



Right to free, prior and informed consent

Sub-regional overview

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CURRENT CONTEXT

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Nueva Zelanda.

Diputados maoríes hicieron un haka para criticar un proyecto de ley



- ▶ **Treaty of Waitangi**, agreement signed in **1840** with more than 500 Maori chiefs
- ▶ It has helped revitalize the Maori language, including making it an official language, and establishing a Maori Health Authority.

Promoters of the law:

- ▶ The Treaty offers Maori rights that are different from those of other New Zealanders...
- ▶ "This is a law for the new modern New Zealanders."

Contradictory processes in the world

Australia/ Argentina



Chile 2022/23



Contradictory processes in the world

Peru, law of November 5, 2024



Artículo VIII. Interpretación de los derechos humanos y tratados internacionales

El contenido y alcances de los derechos constitucionales protegidos por los procesos regulados en el presente código deben interpretarse de conformidad con la Declaración Universal de Derechos Humanos, los tratados sobre derechos humanos de los que el Perú es parte, así como las sentencias adoptadas por los tribunales internacionales sobre derechos humanos en los procesos donde el Perú es parte.

En caso de incompatibilidad entre una norma convencional y una constitucional, o de incompatibilidad entre **decisiones de tribunales internacionales y del tribunal constitucional**, los jueces preferirán la norma o decisión que más favorezca a la persona y sus derechos humanos.

Contradictory processes in the world

Brazil / Peru

Mexico 2024



Sônia Guajajara at the head of the new Ministry of Indigenous Peoples

- ▶ Decree No. 11,355, of January 1, 2023
- ▶ Political/judicial debate on scope of indigenous land recognition

September 2024: Constitutional Reform by a large majority

- ▶ To apply and develop its own normative systems in the regulation and solution of internal conflicts.
- ▶ Indigenous jurisdiction shall be exercised by the community authorities.



Argentina

Rationale for negative vote in UN GA

"Argentina favors the protection of the rights of **indigenous populations** in their diverse cultural traditions to the **extent that cultural richness and diversity contribute to social life.**"

UN General Assembly

November 2024



Urges Governments to ensure that **Indigenous Peoples** are not forcibly displaced from their lands or territories and that no relocation takes place without the free, prior and informed consent of Indigenous Peoples

49. *Emphasizes* the need to guarantee indigenous women and girls, at all levels, equal protection of the law and equality before the courts.

Voting Started

11/11/2024

10:54:15 AM

Item 68 (a) draft resolution A/C.3/79/L.21/Rev.1, as a whole

Rights of Indigenous Peoples

AFGHANISTAN	CAMEROON	FINLAND	KUWAIT	NEPAL	SAUDI ARABIA	UKRAINE
ALBANIA	CANADA	FRANCE	KYRGYZSTAN	NETHERLANDS (KIN...	SENEGAL	UNITED ARAB EMIRATES
ALGERIA	CENTRAL AFR REP...	GABON	LAO PDR	NEW ZEALAND	SERBIA	UNITED KINGDOM
ANDORRA	CHAD	GAMBIA	LATVIA	NICARAGUA	SEYCHELLES	UNITED REP TANZANIA
ANGOLA	CHILE	GEORGIA	LESOTHO	NIGER	SIERRA LEONE	UNITED STATES
ANTIGUA-BARBUDA	CHINA	GERMANY	LIBANON	NIGERIA	SINGAPORE	URUGUAY
ARGENTINA	COLOMBIA	GHANA	LIBERIA	NORTH MACEDONIA	SLOVAKIA	UZBEKISTAN
ARMENIA	COMOROS	GREECE	LIBYA	NORWAY	SLOVENIA	VANUATU
AUSTRALIA	CONGO	GRENADA	LIECHTENSTEIN	OMAN	SOLOMON ISLANDS	VENEZUELA
AUSTRIA	COSTA RICA	GUATEMALA	LITHUANIA	PAKISTAN	SOMALIA	VIET NAM
AZERBAIJAN	COTE D'IVOIRE	GUINEA	LUXEMBOURG	PALAU	SOUTH AFRICA	YEMEN
BAHAMAS	CROATIA	GUINEA-BISSAU	MADAGASCAR	PANAMA	SOUTH SUDAN	ZAMBIA
BAHRAIN	CUBA	GUYANA	MALAWI	PAPUA NEW GUINEA	SPAIN	ZIMBABWE
BANGLADESH	CYPRUS	HAITI	MALAYSIA	PARAGUAY	SRI LANKA	
BARBADOS	CZECHIA	HONDURAS	MALDIVES	PERU	SUDAN	
BELARUS	DEM PR OF KOREA	HUNGARY	MALI	PHILIPPINES	SURINAME	
BELGIUM	DEM REP OF THE C...	ICELAND	MALTA	POLAND	SWEDEN	
BELIZE	DENMARK	INDIA	MARSHALL ISLANDS	PORTUGAL	SWITZERLAND	
BENIN	DJIBOUTI	INDONESIA	MAURITANIA	QATAR	SYRIAN ARAB REP...	
BHUTAN	DOMINICA	IRAN (ISLAMIC REP...	MAURITIUS	REP OF KOREA	TAJIKISTAN	
BOLIVIA	DOMINICAN REPUBLIC	IRAQ	MEXICO	REP OF MOLDOVA	THAILAND	
BOSNIA-HERZEGOVINA	ECUADOR	IRELAND	MICRONESIA (FS)	ROMANIA	TIMOR-LESTE	
BOTSWANA	EGYPT	ISRAEL	MONACO	RUSSIAN FEDERATION	TOGO	
BRAZIL	EL SALVADOR	ITALY	MONGOLIA	RWANDA	TONGA	
BRUNEI DARUSSALAM	EQUATORIAL GUINEA	JAMAICA	MONTENEGRO	SAINT KITTS-NEVIS	TRINIDAD-TOBAGO	
BULGARIA	ERITREA	JAPAN	MOROCCO	SAINT LUCIA	TUNISIA	
BURKINA FASO	ESTONIA	JORDAN	MOZAMBIQUE	SAINT VINCENT-GR...	TURKEY	
BURUNDI	ESWATINI	KAZAKHSTAN	MYANMAR	SAMOA	TURKMENISTAN	
CABO VERDE	ETHIOPIA	KENYA	NAMIBIA	SAN MARINO	TUVALU	
CAMBODIA	FJI	KIRIBATI	NAURU	SAO TOME-PRINCIPE	UGANDA	

IN FAVOUR: 132

AGAINST: 1

ABSTENTION: 6

Some characteristics

- ▶ **Self-executable**
- ▶ **Evolutionary constitutional guarantee models :**
 - The law is subject in form and content to
 - Open clauses for new rights
 - Relevance of interpretation (doctrine/judges)
- ▶ **High percentages of ratification / incorporation into domestic law**
- ▶ **Voluntary ratification / Mandatory compliance**
- ▶ **It involves international monitoring and observation mechanisms**
- ▶ **It calls for rereading and redefining all treaties in terms of the rights of indigenous peoples.**

LATIN AMERICA and the IICHRs

	CEDR	ICCPR	IPDESCR	CEDAW	CDN	CDPD	ACHR	ILO 107	ILO 169
Belize	2001	1996	x	1990	1990	2011	x	x	x
Costa Rica	1967	1968	1968	1986	1990	2008	1970	1959	1993
El Salvador	1979	1979	1979	1981	1990	2007	1978	1958	x
Guatemala	1983	1992	1988	1982	1990	2009	1978	x	1996
Honduras	2002	1997	1981	1983	1990	2008	1977	x	1995
Mexico	1975	1981	1981	1981	1990	2007	1981	1959	1990
Panama	1967	1977	1977	1981	1990	2007	1978	1971	x

International human rights instrument as a source of law



Ratification of the ILO Convention 169 on Indigenous and Tribal Peoples

Fechas de ratificación
Convenio
sobre Pueblos
Indígenas y
Tribales, 1989
(núm. 169)



International Instruments and Indigenous Peoples

Convention 169 on
Indigenous and Tribal
Peoples ILO

American Declaration
on the Rights of
Indigenous Peoples

1989

2007

2016

UN Declaration on the
Rights of Indigenous
Peoples

Components

- Instruments

ILC 169, UN Declaration, OAS Declaration

- Creation of organizations for its follow-up and promotion

Permanent Forum, Special Rapporteurship, Mechanism of Experts, etc.

- Development of doctrine and jurisprudence on the subject.

Treaty Committees, Rapporteurs, Tribunals, IACHR Court.

International Standards



Minimum obligations assumed by States by the mere fact of ratifying treaties and, in general, as members of the regional and global international community.

These are **minimum obligations**, a floor of requirements to be met, but they can always be exceeded according to the conditions of each context. The minimum exists to try to homogenize a base of obligations, but it is aspired that this floor be surpassed.

They are **enforceable obligations** because they are legal norms that can be demanded to be complied with and that oblige the State to do so or, as the case may be, to assume the consequences of their non-implementation.

It is not only the written rules, but also **the applicable law**, in this case in relation to indigenous peoples; that is, the rules, their interpretation, doctrine and jurisprudence to be considered.

The international human rights system has developed a corpus iuris of norms related to indigenous peoples.

Remedy the situation of structural discrimination in which indigenous peoples find themselves.

Inter-American Court of Human Rights

"The right to equality before the law also implies the obligation to adopt measures to ensure that equality is real and effective, that is, to correct existing inequalities, promote inclusion and participation of historically marginalized groups."

Control of Conventionality

Two ways:

- ▶ **Concentrated control**

It is exercised by the IACHR Court, in an international venue;

- ▶ **Fuzzy control**

The duty of national judges to carry out an examination of compatibility between the domestic provisions and acts that they have to apply to a specific case, with international treaties and the jurisprudence of the Inter-American Court of Human Rights.

IACHR Court: constitutionalization of international human rights law, giving expansive effects to the jurisprudence of the IACHR Court.



FROM THE NATION STATE TO GLOBALIST POLYCENTRISM

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From Nation State to Globalist Polycentrism

UN Expert Mechanism Opinion No. 17
(2024)

States should create **autonomous indigenous-specific institutions** to monitor the implementation of the Declaration and evaluate government compliance with its responsibilities and obligations.

The role of the State differs according to historical stages

Each geopolitical order corresponds to a geo-legal order.

Regional dynamics is closely linked to global processes

Legal order of the Nation-States stage

Features

- ▶ State as the sole producer of law,
- ▶ Central role of the legislature in the creation of the national legal system
- ▶ Legal order generated, fundamentally from the state-national space-territory.
- ▶ International law is interstate law.
- ▶ Hegemonic nature of the recognition or non-recognition of other legal systems

Basic principle: **SOVEREIGNTY**

Peace of Westphalia 1648



Legal order of neoliberal globalization

Features

- ▶ Transnational legal production
- ▶ New institutional private order linked to the global economy
- ▶ Privatizing what used to be public and denationalizing what used to be state-owned institutions
- ▶ Legal corpus created in transnational venues accepted by States
- ▶ Production both in transnational headquarters of global economic power and in national headquarters through the *form of transnational legal production*

▶ Basic principle: **MARKET.**





Right of indigenous peoples to participate and to be consulted

Basic Concepts

PARTICIPATION

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The rights of participation and consultation have seen their normative basis broadened, but this is not reflected in better implementation.

- ▶ ILO Convention 169
- ▶ United Nations Declaration of 2007
- ▶ 2016 American Declaration
- ▶ Reinterpretation of Human Rights Treaties
- ▶ Inter-American Commission / Court of Human Rights
- ▶ New international requirements such as WB, IDB, EU (VPA), FVC, etc.

ILO Convention No. 169, to which most Latin American countries are party, requires that means be put in place to enable indigenous peoples **"to participate freely... at all levels of decision-making"** that affect them.

The United Nations Declaration on the Rights of Indigenous Peoples affirms the right to **self-determination**, and contains more than 20 provisions related to the **right of indigenous peoples to participate fully in public decision-making**.

**Governments should
"establish the means by which
indigenous peoples can freely
participate, at least to the
same extent as other sectors
of the population, and at all
levels in decision-making."**

The obligation to consult

Concepts of State Law

Consultation: action of asking for advice



Council, from the Latin *consilium* (deliberation, debate in assembly) and this from the verb *consulere* (to deliberate together, to seek advice, to be experienced and to judge well).

Consent: manifestation/negotiation that generates rights and obligations.



Vices of consent: error, malice, violence

State Responsibility

- ◉ Nationally and internationally
- ◉ Failure to do so implies a normative violation that opens avenues of challenge. Nullity
- ◉ At the international level, it calls for accountability to the international community.
- ◉ It questions the State model implicit in the UN Declaration and constitutional norms.

Source of regulations on FPIC

Country	Sources					
	DONU/DA	CIT 169	Constitution	National law	Decree	National jurisprudence
Belize	X				X	X
Costa Rica	X	X			X	X
El Salvador	X					X
Guatemala	X	X				X
Honduras	X	X			X	
Mexico	X	X	X			X
Panama	X			X		X

Country	FPIC Scope of the procedure								
	General rule	Specific standards	Specific Institution	Principles	Application	Target	Result	Guarantors/observers	Budget
Belize		Mayan Protocol			South/Land	consultation			
Costa Rica			UTCI / Indigenous Instance		Central Adm.	FPIC	Binding		MJ Budget
El Salvador		Yucuaiquín			Municipal				
Guatemala	PJ 2017	CM/CD 2002			All States	FPIC			
Honduras		Protocols			local/land/resources				
Mexico		CDMX 2017	CDMS		State		Binding		Related entities
Panama					All States	FPIC	Binding		Related entities

Explanatory lines of non-compliance

- Questioning of the foundational normative narrative
- Challenges the structural post-colonial perspective
- Deepens the emancipatory aspect of the law
- Modifies the logic of the representative political system
- Tara of inanity and legalistic schizophrenia

Participation and Consultation

The obligation to consult should be read in light of another fundamental principle:

"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 control, as far as possible, their own economic, social and cultural development.

In addition, these peoples shall participate in the formulation, implementation and evaluation of national and regional development plans and programs that may affect them directly".

Chair of the historic
UN Working Group
on Indigenous
Populations.

The best way to describe this process would be to say that it is a kind of second founding of the State thanks to which indigenous peoples are given the opportunity to join all the other peoples that constitute the State on fair and mutually agreed terms, after many years of isolation and exclusion."

Current major stresses

Normative polycentrism	State political management
Opaque legal pluralism	Democratic legal pluralism
Regulatory standards	Emancipatory regulations
Statements / soft law	Effective and efficient standards
Anodyne institutionality	Institutions for change
PI supporting actors	PI central players

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territorio de comunidades indígenas
en Costa Rica, Honduras y Guatemala



... para **defender**
nuestros **derechos**



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 Derechos de los pueblos indígenas

 Obligaciones de Estados y otros

 ¿Cómo defender los derechos?

 Derechos de los pueblos indígenas

 Obligaciones de Estados y otros

 ¿Cómo defender los derechos?





Thank you!!!

