</i>
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UNDRIP  
2007

Articles 8, 11,  
12 and 13

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

...

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

*Recognizes indigenous peoples have the right not to experience the destruction of their culture and forced assimilation*

*Prohibits degrading propaganda*

*Protects indigenous peoples' rights to practise traditions and pass them on to future generations*

*Places positive obligation on the state to ensure rights are realized and cultures are protected*

<b>Kenya Constitution</b> 2010	Article 11	<p>(1) This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.</p> <p>(2) The State shall—</p> <p>(a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage;</p> <p>(b) recognise the role of science and indigenous technologies in the development of the nation; and</p> <p>(c) promote the intellectual property rights of the people of Kenya.</p> <p>(3) Parliament shall enact legislation to-</p> <p>(a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and</p> <p>(b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.</p>	<i>Recognizes the importance of culture and obligates the state to promote and protect cultural expression and indigenous knowledge including through mandating parliament to pass laws to protect indigenous peoples' intellectual property rights over their knowledge and technologies</i>
<b>Nepal Constitution</b> 2015	Article 51(j)(8)	(8) Making special arrangements to ensure the rights of Adivasi Janajatis (indigenous ethnic groups) to lead a dignified life with their respective identities, and making them participate in decision making processes that concern them, and preserving and maintaining the traditional knowledge, skill, experience, culture and social practices of Adivasi Janajatis and local communities.	<i>Obligates the state to make special arrangements to ensure that indigenous peoples can live with respect for their identities</i>
<b>Norway Constitution</b> 1814	Article 108	The authorities of the state shall create conditions enabling the Sami people to preserve and develop its language, culture and way of life.	<i>Obligates the state to create enabling conditions for preservation of Sami culture</i>
<b>Peru Constitution</b> 1993	Articles 2(19) and 89	<p>Article 2 Every person has the right: ... 19. To his ethnic and cultural identity. The State recognizes and protects the ethnic and cultural diversity of the Nation.</p> <p>Article 89 The rural and native communities have legal existence and are corporate entities. ... The State respects the cultural identity of the rural and native communities.</p>	<i>Recognizes indigenous peoples' right to a cultural identity and obligates the state to recognize and protect the cultural diversity of the nation</i>
<b>Sweden Constitution</b> 1974	Article 2	The opportunities of the Sami people and ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own shall be promoted.	<i>Promotes the right of Sami people to develop a cultural and social life of their own</i>
<b>Thailand Constitution</b> 2017	Section 70	The State should promote and provide protection for different ethnic groups to have the right to live in the society according to the traditional culture, custom, and ways of life on a voluntary basis, peacefully and without interference, insofar as it is not contrary to public order or good morals or does not endanger the security of the security, health or sanitation.	<i>Holds the state responsible for promoting and protecting cultures of different ethnic groups</i>

<b>Venezuela Constitution</b> 1999	Article 121	Native peoples have the right to maintain and develop their ethnical and cultural entity, world view, values, spirituality and holy places and places of cult. The State shall promote the appreciation and dissemination of the cultural manifestations of the native peoples.	<i>Protects right to maintain and develop culture</i>  <i>Places positive obligation on state to promote appreciation of indigenous culture</i>
<b>Zimbabwe Constitution</b> 2013	Article 33	The State must take measures to preserve, protect and promote indigenous knowledge systems, including knowledge of the medicinal and other properties of animal and plant life possessed by local communities and people.	<i>Places positive obligation on the state to take measures to preserve, protect and promote indigenous knowledge, including knowledge of medicinal properties of natural resources such as plants</i>



**FINDINGS**

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

**ACTIONS**

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Right to culture, and social and economic development



### **Does the constitution recognize indigenous languages and associated language rights?**

#### EXPLANATION

Indigenous peoples' traditions, religions and cultures are grounded in language. Language is ingrained in indigenous identity, and also is often the means for reinforcing that identity through oral histories, songs, and other governance and religious practices. Despite their centrality to indigenous cultures, indigenous languages are often spoken by small populations and many are in danger of extinction. Indigenous peoples are often not given space to use their languages in government processes, and if they do not speak the national lingua franca they often face disadvantages in accessing services, for example, and also in participating in the mainstream economy. According to international standards, states should take active measures to protect indigenous languages, and associated rights to use languages or access interpretation, as a part of indigenous peoples' rights.

Providing constitutional recognition to indigenous languages should be part of those measures. Recognition of the multilingual nature of the state can go far in symbolizing a state's recognition of diversity and the existence of indigenous peoples. In addition, recognition of the equal value of languages can be a way of showing respect for indigenous cultures and indigenous peoples' dignity. For example, Norway's Sami Act explicitly states: 'Sami and Norwegian are languages of equal worth. They shall be accorded equal status' (Government of Norway 1987: section 1(5)). Countries can also establish institutions to protect and promote indigenous languages (efforts which should always engage indigenous communities themselves and respect the right of these communities to govern the study, use and representations of their own languages). In New Zealand, the Maori Language Act establishes a Maori Language Commission.

To ensure that indigenous peoples are able to realize other rights, such as education, access to justice and political participation, broader language rights that allow for indigenous peoples to use their language in state institutions and processes or, for example, to receive translation/interpretation services in court and other state institutions, are very important. It is critical to protect not only the languages themselves, but also the right to use the language and to not be discriminated against de facto on account of speaking indigenous languages.

INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>ILO Convention 169</b> 1989</p>	<p>Articles 12, 28(3) and 30</p>	<p>Article 12 The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.</p> <p>Article 28(3) 3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.</p> <p>Article 30 1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention. 2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.</p>	<p><i>Details right to interpretation in courts</i></p> <p><i>Places positive obligation on states to take measures to preserve and promote indigenous language use</i></p> <p><i>Calls for states to ensure that rights are understood via 'mass communications' in indigenous languages</i></p>
<p><b>UNDRIP</b> 2007</p>	<p>Article 13</p>	<p>1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.</p> <p>2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.</p>	<p><i>Right to revitalize, use, develop and transmit languages, including traditional names for places</i></p> <p><i>Places positive obligation on states to ensure that indigenous peoples understand and can be understood in all political processes, through interpretation or other means</i></p>
<p><b>Bolivia Constitution</b> 2009</p>	<p>Article 5</p>	<p>I. The official languages of the State are Spanish and all the languages of the rural native indigenous nations and peoples, which are Aymara, Araona, Baure, Bésiro, Canichana, Cavineño, Cayubaba, Chácobo, Chimán, Ese Ejja, Guaraní, Guarasu'we, Guarayu, Itonama, Leco, Machajuyai-kallawaya, Machineri, Maropa, Mojeñotrinitario, Mojeño-ignaciano, Moré, Mosestén, Movima, Pacawara, Puquina, Quechua, Sirionó, Tacana, Tapiete, Toromona, Uruchipaya, Weenhayek, Yaminawa, Yuki, Yuracaré and Zamuco.</p> <p>II. The Pluri-National Government and the departmental governments must use at least two official languages. One of them must be Spanish, and the other shall be determined taking into account the use, convenience, circumstances, necessities and preferences of the population as a whole or of the territory in question. The other autonomous governments must use the languages characteristic of their territory, and one of them must be Spanish.</p>	<p><i>Recognizes multiple official languages of the state</i></p> <p><i>Mandates that processes should be adapted and run in local languages depending on usage of local population</i></p>

<b>Colombia Constitution</b> 1991	Article 10	Spanish is the official language of Colombia. The languages and dialects of ethnic groups are also official in their territories.	<i>Recognizes one official state language, but other localized official languages in different indigenous territories</i>
<b>Costa Rica Constitution</b> 2011	Article 76	Spanish is the official language of the Nation. However, the State will see to the maintenance and cultivation of the national indigenous languages.	<i>Commits to maintenance and cultivation of indigenous languages</i>
<b>Finland Constitution</b> 1999	Article 17	The national languages of Finland are Finnish and Swedish. The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act.	<i>One official state language but right to use languages and cultures locally, and for the Sami to be able to use their language before state authorities</i>
<b>Kenya Constitution</b> 2010	Article 7	7. National, official and other languages (1) The national language of the Republic is Kiswahili. (2) The official languages of the Republic are Kiswahili and English. (3) The State shall— (a) promote and protect the diversity of language of the people of Kenya; and (b) promote the development and use of indigenous languages, Kenyan Sign language, Braille and other communication formats and technologies accessible to persons with disabilities.	<i>Places positive obligation on the state to promote and protect diverse languages</i>
<b>Peru Constitution</b> 1993	Article 19	Every Peruvian has the right to use his own language before any authority by means of an interpreter.	<i>Provides for right to use own language when interacting with the state, including right to interpretation</i>
<b>South Africa Constitution</b> 1996	Sections 6(1) and 6(2)	6. Languages 1. The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. 2. Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.	<i>Recognizes multilingual nature of the state  Places positive obligation on the government to implement positive measures to advance indigenous languages</i>

**Finland, Sámi  
Language Act  
2003**

Sections 1  
and 4

**Section 1**

The purpose of this Act is to ensure, for its part, the constitutional right of the Sámi to maintain and develop their own language and culture.

This Act contains provisions on the right of the Sámi to use their own language before the courts and other public authorities, as well as on the duty of the authorities to enforce and promote the linguistic rights of the Sámi.

The goal is to ensure the right of the Sámi to a fair trial and good administration irrespective of language and to secure the linguistic rights of the Sámi without them needing specifically to refer to these rights.

**Section 4**

A Sámi has the right to use the Sámi language, in his or her own matter or in a matter where he or she is being heard, before any authority referred to in this Act. An authority must not restrict or refuse to enforce the linguistic rights provided in this Act on the grounds that the Sámi knows also some other language, such as Finnish or Swedish.

*Entire law dedicated to preservation and promotion of Sami language and protecting use of Sami language in public processes*

#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Right to culture, and social and economic development



### Does the constitution protect indigenous peoples' right to mother-tongue and culturally appropriate education?

#### EXPLANATION

Indigenous peoples often lag behind other segments of the population in the states they inhabit, particularly with respect to health and education human development indicators. Globally, literacy rates are much lower among indigenous communities as compared with larger national populations, and educational opportunities are limited (Hanemann 2005: 5). Indigenous peoples are often at a disadvantage in educational institutions because instruction is provided either in a manner (pedagogy) or in a language they do not understand. Centralized, government-developed curriculums often fail to take into account the learning needs of indigenous communities or to reflect their knowledge and histories. As such, in accordance with UNDRIP, indigenous peoples have the right to establish their own educational institutions, and/or to access education that is in accordance with their learning traditions and practices, as well as provided in a language they understand.

Education should be guaranteed for all citizens, but—in the case of indigenous peoples—education services should be provided so as to take into account cultural aspects of indigenous peoples' lived realities and practices, most importantly language. There is evidence that people learn better in their mother-tongue language, and indeed indigenous peoples have a right to mother-tongue education in primary school, at least, under international law (Benson 2004). That said, education in indigenous languages should not replace education in national/official languages, which could leave indigenous peoples at a disadvantage in accessing educational and economic opportunities in the future. It is important that indigenous peoples be given the opportunity to learn national languages and/or international languages (such as English) to promote their participation in higher-level education and their ability to gain employment in an increasingly globalized market.

#### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<b>UNDRIP</b> 2007	Article 14	<ol style="list-style-type: none"><li>1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.</li><li>2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.</li><li>3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.</li></ol>	<i>Protects indigenous peoples' right to establish own education systems and to have an education in their own cultural traditions and language</i>
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<p><b>ILO Convention 169</b> 1989</p>	<p>Articles 26, 27, 28 and 29</p>	<p>Article 26 Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.</p> <p>Article 27 1. Education programmes and services for the peoples concerned shall be developed and implemented in cooperation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.</p> <p>2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.</p> <p>3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.</p> <p>Article 28 1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.</p> <p>2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.</p> <p>3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.</p> <p>Article 29 The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.</p>	<p><i>Calls on governments to provide indigenous peoples with equal opportunities to acquire education</i></p> <p><i>Obligates states to develop and implement educational services in cooperation with indigenous peoples and in a manner appropriate to their histories, cultures and learning needs</i></p> <p><i>Recognizes indigenous peoples' right to establish own education institutions and facilities</i></p> <p><i>Protects right to mother-tongue education for indigenous children as well as right to learn 'national' language</i></p>
<p><b>Argentina Constitution</b> 1994</p>	<p>Article 75(17)</p>	<p>The Congress shall have power: ... 17. To recognize the ethnic and cultural pre-existence of indigenous Argentine peoples. To guarantee respect for their identity and their right to bilingual and intercultural education ...</p>	<p><i>Guarantees the right to bilingual and intercultural education</i></p>



<b>Bolivia Constitution 2009</b>	Article 78(II), 80(II), 91(II), 95(II)	<p>Article 78 II. Education is intra-cultural, inter-cultural and multi-lingual throughout the entire educational system.</p> <p>Article 80 II. Education shall contribute to strengthening the unity and identity of everyone as part of the Pluri-National State (Estado Plurinacional), as well as strengthening the identity and cultural development of the members of each nation and rural native indigenous people, and the intercultural understanding and enrichment within the State.</p> <p>Article 91 II. Higher education is intra-cultural, intercultural and multi-lingual, and it has as its mission the comprehensive formation of highly qualified and professionally competent human resources . . .</p> <p>Article 95 II. The universities must implement programs for the recovery, preservation, development, learning and dissemination of the different languages of the nations and rural native indigenous peoples.</p>	<p><i>Promises intercultural and multilingual education</i></p> <p><i>Includes positive obligation on universities to promote indigenous languages</i></p>
<b>Brazil Constitution 1988</b>	Article 210(2)	(2) Regular elementary education shall be given in the Portuguese language, also assuring to indigenous communities the use of their native languages and their own learning procedures.	<p><i>Recognizes that indigenous communities can use own languages and learning procedures alongside regular education in Portuguese</i></p>
<b>Colombia Constitution 1991</b>	Article 10	. . . The education provided in communities with their own linguistic traditions will be bilingual.	<p><i>Guarantees the right to bilingual education</i></p>
<b>Venezuela Constitution 1999</b>	Article 121	. . . The State shall promote the appreciation and dissemination of the cultural manifestations of the native peoples, who have the right to their own education, and an education system of an intercultural and bilingual nature, taking into account their special social and cultural characteristics, values and traditions.	<p><i>Guarantees right to own education system for indigenous peoples, taking account of linguistic and cultural factors</i></p>
<b>Finland, Sámi Language Act 2003</b>	Section 32	<p>Section 32 – Status of the Sámi language in certain administrative contexts Separate provisions apply to the right of the Sámi to receive primary and lower secondary education in their mother tongue, to instruction in the Sámi language, and to the status of the Sámi language as a language of teaching, a discipline and a degree language.</p> <p>The Act on Child Day-Care (36/1973) contains provisions on the right of the Sámi to receive day-care in their mother tongue.</p>	<p><i>Protects right of Sami to primary and lower secondary mother-tongue education; extended to day-care through legislation</i></p>
<b>Norway, The Sámi Act 1987</b>	Section 3(8)	Any person is entitled to receive tuition in Sami. The King may issue further rules regarding the implementation of this provision.	<p><i>Promises right to mother-tongue education</i></p>

**South Africa,  
White Paper for  
Social Welfare**  
1997

Article 25

25. The Department of Welfare will encourage institutions to review current welfare education and training programmes and curricula, particularly in universities and technikons.

(a) Core courses should be redesigned and made flexible and sensitive to provincial and inter-provincial variations. Curricula and training materials should be indigenous and culturally sensitive, and a balance should be maintained between therapeutic and developmental methodologies. Curricula should be developed in consultation with service providers.

*Provision of education should be tailored to indigenous needs and culturally sensitive*

**FINDINGS**

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

**ACTIONS**

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Right to culture, and social and economic development



### **Does the constitution protect the right of indigenous communities to continue to practise their subsistence activities (traditional means of livelihood)?**

#### EXPLANATION

Indigenous peoples' identities are often closely tied to their land and subsistence practices, including certain forms of agriculture, handicraft production, fishing or forestry. When indigenous peoples are marginalized socially and/or alienated from their land, their ability to continue practising subsistence activities is often inhibited with negative consequences on community identity and socio-economic welfare. Environmental policies and their effect on the land are therefore extremely important to indigenous peoples, and governments should commit to consulting with indigenous peoples in the development of such policies. That being said, there are times when these policies or other 'conservation' efforts, might come at odds with indigenous peoples' traditional livelihoods—for example, if indigenous peoples harvest a plant or otherwise depend on natural resources in a national park. In these cases, attempts to manage the overlaps between the rights of indigenous peoples and the development of national parks and conservation efforts are required. Often, these issues are addressed through legislation subsequent to a constitution; however, constitutional guidance protecting indigenous peoples' right to their traditional livelihoods can provide a good platform for later legislative development.

For example, in Canada the Constitution Act of 1982 added the Canadian Charter of Rights and Freedoms and a number of provisions to the Canadian constitutional order. These provisions include section 35 which protects indigenous peoples and their historic treaty rights. On the basis of this law, the Canadian Supreme Court has expanded protection of indigenous subsistence practices to encompass logging and hunting activities. The Supreme Court has defined that 'to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group asserting the right' (Supreme Court of Canada 1995).

Beyond land-based subsistence activities, this question also implicates considerations of traditional knowledge and intellectual property rights to the same (see Question 26). Indigenous peoples' handicrafts and arts are a matter of pride for the community, a symbol of culture, but also potentially sources of income. Ensuring that indigenous peoples can continue to practise their subsistence activities includes traditional arts and handicrafts. An accompanying assurance that indigenous peoples have property rights to these crafts, songs, dances and other aspects of their culture can further protect indigenous peoples' rights to market and receive a fair share of economic benefits for their production. Of course, reasonable rules and definitions of what constitutes indigenous culture and rights over the same might be required by the state but indigenous peoples should be consulted in this process.

INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>ILO Convention 169</b> 1989</p>	<p>Article 23</p>	<p>1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.</p> <p>2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.</p>	<p><i>Holds that governments shall promote and ensure continuation of indigenous peoples' subsistence and traditional economic activities, including by providing resources for the same when requested by indigenous peoples</i></p>
<p><b>UNDRIP</b> 2007</p>	<p>Article 20</p>	<p>1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.</p> <p>2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.</p>	<p><i>Recognizes indigenous peoples' right to maintain economic systems and enjoy own means of subsistence</i></p> <p><i>Provides for redress for indigenous peoples denied their subsistence activities</i></p>
<p><b>Bolivia Constitution</b> 2009</p>	<p>Article 397(I) and (II)</p>	<p>I. Work is the fundamental means by which agrarian property is acquired and maintained. Properties must be used to serve a social purpose or a social economic purpose in order to safeguard the right to them, depending on the nature of the property.</p> <p>II. Social purpose shall be understood to mean the sustainable exploitation of the land by peoples and rural native indigenous communities, as well as that carried out in small properties, and it constitutes the source of subsistence and welfare and socio-cultural development of its owners. The norms of the communities are recognized in the fulfillment of social purpose.</p>	<p><i>Recognizes indigenous traditional uses of land as a sufficient basis to claim and maintain property</i></p>
<p><b>Sweden Constitution</b> 1974</p>	<p>Article 17</p>	<p>Limitations affecting the right to trade or practise a profession may be introduced only in order to protect pressing public interests and never solely in order to further the economic interests of a particular person or enterprise.</p> <p>The right of the Sami population to practise reindeer husbandry is regulated in law.</p>	<p><i>Carves out protections for Sami traditional livelihood (reindeer husbandry), while leaving specifics to legislation</i></p>

<p><b>Venezuela Constitution 1999</b></p>	<p>Article 123</p>	<p>Native peoples have the right to maintain and promote their own economic practices based on reciprocity, solidarity and exchange; their traditional productive activities and their participation in the national economy, and to define their priorities. Native peoples have the right to professional training services and to participate in the preparation, implementation and management of specific training programs and technical and financial assistance services to strengthen their economic activities within the framework of sustainable local development. The State shall guarantee to workers belonging to native peoples the enjoyment of the rights granted under labour legislation.</p>	<p><i>Protects indigenous peoples' rights to maintain and promote their economic practices and traditional productive activities, while also ensuring access to professional training services should indigenous peoples like to enter the mainstream economy</i></p>
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#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Right to culture, and social and economic development



### **Does the constitution protect indigenous peoples' right to health, including access to traditional medicines and services?**

#### EXPLANATION

The right to health implies not only an individual right to access health services, but an obligation for the state to provide (or facilitate the accessibility of) health care to all peoples. A general right to health and health care is often included in constitutions, and indigenous peoples should be guaranteed this same right without discrimination.

For indigenous peoples, the right to health can be enhanced if it is specifically written or interpreted to include recognition, if not provision, of traditional medicines and practices as part of a right to health. For many communities, these are the practices and medicines they trust and rely on and also those most accessible to them. A constitution can protect and promote these practices and ensure that the established national health care scheme covers access to these practices and products. As these practices form part of indigenous culture, please see also Question 21. If indigenous practices are explored or adopted for the general public, it is also important that indigenous peoples are recognized and compensated for these contributions (see Question 26 for further details).

Of course, indigenous peoples should not be forced to rely on these practices and should be guaranteed without prejudice access to regular state health services, according to their preference. Sometimes sub-constitutional innovation can ensure that indigenous peoples are receiving culturally-appropriate health services. For example, the Ministry of Indigenous Peoples' Affairs in Guyana created a specific Department of Social Welfare and Health which is

responsible for formulating, facilitating and coordinating responses to social issues affecting the Indigenous Peoples of Guyana. . . It seeks to address Labour and Welfare issues, which includes assisting persons to apply for benefits they are entitled to from the National Insurance Scheme (NIS) and the old aged pension scheme. The Officers of the Department also work along with law enforcement officers and the Ministry of Social Protection and other relevant stakeholders to investigate or report cases relating to Domestic Violence, Sexual Violence, Labour disputes, Trafficking in Person and other issues affecting Guyana's Indigenous people. Support is also provided to persons in the Georgetown Public Hospital as well as those in correctional facilities. The Department also facilitates late Registration of Births. (Ministry of Indigenous Peoples' Affairs, Guyana n.d.)



INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>ILO Convention 169</b> 1989</p>	<p>Article 25</p>	<p>1. Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.</p> <p>2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in cooperation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.</p> <p>3. The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services.</p> <p>4. The provision of such health services shall be coordinated with other social, economic and cultural measures in the country.</p>	<p><i>Places responsibility on governments to provide adequate health services that are, to the extent possible, community based and designed with an eye to local practices</i></p>
<p><b>UNDRIP</b> 2007</p>	<p>Article 24</p>	<p>1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.</p> <p>2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.</p>	<p><i>Protects indigenous peoples' right to traditional medicines and also to access national health services without discrimination</i></p> <p><i>Places obligation on states to progressive realization of indigenous peoples' right to health</i></p>
<p><b>Bolivia Constitution</b> 2009</p>	<p>Article 42(II)</p>	<p>II. The promotion of traditional medicine shall include the registry of natural medicines and of their curative properties, as well as the protection of their knowledge as intellectual, historic, cultural property and as patrimony of the nations and the rural native indigenous peoples.</p>	<p><i>Prescribes the promotion of traditional medicine including a database of all indigenous medicines and their known properties</i></p>
<p><b>Ecuador Constitution</b> 2008</p>	<p>Article 32</p>	<p>Health is a right guaranteed by the State and whose fulfilment is linked to the exercise of other rights, among which the right to water, food, education, sports, work, social security, healthy environments and others that support the good way of living. The State shall guarantee this right by means of economic, social, cultural, educational, and environmental policies; and the permanent, timely and non-exclusive access to programs, actions and services promoting and providing integral healthcare, sexual health, and reproductive health.</p>	<p><i>Provides for a general right to health for all citizens and places obligation on the state to design policies for this right to be achieved</i></p>

<b>Kenya Constitution</b> 2010	Article 43(1a)	(1) Every person has the right— (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.	<i>Provides for a general right to health for all citizens</i>
<b>Mexico Constitution</b> 1917	Article 2(B)(II)	III. Ensure effective access to health care services by expanding the coverage of the national system, making good use of traditional medicine, and support the nutrition of indigenous people through food programs, especially for the child population.	<i>Places an obligation on the state to provide health care services and expand their applicability including by making use of indigenous practices</i>
<b>Venezuela Constitution</b> 1999	Article 122	Native peoples have the right to a full health system that takes into consideration their practices and cultures. The State shall recognize their traditional medicine and supplementary forms of therapy, subject to principles of bioethics.	<i>Recognizes specialized right to full health systems for indigenous peoples, and holds that this system should recognize indigenous medicines and recognize as supplementary forms of healing</i>

#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Right to culture, and social and economic development



### Does the constitution recognize indigenous communities' rights to intellectual property ownership over their traditional knowledge and traditional cultural expressions?

#### EXPLANATION

The right to culture (Question 21) can be reinforced by a right to ownership/intellectual property rights over aspects of culture. These ensure that indigenous peoples have autonomy over how their image and culture is represented and, in some cases, replicated.

Indigenous peoples have a wealth of traditional knowledge and traditional cultural expressions that are potentially valuable and marketable. This knowledge includes understanding of medicinal plants and environmental management techniques, as well as the location and proper use of natural resources. In many countries, indigenous peoples are also provided with intellectual property rights over their cultural practices and traditions, handicrafts and livelihoods and other aspects of culture. This can be an important source of both recognition and income for indigenous peoples' cultures.

Indigenous peoples' collective ownership over traditional knowledge and traditional cultural expressions is recognized under international law and can be protected domestically in a constitution. That being said, this right has often been violated in the past and indigenous peoples have been dispossessed of knowledge or have had this knowledge appropriated by other actors without acknowledgment or compensation for their contributions. International law has expanded to include a right to redress for these historic violations of indigenous peoples' right to intellectual property ownership over their traditional knowledge and traditional forms of cultural expressions.

#### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<b>Convention on Biological Diversity</b> 1992	Article 8(j)	(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.	<i>Calls for benefit-sharing from application or other use of indigenous knowledge, innovation and practices in the area of biological diversity</i>
<b>Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples</b> 1993	Articles 2.1, 2.2 and 2.4	In the development of policies and practices, States, National and International Agencies must 2.1 Recognise that Indigenous peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge. 2.2 Recognise that Indigenous peoples also have the right to create new knowledge based on cultural traditions. ... 2.4 Accept that the cultural and intellectual property rights of Indigenous peoples are vested with those who created them.	<i>Recognizes indigenous peoples as guardians of traditional knowledge with the right to control dissemination of this knowledge under cultural and intellectual property rights</i>

<p><b>UNDRIP</b> 2007</p>	<p>Articles 11 and 31</p>	<p>Article 11 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.</p> <p>Article 31 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.</p>	<p><i>Obligates states to provide effective mechanisms and redress for violations of indigenous peoples' right to free, prior and informed consent (FPIC) regarding their 'cultural, intellectual, religious and spiritual property'</i></p> <p><i>Recognizes indigenous peoples' right to control, protect and develop cultural heritage and knowledge and their right to intellectual property rights over the same</i></p>
<p><b>Bolivia Constitution</b> 2009</p>	<p>Articles 30(II, 11), 42, 304(II, 3)</p>	<p>Article 30 II. In the framework of the unity of the State, and in accordance with this Constitution, the nations and rural native indigenous peoples enjoy the following rights: . . . 11. To collective ownership of the intellectual property in their knowledge, sciences and learning, as well as to its evaluation, use, promotion and development.</p> <p>Article 42 I. It is the responsibility of the State to promote and guarantee the respect for, and the use, research and practice of traditional medicine, rescuing ancestral knowledge and practices created from the thinking and values of all the nations and the rural native indigenous peoples. II. The promotion of traditional medicine shall include the registry of natural medicines and of their curative properties, as well as the protection of their knowledge as intellectual, historic, cultural property and as patrimony of the nations and the rural native indigenous peoples.</p> <p>Article 304 II. The rural native indigenous villages can exercise the following shared authority: . . . 3. The safeguard and registration of collective intellectual property related to knowledge of genetic resources, traditional medicine and germ plasma, in accordance with the law.</p>	<p><i>Protects collective intellectual property rights</i></p> <p><i>Obligates the state to promote research and investment in traditional knowledge, medicines and practices</i></p>

<p><b>Ecuador Constitution 2008</b></p>	<p>Article 57(12)</p>	<p>Indigenous communes, communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments, the following collective rights:</p> <p>...</p> <p>(12) To uphold, protect and develop collective knowledge; their science, technologies and ancestral wisdom; the genetic resources that contain biological diversity and agricultural biodiversity; their medicine and traditional medical practices, with the inclusion of the right to restore, promote, and protect ritual and holy places, as well as plants, animals, minerals and ecosystems in their territories; and knowledge about the resources and properties of fauna and flora.</p>	<p><i>Includes intellectual property in list of other collective rights for indigenous peoples</i></p>
<p><b>Kenya Constitution 2010</b></p>	<p>Articles 11 and 69</p>	<p>Article 11</p> <p>(2) The State shall—</p> <p>...</p> <p>(c) promote the intellectual property rights of the people of Kenya.</p> <p>(3) Parliament shall enact legislation to—</p> <p>(a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and</p> <p>(b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.</p> <p>Article 69</p> <p>69. Obligations in respect of the environment</p> <p>(1) The State shall—</p> <p>...</p> <p>(c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.</p>	<p><i>Calls on parliament to enact legislation promising compensation for use of and ownership over traditional knowledge</i></p>
<p><b>Venezuela Constitution 1999</b></p>	<p>Article 124</p>	<p>Collective intellectual property rights in the knowledge, technologies and innovations of native peoples are guaranteed and protected. Any activity relating to genetic resources and the knowledge associated with the same, shall pursue collective benefits. The registry of patents on this ancestral knowledge and these resources is prohibited.</p>	<p><i>Guarantees collective intellectual property rights</i></p>

<p><b>The Philippines, Indigenous Peoples' Rights Act</b> 1997</p>	<p>Sections 32, 34 and 35</p>	<p>SECTION 32. Community Intellectual Rights. — ICCs/IPs [indigenous cultural communities/ indigenous peoples] have the right to practice and revitalize their own cultural traditions and customs. The State shall preserve, protect and develop the past, present and future manifestations of their cultures as well as the right to the restitution of cultural, intellectual, religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs.</p> <p>SECTION 34. Right to Indigenous Knowledge Systems and Practices and to Develop own Sciences and Technologies. — ICCs/IPs [indigenous cultural communities/indigenous peoples] are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts.</p> <p>SECTION 35. Access to Biological and Genetic Resources. — Access to biological and genetic resources and to indigenous knowledge related to the conservation, utilization and enhancement of these resources, shall be allowed within ancestral lands and domains of the ICCs/IPs only with a free and prior informed consent of such communities, obtained in accordance with customary laws of the concerned community.</p>	<p><i>Protects 'Community Intellectual Rights' including obligating free, prior and informed consent (FPIC) in relation to the use of intellectual, cultural, religious or spiritual property</i></p>
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#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*





**VIII. Protecting  
and promoting  
indigenous  
peoples' rights**

**Questions 27–34**

## Protecting and promoting indigenous peoples' rights



### **Does the constitution establish a national indigenous peoples' commission, ministry or other specialized government body to promote and protect indigenous peoples' rights?**

#### EXPLANATION

Independent commissions, tribunals and ombudsmen can complement judiciaries and play an important oversight and enforcement function in constitutional orders. These bodies may also be more accessible to the public than the judiciary, especially for the economically disadvantaged and otherwise marginalized who might have difficulty accessing courts. Over time, these 'fourth branch' institutions have proliferated in constitutions, including a rise in social inclusion and even commissions specifically for indigenous peoples alongside more traditional fourth-branch institutions. Constitutional entrenchment of these bodies is best practice as it gives them a higher status and endurance than bodies established through legislation; that being said, even establishing such bodies through legislation can go a long way in promoting indigenous peoples' rights.

The mandate of these institutions should broadly be to ensure that government entities and processes operate in compliance with indigenous peoples' rights in the constitution, but specific mandates vary. For example, a commission's specific mandate might include investigatory capacities to look into rights violations. An independent indigenous peoples' commission can serve to provide expert advice and recommendations on indigenous peoples' issues, raise awareness and promote the integration and coordination of activities relating to these issues, and prepare and disseminate information on them. Commissions can be permanent features of the constitutional order or can be set up on an ad-hoc basis to resolve specific complaints or investigate specific wrongs—for example, Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls, which was set up temporarily (2016–2018) with a mandate 'to look at all underlying causes of violence against Indigenous women and girls including systemic issues; to make concrete recommendations to end the unacceptably high rates of violence; to examine institutional policies and practices such as policing or child welfare' (Government of Canada 2019). Sometimes these commissions can make recommendations, binding or non-binding, to other government actors and bodies; sometimes they are empowered to support legal cases (see Question 29 on standing) on behalf of the peoples they represent, either by bringing these cases to court or by providing financial resources or evidence—for example, by filing amicus briefs or other supporting documentation in these cases.

Besides commissions, some countries have also sought to establish ministries or secretariats of indigenous affairs to ensure that the executive portfolio and actions are responsive to indigenous peoples' rights and issues. Other countries have created specialized committees or departments within parliaments or other government agencies and institutions to mainstream consideration of indigenous peoples' issues—for example, the United States Senate Committee on Indian Affairs. To be clear, these bodies do not qualify as indigenous peoples' consultative mechanisms or even as mechanisms for indigenous peoples' representation in government (see Questions 13 and 14), since they do not include representation of indigenous peoples themselves, but they do symbolize a government effort to account for and look after indigenous peoples' issues at the national level, and, hopefully, also a government commitment to indigenous peoples' rights included in the constitution and national legislation.

Institutional innovation to promote and protect indigenous peoples' rights is an ongoing process. New Zealand provides an excellent example. Despite already establishing the progressive Waitangi Tribunal (1975) to investigate ongoing treaty claims between Maori indigenous peoples and the government, New Zealand also established the Office for Māori Crown Relations—Te Arawhiti, via Cabinet Decision in 2018, in order to support the government in being a 'fair treaty partner'

and honouring its commitment to the Maori nations in the Treaty of Waitangi. This shows that it is possible to have more than one institution dedicated to indigenous peoples' affairs, and each institution can serve a slightly different function.

The United Nations Permanent Forum on Indigenous Issues presents a good practice example for how even the type of government institutions discussed in this question (i.e. commissions, ministries, etc.) can be made more representative and, at the same time, can evolve towards also being institutions of co-governance, partnership and consultation with indigenous peoples. The Permanent Forum is made up of 16 independent experts, functioning in their personal capacity, who serve for a term of three years as members and may be re-elected or reappointed for one additional term (United Nations Permanent Forum on Indigenous Issues 2007: 7–8). Eight of the members are nominated by governments and eight are nominated directly by indigenous organizations in their regions. The members nominated by indigenous organizations are appointed by the President of the United Nations Economic and Social Council (ECOSOC) and represent seven sociocultural regions to give broad representation to the world's indigenous peoples. The regions are: Africa; Asia; Central and South America and the Caribbean; the Arctic; Eastern Europe, the Russian Federation, Central Asia and Transcaucasia; North America; and the Pacific. This shows how, through innovative appointment procedures, states can begin to improve the practices and the impact of the institutions they set up and ensure that these are aligned with indigenous peoples' foundational right to self-determination.

INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>Angola, Ombudsman</b> Established by <b>Constitution</b> 2010</p>	<p>Article 192(1)</p>	<p>(1) The Ombudsman shall be an independent public body whose purpose shall be to defend the rights, freedoms and guarantees of citizens ensuring, by informal means, the justice and legality of the public administration.</p>	<p><i>Provides general protection for all citizens' rights through the establishment of an independent and accessible ombudsman</i></p>
<p><b>Guyana, Indigenous Peoples' Commission</b> Established by <b>Constitution</b> 2016</p>	<p>Article 212T</p>	<p>212T. Functions of the Indigenous Peoples' Commission In addition to the functions specified in article 212] (2) the functions of the Indigenous Peoples' Commission are to-</p> <ul style="list-style-type: none"> <li>a. promote and protect the rights of the indigenous peoples;</li> <li>b. raise awareness of the contribution of, and problems faced by, indigenous peoples;</li> <li>c. promote empowerment of the indigenous peoples, especially with regard to the village council in the local government system and the scope and authority of the Council of Tashaos;</li> <li>d. make recommendations on economic and education policies to advance the interest of the indigenous peoples;</li> <li>e. make recommendations for the protection, preservation and promulgation of the cultural heritage and language of the indigenous peoples;</li> <li>f. promote consultation and cooperation with indigenous peoples especially with regard to their participation in national decision-making and other decisions that affect their lives;</li> <li>g. recommend and promote training and technical assistance to support initiative by and for indigenous peoples;</li> <li>h. educate employers and the public and make recommendations to improve employment practices related to indigenous peoples; and</li> <li>i. monitor the need for and recommend where appropriate the establishment of mechanisms to provide counselling for indigenous peoples.</li> </ul>	<p><i>Establishes the Indigenous Peoples' Commission with the mandate of protecting the rights of indigenous peoples as well as a number of other identified functions</i></p>
<p><b>Nepal, Indigenous Nationalities Commission</b> Established by <b>Constitution</b> 2015</p>	<p>Article 261</p>	<p>(1) There shall be an Indigenous Nationalities Commission of Nepal, consisting of a Chairperson and a maximum of four other members. (2) The President shall, on the recommendation of the Constitutional Council, appoint the Chairperson and members of the Indigenous Nationalities Commission. (3) The term of office of the Chairperson and members of the Indigenous Nationalities Commission shall be six years from the date of appointment. (4) Other matters relating to the qualification for the Chairperson and members of the Indigenous Nationalities Commission, circumstances in which their offices fall vacant, their remuneration and conditions of service and the functions, duties and powers of this Commission shall be as provided for in the Federal law.</p>	<p><i>Mandates the setting up of an Indigenous Nationalities Commission as a fourth branch institution in Nepal</i></p>

<p><b>South Africa, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities</b> Established by <b>Constitution 1996</b></p>	<p>Section 181(1)</p>	<p>1. The following state institutions strengthen constitutional democracy in the Republic: ... c. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.</p>	<p><i>Establishes a constitutional commission for the promotion and protection of the rights of 'cultural, religious and linguistic' communities</i></p>
<p><b>Bangladesh, Ministry of Chittagong Hill Tracts Affairs</b> Established by <b>Chittagong Hill Tracts Accord 1997</b></p>	<p>Part D, article 18</p>	<p>A ministry on Chittagong Hill Tracts Affairs shall be established by appointing a Minister from among the tribals.</p>	<p><i>Commits the government to establishing a Ministry to streamline Chittagong Hill Tracts (tribal) affairs within the government; Ministry was established in 1998</i></p>
<p><b>Brazil, Fundação Nacional do Índio (FUNAI)</b> Established by <b>Law No. 5,374</b>, 5 December 1967</p>	<p>Entire law as represented by Title</p>	<p>Authorizes the institution of the 'Fundação Nacional do Índio' and makes other arrangements.</p>	<p><i>Establishes the Indian National Foundation (Fundação Nacional do Índio, FUNAI) as the official indigenist organ of the country, subordinated to the Ministry of Justice</i></p>
<p><b>Brazil, Fundação Nacional do Índio (FUNAI)</b> Established by <b>Law No. 5,374</b>, 5 December 1967</p>			<p><i>Mandates FUNAI as the coordinator and main executor of the federal government's indigenous peoples' policy with a mission to protect and promote the rights of Brazil's indigenous peoples</i></p>
<p><b>Canada, Ministry of Crown-Indigenous Relations</b>, mandate established by Appointment Letter for Current Minister, 13 December 2019</p>	<p>Entire letter</p>	<p>As Minister of Crown-Indigenous Relations, you will continue the work to renew the nation-to-nation, Inuit-Crown and government-to-government relationship between Canada and Indigenous Peoples. This includes continuing to modernize our institutional structure and governance so that First Nations, Inuit and Métis Peoples can build capacity that supports implementation of their vision of self-determination. ... In particular, you will:</p> <ul style="list-style-type: none"> <li>• Lead a whole-of-government approach on the continued renewal of a nation-to-nation, Inuit-Crown and government-to-government relationship with Indigenous Peoples, advancing co-developed distinctions-based policy and improving our capacity as a Government to consider and respond to the unique realities of Indigenous Peoples.</li> <li>• Support the Minister of Justice and Attorney General of Canada in work to introduce co-developed legislation to implement the United Nations Declaration on the Rights of Indigenous Peoples by the end of 2020.</li> <li>• Lead and coordinate the work required of all Ministers to continue to implement the Truth and Reconciliation Commission's Calls to Action.</li> </ul>	<p><i>Provides detailed description of responsibilities of the Ministry vis-à-vis other ministries and state institutions</i></p>

- Lead and coordinate the work required of all Ministers in establishing a National Action Plan in response to the National Inquiry into Missing and Murdered Indigenous Women and Girls' Calls for Justice, in partnership with First Nations, Inuit and Métis Peoples.
- Co-develop with Indigenous Peoples a new distinctions-based process for the ongoing review, maintenance and enforcement of Canada's treaty obligations between the Crown and Indigenous communities. This work will be supported by a new National Treaty Commissioner's Office that will be designed and established with Indigenous partners.
- Continue to support Indigenous-led processes for rebuilding and reconstituting their historic nations, advancing self-determination and, for First Nations, transitioning away from the Indian Act.
- Continue ongoing work with First Nations to redesign federal policies on additions to reserves, and on the Specific Claims process.
- Continue ongoing work with First Nations, Inuit and Métis to redesign the Comprehensive Claims and Inherent Rights Policies.
- Work with the Minister of Finance and the Minister of Natural Resources to develop a new national benefits-sharing framework for major resource projects on Indigenous territory.
- Deepen work with the Minister of Finance, working with the Minister of Indigenous Services, to establish a new fiscal relationship with Indigenous Peoples that ensures sufficient, predictable and sustained funding for communities, and that nations have the revenue generation and fiscal capacity to govern effectively and to provide programs and services to those for whom they are responsible.
- Work with First Nations, Inuit and Métis Nation leadership, with the support of the Minister of Public Services and Procurement, to conclude the Government's contribution to the space for Indigenous Peoples in the Parliamentary Precinct.
- With the support of the Minister of Northern Affairs, co-develop and implement an Inuit Nunangat policy, and fully implement Inuit land claims agreements.
- Continue our regular meetings on Indigenous priorities through the Assembly of First Nations-Canada Memorandum of Understanding on Joint Priorities, the Inuit-Crown Partnership Committee and the Canada-Métis Nation Accord.
- Work with the Deputy Prime Minister and Minister of Intergovernmental Affairs and with me to support a First Ministers' Meeting on Reconciliation with Indigenous Peoples, and continue to advance meaningful inclusion of First Nations, Inuit and Métis partners in federal and intergovernmental decision-making processes that have an impact on Indigenous rights and interests.

<p><b>Chile, Fondo de Desarrollo Indigena (CONADI)</b> Established by Law No. 19.253</p>	<p>Chapter III, para. 1</p>	<p>Article 23. Create an Indigenous Development Fund whose purpose will be to finance special programs aimed at the development of indigenous peoples and communities, which will be administered by the Corporation.</p>	<p><i>Establishes CONADI under the Ministry of Social Development and Family</i></p>
<p><b>New Zealand, Waitangi Tribunal</b> Established by Treaty of Waitangi Act 1975</p>	<p>Entire Law, particularly sections 4–8; section 5 cited as an example here</p>	<p>5. The functions of the Tribunal shall be—  (a) to inquire into and make recommendations upon, in accordance with this Act, any claim submitted to the Tribunal under section 6:  (aa) to make recommendations, in accordance with section 8D, that land or interests in land be no longer subject to resumption under section 27B of the State-Owned Enterprises Act 1986 or section 212 of the Education Act 1989:  (ab) to make any recommendation or determination that the Tribunal is required or empowered to make under Schedule 1 of the Crown Forest Assets Act 1989:  (ac) to make recommendations in accordance with section 8HE that land, or any part of any land, that is subject to a Crown forestry licence under the Crown Forest Assets Act 1989, be no longer liable to be returned to Maori ownership under section 36 of that Act:  (ad) to make recommendations in accordance with section 8D (as applied by section 8H) that land or any interest in land that, immediately before being vested in a Crown transferee company pursuant to section 6 of the New Zealand Railways Corporation Restructuring Act 1990, was land owned by the Crown or an interest owned by the Crown in land, be no longer subject to resumption under section 39 of that Act:  (b) to examine and report on, in accordance with section 8, any proposed legislation referred to the Tribunal under that section.</p>	<p><i>Establishes the Waitangi Tribunal as a specialized commission of inquiry that can make recommendations on claims brought forth by Maori indigenous peoples relating to the government and breaches of treaty rights</i></p>
<p><b>The Philippines, National Commission on Indigenous Peoples</b> Established by Indigenous Peoples' Rights Act 1997</p>	<p>Title, Chapter VII, specifically sections 38, 39 and 44</p>	<p>An Act to recognize, protect and promote the rights of indigenous cultural communities/indigenous peoples, creating a National Commission on Indigenous Peoples, establishing implementing mechanisms, appropriating funds therefor, and for other purposes</p> <p>CHAPTER VII National Commission on Indigenous Peoples (NCIP)</p> <p>SECTION 38. National Commission on Indigenous Cultural Communities/Indigenous Peoples (NCIP). — To carry out the policies herein set forth, there shall be created the National Commission on ICCs/IPs (NCIP), which shall be the primary government agency responsible for the formulation and implementation of policies, plans and programs to promote and protect the rights and well-being of the ICCs/IPs and the recognition of their ancestral domains as well as the rights thereto.</p> <p>SECTION 39. Mandate. — The NCIP shall protect and promote the interest and well-being of the ICCs/IPs with due regard to their beliefs, customs, traditions and institutions.</p>	<p><i>Establishes the National Commission on Indigenous Peoples and defines its mandate and key functions</i></p>

SECTION 44. Powers and Functions. — To accomplish its mandate, the NCIP shall have the following powers, jurisdiction and function:

- a) To serve as the primary government agency through which ICCs/IPs can seek government assistance and as the medium, through which such assistance may be extended;
- b) To review and assess the conditions of ICCs/IPs including existing laws and policies pertinent thereto and to propose relevant laws and policies to address their role in national development;
- c) To formulate and implement policies, plans, programs and projects for the economic, social and cultural development of the ICCs/IPs and to monitor the implementation thereof;
- d) To request and engage the services and support of experts from other agencies of government or employ private experts and consultants as may be required in the pursuit of its objectives;
- e) To issue certificate of ancestral land/domain title;
- f) Subject to existing laws, to enter into contracts, agreements, or arrangement, with government or private agencies or entities as may be necessary to attain the objectives of this Act, and subject to the approval of the President, to obtain loans from government lending institutions and other lending institutions to finance its programs;
- g) To negotiate for funds and to accept grants, donations, gifts and/or properties in whatever form and from whatever source, local and international, subject to the approval of the President of the Philippines, for the benefit of ICCs/IPs and administer the same in accordance with the terms thereof; or in the absence of any condition, in such manner consistent with the interest of ICCs/IPs as well as existing laws;
- h) To coordinate development programs and projects for the advancement of the ICCs/IPs and to oversee the proper implementation thereof;
- i) To convene periodic conventions or assemblies of IPs to review, assess as well as propose policies or plans;
- j) To advise the President of the Philippines on all matters relating to the ICCs/IPs and to submit within sixty (60) days after the close of each calendar year, a report of its operations and achievements;
- k) To submit to Congress appropriate legislative proposals intended to carry out the policies under this Act;
- l) To prepare and submit the appropriate budget to the Office of the President;
- m) To issue appropriate certification as a pre-condition to the grant of permit, lease, grant, or any other similar authority for the disposition, utilization, management and appropriation by any private individual, corporate entity or any government agency, corporation or subdivision thereof on any part or portion of the ancestral domain taking into consideration the consensus approval of the ICCs/IPs concerned;



		<p>n) To decide all appeals from the decisions and acts of all the various offices within the Commission;</p> <p>o) To promulgate the necessary rules and regulations for the implementation of this Act;</p> <p>p) To exercise such other powers and functions as may be directed by the President of the Republic of the Philippines.</p>	
<p><b>United States of America, Senate Committee on Indian Affairs</b> Established by <b>Senate Resolution 4</b>, Sec. 105, 95th Congress, 1st Session 1977</p>	<p>Senate Rule XXV, paragraphs (b) (2) and (3), and (c)(1)(A)</p>	<p>(b) . . .</p> <p>(2) It shall be the duty of the select committee to conduct a study of any and all matters pertaining to problems and opportunities of Indians, including but not limited to, Indian land management and trust responsibilities, Indian education, health, special services, and loan programs, and Indian claims against the United States.</p> <p>(3) The select committee shall from time to time report to the Senate, by bill or otherwise, its recommendations with respect to matters referred to the select committee or otherwise within its jurisdiction.</p> <p>(c)(1) For the purposes of this section, the select committee is authorized, in its discretion,</p> <p>(A) to make investigations into any matter within its jurisdiction . . .</p>	<p><i>Establishes Committee on Indian Affairs with the US Senate to look into and report to the Senate on issues pertaining to indigenous peoples</i></p> <p><i>Provides the Committee with investigative authority</i></p>

**FINDINGS**

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

**ACTIONS**

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Protecting and promoting indigenous peoples' rights



### **Does the constitution indicate, in multi-layered state structures, which level(s) of government are primarily responsible for coordination, protection and promotion of indigenous peoples' rights?**

#### EXPLANATION

In recognition of the right to self-determination and its attendant rights to autonomy and self-government, best practice from an indigenous peoples' rights perspective is to recognize indigenous peoples and their traditional authorities as a co-equal branch or level of government within the state. Where indigenous peoples have territorial autonomy, their self-governing institutions might be integrated in the institutions of the state on an equal footing with other subnational units. Despite this best practice, constitutions in a multi-layered state structure will often designate a level of government that is ultimately responsible for consulting and negotiating agreements and relationships with indigenous peoples, and even possibly for promoting and protecting indigenous peoples' rights. This is particularly important for federal or highly decentralized states in which indigenous communities live within (and across) substate territorial boundaries. As part of a constitution assessment of indigenous peoples' rights, it is important to understand whether the constitution assigns such competencies/authorities to a level or levels of government and, if so, which level or levels. This assignment or scope of competency identifies key stakeholders in indigenous peoples-state relations and frames the related processes and mechanisms to protect, respect and promote indigenous peoples' rights.

Constitutional approaches take several forms. In the United States, the federal (central) government has primary responsibility for managing affairs with the Indian nations but, in practice, some of the USA's composite states have also developed relationships, laws and policies to address indigenous peoples' issues, and the federal government has devolved some responsibilities related to tribal affairs to state governments via national legislation. In Canada and Mexico, the responsibility over indigenous peoples' rights is shared by different levels of government. In practice, Canada has utilized a set of equitable 'ground rules' for the negotiation of constructive arrangements with indigenous peoples that necessarily involve indigenous nations, provincial (substate) authorities and the federal government. The competence for the protection and promotion of indigenous peoples' rights at the national level is therefore shared among the federal government and the provinces. In Mexico, this shared responsibility is more express, with the specific obligations of federal, state and local authorities detailed in the Constitution.

Even in non-federal countries, this is an important issue to consider. For example, in the Philippines, the autonomous government in the Bangsamoro is given competency to govern indigenous peoples' issues and relationships at the subnational level. The national government in the Philippines maintains this responsibility throughout the country but a special exception is made by the Bangsamoro Organic Law which gives the Bangsamoro Government shared authority over indigenous peoples' affairs. This can be positive but can also leave indigenous peoples vulnerable to a lack of services and protections if the delineation of authority is not clear.

INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>Mexico Constitution</b> 1917</p>	<p>Article 2</p>	<p>. . . Indigenous people’s right to self-determination shall be subjected to the Constitution in order to guarantee national unity. States’ and Federal District’s constitutions and laws must recognize indigenous peoples and communities, taking into account the general principles established in the previous paragraphs, as well as ethnic-linguistic and land settlement criteria. A. . . . The constitutions and laws of the States and the Federal District shall establish those elements of self-determination and autonomy that may best express the conditions and aspirations of indigenous peoples in each State, as well as the rules, according to which indigenous communities will be defined as public interest entities. B. In order to promote equal opportunities for indigenous people and to eliminate discriminatory practices, the Federation, the Federal District, the States and the local councils shall establish the necessary institutions and policies to guarantee indigenous people’s rights and comprehensive development of indigenous communities. Such institutions and policies shall be designed and operated together with them.</p>	<p><i>Places the responsibility to protect and promote indigenous peoples’ rights, including rights to self-determination, on federal, state and local council authorities</i></p> <p><i>Includes a series of specific state obligations to this end</i></p>
<p><b>United States Constitution</b> 1789</p>	<p>Article 1, section 8</p>	<p>Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.</p>	<p><i>Provides Congress (national government) with the authority to regulate trade—and in theory relationships—with indigenous peoples</i></p> <p><i>Note: Despite the constitutional assignment of Indian affairs to the federal government, several federal laws have granted states a degree of jurisdiction or co-jurisdiction over matters related to indigenous peoples. These laws include:</i></p> <ul style="list-style-type: none"> <li>• <i>Public Law Act 280 (1953), which enabled five (sub) states to assume general criminal and some civil jurisdiction over Indian reservations (tribal land) within the states</i></li> <li>• <i>Indian Child Welfare Act (1978), which established procedures and dual jurisdiction between states and tribes, deferring to tribal governments</i></li> </ul>
<p><b>The Philippines, Bangsamoro Organic Law</b> 2018</p>	<p>Article V, section 2</p>	<p>Section 2 Powers of the Bangsamoro Government. . . . The Bangsamoro Government shall exercise its authority over the following matters . . . . . . (ff) Indigenous peoples’ rights;</p>	<p><i>Gives the government of the Bangsamoro Autonomous Region the competency/ authority to govern on the issue of indigenous peoples’ rights</i></p>

#### FINDINGS

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Protecting and promoting indigenous peoples' rights



### **Does the constitution include rules for 'standing' that are sufficiently open and accessible to ensure indigenous peoples' right to access courts?**

#### EXPLANATION

Having rights on paper is important but in order to ensure that these rights are meaningful, indigenous peoples must be able to bring cases challenging government actions and laws that contradict these rights. The ability to bring cases is often determined in large part by the issue of 'standing'. Standing is the capacity of a party (a person, organization or other legal entity) to bring a lawsuit to court or to 'stand' in front of a judge. Standing is a legally defined status determined by the relationship between the party and the governmental action or law being challenged. Standing can be defined in the constitution with regard to specific rights, such as fundamental rights, as well as in statutes.

This is a particularly important issue for indigenous peoples who have historically been denied standing in the past, as part of historic efforts to deny indigenous peoples' sovereignty as peoples, and their dignity as individuals. For example, in 1919 the Privy Council, the highest court in the British Empire, refused to acknowledge the legal personality of indigenous peoples on account of them being 'so low on the scale of social organization that their usages and concepts of rights and duties are not to be reconciled with the institutions and legal ideas of civilized society' (Goodhart 2016). In 1928, the Permanent Court of International Arbitration claimed that indigenous peoples did not have standing while describing them as 'savage' (ibid.). To counteract the wrongs caused by these perceptions and their consequential denial of indigenous peoples' rights to access justice and to effective remedies for rights violations, it is incredibly important that indigenous peoples' standing is recognized.

Generally, broader rules of standing mean more open and greater access for marginalized individuals and groups to the formal state justice system. For many issues, standing requires that the suing party has some connection to, and has experienced some type of harm from, the action or law at issue. However, the nexus between the definitions of 'connection' and 'harm' varies. Allowing an individual or group that has not necessarily experienced direct (i.e. personal) harm to bring a case on behalf of others means that those with greater resources can legally advocate for those with fewer resources. Further, allowing standing for cases that anticipate a hypothetical harm (rather than requiring actual harm) protects indigenous peoples who may experience injury if a governmental action or law were allowed to proceed. Standing is also related to the issue of recognizing collectives as rights holders and legal entities (see Question 8), insofar as that can determine whether collectives have standing. As such, many indigenous examples of standing are covered in Question 8. In Ecuador in 2017, indigenous peoples were able to bring a case against palm oil companies based on their legal personality as a collective and the rights newly bestowed on nature in the 2008 Constitution; this case was also the first in which 'nature' was given legal standing, alongside the indigenous communities of La Chiquita and the Awá community of Guadualito.

An ombudsman or specialized government commission (see Question 27) can also be granted the authority to challenge the constitutionality of a law or government action. Such a provision further expands access to justice for those with fewer resources, as it allows the ombudsman or commission to take up constitutional violations directly with the courts and does not rely on the resources and capacities of individuals and non-governmental organizations. In the absence of such a provision, ensuring access to legal aid for those who might otherwise have trouble accessing the courts becomes increasingly important.

INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>Argentina Constitution</b> 1994</p>	<p>Article 43</p>	<p>Any person may file an expeditious and swift action of ‘amparo,’ whenever no other more appropriate judicial means exists, against any act or omission by public authorities or by private individuals, that presently or imminently harms, restricts, alters or threatens, in an arbitrary or manifestly illegal manner, the rights and guarantees recognized by this Constitution, by a treaty, or by a law. As appropriate, the judge may declare the norm upon which the harmful act or omission is founded unconstitutional. [When] this action complains of any form of discrimination, or regards the rights that protect the environment, competition, the user, the consumer, or rights of a collective nature in general, it may be brought by the affected party, the Defender of the People [ombudsman], and the associations that support these ends that are registered as required by a law that shall determine the requirements and forms of their organization.</p>	<p><i>Provides that when all other legal remedies are inadequate or lacking, an affected individual or someone acting on their behalf can approach the court</i></p> <p><i>Empowers the Ombudsman as a defender of the people to bring forward any case, particularly those that are collective in nature, related to discrimination or threats to the environment</i></p>
<p><b>Ecuador Constitution</b> 2008</p>	<p>Articles 10, 11(1) and 71</p>	<p>TITLE II. RIGHTS CHAPTER 1. PRINCIPLES FOR THE ENFORCEMENT OF RIGHTS ARTICLE 10 Persons, communities, peoples, nations and communities are bearers of rights and shall enjoy the rights guaranteed to them in the Constitution and in international instruments. Nature shall be the subject of those rights that the Constitution recognizes for it. ARTICLE 11 The exercise of rights shall be governed by the following principles: 1. Rights can be exercised, promoted and enforced individually or collectively before competent authorities; these authorities shall guarantee their enforcement. CHAPTER 7. RIGHTS OF NATURE ARTICLE 71 Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.</p>	<p><i>Recognizes collectives and nature as rights holders with standing to hold the government accountable. Note that this is part of the chapter on enforcement of rights</i></p> <p><i>Provides nature with specific rights and empowers peoples to bring cases on behalf of nature, thereby giving nature standing in court</i></p>

<p><b>South Africa Constitution</b> 1996</p>	<p>Section 38</p>	<p>Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:</p> <ol style="list-style-type: none"> <li>a. anyone acting in their own interest;</li> <li>b. anyone acting on behalf of another person who cannot act in their own name;</li> <li>c. anyone acting as a member of, or in the interest of, a group or class of persons;</li> <li>d. anyone acting in the public interest; and</li> <li>e. an association acting in the interest of its members.</li> </ol>	<p><i>Provides very broad standing by ensuring that the Ombudsman, affected individuals and also unaffected others (individuals or groups) can approach the court for past or anticipated rights violations</i></p>
<p><b>Zimbabwe Constitution</b> 2013</p>	<p>Article 85</p>	<ol style="list-style-type: none"> <li>1. Any of the following persons, namely— <ol style="list-style-type: none"> <li>a. any person acting in their own interests;</li> <li>b. any person acting on behalf of another person who cannot act for themselves;</li> <li>c. any person acting as a member, or in the interests, of a group or class of persons;</li> <li>d. any person acting in the public interest;</li> <li>e. any association acting in the interests of its members;</li> </ol> is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter [Chapter 4: Declaration of Rights] has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation. </li> <li>2. The fact that a person has contravened a law does not debar them from approaching a court for relief under subsection (1).</li> <li>3. The rules of every court must provide for the procedure to be followed in cases where relief is sought under subsection (1), and those rules must ensure that— <ol style="list-style-type: none"> <li>a. the right to approach the court under subsection (1) is fully facilitated;</li> <li>b. formalities relating to the proceedings, including their commencement, are kept to a minimum;</li> <li>c. the court, while observing the rules of natural justice, is not unreasonably restricted by procedural technicalities; and</li> <li>d. a person with particular expertise may, with the leave of the court, appear as a friend of the court.</li> </ol> </li> </ol>	<p><i>Allows for affected individuals or groups, or others acting on their behalf or in the public interest, to approach the court for past or anticipated rights violations</i></p> <p><i>Mandates that court procedures facilitate accessibility of justice for all</i></p>
<p><b>New Zealand, Tutohu Whakatupua Agreement</b> 2012</p>	<p>Paragraphs 2.4, 2.6 and 2.7</p>	<p>2.4 The settlement will provide for the statutory recognition of the Whanganui River as Te Awa Tupua. The indicative wording for the statutory recognition of Te Awa Tupua is as follows: Te Awa Tupua comprises the Whanganui River as an indivisible and living whole, from the mountains to the sea, incorporating its tributaries and all its physical and metaphysical elements.</p> <p>2.6 The settlement will provide for the recognition of Te Awa Tupua as a legal entity.</p> <p>2.7 The creation of a legal personality for the River is intended to:</p> <ol style="list-style-type: none"> <li>2.7.1 reflect the Whanganui Iwi view that the River is a living entity in its own right and is incapable of being ‘owned’ in an absolute sense; and</li> <li>2.7.2 enable the River to have legal standing in its own right.</li> </ol>	<p><i>Represents an example of granting an entity legal ‘standing’; concerned about environmental damage, an indigenous group brought a claim to grant a certain river its own legal standing—the court recognized the river’s importance and granted it its own legal personality</i></p>



**FINDINGS**

*Answer to the question (Y/N) and other notes and observations about how well the constitution addresses the issue(s) raised in the question. Include relevant provisions (article number(s) and text of the provision(s)). Also note inconsistent and/or contradictory provisions, or if no relevant provisions exist.*

**ACTIONS**

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

# Protecting and promoting indigenous peoples' rights



## Does the constitution guarantee legal aid for persons and groups unable to afford private legal representation?

### EXPLANATION

As noted in Question 29 on standing, rights are only meaningful insofar as they can be enforced. One threshold issue for enforcing rights is standing, or the ability of peoples to bring cases against the government for violations of their rights. Even if individuals or groups have standing, however, accessing courts of justice and taking on impact litigation and other major cases is expensive, bureaucratically complicated and highly time-consuming. Many marginalized peoples have difficulty affording lawyers to assist them in bringing a case forward and navigating the legal system. As such, in order to ensure equitable access to justice, it is not uncommon for constitutions to provide a right to legal representation that encompasses a right to a publicly funded lawyer in the event that the individual or group cannot afford or obtain private legal representation.

The right to legal aid (support to pay for legal representation and advice, or cost-free legal representation and advice provided by the state) can be incredibly important to allow marginalized and economically disadvantaged peoples to have equal access to the justice system. One important consideration when assessing provisions on legal aid is whether the guarantee applies to civil and administrative as well as criminal law cases. This is very important for indigenous peoples whose rights encompass issues such as land and property, as well as representation in government. Ensuring legal aid for all cases is best practice but many countries limit legal aid provision to defendants facing criminal charges. Another consideration is whether or not legal aid is limited to citizens or extended to all residents or peoples facing charges in a court of law.

### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems</b> 2013</p>	<p>Paragraphs 26, 32 and 33</p>	<p>26. States should ensure the provision of legal aid to all persons regardless of age, race, colour, gender, language, religion or belief, political or other opinion, national or social origin or property, citizenship or domicile, birth, education or social status or other status.</p> <p>32. Special measures should be taken to ensure meaningful access to legal aid for women, children and groups with special needs, including, but not limited to, the elderly, minorities, persons with disabilities, persons with mental illnesses, persons living with HIV and other serious contagious diseases, drug users, indigenous and aboriginal people, stateless persons, asylum seekers, foreign citizens, migrants and migrant workers, refugees and internally displaced persons. Such measures should address the special needs of those groups, including gender sensitive and age-appropriate measures.</p> <p>33. States should also ensure that legal aid is provided to persons living in rural, remote and economically and socially disadvantaged areas and to persons who are members of economically and socially disadvantaged groups.</p>	<p><i>Recognizes the particular importance of legal aid for marginalized communities, including indigenous peoples and those living in remote areas</i></p>
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<b>India Constitution</b> 1949	Article 39A	The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.	<i>Provides that the justice system is based on principle of equal opportunity and that no citizen will be denied access to justice due to economic or other disadvantages</i>
<b>Kazakhstan Constitution</b> 1995	Article 13(3)	3. Everyone shall have the right to qualified legal assistance. In cases stipulated by law, legal assistance shall be provided free of charge.	<i>Provides broad right to legal assistance to all citizens</i>
<b>Marshall Islands Constitution</b> 1979	Article II, section 4(4)	In all criminal prosecutions, the accused shall enjoy the right to be informed promptly and in detail of the nature and cause of the accusation against him; to a prompt judicial determination of whether there is good cause to hold him for trial; to a speedy and public trial before an impartial tribunal; to have adequate time and facilities for the preparation of his defence; to defend himself in person or through legal assistance of his own choice and, if he lacks funds to procure such assistance, to receive it free of charge if the interests of justice so require; to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favour.	<i>Guarantees legal assistance but only to defendants in criminal cases</i>
<b>The Philippines Constitution</b> 1987	Article III, section 11 and article VIII, section 5	Article III, section 11 Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty. Article VIII, section 5 The Supreme Court shall have the following powers: ... 5. Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights.	<i>Provides for legal aid in all cases regardless of type, but specifically including cases involving the violation of constitutional rights</i>
<b>Tunisia Constitution</b> 2014	Article 108	The right to litigation and the right to defence are guaranteed. The law facilitates access to justice and provides legal assistance to those without financial means.	<i>Provides legal aid for all who need it, regardless of case type</i>
<b>Finland, Legal Aid Act</b> 2002	Section 2	1) Legal aid shall be given to persons resident in Finland, as well as to citizens of a member state of the European Union or the European Economic Area who are working or seeking work in Finland, as required by the Regulation on freedom of movement for workers within the Community (EEC) No. 1612/68 and the Agreement on the European Economic Area. 2) In addition, legal aid shall be given irrespective of the criteria provided in paragraph (1), if the person has a matter to be heard by a Finnish court of law or if there otherwise is a special reason for legal aid to be given. Legal advice, as a part of legal aid, shall be provided irrespective of the criteria provided in paragraph (1) under the conditions laid down in the Convention on International Access to Justice (TrS 47/1988).	<i>Extends legal aid to all citizens of the EU who are in Finland for work even if not citizen of Finland</i>

#### FINDINGS

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#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Protecting and promoting indigenous peoples' rights



### **Does the constitution clearly define permissible grounds or processes for rights limitations, and ensure that they are justiciable?**

#### EXPLANATION

Constitutions can specify the reasons or circumstances under which some rights may be limited, such as during a state of emergency or when they infringe on the rights of others. This is called a 'derogation' of rights. Some rights, however, are non-derogable, such as the right to life. This is based on ICCPR, which states: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life' (United Nations 1966a: article 6(1)). Nonetheless, rights limitations are common features of constitutions, especially with regard to the rights to freedom of expression and association. When limitations are placed on fundamental rights, it should be clearly articulated when the limitations apply and what the scope of their application is. A judiciary or other independent dispute resolution body is often given authority to test the proportionality, justification and reasonableness of rights limitations.

#### *Ensuring harmful behaviour from others is not allowed*

Rights can be legitimately limited, such as when they conflict with the rights of others. Speech that incites hatred, hostility, discrimination, intolerance and/or violence is frequently limited because it violates the rights of others and may violate guiding principles of the state, such as building a democratic society, seeking social justice, equality and human dignity. Speech that incites violence or discrimination against indigenous peoples harms their fundamental rights and undermines equality, particularly through the perpetuation of stereotypes. In this way, rights limitations that would curb someone's right to free speech if they were espousing violence can benefit indigenous peoples. This type of limitation is recognized by UNDRIP, which prohibits 'any form of propaganda designed to promote or incite racial or ethnic discrimination directed against' indigenous peoples (United Nations 2007: article 8). This prohibition could come into conflict with someone's right to free speech and balancing would have to occur.

#### *Ensuring limitations are reasonable*

Rights limitations can be easily misused if they are not reasonable or well defined. If national security or social harmony, for example, are recognized as grounds upon which to limit rights, then who defines what national security or social harmony are and when they are at risk? These justifications have been used by governments in the past to limit advocacy on indigenous peoples' issues or the formation of parties based on religion, caste, ethnicity, gender or region. The more clearly defined rights limitations are, the less scope there is for abuse.

INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<p><b>ICCPR</b> 1966</p>	<p>Article 20(2)</p>	<p>2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.</p>	<p><i>Demonstrating that even ICCPR allows for rights limitations, in this case on freedom of expression, under certain circumstances</i></p>
<p><b>Fiji Constitution</b> 2013</p>	<p>Articles 17(3)(b) and (4)</p>	<p>(3) To the extent that it is necessary, a law may limit, or may authorise the limitation of, the rights and freedoms mentioned in subsection (1) in the interests of: ... (b) the protection or maintenance of the reputation, privacy, dignity, rights or freedoms of other persons, including— (i) the right to be free from hate speech, whether directed against individuals or groups; ... (4) In this section, ‘hate speech’ means an expression in whatever form that encourages, or has the effect of encouraging discrimination on a ground listed or prescribed under section 26.</p>	<p><i>Allows limitations on rights based on a set of specified grounds and circumstances</i></p>
<p><b>Honduras Constitution</b> 1982</p>	<p>Article 64</p>	<p>Laws and governmental provisions or any other provisions that regulate the exercise of declarations, rights and guarantees recognized by this Constitution shall not be enforced if they diminish, restrict, or evade such rights and guarantees.</p>	<p><i>Declares that rights should not be limited</i></p>
<p><b>South Africa Constitution</b> 1996</p>	<p>Sections 36 and 37(5)</p>	<p>Section 36 1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- a. the nature of the right; b. the importance of the purpose of the limitation; c. the nature and extent of the limitation; d. the relation between the limitation and its purpose; and e. less restrictive means to achieve the purpose. 2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights. Section 37(5) 5. No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorize: ... c. any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table. ... Section Number – 9. Section Title – Equality. Extent to which the right is protected – With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.</p>	<p><i>Permits a narrow set of limitations on rights, and states that the limitation must be necessary according to defined criteria</i></p> <p><i>Identifies non-derogable rights</i></p>

<p><b>Zimbabwe Constitution</b> 2013</p>	<p>Article 86</p>	<p>1. The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.</p> <p>2. The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including:</p> <ul style="list-style-type: none"> <li>a. the nature of the right or freedom concerned;</li> <li>b. the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;</li> <li>c. the nature and extent of the limitation;</li> <li>d. the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;</li> <li>e. the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and</li> <li>f. whether there are any less restrictive means of achieving the purpose of the limitation.</li> </ul> <p>3. No law may limit the following rights enshrined in this Chapter, and no person may violate them:</p> <ul style="list-style-type: none"> <li>a. the right to life, except to the extent specified in section 48;</li> <li>b. the right to human dignity;</li> <li>c. the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;</li> <li>d. the right not to be placed in slavery or servitude;</li> <li>e. the right to a fair trial;</li> <li>f. the right to obtain an order of habeas corpus as provided in section 50(7)(a).</li> </ul>	<p><i>Permits a narrow set of limitations to rights, and states that the limitation must be necessary according to defined criteria</i></p> <p><i>Specifies rights that cannot be limited</i></p>
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#### FINDINGS

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#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*



## Protecting and promoting indigenous peoples' rights



### Does the constitution state that international human rights treaties take effect automatically upon ratification, or is a secondary domestication process required?

#### EXPLANATION

Countries where international law can be applied in domestic courts are considered 'monist' countries, whereas countries where international law has to be adopted formally on a treaty-by-treaty basis in order to be applied in domestic courts are 'dualists'.

It may be more efficient for signed and ratified international treaties to apply directly—that is, to automatically become law. There may be a significant or perpetual delay in integrating international law into domestic law for various reasons, including a lack of political will or opposition from a powerful constituency. The indirect application of international treaties and conventions requires that domestic legislation be passed in order to operationalize the obligations contained in those instruments. Direct application will give indigenous peoples more immediate access to rights contained in international treaties, conventions, etc. On the other hand, it may be preferable to require parliament to implement international obligations into domestic law, so they have domestic political legitimacy.

Some constitutions and legislation may directly refer to international law.

#### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<b>Brazil Constitution</b> 1988	Article 5(3)	(3) International treaties and conventions on human rights approved by both houses of the National Congress, in two different voting sessions, by three-fifths votes of their respective members, shall be equivalent to Constitutional Amendments.	<i>Affords ratified treaties the same status as the Constitution</i>
<b>Bolivia Constitution</b> 2009	Article 14(III)	III. The State guarantees everyone and all collectives, without discrimination, the free and effective exercise of the rights established in this Constitution, the laws and international human rights treaties.	<i>Guarantees all citizens the power to exercise international human rights</i>
<b>Dominican Republic Constitution</b> 2015	Article 74(3)	3. Treaties, pacts, and conventions related to human rights, adopted and ratified by the Dominican State have constitutional hierarchy and are for direct and immediate application by the courts and other organs of the State.	<i>Gives treaties on human rights constitutional status as highest laws of the land and holds them directly applicable in courts and other state bodies</i>
<b>Kenya Constitution</b> 2010	Articles 2(5) and 2(6)	(5) The general rules of international law shall form part of the law of Kenya. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.	<i>Holds that international law is to be considered law in Kenya</i>

<p><b>Kyrgyzstan Constitution</b> 2010</p>	<p>Article 6(3)</p>	<p>(3) International treaties to which the Kyrgyz Republic is a party that have entered into force under the established legal procedure and also the universally recognized principles and norms of international law shall be the constituent part of the legal system of the Kyrgyz Republic. The provisions of international treaties on human rights shall have direct action and be of priority in respect of provisions of other international treaties.</p>	<p><i>Provides that international treaties will take direct effect, with particular prioritization of human rights treaties</i></p>
<p><b>South Sudan Constitution</b> 2011</p>	<p>Article 9(3)</p>	<p>(3) All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill.</p>	<p><i>Establishes monist system where all international treaties ratified are considered part of the constitutional order</i></p>

#### FINDINGS

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#### ACTIONS

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Protecting and promoting indigenous peoples' rights



### Does the constitution permit, encourage or require courts to consider foreign law when they interpret and apply human rights provisions?

#### EXPLANATION

If indigenous peoples' rights are newly added to the constitution or have never been extensively applied or tested, it may be helpful for courts to look to foreign law and foreign case law when developing their own jurisprudence concerning indigenous peoples' rights, particularly complex ones such as the right to self-determination or free, prior and informed consent (FPIC). A constitution can permit, encourage or require courts to consider the laws of other countries in making its decisions. Considering how other countries have understood and addressed similar issues can promote judicial interpretation that is aligned with international standards and best practice and may even inspire innovative constitutional interpretation where one or a small number of other countries have understood or realized indigenous peoples' rights in new ways.

#### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<b>Malawi Constitution</b> 1994	Article 11(2)(c)	2. In interpreting the provisions of this Constitution, a court of law shall ... (c) where applicable, have regard to current norms of public international law and comparable foreign case law.	<i>Mandates courts to 'regard' comparable foreign case law in applicable cases</i>
<b>South Africa Constitution</b> 1996	Article 39(1)(c)	1. When interpreting the Bill of Rights, a court, tribunal or forum ... c. may consider foreign law.	<i>Provides permission for courts to consider foreign law in cases related to the Bill of Rights</i>
<b>Zimbabwe Constitution</b> 2013	Article 46(1)(e)	1. When interpreting this Chapter, a court, tribunal, forum or body ... (e) may consider relevant foreign law.	<i>Allows courts to consider foreign law</i>

**FINDINGS**

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**ACTIONS**

*Suggested advocacy and other follow-on actions to address or disseminate findings.*

## Protecting and promoting indigenous peoples’ rights



### Does the constitution encourage or require courts and other bodies to consider international law when they interpret and apply human rights provisions?

#### EXPLANATION

The breadth of international human rights law, captured in international and regional treaties/conventions and in international declarations and principles (‘soft law’)—and the depth of guidance in its interpretation through the judgements of international courts, experts and recommendations of commissions/committees mandated to oversee the implementation of treaties—can be valuable when courts are interpreting constitutions and relevant pieces of legislation in relation to indigenous peoples’ and other human rights. International law and ‘soft law’ may be particularly helpful in cases when the standard for protecting the rights of indigenous peoples may be higher than it is in the domestic context, or where domestic law is vague or silent on an issue. These interpretations can then help guide judges towards better protection and promotion of these rights. It is good practice to require, or at least permit, courts to consider or reference international law, including the interpretations of international human rights lawyers and other expert opinions, in deciding human rights cases. This ‘permission’ is often found in a constitution.

#### INTERNATIONAL STANDARDS AND NATIONAL EXAMPLES

<b>Maldives Constitution</b> 2008	Article 68	When interpreting and applying the rights and freedoms contained within this Chapter [Chapter II, Fundamental Rights and Freedoms], a court or tribunal shall promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and shall consider international treaties to which the Maldives is a party.	<i>Requires courts/tribunals to consider international treaties that the Maldives is party to when applying rights and freedoms</i>
<b>Timor-Leste Constitution</b> 2002	Section 23	Fundamental rights enshrined in the Constitution shall not exclude any other rights provided for by the law and shall be interpreted in accordance with the Universal Declaration of Human Rights.	<i>Holds that the Constitution shall be interpreted in accordance with the UDHR</i>

#### FINDINGS

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#### ACTIONS

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### **Expert Mechanism on the Rights of Indigenous Peoples**

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### **United Nations Permanent Forum on Indigenous Issues**

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### **United States Senate Committee on Indian Affairs**

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### **Waitangi Tribunal, New Zealand**

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# Annexes

# Annex 1. ILO Convention 169: Indigenous and tribal peoples convention, 1989

## Preamble

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 76th Session on 7 June 1989, and

Noting the international standards contained in the Indigenous and Tribal Populations Convention and Recommendation, 1957, and

Recalling the terms of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the many international instruments on the prevention of discrimination, and

Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and

Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and

Noting that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded, and

Calling attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding, and

Noting that the following provisions have been framed with the co-operation of the United Nations, the Food and Agriculture Organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organisation and the World Health Organisation, as well as of the Inter-American Indian Institute, at appropriate levels and in their respective fields, and that it is proposed to continue this co-operation in promoting and securing the application of these provisions, and

Having decided upon the adoption of certain proposals with regard to the partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention revising the Indigenous and Tribal Populations Convention, 1957;

adopts this twenty-seventh day of June of the year one thousand nine hundred and eighty-nine the following Convention, which may be cited as the Indigenous and Tribal Peoples Convention, 1989;

## **PART I. GENERAL POLICY**

### **Article 1**

1. This Convention applies to:
  - (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
  - (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.
3. The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

### **Article 2**

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
2. Such action shall include measures for:
  - (a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;
  - (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;
  - (c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

### **Article 3**

1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.
2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

### **Article 4**

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

#### **Article 5**

In applying the provisions of this Convention:

- (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;
- (b) the integrity of the values, practices and institutions of these peoples shall be respected;
- (c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

#### **Article 6**

1. In applying the provisions of this Convention, governments shall:

- (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
- (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
- (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

#### **Article 7**

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

#### **Article 8**

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. These peoples shall have the right 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. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

#### **Article 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.

2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

#### **Article 10**

1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.

2. Preference shall be given to methods of punishment other than confinement in prison.

#### **Article 11**

The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.

#### **Article 12**

The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

## **PART II. LAND**

#### **Article 13**

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

#### **Article 14**

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

#### **Article 15**

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

#### **Article 16**

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.
3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

#### **Article 17**

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.
2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.
3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

#### **Article 18**

Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.



## Article 19

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

- (a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
- (b) the provision of the means required to promote the development of the lands which these peoples already possess.

# PART III. RECRUITMENT AND CONDITIONS OF EMPLOYMENT

## Article 20

1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.

2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:

- (a) admission to employment, including skilled employment, as well as measures for promotion and advancement;
- (b) equal remuneration for work of equal value;
- (c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;
- (d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.

3. The measures taken shall include measures to ensure:

- (a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;
- (b) that workers belonging to these peoples are not subjected to working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances;
- (c) that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude;
- (d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.

4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

## **PART IV. VOCATIONAL TRAINING, HANDICRAFTS AND RURAL INDUSTRIES**

### **Article 21**

Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.

### **Article 22**

1. Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application.
2. Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities.
3. Any special training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Any studies made in this connection shall be carried out in co-operation with these peoples, who shall be consulted on the organisation and operation of such programmes. Where feasible, these peoples shall progressively assume responsibility for the organisation and operation of such special training programmes, if they so decide.

### **Article 23**

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.
2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

## **PART V. SOCIAL SECURITY AND HEALTH**

### **Article 24**

Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.

### **Article 25**

1. Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.
2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.

3. The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services.
4. The provision of such health services shall be co-ordinated with other social, economic and cultural measures in the country.

## **PART VI. EDUCATION AND MEANS OF COMMUNICATION**

### **Article 26**

Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.

### **Article 27**

1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.
2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.
3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.

### **Article 28**

1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.
2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.
3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

### **Article 29**

The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.

### **Article 30**

1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.

2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.

#### **Article 31**

Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

## **PART VII. CONTACTS AND CO-OPERATION ACROSS BORDERS**

#### **Article 32**

Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

## **PART VIII. ADMINISTRATION**

#### **Article 33**

1. The governmental authority responsible for the matters covered in this Convention shall ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned, and shall ensure that they have the means necessary for the proper fulfilment of the functions assigned to them.

2. These programmes shall include:

- (a) the planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention;
- (b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned.

## **PART IX. GENERAL PROVISIONS**

#### **Article 34**

The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

#### **Article 35**

The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

## **PART X. FINAL PROVISIONS**

### **Article 36**

This Convention revises the Indigenous and Tribal Populations Convention, 1957.

### **Article 37**

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

### **Article 38**

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

### **Article 39**

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

### **Article 40**

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

### **Article 41**

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

### **Article 42**

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

### Article 43

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides-

(a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 39 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

**2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.**

### Article 44

**The English and French versions of the text of this Convention are equally authoritative.**

# Annex 2. United Nations Declaration on the Rights of Indigenous Peoples

*Resolution adopted by the General Assembly on 13 September 2007*

[without reference to a Main Committee (A/61/L.67 and Add.1)]

## **61/295. United Nations Declaration on the Rights of Indigenous Peoples**

*The General Assembly,*

*Taking note* of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006, by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

*Recalling* its resolution 61/178 of 20 December 2006,<sup>13</sup> by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

*Adopts* the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

*107th plenary meeting  
13 September 2007*

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<sup>13</sup> See Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53), part one, chap. II, sect. A.

## Annex

### United Nations Declaration on the Rights of Indigenous Peoples

*The General Assembly,*

*Guided* by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

*Affirming* that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

*Affirming* also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

*Affirming further* that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

*Reaffirming* that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

*Concerned* that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

*Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

*Recognizing also* the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

*Welcoming* the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

*Convinced* that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

*Recognizing* that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

*Emphasizing* the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

*Recognizing in particular* the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

*Considering* that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

*Considering also* that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

*Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights <sup>2</sup> and the International Covenant on Civil and Political Rights,<sup>1</sup> as well as the Vienna Declaration and Programme of Action,<sup>2</sup> affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

*Bearing in mind* that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

*Convinced* that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

*Encouraging* States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

*Emphasizing* that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

*Believing* that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

*Recognizing and reaffirming* that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

*Recognizing* that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

*Solemnly proclaims* the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

#### *Article 1*

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights <sup>3</sup> and international human rights law.

#### *Article 2*

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

#### *Article 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.

#### *Article 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.

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1 See resolution 2200 A (XXI), annex.

2 A/CONF.157/24 (Part I), chap. III.

3 Resolution 217 A (III).



*Article 5*

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

*Article 6*

Every indigenous individual has the right to a nationality.

*Article 7*

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

*Article 8*

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

*Article 9*

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

*Article 10*

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

*Article 11*

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

*Article 12*

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

*Article 13*

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

*Article 14*

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

*Article 15*

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

*Article 16*

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

*Article 17*

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

*Article 18*

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

*Article 19*

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

*Article 20*

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

*Article 21*

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

*Article 22*

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

*Article 23*

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

*Article 24*

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

*Article 25*

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

*Article 26*

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

*Article 27*

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

*Article 28*

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

*Article 29*

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

*Article 30*

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

*Article 31*

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

*Article 32*

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

*Article 33*

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

*Article 34*

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

*Article 35*

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

*Article 36*

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

*Article 37*

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

*Article 38*

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

*Article 39*

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

*Article 40*

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

*Article 41*

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

*Article 42*

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

*Article 43*

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

*Article 44*

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

*Article 45*

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

*Article 46*

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

# Annex 3. List of questions

I. Recognition and citizenship		Y/N
1	Does the constitution specifically identify, recognize or define indigenous peoples, including protection of the right to self-identification?	
2	Does the constitution recognize the state as multicultural, multinational or multi-ethnic, or promote the values of diversity and inclusivity in other ways?	
3	Does the constitution ensure national citizenship for indigenous peoples and include a guarantee that claiming indigenous identity will not impact on the right to national citizenship?	
II. Right to equality and anti-discrimination		
4	Does the constitution guarantee equality before the law and prohibit discrimination? If so, is ethnic, racial or cultural identity recognized as one of multiple prohibited grounds for discrimination?	
5	Does the constitution allow for or mandate special measures aimed at achieving substantive equality for indigenous peoples?	
III. Foundations for indigenous peoples' rights		
6	Does the constitution recognize indigenous peoples' rights as additional to, and not a replacement of, the fundamental rights guaranteed to all citizens?	
7	Does the constitution recognize indigenous peoples' right to self-determination as a foundation for other indigenous peoples' rights?	
8	Does the constitution recognize collective rights? If so, is it a general recognition or specific to indigenous peoples?	
9	Does the constitution provide for how fundamental citizen and human rights, including equality before the law and protections for women and other inter-sectionally vulnerable groups, should be reconciled with indigenous peoples' rights?	
IV. Autonomy: Agreement-making and self-government		
10	Does the constitution honour historic and future agreement-making or treaty arrangements between indigenous peoples and the state in a way that validates the inherent sovereignty (autonomy) of indigenous peoples?	
11	Does the constitution recognize indigenous peoples' rights to autonomy and self-government, territorial or otherwise?	
12	Does the constitution entitle indigenous peoples to maintain and apply their customary laws and dispute resolution processes in their territories?	
V. Consultation, political participation and representation		
13	Does the constitution protect indigenous peoples' right to consultation through their own chosen representatives by formally recognizing indigenous peoples' organizations or otherwise establishing a specialized consultative mechanism between indigenous peoples and the government?	
14	Does the constitution recognize and provide an electoral mechanism for ensuring indigenous peoples' right to political participation and representation, particularly in the state legislature?	
15	Does the constitution provide mechanisms to promote indigenous peoples' representation in the executive branch of government?	
16	Does the constitution ensure indigenous peoples' representation in the judicial branch is accounted for and that judicial appointment mechanisms, especially those to the supreme or constitutional courts, facilitate the inclusion of indigenous peoples?	
17	Does the constitution guarantee or facilitate the recruitment or appointment of indigenous peoples to civil service positions, independent bodies and the military?	

<b>VI. Land, territories and natural resources rights</b>		<b>Y/N</b>
18	Does the constitution recognize the special relationship between indigenous peoples and land, including by protecting collective ownership rights over ancestral lands and territories and establishing high burdens for dispossessing indigenous peoples of their lands?	
19	Does the constitution afford indigenous peoples special rights to natural resources within/on/under their lands and territories? Does the constitution call for benefit-sharing with indigenous peoples for natural resource-related activities carried out on their land?	
20	Does the constitution obligate the government to consult in good faith with indigenous peoples or to seek their free, prior and informed consent (FPIC) before implementing development projects and other policies that have an impact on indigenous lands, territories, rights and resources?	
<b>VII. Right to culture, and social and economic development</b>		
21	Does the constitution protect indigenous peoples' rights to maintain and develop their cultures, cultural identities and practices, and have them respected?	
22	Does the constitution recognize indigenous languages and associated language rights?	
23	Does the constitution protect indigenous peoples' right to mother-tongue and culturally appropriate education?	
24	Does the constitution protect the right of indigenous communities to continue to practise their subsistence activities (traditional means of livelihood)?	
25	Does the constitution protect indigenous peoples' right to health, including access to traditional medicines and services?	
26	Does the constitution recognize indigenous communities' rights to intellectual property ownership over their traditional knowledge and traditional cultural expressions?	
<b>VIII. Protecting and promoting indigenous peoples' rights</b>		
27	Does the constitution establish a national indigenous peoples' commission, ministry or other specialized government body to promote and protect indigenous peoples' rights?	
28	Does the constitution indicate, in multi-layered state structures, which level(s) of government are primarily responsible for coordination, protection and promotion of indigenous peoples' rights?	
29	Does the constitution include rules for 'standing' that are sufficiently open and accessible to ensure indigenous peoples' right to access courts?	
30	Does the constitution guarantee legal aid for persons and groups unable to afford private legal representation?	
31	Does the constitution clearly define permissible grounds or processes for rights limitations, and ensure that they are justiciable?	
32	Does the constitution state that international human rights treaties take effect automatically upon ratification, or is a secondary domestication process required?	
33	Does the constitution permit, encourage or require courts to consider foreign law when they interpret and apply human rights provisions?	
34	Does the constitution encourage or require courts and other bodies to consider international law when they interpret and apply human rights provisions?	



# About the author

**Amanda Cats-Baril** is International IDEA's Senior Programme Officer for constitution-building in Asia and the Pacific. In this capacity, she supports constitution-building processes in Nepal, Myanmar and the Philippines, among other contexts, by providing technical assistance to governments, civil society organizations and International IDEA projects.

Cats-Baril is an international lawyer who specializes in constitutional law, human rights, post-conflict transitions and democratization. She focuses particularly on the promotion and protection of indigenous peoples' rights and interests in the context of large-scale development and government reform processes.

Upon graduating from NYU School of Law, Cats-Baril served as an Arthur Helton Fellow supporting indigenous groups' advocacy and engagement in Nepal's constitution-writing process. She has since conducted legal analysis and programme design around Asia for international organizations including UNDP, ICJ, the World Bank and the International Working Group on Indigenous Affairs.

Prior to joining International IDEA, Cats-Baril served as a democracy and governance specialist with USAID/Nepal, managing a portfolio of peacebuilding, conflict mitigation and local governance projects, and advising the US government on constitutional issues, transitional justice and conflict sensitivity.

# About the artist

Born in Adelaide, South Australia, Sarrita King is the daughter of renowned influential indigenous artist, the late William King Jungala. Her combinations of styles, philosophies and pictorial storytelling have become characteristic of her work, resulting in acclaim and world-recognition.

My works try to capture philosophies and elements of life that everyone can relate to and feel a connection to. This brings the viewer into the artwork and helps... them to understand Aboriginal culture.

(Sarrita King)

Spending her formative years in the harsh and exacting Northern Territory, she was close to the spirit of her people, the Gurindji tribe, and she daily felt the degradation, reparation, hope and beauty of a land that was in constant flux, turmoil and renewal. At the age of 16 she began to paint. The sand hills, lightning, space, direction, mass, torrential rain, fire, rivers of sand—everywhere the inspiration was rife and plentiful. Representing these visually riveting and dramatic Australian icons on canvas was the challenge that Sarrita accepted and dominated.

As daughters to the great indigenous artist William King, Sarrita and her sister were always in the presence of a seemingly omniscient artistic eye that brought even the most mundane of elements into a vibrant and visceral reality that could not be ignored. When asked about her father, Sarrita comments: 'His openness, life philosophy and storytelling compelled both of us to follow in his footsteps and carry on his legacy through the art.'

Sarrita is a self-confessed artist of today—she unashamedly combines methods and techniques from past and present times and is developing a future style for all generations to enjoy. She admits that 'dotting' is not necessarily a long tradition of indigenous artists and she uses it in among a variety of other methods, which combined bring a driving and passionate energy to her contemporary work.

Her style is uniquely her own and is applauded not only in Australia but on the world-stage across Europe, Canada and elsewhere.

Combining the rich traditional culture and methods of indigenous artists with contemporary attitudes and new techniques has seen Sarrita develop a new style of indigenous art. She has striven to remain faithful to the old while embracing the new, demonstrating that indigenous art is not just about what has been, but about highlighting the here, the now and the future.

The new generation has a duty to share and continue the path set before us by the earlier generations. The motivation to create and share my artwork comes from the desire to involve the world with the rich Australian indigenous heritage.

(Sarrita King)

# About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

## What do we do?

In our work we focus on three main impact areas: electoral processes; constitution-building processes; and political participation and representation. The themes of gender and inclusion, conflict sensitivity and sustainable development are mainstreamed across all our areas of work.

International IDEA provides analyses of global and regional democratic trends; produces comparative knowledge on democratic practices; offers technical assistance and capacity-building on reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

## Where do we work?

Our headquarters are located in Stockholm, and we have regional and country offices in Africa, Asia and the Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations and is accredited to European Union institutions.

<<https://www.idea.int>>

The *Indigenous Peoples' Rights in Constitutions Assessment Tool* helps users to analyse a constitution from the perspective of indigenous peoples' rights. Using a series of questions, short explanations and example provisions from constitutions around the world, the Assessment Tool guides its users through the text of a constitution and allows for systematic analysis of the language and provisions of a constitutional text to assess how robustly indigenous peoples' rights are reflected in it.

A constitution articulates a vision that reflects a state's values and history, as well as its aspirational objectives for the future. As the supreme law of a state, the constitution defines its structure and institutions, distributes political power, and recognizes and protects fundamental rights, critically determining the relationship between citizens and governments.

Embedding in a constitution recognition of and rights-based protections for specific groups, such as indigenous peoples, can give these groups and their rights enhanced protection.

This can be furthered by providing for specialized institutions and processes to deepen the realization of those rights in practice.



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ISBN: 978-91-7671-324-2 (PDF)