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South/North Exchange of 2009 - The Constitutional Recognition of Indigenous Peoples in Latin America

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**THE CONSTITUTIONAL RECOGNITION OF
INDIGENOUS PEOPLES IN LATIN AMERICA¹**

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Steward²**

I. INTRODUCTION

In the last few decades, recognition of indigenous peoples' rights in Latin American constitutions has undergone a vertiginous evolution.³ For many years, legal systems of Latin America ignored, excluded, assimilated, and repressed indigenous peoples.

¹ The present paper forms part of a broader investigation on constitutional recognition of indigenous peoples in Comparative Law: Gonzalo Aguilar et al., *Modelos de Reconocimiento Constitucional de los Pueblos Indígenas en América Latina*, in 3 PARTICIPACIÓN Y NUEVOS DESAFÍOS POLÍTICO-INSTITUCIONALES, MINISTERIO SECRETARÍA GENERAL DE LA PRESIDENCIA DE CHILE 149-205 (2009).

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³ Paul J. Magnarella, *Protecting Indigenous Peoples*, 5 HUM. RTS. & HUM. WELFARE, 125, 125-35 (2005).

This article explains the diversity of recognition of indigenous peoples' rights in the constitutions of fifteen Latin American countries. Moreover, it describes, analyzes, and compares the constitutional norms currently in force in Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, México, Nicaragua, Panama, Paraguay, Peru, and Venezuela.

In order to illustrate the specificities of Latin American constitutionalism in this area, we have decided to select eight key topics: (1) indigenous peoples, (2) cultural diversity, (3) self-determination, (4) political participation, (5) lands, territories, and natural resources, (6) indigenous languages, (7) intercultural bilingual education, and (8) customary indigenous law. With respect to each of these topics, a theoretical framework is provided for a more precise conceptual understanding – as well as a detailed analysis of the expressed recognition of these variables within the current 15 constitutions in force today.

Aside from recognizing the normative heterogeneity that exists in the region, the final section of this article puts forward a typology that leads to classify Latin American constitutions according to their levels of formal recognition of indigenous peoples and their rights.

This research was originally undertaken in order to promote a constitutional recognition of indigenous peoples in the Chilean Constitution.⁴ Nonetheless, the findings of this investigation could also be valuable as supporting material for debates that occur in other countries in the region or in other regions. In order to make it possible to learn from comparative experiences, it is important to keep in mind the consensus reached by the international community on indigenous peoples' rights. For instance, the Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries adopted by the International Labor Organization (1989) (hereinafter ILO Convention No. 169),⁵ the United Na-

⁴ At the moment of this writing, there is a debate over a draft of constitutional reform on recognition of indigenous peoples submitted by the Former President of the Republic of Chile, Michelle Bachelet, to the Chilean Congress. The history of this debate is available on the internet, <http://www.bcn.cl>. See generally Miriam Henríquez, *Los Pueblos Indígenas y su Reconocimiento Constitucional de los Derechos de los Pueblos Indígenas*, in 1 REFORMA CONSTITUCIONAL 127-45 (2006); Víctor Toledo, *Trayectoria de una Negación. La Transición Chilena y el Compromiso de Reconocimiento Constitucional de los Derechos de los Pueblos Indígenas*, in Serie Aportes a un Balance de Políticas Indígenas 1990-2006, Center of Public Politics and Indigenous Rights in Santiago (2005), available at <http://www.scribd.com/-doc/15779668/2006-Dossier-Trayectoria-de-Una-Negacion-Chile-19892006>.

⁵ ILO Convention No. 169 defines tribal peoples in art. 1.1 a) in the following man-

tions' Declaration on the Rights of Indigenous Peoples (2007) (hereinafter DRIPs),⁶ and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) (hereinafter UNESCO Convention 2005)⁷ adopted by the United Nations Economic, Social, and Cultural Organization (hereinafter UNESCO), as well as other international instruments that seek to inform and guide domestic legal order. In effect, non-discrimination, self-determination, cultural integrity, property, use, control and access to lands, territories, and resources, development and social well-being, and participation are the essential elements of the international standard for indigenous peoples' rights.

This study is structured into three sections, aside from the introductory words and final comments. The first section is a comparative review of the recognition of indigenous peoples' rights in the fifteen Latin American constitutions mentioned. The second section systematizes the previous section and formulates a typology that contributes to assess the degree, scope and intensity of constitutional recognition in the countries in question. The last section provides comments on this systematization and contains the principal findings from this investigation.

From a methodological point of view, this paper puts special emphasis on bibliographical research, with a special focus on comparative public law. It also analyzes the recently approved constitutions in Bolivia

ner: "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" and art. 1.1 b) understands indigenous peoples as 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.

Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169> [hereinafter ILO Convention No. 169].

⁶ *U.N. Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter DRIPs].

The nature of these collective rights corresponds closely to the indigenous worldview in that they reflect and promote the indivisibility of the community. ...As human rights, individual and collective rights are not only compatible, but may also be mutually reinforcing. The safeguard of the rights and well-being of any group lays the foundation for the realization of the rights of its individual members.

Ensuring the Rights of Indigenous Children, 11 INNOCENTI DIGEST, Oct. 2003, at 6-7.

⁷ Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, 45 I.L.M. 269, available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>.

and Ecuador,⁸ the decisions of international tribunals – in particular the Inter-American Court of Human Rights (IACHR), and various international human rights instruments.

II. ANALYSIS OF THE CONSTITUTIONAL RECOGNITION OF INDIGENOUS PEOPLES IN LATIN AMERICA

This section analyzes a large number of Latin American constitutions that have distinctly dealt with indigenous peoples. This comparative review is based upon eight topics; the selection of which was centered upon those factors that are most relevant in light of international human rights norms and indigenous current claims. The eight variables are the following: (1) peoples; (2) cultural diversity; (3) self-determination; (4) political participation; (5) territories and natural resources; (6) indigenous languages; (7) intercultural bilingual education; and (8) customary indigenous law. In each section, these topics are examined following a comparative format, first a theoretical framework and then a synthetic overview of their constitutional recognition in Latin America.

A. Peoples

A.1. Conceptual Framework

One fundamental question that arose from the debate on the constitutional recognition of indigenous peoples and their rights is how to identify and define these specific groups. From the perspective of cultural identity, this inquiry inherently suggests the need to explore the meaning of the notion “indigenous peoples.” Some authors argue that the term implies a former state or one that existed prior to the foreign or acquired

⁸ Evo Morales, President of the Republic of Bolivia, and Rafael Correa, President of the Republic of Ecuador convened Constituent Assemblies, in August 2006 and November 2007, respectively, with the goal of elaborating and submitting new constitutions by popular ratification in Bolivia and Ecuador. In both countries the process was marked by a strong and active indigenous protagonism. This participation expanded the scope and content of the rights as both an individual and collective right for indigenous peoples. On Sept. 28, 2008, through a national referendum, Ecuador approved its new Constitution with 63.94% of the votes, being published in the Official Bulletin, No. 449 on Oct. 20, 2008. In Bolivia, a national constituency referendum took place on Jan. 25, 2009, achieving 61.43% of the votes in favor of the new Constitution and Evo Morales enacted the new Constitution on Feb. 7, 2009. Considering that the popular approval of these new constitutions is very recent, this article examines the constitutional norms in these new constitutions as well as the previous ones.

state.⁹ In this same sense, Michael Dove noted that while the connotations of the popular use of the term “indigenous” are centered upon the indigenous identity or in their original being, the formal international definitions focus more on historical continuity, differences, marginalization, self-identity, and self-governance.¹⁰ Moreover, from an international legal perspective, the determination of whether these indigenous groups are peoples, minorities, or populations has a profound impact.

In Public International Law, an early debate arose to determine whether indigenous peoples would be recognized as peoples or minorities. In this context, indigenous groups desired to be recognized as peoples. The conflict was finally resolved when international conventional indigenous law recognized the terminology of *pueblos*.¹¹ Although international courts, such as the IACHR, initially moved slowly, they have now recognized the legal status of indigenous peoples. Examples of this change are evidenced by recent case-law such as the case of the *Pueblo Saramaka*.¹²

With respect to the concept of peoples, UNESCO organized an international meeting of experts in 1989. For this occasion, the experts put forward a set of distinctive characteristics to further clarify the concept of peoples. These key features are the following:

1. A group of human beings who enjoy some or all of the following common features: a) a common historical tradition; b) racial or ethnic identity; c) cultural homogeneity; d) linguistic unity; e) religious or ideological affinity; f) territorial connection; g) common economic life;
2. The group must be of a certain number which need not be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a State;

⁹ Jim Igoe, *Becoming Indigenous Peoples: Difference, Inequality and the Globalization of East African Identity Politics*, 10/5/06 AFR. AFFAIRS 399, 399-420 (2006).

¹⁰ Michael R. Dove, *Indigenous People and Environmental Politics*, 35 ANN. REV. OF ANTHROPOLOGY 191, 192 (2006).

¹¹ See ILO Convention No. 169, *supra* note 5, art. 1, § 1(b). See also U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 6, art. 3: “Indigenous peoples have the right to self-determination. In virtue of this right they freely determine their political condition and freely pursue their economic, social, and cultural development.” (Text approved by the Council on Human Rights through Resolution 1/2 by the Council of Human Rights on June 29, 2006 and approved by the General Assembly of the United Nations through Resolution A/RES/61/295 on September 13, 2007).

¹² Case of the Saramaka People v. Suriname, 2007 Inter-Am. C.H.R. (ser. C) No. 172 (Nov. 28, 2007), available at http://www.forestpeoples.org/documents/s_c_america/suriname_iachr_saramaka_judgment_nov07_eng.pdf.

3. The group as a whole must have the will to be identified as a people or the consciousness of being a people – allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have that will or consciousness; and possibly;
4. The group must have institutions or other means of expressing its common characteristics and will for identity.¹³

The broadest conception of the term indigenous peoples arose from a working definition of indigenous communities, peoples and nations proposed by the Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities Protection, José Martínez Cobo. This formulation appeared in his study of the *Problem of Discrimination Against Indigenous Populations*.¹⁴ Martínez Cobo defined indigenous peoples as:

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 on 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 system.¹⁵

The Chilean Constitutional Court had the opportunity to define the concept of indigenous peoples, stating that:

[I]t should be considered as a group of people or groups of people from a country that possesses their own common cultural characteristics, that do not find themselves fitted with public authority and that have and will continue to have the right to participate and be consulted, in matters that concern them, with strict subjection to the [Constitutional law] of the respective State in which they form a part.¹⁶

¹³ UNESCO, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, Final Report and Recommendations, 22 February 1990, SHS-89/CONF.602/7, available at <http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf>.

¹⁴ This study began in 1972 and was completed in 1986, becoming the most voluminous text of its type, based on 37 monographs.

¹⁵ Jose R. Martinez Cobo, “*Study on the Problem of Discrimination Against Indigenous Populations*,” U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1987).

¹⁶ Tribunal Constitucional [T.C.] [Constitutional Court], Case N° 309, 4 August 2000, “REQUERIMIENTO RESPECTO DEL CONVENIO N° 169, SOBRE PUEBLOS

The use of the term “peoples” is vitally significant for indigenous groups, due to the fact that from this term derives from a series of rights of fundamental importance for indigenous peoples’, such as, their right to self-determination.¹⁷ As a consequence, the nomenclature used within the applicable legal statute for indigenous communities is crucial in the context of constitutional recognition.

For instance, the concept of minority implies the application of a legal statute completely different from the status of people. Indeed, the concept of people requires the State to recognize a more powerful set of rights. Paradoxically, at an earlier time, indigenous groups were generally referred to in the domestic legal order as minorities. Today, the tendency has been to reject this classification, in favor of a classification as peoples.

From an international perspective, the concept of population maintains a separate and distinct meaning within the context of defining a State. However, in international law, the concept of population fails to apply any special status which in turn implies that it does not recognize any specific rights.

The constitutions that have explicitly recognized indigenous groups and their rights generally use a special terminology, such as, ethnic groups, community, etc. These notions, different from the concept of peoples, lack the legal capacity to generate the application of a special statute, which stand at the heart of indigenous claims.

A.2. Constitutional Recognition of Peoples

With respect to the constitutional designation of indigenous peoples, Latin American constitutions offer both a varied and wide range of possibilities, including, peoples, communities, and ethnic groups. Nonetheless, the use of a specific concept does not always imply direct and expressed recognition of indigenous rights, but rather, it may implicate a residual or tangential reference.

The Argentine Constitution uses the concept of “pueblo” in order

INDÍGENAS Y TRIBALES EN PAÍSES INDEPENDIENTES, ADOPTADO POR LA ORGANIZACIÓN INTERNACIONAL DEL TRABAJO, EL 27 DE JUNIO DE 1989”, available at <http://www.tribunalconstitucional.cl/index.php/sentencias/view/310>. This extract has been translated from Spanish to English by the authors of this article.

¹⁷ Magnarella, *supra* note 3, at 126. “[T]he term is generally used to describe a population that shares most of the following characteristics: a common historical tradition; self-identity as a distinctive cultural or ethnic group; cultural homogeneity; a shared language, and; a traditional territorial connection.” *Id.*

to effectuate a direct and expressed recognition of indigenous peoples.¹⁸ Along this same line, but with the inclusion of an explicit reference to the rights of indigenous peoples, the same acknowledgment can be found in the new Bolivian Constitution.¹⁹ At the same time, the Mexican Constitution expressly recognizes the existence of indigenous peoples as an original component of the multi-cultural composition of the nation.²⁰ The Nicaraguan Constitution makes an explicit recognition; for instance, the first few articles recognize the existence of indigenous peoples and their rights, especially with regard to “the right of maintaining and developing their identity and culture.”²¹ The Paraguayan Constitution provides for the expressed and direct recognition of indigenous peoples.²² Finally, an equally expressed and direct identification of indigenous peoples, based upon recognition of their pre-colonial rights over ancestral lands and those that they traditionally occupy, exists within the Venezuelan Constitution.²³

¹⁸ Art. 75.17, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

¹⁹ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 171 § I (Bol.): “They recognize, respect and protect on the mark of the Law, the social, economic, and cultural rights of indigenous peoples that inhabit the national territory, especially those relating to their original communal lands, guaranteeing the use and improvement of sustainable natural resources, their identity, values, languages, customs and institutions.” (The translation of the constitutions hereinafter are made by the authors).

²⁰ “The Nation has a plural-cultural composition originally sustained within the indigenous peoples...” Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 2, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

²¹ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] art. 5, La Gaceta, Diario Oficial [L.G.] 9 January 1987.

The State recognizes the existence of indigenous peoples, that enjoy the rights, duties, and guarantees provided in the Constitution, and especially those on the maintenance and development of their identity and cultural, having their forms of social organization and administering their local affairs; in the same way as maintaining the forms of communal property of their lands and the possession, use, and enjoyment of the same, all in conformance with the law. For the communities of the Atlantic Coast establish themselves as an autonomous regime in the present Constitution.

Id.

²² CONSTITUCIÓN POLÍTICA DE 1992 [CONSTITUTION] June 20, 1992, art. 62 (Para.). “This Constitution recognizes the existence of indigenous peoples, defined as cultural groups prior to the formation and organization of the Paraguayan state.” *Id.*

²³ CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 30, 1999, art. 119.

“The State will recognize the existence of indigenous peoples and communities, their social, political, and economic organization, their cultures, uses, and customs, languages and religions, in the same way as their habitat and native rights over ancestral lands and those they traditionally occupy and those that are necessary for

The new Bolivian Constitution undertakes an exhaustive acknowledgment of indigenous peoples and their rights. From the perspective of the recognition of those groups as peoples, article 2 of the new constitution indicates:

Given the pre-colonial existence of nations and original indigenous peoples and their ancestral control over their territories, one guarantees their self-determination in the setting of State unity, that consists of their right to autonomy, to self-governance, to their culture, to the recognition of their institutions and the consolidation of their territorial identities, which conform to this Constitution and to the Law.²⁴

In this sense, it is possible to highlight two interesting aspects, on the one hand, it expressly alludes to the pre-colonial existence of indigenous peoples, and, on the other, it references the additional concept of nation, as wanting to transmit an implicit message in that they also constitute a nation in the form that contemporary constitutionalism understands this term. Moreover, lying within the changes and excellent contributions to the constitution from the debate over indigenous peoples, there is a proposal for the definition of peoples. In effect, article 30, section I indicates that “[i]t is a nation and the human collectivity of the original indigenous people that share cultural identity, language, historic tradition, institutions, territoriality, and world-view, whose existence began before the colonial Spanish invasion.”²⁵ Martinez Cobo proposes that this definition is composed of two elements: first, their own cultural identity and second, their existence prior to the arrival of European colonizers. The definition in the Bolivian Constitution fails to incorporate the desire to conserve and transmit cultural identity to future generations.

The Colombian Constitution is among those constitutions that makes reference to, but fails to include the concept of *pueblos* in the implicit recognition of the existence or pre-existence of indigenous peoples, such as those which only make a tangential reference.²⁶ Falling within

the development and guarantee of their forms of living. It will correspond to the National Executive, with the participation of indigenous peoples, demarking and guaranteeing the right to the collective possession of their lands, those which are inalienable, imprescriptible, unseizable, and non-transferrable in agreement with that which is established in this Constitution and in the law.”

Id.

²⁴ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 2 (Bol.).

²⁵ *Id.* art. 30 § I.

²⁶ Article 96.2 of the Colombian Constitution establishes that they are national Colombians by adoption: “The members of the indigenous peoples that share border territories, with the application from the beginning of reciprocity according to public treaties.”

this same line of thought, the Ecuadorian Constitution refers to indigenous peoples by way of making their language the official language of the country.²⁷ Moreover, the Ecuadorian Constitution alludes to indigenous peoples in order to affirm that, as a form of avoiding any separatist claim, they form part of the State, unique and indivisible.²⁸ A similar affirmation appears in the Venezuelan Constitution with the additional statement that indigenous peoples have the duty to safeguard the integrity of the State and its national sovereignty.²⁹ Finally, the Ecuadorian Constitution mentions indigenous peoples and expressly recognizes a number of their collective rights, which were a source of debate for an eventual constitutional reform.³⁰

CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 96.2. Also, Article 246 of this Constitution states:

The authorities of the indigenous (Indian) peoples may exercise their jurisdictional functions within their territorial jurisdiction in accordance with their own laws and procedures provided these are not contrary to the Constitution and the laws of the Republic. The law will establish the forms of coordination of this special jurisdiction with the national judicial system.

Id. art. 246.

²⁷ CONSTITUCIÓN POLÍTICA DE 2008 [C.P.] [CONSTITUTION] Sept. 2008, art. 1 (Ecuador).

Ecuador is a social state of law, sovereign, unitary, independent, democratic, plural-cultural, and multiethnic. The government is Republican, presidential, elective, representative, responsible, alternative, participatory, and has a decentralized administration. The sovereignty belongs to the people, whose will is the base of authority, that is exercised through the organs of public power and the democratic means foreseen in this Constitution. The State respects and stimulates the development of all Ecuadorian languages. Spanish is the official language. Quechuan, Shuar, and the other ancestral languages are official languages for indigenous peoples, in the terms that the law fixes. The flag, shield, and hymn established by the law, are the symbols of the mother country.”

Id.

²⁸ *Id.* art. 56. “The indigenous peoples, who are automatically defined as nationals of ancestral races, and the black peoples or *Afroecuatorians*, form part of the Ecuadorian state, unique and indivisible.” *Id.*

²⁹ CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 30, 1999, art. 126.

The indigenous peoples, as cultures of ancestral races, form part of the Nation, the State, and the Venezuelan people as unique, sovereign, and indivisible. In conformance with this Constitution they have the duty of safeguarding the integrity and the national sovereignty. The term ‘people’ will not be interpreted in this Constitution in the sense that international rights give.”

Id.

³⁰ CONSTITUCIÓN POLÍTICA DE 2008 [C.P.] [CONSTITUTION] Sept. 2008, art. 85 (Ecuador). “The State will recognize and guarantee to indigenous peoples, in conformance with this Constitution and the law, the respect to public order and to human rights, the

By evaluating the constitutional terminology used by legal systems similar to that of Chile, one can understand that diverse Latin American constitutions proposed definitions, either expressly or implicitly, of the term indigenous peoples. For instance, the Ecuadorian Constitution expressly recognizes that indigenous peoples are understood to be “ancestral racial nationalities.”³¹ At the same time, the Mexican Constitution indicates that the indigenous peoples are:

Those that descend from populations that inhabited the actual territory of the country at the beginning of colonization and that conserve their own social, economic, cultural, and political institutions, or parts of them. The awareness of their indigenous identity should be fundamental criteria for determining to whom the classification as indigenous peoples will apply.³²

Similar to the Mexican case, the Paraguayan Constitution defines indigenous peoples as “cultural groups prior to the formation and organization of the Paraguayan state.”³³ With regards to Venezuela, their constitution supports the recognition of indigenous peoples “as cultures of ancestral races.”³⁴ Therefore, the fundamental boundaries of the definition and the exact understanding of indigenous peoples, from which they will derive a more coherent understanding of their own rights, come from the territorial occupation at the time of colonization and the fact that their cultures have ancestral roots, which they maintain and wish to conserve.

B. Cultural Diversity

B.1. Conceptual Framework

The existing consensus within the international community defines culture as, “the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”³⁵ Culture is a social dimension that is

following collective rights....” *Id.*

³¹ *Id.* art. 57.

³² Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 2, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

³³ CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY [CONSTITUTION] June 20, 1992, art. 62.

³⁴ CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 30, 1999, art. 126.

³⁵ UNESCO Res. 25, UNESCO Doc. 31 C/25 (Nov. 2, 2001). *available at* <http://unesdoc.unesco.org/images/0012/001271/127160m.pdf> [hereinafter Universal Declaration on Cultural Diversity]. “This definition is in line with the conclusions of the

sheltered from the length of existence and is constructed as a consequence of a series of social and historical events. The culture of a society or people is seen through elements of life; such as methods of communication, connecting to the present,³⁶ representing a common past, and protecting a shared future.

The expression “cultural diversity” does not only refer to the coexistence of various cultures in a determined area, but rather an aspiration for a harmonious coexistence which is respectful of the dignity of each particular cultural group.³⁷ Similarly, UNESCO understands cultural diversity as:

The manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.³⁸

Various international treaties and declarations recognize the concept of cultural diversity;³⁹ the most important of which is the UNESCO Uni-

World Conference on Cultural Policies [1982 Mexico], of the World Commission on Culture and Development (*Our Creative Diversity*, 1995), and of the Intergovernmental Conference on Cultural Policies for Development [1998].” *Id.*

³⁶ Nevertheless, the first anthropological definition of *culture* dates back to 1871 when Edward Burnett Tylor held that it was the “total complex that includes knowledge, belief, art, morals, law, customs and other abilities and habits acquired by man as a member of society.” It is certain that the disciplinary reflection on this theme was developed in the 20th century. See generally RALPH LINTON, *CULTURA Y PERSONALIDAD* (Cooper Square Publishers 1971); PITIRIM A. SOROKIN, *SOCIETY, CULTURE, AND PERSONALITY: THEIR STRUCTURE AND DYNAMICS* (1962); Clyde Kluckhohn & William Kelly, *The Concept of Culture*, in *THE SCIENCE OF MAN IN THE WORLD* 78-106 (Ralph Linton ed., 1945); and Ruth Benedict, *PATTERNS OF CULTURE* (1934).

³⁷ PROGRAMA DE LAS NACIONES UNIDAS PARA EL DESARROLLO, *DIVERSIDAD ÉTNICO-CULTURAL Y DESARROLLO HUMANO: LA CIUDADANÍA EN UN ESTADO PLURAL* (2005). Compare BHIKHU PAREKH, *RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY* 253 (2005), with DANIEL J. OLIVA MARTÍNEZ & DIEGO BLÁZQUEZ, *LOS DERECHOS HUMANOS ANTE LOS DESAFÍOS INTERNACIONALES DE LA DIVERSIDAD CULTURAL* 72 (2007).

³⁸ Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, UNESCO Doc. No. CLT-2005/Convention Diversité-Cult. Rev., available at <http://unesdoc.unesco.org/images/0014/001-429/142919e.pdf>.

³⁹ Cf. Agreement on the Importation of Educational, Scientific, and Cultural Materials, 131 U.N.T.S. 25 (No. 1734) (1950), available at http://www.unesco.org/education/information/nfsunesco/pdf/IMPORT_E.PDF; Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731; Declaration of the Principles of In-

versal Declaration of Cultural Diversity adopted by UNESCO. Article I of this Declaration establishes the idea that cultural diversity “is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind.”⁴⁰ Article II reinforces the importance of ensuring “harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together.”⁴¹ For purposes of this work, it is noteworthy to emphasize article IV of the above mentioned declaration in particular. In addition to human rights, article IV guarantees cultural diversity, stating that “the defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.”⁴²

Recognizing cultural diversity is crucially important for indigenous peoples. It is well known that many States promote assimilation and Euro-centric policies, including those with extreme practices such as genocide, which is used with the deliberate intent of creating a homogenous population with certain cultural values and ways of life that reflect the dominant sector of the population.⁴³ Chile failed to escape this historical

ternational Cultural Cooperation, Nov. 4, 1966, UNESCO, art. 1, available at <http://www.unesco.org>; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 96 Stat. 2350, 823 U.N.T.S. 231; Convention for the Protection of the World Cultural and Natural Heritage arts. 19, 21, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151; *Declaration on Race and Racial Prejudice*, UNESCO Gen. Conf. Res. 20 C/Res.3/1.1/2, 20th Sess. (1978), U.N. doc. E/CN.4/Sub.2/1982/2/Add.1, annex V (1982); Recommendation Concerning the Status of the Artist, UNESCO, 21st Sess. Oct. 27, 1980, available at http://portal.unesco.org/en/ev.php-URL_ID=13138&URL_D-O=DO_TOPIC&URL_SECTION=201.html; Recommendation On Safeguarding Traditional and Popular Culture, UNESCO, Organizational General Conference, 25th Sess., Nov. 15, 1989, available at http://www.unesco.org/culture/laws/paris/html_eng/page1.shtml; and all of the instruments associated with UNESCO. Moreover, it should include the view of ILO Convention No. 169, *supra* note 5, among others. These norms should be interpreted in harmony with article 27 of the Universal Declaration on Human Rights, G.A. Res. 217A, art. 27, U.N. Doc. A/810 (Dec. 12, 1948), and articles 13 and 15 of the International Covenant on Economic, Social, and Cultural Rights arts. 13, 15, Dec. 16, 1966, 993 U.N.T.S. 3, available at <http://www2.ohchr.org/english/law/cescr.htm>.

⁴⁰ Universal Declaration on Cultural Diversity, *supra* note 35, art. 1.

⁴¹ *Id.* art. 2.

⁴² *Id.* art. 4.

⁴³ See THOMAS R. BERGER, *A LONG AND TERRIBLE SHADOW: WHITE VALUES, NATIVE RIGHTS IN THE AMERICAS SINCE 1492* (2d ed. 1999).

tendency. During the 19th and 20th centuries, Chile promoted the notion of *chilenidad*, a conception that refused to acknowledge the existence of indigenous peoples, and marginalized certain ethnic groups.⁴⁴ In order to counteract this tendency, in the last few decades, numerous countries have begun to promote and value the cultural and ethnic diversity of their population. In doing so, these countries are incorporating changes in their constitutional systems and the design of public policies. Certainly, for the most part States and cultural majorities have postponed the expressed recognition that indigenous peoples demand. Pressures from indigenous peoples have played a critical role in achieving the recent constitutional modifications.⁴⁵

B.2. Constitutional Recognition of Cultural Diversity

In Latin America, various constitutional orders have moved towards a greater acceptance of cultural diversity as a structural element of the political-social system. For example, Bolivia defines itself as a multi-ethnic, culturally plural nation.⁴⁶ Similarly, Ecuador and Nicaragua recognize themselves as culturally plural, multi-ethnic countries. In the Colombian Constitution, the State recognizes and protects ethnic diversity and Colombian culture. Mexico defines itself as a united and indivisible

⁴⁴ Cf. JOSÉ BENGOA, LA MEMORIA OLVIDADA: HISTORIA DE LOS PUEBLOS INDÍGENAS EN CHILE 21-34 (2004); JORGE PINTO, LA FORMACIÓN DEL ESTADO, LA NACIÓN Y EL PUEBLO MAPUCHE 159-82 (2000); GABRIEL SALAZAR & JULIO PINTO, HISTORIA CONTEMPORÁNEA DE CHILE 137-73 (2002).

⁴⁵ According to Bengoa,

[a]l proponer una sociedad multiétnica y multicultural los indígenas no sólo han cuestionado su propia situación de pobreza y marginalidad, sino que han cuestionado también las relaciones de dominación de la sociedad latinoamericana basadas en la discriminación racial, en la intolerancia étnica y en la dominación de una cultura sobre las otras. Los indígenas han cuestionado las bases del Estado Republicano Latinoamericano, construido sobre la idea de “un solo pueblo, una sola Nación, un solo Estado.

JOSÉ BENGOA, LA EMERGENCIA INDÍGENA EN AMÉRICA LATINA 27 (2000).

⁴⁶ With the entrance into force of the new Bolivian Constitution in 2009, CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009 (Bol.), it is noteworthy to mention the articulated innovations in the following aspects: the Bolivian State is plural-national and intercultural, *id.* art. 1; the State should foment the intracultural, intercultural, and plural-lingual dialogue (art. 9.2, in relation to art. 100.I), *id.* 9.2; see *id.* 100.I; and preserve the plural-national diversity, *id.* art. 9.3; it recognizes the right to cultural identity for nations and indigenous peoples, *id.* art. 30.II.2; moreover, it mentions that cultural diversity “constitutes the essential base of the Plural-National Communitarian State,” *id.* art. 100.I; the inter-culturality being “the instrument for the cohesion and the harmonic and balanced coexistence between all of the peoples and nations,” *id.*

nation although its people are comprised of many cultures. Paraguay identifies itself as a culturally plural society, but it also introduces the idea of language, recognizing itself as a bilingual society. Peru acknowledges and protects ethnic and cultural pluralism within its country, while Venezuela recognizes and respects the “inter-culturalism” under the basic idea of the equality of cultures. At the same time, in other Latin American constitutions there is a tacit recognition, or better, a slight recognition, of cultural diversity. For instance, the following constitutions contain recognition of cultural diversity: Argentina (articles 75, 17 and 19), Guatemala (articles 58 and 66-70), Honduras (article 173), and Panama (article 86). Most importantly, through this constitutional formula of recognizing cultural diversity as a way of defining a society, it is possible to articulate the demands of a pluralist society while at the same time aspiring to integrate these demands into the domestic policies of the State.⁴⁷

C. *Self-Determination*

C.1. Conceptual Framework

Undoubtedly, one of the main collective rights that exist for indigenous peoples is the human right to self-determination.⁴⁸ Self-determination is a dynamic and evolving right in Public International Law. It has a legal character, but at the same time possesses a strong political charge which, depending on the interest of the parties involved, is interpreted differently.⁴⁹ Article I of the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR) categorize self-determination as a human right and establish that “all peoples have the right to self-determination. By virtue of this right, they can freely establish their own government and provide for their economic, cul-

⁴⁷ See Cynthia Hamilton, *Multiculturalism as Political Strategy*, in MAPPING MULTICULTURALISM 167-77 (Avery F. Gordon & Christopher Newfield eds., 1997).

⁴⁸ “For indigenous peoples everywhere in the world today, self-determination is the central tenet and main symbol of their movements.” Erica-Irene A. Daes, *Protection of the World’s Indigenous Peoples and Human Rights*, in HUMAN RIGHTS: CONCEPTS AND STANDARDS 303 (Janusz Symonides ed., 2000).

⁴⁹ “The principle of the right of peoples to self-determination has been present in international debates for almost a century, and the current claims to this right by indigenous organizations is only the latest instance of its use in the expanding debate about human rights.” Rep. of the Comm’n on Human Rights, 58th sess, Feb. 4, 2002, ¶ 88, U.N.Doc. E/CN.4/2002/97.

tural and social development.”⁵⁰ Ownership of this right, as the people know it to be, is of a collective nature, and its contents and scope of applicability can be explained by the function of its collective possession. This explains the reason for which indigenous groups self-identify as peoples and claim recognition in national, regional and international forums, as well as legal instruments.⁵¹

The actual guarantee of the right to self-determination, which lies at the heart of what indigenous peoples of Latin America are claiming and fighting for, is a pre-requisite for the fulfillment and enjoyment of other collective rights, such as the right to land, territories, resources, culture, language and education.⁵² For this reason, one of the first rights proclaimed in the United Nations’ DRIPs is the right to self-determination. Inspired by the Covenants previously mentioned, article 3 of DRIPs, which is the fruit of lengthy negotiations and discussions within the United Nations, makes the same arrangement of rights stemming from the right to self-determination, stating: “[i]ndigenous peoples have the right to self-determination. By virtue of the right, indigenous peoples will have self-determination over their politics, and be able to freely pursue their economic, social and cultural development.”⁵³ In other words, the right of the people to self-determination implies freedom for the communities to establish their own judicial and political systems, and at the same time, the ability to be informed and consistently participate in decision-making processes over matters that directly or indirectly affect them. In this sense, Stavenhagen pointed out that the right to self-determination “compliments principle participation from non-members

⁵⁰ *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, art. 1.1, U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), available at <http://www2.ohchr.org/english/law/ccpr.htm>; *International Covenant on Economic, Social, & Cultural Rights*, G.A. Res. 2200A, art. 1.1, U.N. Doc. A/6316 (Dec. 16, 1966), available at <http://www2.ohchr.org/english/law/cescr.htm> [hereinafter ICCPR].

⁵¹ “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.” DRIPs, *supra* note 6, art. 2.

⁵² “Self-determination is the primary collective right that makes it possible to exercise all other rights. International instruments have recognized it as an essential characteristic of all peoples, and it is seen as being essential to the survival and integrity of their societies and cultures.” Marie Leger, *Recognition of the Right to Self-Determination for Indigenous Peoples: Asset or Threat?*, in SEMINAR: RIGHT TO SELF-DETERMINATION OF INDIGENOUS PEOPLES 3 (2002), available at http://www.dd-rd.ca/site/_PDF/publications/indigenous/proceedingsExpertSeminarMay2002PRINT.pdf.

⁵³ DRIPs, *supra* note 6, art. 3.

of indigenous peoples, in relation to management of development projects and programs, with the principle that indigenous peoples should also be participants in their own development.”⁵⁴ The rule governing participation of indigenous peoples in all of the areas that affect them is a direct consequence of the right to self-determination. For instance, in reference to the exercise of the right to development, article 23 of the Declaration establishes that “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.”⁵⁵ The right to self-determination definitively permits the exercise of the rest of these rights.

The right to autonomy or self-governance is the legal and political form in which the States have intended to give indigenous peoples the right to self-determination.⁵⁶ At the international level, the right to autonomy for indigenous peoples has been recognized through article 4 of DRIPs, affirming that, “[i]ndigenous 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.”⁵⁷ Regarding indigenous peoples, Daes classifies the right to self-governance, or autonomy, as a subsidiary right, or as a component of the right to self-determination.⁵⁸ According to Wilhemi,

Autonomy is intended as an internal manifestation of self-determination. It can be given in time with distinct steps, that is, a greater or lesser space for self-governance, as well as in the framework of different strategies. There will be an enormous variance in functioning of the multitude of factors be-

⁵⁴ *Report by the Special Rapporteur Rodolfo Stavenhagen on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, ¶ 36, U.N. Doc. A/HRC/6/15 (Nov. 15, 2007), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/6session/A.HRC.6.15.pdf>. “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.” ILO Convention No. 169, *supra* note 5, art. 7.1.

⁵⁵ DRIPs, *supra* note 6, art. 23.

⁵⁶ On the content of the right to autonomy in the case of indigenous peoples, see GONZALO AGUILAR CAVALLO, *DINÁMICA INTERNACIONAL DE LA CUESTIÓN INDÍGENA* 485-93 (2007).

⁵⁷ DRIPs, *supra* note 6, at art. 4.

⁵⁸ Daes, *supra* note 48, at 307, 314.

tween those that should be emphasized and that affect the reality of the indigenous people, [...] their [demographics], social and political presence, and capacity to pressure, threaten and negotiate with the State.⁵⁹

C.2. Constitutional Recognition of the Right to Self-Determination

Five Latin American constitutions spell out in general terms peoples' right to self-determination: Colombia, Ecuador, Mexico, Nicaragua, and Paraguay.⁶⁰ However, except in the case of Mexico, none of the constitutions explicitly recognizes the right to self-determination for indigenous peoples. In this context, it is important to emphasize article 2 of Mexico's Constitution, which sets apart the right to self-determination for indigenous peoples and establishes political and legal autonomy in order to allow them to exercise that right. According to article 2, "[t]he right of indigenous peoples to self-determination is exercised in a constitutional framework of autonomy that preserves national unity."⁶¹

However, the form of self-determination in the new Bolivian Constitution expands as an umbrella for a series of rights. In effect, article 2 of the new Bolivian Constitution takes the position that:

[G]iven that the pre-colonial existence of the nations and indigenous peoples, and their ancestral authority over their territories, they are guaranteed the right to self-determination in the framework of unity of the State, which is consistent with their right to autonomy and self-governance, culture, recognition of their institutions and the consolidation of their territorial entities, conforming with this Constitution and the Law.⁶²

Similar to Mexico's Constitution, the new Bolivian Constitution frames indigenous peoples' right to self-determination in the context of national unity, limiting its exercise to an internal dimension and shirking the legi-

⁵⁹ Marco Wilhelmi, *El derecho de los pueblos indígenas a la libre determinación*, in PUEBLOS INDÍGENAS Y DERECHOS HUMANOS 399, 411 (Mikel Berraondo ed., 2006), available at <http://www.ibcperu.org/doc/isis/9002.pdf>.

⁶⁰ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 9; CONSTITUCIÓN POLÍTICA DE 2008 [C.P.] [CONSTITUTION] Sept. 2008, art. 4.6 (Ecuador); Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 89.X, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [Cn.] art. 5, La Gaceta, Diario Oficial [L.G.] 9 January 1987, as amended by Ley No. 527, Reforma Parcial de la Constitución Política de la República de Nicaragua, Apr. 8, 2005, L.G. Apr. 8, 2005; CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY [CONSTITUTION] June 20, 1992, art. 143.2.

⁶¹ Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 2, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

⁶² CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 2 (Bol.).

timacy of any secessionist demands or efforts to divide the territory.

On the other hand, the constitutions of Colombia, Mexico and Nicaragua, as well as the new Bolivian Constitution, clearly recognize indigenous peoples' right to autonomy. Each one of the constitutions describes the reach, context and content of said autonomy.⁶³ In the case of Colombia, the indigenous territories constitute one of the territorial entities of the State and indigenous communities keep autonomy for the "management of their interests" including the right to govern through their own authority and administration of resources.⁶⁴ The scope of autonomy granted to the indigenous territories is extensive, and includes a political, economic, and social dimension, as demonstrated in article 330 of the constitution:

In conformity with the Constitution and the laws, the indigenous territories will be governed by advice conformed and regulated according to the uses and customs of their communities, and will exercise the following functions: 1. Look after the application of legal norms regarding use of the land and people in their territory. 2. Design policies, plans and programs for economic and social development inside their territory, in accordance with the National Plan for Development. 3. Promote public investment in their territories and ensure their proper execution. 4. Obtain and distribute resources 5. Ensure the preservation of natural resources. 6. Coordinate programs and projects that promote different communities in their territory. 7. Maintain public order inside their territory in collaboration and agreement with the instructions and dispositions of the National Government. 8. Represent the territories before the National Government and the entities that are integrated into the government. 9. The Constitution and the law mark these functions.⁶⁵

In the case of Mexico, indigenous peoples' right to autonomy is manifested within the recognition of a series of collective rights, including the "preservation of their way of life and social, economic and political organization" or "preserving and enriching their languages."⁶⁶ Meanwhile, the Nicaraguan Constitution grants autonomy to the Atlantic Coast communities, which are comprised of indigenous peoples and other eth-

⁶³ José Aylwin, *Los Ombudsman y los derechos de los pueblos indígenas en América Latina*, in *PUEBLOS INDÍGENAS Y DERECHOS HUMANOS* 340 (Mikel Berraondo ed., 2006).

⁶⁴ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 287.

⁶⁵ *Id.* art. 330.

⁶⁶ Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 2.A, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

nic groups.⁶⁷

The Bolivian Constitution, in addition to being a setting for the development of indigenous peoples rights, contains components of constitutional regulation, stating: “[t]he autonomy of original indigenous lands is the expression of the right to self-governance as an exercise of self-determination of the nations and original indigenous peoples.”⁶⁸ It also creates “original indigenous autonomous entities” that should elaborate their autonomous status in agreement with their own law and procedures.⁶⁹

Finally, the constitutions of Ecuador and Peru provide for recognition with a certain degree of autonomy in favor of indigenous peoples, although this recognition is less explicit and extensive as in the previously mentioned cases. Ecuador’s constitution refers to indigenous electoral districts (*circunscripciones territoriales indígenas*) and *Afro-Ecuadorians*, whose governments are autonomous.⁷⁰ In regard to the Peruvian Constitution, article 89 states that farming communities (*comunidades campesinas*) and natives are autonomous “in their organization, in their communal work and in the use and free disposal of their lands, as well as in economic and administrative matters inside the framework that the law establishes.”⁷¹

D. Political Participation

D.1. Conceptual Framework

One of the indigenous peoples’ greatest demands is State recognition of the right to self-determination which has been recognized within the international human rights community.⁷² The manifestation of the right is reflected within the respect, protection, and guarantee of indigen-

⁶⁷ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [Cn.] arts. 5, 181, La Gaceta, Diario Oficial [L.G.] 9 January 1987, as amended by Ley No. 527, Reforma Parcial de la Consitución Política de la República de Nicaragua, Apr. 8, 2005, L.G. Apr. 8, 2005.

⁶⁸ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 290.I (Bol.).

⁶⁹ *Id.* arts. 292-93.

⁷⁰ CONSTITUCIÓN POLÍTICA DE 2008 [C.P.] [CONSTITUTION] Sept. 2008, arts. 224, 228 (Ecuador).

⁷¹ CONSTITUCIÓN POLÍTICA DEL PERÚ [CONSTITUTION] Dec. 29, 1993, art. 89.

⁷² “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.” ICCPR, *supra* note 50, art. 1.

ous rights through political participation.⁷³ One example pertains to self-determination in Resolution 2625 of the General Assembly of the United Nations.⁷⁴ In the case of non-colonial peoples in independent states, this declaration represents the right to exercise democracy, or to possess a representative government that acts as a protector of the rights of minority groups.⁷⁵ This includes the ability to vote, to be elected, and especially in the case of indigenous peoples, to receive respect for their traditional forms of social organization.⁷⁶

One of the rights most claimed by indigenous peoples is that of political participation. This signifies more than just a mere extension of the right to self-determination, which was first recognized in the ICCPR, in ILO Convention No. 169, and in DRIPs. Similarly, each of these instruments recognizes the right to political participation for indigenous peoples. This recognition stems from the right to self-determination and should be acknowledged directly and without discrimination.

Political participation for indigenous peoples is a specific right derived from their right to self-determination; however, the power to vote and participate in periodical elections does not represent a realization of this specific right. In fact, Erica-Irene A. Daes stated that “[t]he right to self-determination may be satisfied where a people enjoys an effective voice, through its own representatives, in the governing of a democratic state, and suffers no disadvantage or discrimination.”⁷⁷ Indigenous

⁷³ See *id.* art. 25.

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.

Id.

⁷⁴ Declaration Relating to the Principles of International Rights Referring to Relations of Friendship and Cooperation Between the States Conforming with the Charter of the United Nations, G.A. Res. 2625 (XXV) (Oct. 24, 1970):

None of the dispositions of the preceding paragraphs will be understood as authorizing or fomenting whatever action directed at breaking or scorning, totally or partially, the territorial integrity of sovereign and independent States that conduct themselves in conformance with the principle of equality of rights and the self-determination of indigenous peoples before described and they are, so fitted with by a government that represents the totality of the people pertaining to the authority, without distinction by motive of race, creed, or color.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ “[T]he right of self-determination may be satisfied where a people enjoys an ef-

claims go far beyond the simple right to vote. They also include the power to determine their own destiny and assume the management of their lands, territories, natural resources, education, health, and in the end, their own economic, social, political, and legal systems.⁷⁸ The true and substantive right to participate within government institutions implies more than just superficial consultation with the government. It requires participation that rests upon three basic characteristics: previous, informed, and free. These three factors are crucial in the process of achieving adequate involvement for indigenous peoples because they will permit the attainment of a valid consent. Non-binding participation, on the other hand, fails to satisfy international participation criteria for indigenous peoples.⁷⁹ At the same time, their demand for political participation also translates into the right to be chosen and to become a political actor, which requires complete recognition of their status within the legal framework. This right was recognized in the case of *Yatama v. Nicaragua*, which was decided by the IACHR.⁸⁰ This case serves as a remarka-

fective voice, through its own representatives, in the governing of a democratic State, and suffers no disadvantage or discrimination,” U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, Working Group on Indigenous Populations, Working Paper: *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People*, para. 19, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (June 10, 1996) (prepared by Erica-Irene A. Daes).

The international community and the present writer discourage secession as a remedy for the abuse of fundamental rights, but, as recent events around the world demonstrate, secession cannot be ruled out completely in all cases. The preferred course of action, in every case except the most extreme ones, is to encourage the State in question to share power democratically with all groups, under a constitutional formula that guarantees that the Government is ‘effectively representative.’

ECOSOC, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Discrimination Against Indigenous Peoples: Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*, ¶23, U.N. Doc. E/CN.4/Sub.2/1993/26/Add.1 (July 19, 1993) (prepared by Erica-Irene A. Daes).

⁷⁸ Magnarella, *supra* note 3, at 125-35 (concerning the participatory principle as an attribute of the constitutional notion of autonomy). See Giancarlo Rolla, *L’autonomia costituzionale delle comunità territoriali. Tendenze e problemi*, in 2 STUDI IN ONORE DI HUMBERTO POTOTSCHNIG 1129-1170, (Giuffrè ed., 2002).

⁷⁹ As one can see, political participation implies participation in the making of decisions and auto-governance. Steven Wheatley, *Non-Discrimination and Equality in the Right of Political Participation for Minorities*, 3 J. ON ETHNOPOLITICS & MINORITY ISSUES IN EUR. 1, 1-20 (2002).

⁸⁰ YATAMA v. Nicaragua, Case 12.388, Inter-Am. C.H.R., Report No. 125/01 (2001), available at <http://www.cidh.org/indigenas/nicaragua12.388eng.htm>.

[E]merging customary international law—to which the YATAMA v. Nicaragua decision contributes—affirms that the right to political participation for indigenous peoples includes two more specific rights: (1) the right to special remedial meas-

ble precedent in guaranteeing the right to political participation for indigenous peoples.

D.2. Constitutional Recognition of Political Participation

Various Latin American constitutions recognize indigenous peoples' aspiration of self-determination, especially through formal recognition of the indigenous peoples' right to participate in the political system.

This concept is clearly manifested within the Colombian Constitution, which has one of the most developed, extensive, and perfected texts in terms of recognizing this fundamental right. For example, the Colombian Constitution reserves special quotas, in both the Senate and House of Representatives, in order to ensure the representation of indigenous peoples and ethnic groups.⁸¹ Today, if a State seeks to create an expressed constitutional recognition of indigenous rights, the Venezuelan Constitution could serve as an excellent model. This constitution provides for a smooth and complete recognition of political participation.⁸²

ures to guarantee participation and (2) the right to participate in national political elections in accordance with their traditional organizational structures. Furthermore, by recognizing the rights of indigenous peoples to effectively participate in the national politics of the state, in accordance with their traditional forms of organization and practices, *YATAMA v. Nicaragua* and the other developments reviewed in this Note help advance the right to self-determination of indigenous peoples.

Maia Sophia Campbell, Note, *The Right of Indigenous Peoples to Political Participation and the Case of Yatama v. Nicaragua*, 24 *ARIZ. J. INT'L & COMP. L.* 499, 499-540 (2007).

⁸¹ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 171. Article 171 states, "[t]he Senate of the Republic will be integrated by eighty-three senators, chosen in the following manner: seventy-eight chosen in national circumscription, two chosen in special national circumscription by indigenous communities, and three in special national circumscriptions by political minorities." *Id.* Article 176 adds that

[t]he Chamber of Representatives will be chosen in special and territorial circumscriptions. For the election of Representatives to the Chamber, each department and the Capital District of Bogota will conform to a territorial circumscription. The Chamber of Representatives will be integrated with 166 Representatives. ... The Law will establish a special circumscription to ensure participation in the Chamber of Representatives by ethnic groups and political minorities and Colombians on the outside. Through this circumscription five Representatives will be chosen.

Id. art. 176.

⁸² "Indigenous people have the right to political participation. The State will guarantee indigenous representation in the National Assembly and in the deliberating bodies of federal and local entities with indigenous populations, in conformance with the law." CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 30, 1999, art. 125.

Another strong case is the new Bolivian Constitution, which provides for an expressed recognition of the right to participation for nations and indigenous peoples in article 30, section 2, numbers 15, 16, and 18. Number 15 states that the peoples have the right to “be consulted by means of appropriate procedures, particularly through their institutions, each time [the government] foresees that legislative or administrative measures could affect them.”⁸³ Notwithstanding the achievements within this constitution, which may perhaps represent the most advanced accomplishment within Latin America, it still fails to reach the standards proposed by international law. For instance, in ILO Convention No. 169, pertaining to participatory rights of indigenous peoples, it is one thing to have the right to consultation but it is an entirely different matter to require participation that involves binding consent. The new Bolivian Constitution expressly guarantees the right “to participation in the benefits from the exploitation of natural resources in their territories” and the right “to participation in State bodies.”⁸⁴ Moreover, from the perspective of voters’ rights, the new Bolivian Constitution provides for “the direct election of representatives from nations and indigenous peoples, in accords with their norms and own procedures.”⁸⁵

Similarly, Ecuador’s constitution has guaranteed participatory rights of indigenous peoples, expressly providing for “the right to participate, through representatives, in the official organisms that determine the law.”⁸⁶ Moreover, this same constitution states that “for the administration of the State and political representation ... [t]here will be electoral districts in indigenous territories.”⁸⁷ Acting in the same fashion as the Colombian Constitution with respect to legislative power, Ecuador’s constitution reserves a number of seats in the Constitutional Tribunal for indigenous organizations.⁸⁸

⁸³ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, arts. 30.II.15 (Bol.).

⁸⁴ *Id.* arts. 30.II.16, 30.II.18.

⁸⁵ *Id.* art. 26.II.4.

⁸⁶ Political Constitution of Ecuador art. 84 (1998). “The State will recognize and guarantee to indigenous peoples, in conformance with this Constitution and the law, with respect to public order and to human rights, the following collective rights: 14. Participating, through representatives, in the official organisms that the law determines.” *Id.*

⁸⁷ CONSTITUCIÓN POLÍTICA DE 1998 [C.P.] [CONSTITUTION] June 5, 1998, art. 224 (Ecuador). “The territory of Ecuador is indivisible. For the administration of the State and the political representation will exist in provinces, cantons, and parishes. There will be indigenous and Afro-Ecuadorian territorial circumscriptions that will be established by the law.” *Id.*

⁸⁸ *Id.* art. 275.

In the case of the Mexican Constitution, the right to self-determination is closely tied up with the autonomy “to elect, in accordance with their rules, the authorities or representatives for the exercise of their own forms of internal government,” and “to elect, in municipalities with indigenous populations, representatives before the town halls.”⁸⁹ The Mexican Constitution also establishes an obligation for public institutions, at the federal, state, and municipal levels, “to consult indigenous peoples in the elaboration [of development plans and] to incorporate their recommendations and proposals...” within them.⁹⁰

Nicaragua’s constitution allows communities along the Atlantic Coast to set up organizations “with the goal of achieving the realization of their aspirations in accordance with their own interests and participation in the construction of a new society.”⁹¹ In the case of the Panamanian Constitution, the State assumes the commitment of promoting indigenous education “with the goal of achieving their active participation as a citizen” or with the end of “promoting their ... political participation in the national life.”⁹² In regard to the Paraguayan Constitution, it guarantees indigenous peoples’ right to political participation “in agreement with their customary uses.”⁹³

Aside from the power of political participation, indigenous peoples’

⁸⁹ Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, arts. 2.A.III, 2.A.VII Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

⁹⁰ *Id.* art. 2.B.IX.

⁹¹ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [Cn.] art. 49, La Gaceta, Diario Oficial [L.G.] 9 January 1987, as amended by Ley No. 527, Reforma Parcial de la Consitución Política de la República de Nicaragua, Apr. 8, 2005, L.G. Apr. 8, 2005.

In Nicaragua the workers of the city and country, the women, the Young, the farming and stockbreeding producers, the artisans, the professionals, the technicians, the intellectuals, the artists, the religious, the Atlantic Coast Communities, and the population in general has the right to form organizations, without any discrimination, with the end of achieving the realization of their aspirations according to their own interests and to participate in the construction of a new society. These organizations will form in agreement with voluntary participation and choice by the citizen, they will have a social function and will be able to, or not, have a partisan character, according to their nature and goals.

Id.

⁹² CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ DE 1972 [CONSTITUTION] art. 120. “The State will give special attention to the farming and indigenous communities with the goal of promoting their economic, social and political participation in the national life.” *Id.*

⁹³ CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY [CONSTITUTION] June 20, 1992, art. 65. “It guarantees to indigenous peoples the right to participate in the economic, social, political, and cultural life of the country, in agreement with their customary uses, this Constitution, and the national laws.” *Id.*

right to self-determination serves as a basis for the claim and fight for collective rights to lands, territories, and natural resources.

E. Lands, Territories, and Natural Resources

E.1. Conceptual Framework

Why do rights pertaining to land, territories, and natural resources lie at the heart of indigenous peoples' vindication throughout all parts of the world? The fundamental reason resides in the special relationships that indigenous peoples share with the spaces that they have traditionally possessed, occupied, or utilized.⁹⁴ They consider themselves historically and spiritually united to the land and they envision a holistic view of life, earth, and the environment.⁹⁵ Possessing, conserving, and administering lands, territories, and ancestral resources is vital for the integrity and physical and cultural survival of indigenous peoples. Even more, these claims are a response to the historical plundering of their lands and territories as well as the destruction and appropriation of the natural resources that exist within these places. In this context, it is not unusual that the Sixth Session of the UN Permanent Forum on Indigenous Issues, which occurred at the UN in New York on May 14-25, 2007, focused on

⁹⁴ Article 13(1) of ILO Convention No. 169 states,

In applying the provisions of this Part of the Convention governments shall respect the special importance of 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.

ILO Convention No. 169, *supra* note 5, art. 13(1); "Since ancestral times the indigenous have maintained a special relation with the land, that which is their means of life and sustenance and the base of their existence as identifiable territorial communities." U.N. Econ. & Soc. Council, Comm'n on Human Rights, Indigenous Issues: Human Rights and Indigenous Issues: *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, Mr. Rudolfo Stavenhagen, Submitted Pursuant to Commission Resolution 2001/57, P 56, U.N. Doc. E/CN.4/2002/97 (Feb. 4, 2002); Erica-Irene A. Daes, *Los pueblos indígenas y su relación con la tierra*, Final Working Paper, U.N. Doc. E/CN.4/Sub.2/2000/25 (June 30, 2000).

⁹⁵ Art. 25 of DRIPs states,

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.

DRIPs, *supra* note 6, art. 25.

the special topic of territories, lands, and natural resources.⁹⁶

From a conceptual point of view, one generally refers to lands, territories, and resources that indigenous peoples have traditionally possessed, occupied, or utilized in a different form. According to Stavenhagen, “the question of land rights may not be separated from the question of access to natural resources and their utilization by indigenous communities.”⁹⁷ ILO Convention No. 169 understands territory as meaning “the total environment of the areas which the peoples concerned occupy or otherwise use.”⁹⁸ The concept of natural resources involves both renewable and non-renewable resources that are found in the ground (including, for example, waters and forests), in the subsoil, and within traditional territories.

Indigenous rights over lands, territories, and natural resources cover a broad and complex scope of collective rights that continues to be an object of important jurisprudential and legislative development at both a national and international levels. This collection of rights attempts to regulate a variety of legal situations in which indigenous peoples find themselves in relation to their lands and ancestral territories. Several examples include property, possession, occupation, control, administration, conservation, development, utilization, and access. These powers definitively point to the recognition and legal protection of the lands and ancestral territories, for example, the natural resources existing within them. For indigenous peoples, this signifies the utilization of self-determination and other key human rights that are pivotal to their survival, such as the right to food, health, or culture.⁹⁹

Within the international law sphere, ILO Convention No. 169 and the U.N. DRIPs provide a significantly similar series of rights and obli-

⁹⁶ Territories, lands, and natural resources “have special importance for indigenous peoples because their elements constitute the base of their lives, existence, means of life, and they are the source of their spiritual, cultural, and social identity. *Report on the Sixth Period of Sessions for the Permanent Forum for Indigenous Questions*, May 14-25, 2007, U.N. Doc. E/2007/43 -E/C.19/2007/12 par. 4.

⁹⁷ Report from the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms, *supra* note 88, at par. 55.

⁹⁸ ILO Convention No. 169, *supra* note 5, art. 13(2). The UN’s DRIPs does not contain a definition on the concepts of lands, territories, and resources. *See generally* DRIPs, *supra* note 6.

⁹⁹ “The respect for indigenous peoples’ rights to property, control, and access to their traditional lands and natural resources represents a condition for the exercise of other rights, such as the right to nourishment, health, adequate living, culture, or to the exercise of religion.” Report on the Situation of Human Rights and Fundamental Liberties, *supra* note 51, at par. 43.

gations over lands, territories, and resources, particularly in reference to the right to property, possession, and use.¹⁰⁰ Both international instruments recognize the existence of systems and traditional forms of possession that are unique to indigenous peoples and their collective dimensions.¹⁰¹ In the case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* in 2001, the IACHR affirmed that “[a]mong indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community.”¹⁰²

E.2. Constitutional Recognition of Lands, Territories, and Natural Resources

In the great majority of Latin American constitutions that facilitated some type of recognition of indigenous peoples and/or their rights, there are specific provisions relating to indigenous peoples and their lands, territories, and natural resources,¹⁰³ in the form of an explicit mention within a general article¹⁰⁴ or in one or various articles exclusively dedicated

¹⁰⁰ ILO Convention No. 169, *supra* note 5, arts. 13-19; DRIPs, *supra* note 13, arts. 25-30.

¹⁰¹ ILO Convention No. 169, *supra* note 5, art. 17(1); DRIPs, *supra* note 13, arts. 26-27; “States shall give legal recognition and protection to these lands, territories, and resources.” Claudia Cinelli, *La dimensión colectiva del derecho a la propiedad de la tierra*, in 3 CUADERNOS ELECTRÓNICOS: DERECHOS HUMANOS Y DEMOCRACIA 58, 58 (2006), available at <http://www.portalfio.org/inicio/repositorio/CUADERNOS/CUADERNO-3/Derecho%20a%20la%20Propiedad%20de%20la%20Tierra.pdf>. “When we speak of the collective dimension of the right to property we should not leave aside expressions of the question of indigenous peoples’ right to protection of their customary holding of the land.” *Id.* at 59.

¹⁰² *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001), available at <http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html>.

¹⁰³ The Constitutions of Costa Rica, Honduras, and El Salvador do not address the issue of lands, territories, and natural resources.

¹⁰⁴ Art. 75.17, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 171 (Bol.); CONSTITUCIÓN POLÍTICA DE 2008 [C.P.] [CONSTITUTION] Sept. 2008, art. 84 (Ecuador); Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 2, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [Cn.] arts. 5, 89, 181, La Gaceta, Diario Oficial [L.G.] 9 January 1987, as amended by Ley No. 527, Reforma Parcial de la Constitución Política de la República de Nicaragua, Apr. 8, 2005, L.G. Apr. 8, 2005; CONSTITUCIÓN POLÍTICA DEL PERÚ [CONSTITUTION] Dec. 29, 1993, art. 89.

to this principle.¹⁰⁵ It is important to note that several of these constitutions only refer to the lands and territories without making reference to natural resources.¹⁰⁶

Additionally, one can observe that the concept of territory is scarcely used in relation to indigenous peoples, with the important exception of the use of the terms “indigenous territories” or “indigenous territorial entities” in the Colombian Constitution and the new Bolivian Constitution.¹⁰⁷ This exception is devoted to recognizing indigenous peoples’ right to “self-determination and territoriality.”¹⁰⁸ The Mexican and Venezuelan Constitutions apply the terms “territory” and “habitat,” while the Constitution of Paraguay is limited to mentioning the word “habitat.”¹⁰⁹ The reluctance in using the term territory in connection with land can be explained by the State’s apprehension of a potential conflict with the important concept of national territory and the traditional principle of integrity of national territory.

Evaluating the constitutional frameworks and their relation to the lands of indigenous peoples, only the Brazilian Constitution contains a specific definition; it states that “[l]ands traditionally occupied by Indians are those on which they live on a permanent basis, those utilized for their productive activities, those indispensable to the preservation of the environmental resources necessary for their well-being and for their

¹⁰⁵ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, arts. 394.III, 402 (Bol.); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 231(Braz.); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 330; CONSTITUCIÓN DE 1985 CON LAS REFORMA DE 1993 [CONSTITUTION] Nov. 17, 1993, arts. 67-68 (Guat.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ DE 1972 [CONSTITUTION] art. 123; CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY [CONSTITUTION] June 20, 1992, art. 64; CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 30, 1999, art. 120.

¹⁰⁶ This is the case for the Constitutions of Guatemala, Panama, Paraguay, and Peru.

¹⁰⁷ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 329-30; CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 30 (Bol.).

¹⁰⁸ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 30.4 (Bol.).

¹⁰⁹ Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 2, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (“...They are integral communities of indigenous people, such that they form a social, economic and cultural unit, seated in a *territory* and that recognizes their own authorities in agreement with their uses and customs...”), *Id.* art. 2.A.V (“Conserving and improving the *habitat* and preserving the integration of their lands in terms established by the Constitution.”); CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 30, 1999, art. 120 (“The use of natural resources in indigenous *habitats*...”); *Id.* art. 156.32 (“Indigenous peoples and territories occupied by them are within the competence of the National Public Power...”); CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY [CONSTITUTION] June 20, 1992, art. 63 (“The right of indigenous peoples to preserve and to develop their ethnic identity in the respective *habitat* remains recognized and guaranteed.”).

physical and cultural reproduction, according to their uses, customs and traditions.”¹¹⁰

The objective of the comparative analysis of these Latin American constitutions is to show the scope of the normative differences in relation to the nature, formation, and content of the specific rights over lands as well as the State obligations that are connected with it. Nevertheless, the majority of these constitutions recognize collective aspects that relate both to indigenous peoples and their lands. The constitutions of Argentina,¹¹¹ Ecuador,¹¹² Nicaragua,¹¹³ Panama,¹¹⁴ Paraguay,¹¹⁵ Peru,¹¹⁶ and Venezuela,¹¹⁷ as well as the new Bolivian Constitution,¹¹⁸ recognize indigenous peoples’ right to the collective ownership of lands that they have

¹¹⁰ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 231.1 (Braz.).

¹¹¹ “[R]ecognizing the legal personality of their communities, and the possession and communitarian use of the lands that they traditionally occupy” Art. 75.17, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

¹¹² Constitution of Ecuador art. 84.2: “Conserving the imprescriptible possession of the comunal lands...”

¹¹³ “[T]he State recognizes the existence of indigenous peoples, they possess the rights, duties, and guarantees consigned by the Constitution, and especially ... maintaining the communal forms of use of their lands, and the possession, use and enjoyment of the same, all in conformance with the law” CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [Cn.] art. 5, La Gaceta, Diario Oficial [L.G.] 9 January 1987, as amended by Ley No. 527, Reforma Parcial de la Constitución Política de la República de Nicaragua, Apr. 8, 2005, L.G. Apr. 8, 2005.

¹¹⁴ “The State guarantees to indigenous peoples the reservation of necessary lands and collective possession of the same for the achievement of their economic and social well-being.” CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ DE 1972 [CONSTITUTION] art. 123.

¹¹⁵ “Indigenous peoples have the right to communal possession of the land, in sufficient size and quality for the conservation and development of their own peculiarities of life....” CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY [CONSTITUTION] June 20, 1992, art. 64.

¹¹⁶ “The State preferably supports agrarian development. It guarantees the right to possess the land, in private or communal form or in whatever other associative form.” CONSTITUCIÓN POLÍTICA DEL PERÚ [CONSTITUTION] Dec. 29, 1993, art. 88.

The Agrarian and Native Communities have legal existence and are legal persons.

They are autonomous in their organization, in communal work and in the use and free disposition of their lands, such as in the economic and administrative areas, inside of the framework that the law establishes. The possession of their lands is imprescriptible, save in the case of abandonment foreseen in the previous Article.

Id. art. 89.

¹¹⁷ “Corresponding to the National Executive, with the participation of indigenous peoples, demarking and guaranteeing the right to the collective possession of their lands” CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 30, 1999, art. 119.

¹¹⁸ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, arts. 30.6, 394.III (Bol.).

traditionally occupied, although some use the term “community” or “communal” instead of defining them as “collective.” Other constitutions offer a more precarious recognition of indigenous rights over lands. For instance, article 171.1 of the Bolivian Constitution only mentions the respect and protection of economic, social, and cultural rights of indigenous peoples, especially those relating to their original communal lands.¹¹⁹ Various constitutions grant special protection to indigenous lands and to the rights over them, establishing that they are inalienable, non-transferable, unseizable, and indivisible.¹²⁰ In relation to the obligations that are incumbent upon the States in respect to the protection of indigenous territories, moreover the general requirements of recognition, respect, and protection, only the constitutions of Brazil¹²¹ and Venezuela¹²² contain specific State duties to demark indigenous territories. The Argentinean¹²³ and Guatemalan¹²⁴ Constitutions foresee the possibility of delivering other types of lands that are not considered traditional for the well-being of indigenous peoples. This State prerogative is also predicted to exist in the new Bolivian Constitution.¹²⁵

Referring to constitutional rights over existing natural resources in indigenous lands, the Constitutions of Brazil, Mexico, and Ecuador, similar to the new Bolivian Constitution, establish differentiated rights according to the type of natural resource. For instance, Brazil distinguishes between the “riches of the soil, the rivers, and the lakes existing therein,” the “hydraulic resources,” and the “mineral riches.”¹²⁶ While Mexico foresees the specific case of strategic resources,¹²⁷ Ecuador and the new Bolivian Constitution refer to “renewable natural resources” and “non-renewable natural resources.”¹²⁸

¹¹⁹ *Id.* art. 171.1.

¹²⁰ This is the case in the Constitutions of Brazil, Colombia, Ecuador, Paraguay, Peru, and Venezuela, as well as the new Bolivian Constitution.

¹²¹ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 231(Braz.).

¹²² CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 30, 1999, art. 119.

¹²³ Art. 75.17, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

¹²⁴ CONSTITUCIÓN DE 1985 CON LAS REFORMA DE 1993 [CONSTITUTION] Nov. 17, 1993, art. 68 (Guat.): “Through special programs and adequate legislation, the State will provide state lands to indigenous communities that need them for their development.”

¹²⁵ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 395.I (Bol.).

¹²⁶ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] arts. 231.2-231.3 (Braz.).

¹²⁷ Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 2.A.VI, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

¹²⁸ CONSTITUCIÓN POLÍTICA DE 2008 [C.P.] [CONSTITUTION] Sept. 2008, art. 84.4-84.5 (Ecuador); CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 30.15-17, 402 (Bol.).

In general terms and due to evident economic reasons, the indigenous peoples' constitutional protection of natural resources is far less than that which is provided for indigenous lands. Latin American constitutional norms devote three different types of rights to natural resources. First, the right to use and enjoy natural resources (e.g., the Constitutions of Bolivia,¹²⁹ Brazil in respect to land, river, and lake resources,¹³⁰ Mexico,¹³¹ and Nicaragua¹³²). Second, the right to participate in the use of these resources (e.g., the Constitutions of Argentina,¹³³ Bolivia in regards to non-renewable natural resources,¹³⁴ Colombia,¹³⁵ and Ecuador in reference to renewable natural resources¹³⁶). And finally, the right to consult

¹²⁹ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 171.1 (Bol.). “[G]uaranteeing the use and sustainable enjoyment of the natural resources” In article 30.17, the new Bolivian Constitution (2009) guarantees indigenous peoples’ right to the use and exclusive enjoyment of renewable natural resources existing in their territory. *Id.* art. 30.17. *Id.*

¹³⁰ “The lands traditionally occupied by the Indians are assigned to their permanent possession, corresponding to the exclusive use of the riches of the soil, of the rivers, and of the lakes existing in them.” CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 231.2 (Braz.).

¹³¹

Agreeing, with respect to the forms and modalities of possession and ownership of the established lands in this Constitution and to the laws of the matter, such as the rights acquired by third parties or by integrants of the community, to the use and preferable enjoyment of the natural resources in the places that the communities habit and occupy, save those that correspond to strategic areas, in terms of this Constitution.

Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 2.A.VI, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

¹³² “Equally recognizing the possession, use and enjoyment of the waters and forests of their communal lands”; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [Cn.] art. 89, La Gaceta, Diario Oficial [L.G.] 9 January 1987, as amended by Ley No. 527, Reforma Parcial de la Consitución Política de la República de Nicaragua, Apr. 8, 2005, L.G. Apr. 8, 2005. “The Atlantic Coast Communities have the right to live and develop themselves under the forms of social organization that correspond to their historical traditions and cultures. The State guarantees to these communities the enjoyment of their natural resources” *Id.* art. 180.

¹³³ “Corresponding to Congress: [...] Assuring their participation in the management referring to their natural resources and to the other interests that affect them.” Art. 75.17, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

¹³⁴ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, arts. 30.16, 402 (Bol.).

¹³⁵ “The exploitation of the natural resources in the indigenous territories will be done without impairing the cultural, social and economic integrity of the indigenous communities. In the decisions that they adopt in respect to said exploitation, the Government will favor the participation of the representatives from the respective communities.” CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 330.

¹³⁶ “Participating in the use, usufruct, administration, and conservation of the renew-

with the State (e.g., the Constitutions of Bolivia, in regards to non-renewable natural resources,¹³⁷ Brazil with respect to hydraulic or mineral resources,¹³⁸ Ecuador in reference to non-renewable natural resources,¹³⁹ and Venezuela¹⁴⁰).

F. Indigenous Languages

F.1. Conceptual Framework

Within the 671 indigenous peoples in Latin America,¹⁴¹ there is an extraordinary linguistic diversity. Considered a mechanism of identity and dignity, the protection of indigenous languages is one of the fundamental aspirations and demands of indigenous peoples in order to safeguard their heritage.¹⁴² Historically, many indigenous languages were prohibited, particularly within the educational sphere.¹⁴³ The purpose of

able natural resources that they find in their lands.” CONSTITUCIÓN POLÍTICA DE 2008 [C.P.] [CONSTITUTION] Sept. 2008, art. 84.4 (Ecuador).

¹³⁷ “[The State] will respect and guarantee the right to obligatory previous consultation, realized by the State, in good and concerted faith, with respect to the exploitation of the non-renewable natural resources in the territory that they inhabit.” CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 30.15 (Bol.).

¹³⁸ “The enjoyment of hydraulic resources, including energetic capacity, the search and extraction of mineral resources in indigenous lands can only be effectuated with authorization from the National Congress, hearing the affected communities; rest assured the participation in the results of the extraction, in conformance with the law.” CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 231.3 (Braz.).

¹³⁹ “To be consulted on plans and prospection programs and exploitation of non-renewable resources that they find in their territories and that can affect the environment or culture; participating the benefits that those projects carry, inasmuch as it is possible and receiving reparations for the social-environmental harms that they cause.” CONSTITUCIÓN POLÍTICA DE 2008 [C.P.] [CONSTITUTION] Sept. 2008, art. 84.5 (Ecuador).

¹⁴⁰

The enjoyment of natural resources in the indigenous habitations on the part of the State will be done without injuring the cultural, social and economic integrity of the same and, equally, it is subject to prior information and consultation with the respective indigenous communities. The benefits of this use on the indigenous peoples’ part is subject to this Constitution and to the law.

CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 30, 1999, art. 120.

¹⁴¹ CEPAL, *Panorama Social de América Latina 2006*, 145 (Dec. 2006), http://www.cepal.org/publicaciones/xml/0/27480/PSE2006_Cap3_PueblosIndigenas.pdf.

¹⁴² *Id.*

¹⁴³ AUSTRALIAN PARLIAMENT, HOUSE OF REPRESENTATIVES, STANDING COMMITTEE ON ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS, LANGUAGE AND CULTURE: A MATTER OF SURVIVAL: REPORT OF THE INQUIRY INTO ABORIGINAL AND TORRES STRAIT ISLANDER LANGUAGE MAINTENANCE. (Canberra: Australian Government Publishing Ser-

these prohibitions was to assimilate indigenous people into the dominant culture and language, thus contributing to the extinction of numerous languages. Nevertheless, indigenous organizations have achieved the constitutional recognition of their linguistic rights, which in some countries has led to positive results through specific legislation¹⁴⁴ or policies or programs for their protection and promotion.¹⁴⁵

In conformance with the demands of the international community, linguistic rights form part of indigenous peoples' right to self-determination, and they should be understood as independent and complementary of human rights.¹⁴⁶ More than just the basic right to converse and utilize their languages, linguistic rights include: "the right to receive an education in the maternal language, the right to have indigenous languages recognized in the constitutions and laws, the right to non-discrimination on the basis of language, the right to create modes of communication in indigenous languages and to have access to them."¹⁴⁷

Linguistic rights exist within various international instruments. ILO Convention No. 169, article 28.3 reaffirms the need "to adopt frameworks in order to preserve indigenous languages of interested peoples and to promote the development and practice of them."¹⁴⁸ As stated in article 7.1.a of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions by UNESCO in 2005, separate States:

[S]hall endeavor to create in their territory an environment which encourages individuals and social groups to create, produce, disseminate, and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples.¹⁴⁹

Additionally, article 13.1 of DRIPs (2007) recognizes that "[i]ndigenous

vice 1992).

¹⁴⁴ Cf. Ley General de Derechos Lingüísticos de los Pueblos Indígenas, LXI Legislatura (June 18, 2006), <http://www.diputados.gob.mx/LeyesBiblio/pdf/257.pdf>.

¹⁴⁵ Program for the Protection of Ethno-Linguistic Diversity, Cultural Ministry (Bogotá), 2008, available at <http://www.mincultura.gov.co/eContent/library/documents/DocNewsNo1385DocumentNo1720.DOC>.

¹⁴⁶ Permanent Forum on Indigenous Issues, *Report of the international expert group meeting on indigenous languages*, 7th Sess., New York, E/C.19/2008/3 (Jan 21, 2008), available at <http://www.un.org/-events/iyl/pdf/N0821356.pdf> [hereinafter International Expert Group Meeting on Indigenous Languages].

¹⁴⁷ *Id.*

¹⁴⁸ ILO Convention No. 169, *supra* note 5, art. 28.3.

¹⁴⁹ UNESCO, Convention on Cultural Expressions, Oct. 2005, art. 7.1.a., U.N.Doc. CLT/CEI/DCE/2007/PI/32 (March 18, 2007).

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.”¹⁵⁰

In honor of the U.N. General Assembly’s declaration of 2008 being the International Year of Languages, a meeting was dedicated to bringing together the International Expert Group Meeting on Indigenous Languages in order to discuss the importance of linguistic rights and the urgency to protect them, due to the fact that the majority are in danger of extinction. Acting in response to this urgency, in March, 2008, UNESCO suggested the possibility of creating an international normative instrument for the protection of indigenous languages and other languages in danger of extinction.¹⁵¹

F.2. Constitutional Recognition of Indigenous Languages

The recognition of indigenous languages in Latin American constitutions has been characterized by a great heterogeneity. In contrast to other rights, the majority of Latin American constitutions integrated in some form or another, explicit or implicit, the recognition of indigenous languages and in some cases their derivative rights. In evaluating sixteen Latin American constitutions, thirteen contain specific articles relating to indigenous languages: Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, and Venezuela. This occurrence is mainly in response to the demands and claims of indigenous peoples in terms of the use and conservation of indigenous languages.¹⁵² Nevertheless, there still exists a broad spectrum of recognition, starting with the mere acknowledgment of the indigenous language and expanding to a recognition that includes derivative language rights, such as the right to use the language, conserve it, to not be discriminated for linguistic motives, or in some cases designating it as the official language within their territories.

The constitutions of Bolivia, Nicaragua, and Ecuador offer a broad-

¹⁵⁰ DRIPs, *supra* note 11, art. 13.1.

¹⁵¹ See Report from the General Director on the Technical and Legal Aspects of a Possible International Normative Instrument for the Protection of Indigenous Languages and Languages in Danger of Extinction, includes a study of the results from UNESCO programs executed in this area, Executive Council, 179th Reunion, Paris, Fr., March, 2008.

¹⁵² It goes without saying that in the case of the Constitutions of Argentina and Honduras there does not exist any explicit recognition of indigenous languages.

er recognition of indigenous peoples, including derivative rights.

In terms of linguistics, article 1 of the new Bolivian Constitution indicates a plural character of the State in linguistic terms. Moreover, article 5.1 specifies that each of the thirty-six indigenous languages should be recognized as an official language of the State, next to Spanish. In regards to national and local governance, the Constitution mentions the utilization of at least two official languages, assuming that one of these languages is indigenous.¹⁵³ This step constitutes a new development in Latin American constitutionalism. On the other hand, the Bolivian State compromises itself as it attempts to respect and promote indigenous languages.¹⁵⁴

In Nicaragua, article 11 of the Constitution recognizes that “the languages of the communities along the Atlantic Coast of Nicaragua also will have official use in cases that establish the law.”¹⁵⁵ Additionally, articles 90 and 91 explain that:

[T]he communities along the Atlantic Coast have the right to the free expression and preservation of their languages, art, and culture. The development of their culture and values enriches the national culture. The State will create special programs for the exercise of these rights, [and] the State has the obligation of inspiring laws that seek to promote actions which assure that no Nicaraguan is the object of discrimination due to their language, culture, or origin.¹⁵⁶

Article 1 of Ecuador’s constitution explicitly refers to the use and conservation of indigenous languages: “Quechua, Shuar, and the other ancestral languages represent official [languages] for indigenous peoples, in the terms that the law fixes.”¹⁵⁷ Another development is found in article 84.1 of the constitution, which assures the development and strengthening of linguistic identity as a collective right.¹⁵⁸

¹⁵³“The plural-national government and provincial governments will have to utilize at least two official languages....” CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 5.II (Bol.).

¹⁵⁴ *Id.* art. 30.II.9.

¹⁵⁵ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [Cn.] art. 11, La Gaceta, Diario Oficial [L.G.] 9 January 1987, as amended by Ley No. 527, Reforma Parcial de la Consitución Política de la República de Nicaragua, Apr. 8, 2005, L.G. Apr. 8, 2005.

¹⁵⁶ *Id.* art. 90-91.

¹⁵⁷ CONSTITUCIÓN POLÍTICA DE 2008 [C.P.] [CONSTITUTION] Sept. 2008, art. 1 (Ecuador).

¹⁵⁸ *Id.* art. 84.1:

The State will recognize and guarantee to indigenous peoples, in accordance with this Constitution and the law, with respect to public order and to human rights, the

Although the constitutions of Colombia, Costa Rica, Guatemala, Peru, Mexico, and Venezuela make explicit reference to the use and conservation of indigenous languages, the discrepancies and differences in terminology sometimes cause a different impact. The Colombian Constitution states that indigenous languages will be considered official in the territories that the ethnic groups inhabit.¹⁵⁹ The Costa Rican Constitution establishes that the “State will watch over the maintenance and cultivation of national indigenous languages.”¹⁶⁰ In Mexico, the necessity to preserve and enrich indigenous languages is recognized and guaranteed.¹⁶¹ The Guatemalan Constitution recognizes and preserves indigenous languages and dialects.¹⁶² The Constitutions of Peru and Venezuela require that indigenous languages be preserved, respected, and have official use in their territories.¹⁶³ Moreover, it needs to be added that Brazil and Paraguay only recognize the existence of indigenous languages as part of their national heritages.¹⁶⁴

It is evident that the complete exercise of linguistic rights finds itself intimately tied with the operation of other basic human rights, such as the right to education. Nevertheless, the complete acquisition of linguistic rights will be impossible unless other basic rights, such as the right to education, are recognized.¹⁶⁵ In effect, in order to sustain and support the development of indigenous languages, one needs to recognize and implement an education that is taught in the maternal language. In the following section, this paper will refer specifically to the intercultural bilingual education within Latin American constitutionalism.

... collective rights [of] ...[m]aintaining, developing, and fortifying their identity and traditions in that which is spiritual, cultural, linguistic, social, political, and economic.

Id.

¹⁵⁹ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 10.

¹⁶⁰ POLITICAL CONSTITUTION DE 1949 [CONSTITUTION] art. 76.

¹⁶¹ Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 2.A.IV, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

¹⁶² CONSTITUCIÓN DE 1985 CON LAS REFORMA DE 1993 [CONSTITUTION] Nov. 17, 1993, arts. 58, 66, 143 (Guat.).

¹⁶³ CONSTITUCIÓN POLÍTICA DEL PERÚ [CONSTITUTION] Dec. 29, 1993, arts. 17, 48; CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 30, 1999, arts. 19, 119.

¹⁶⁴ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 231(Braz.); CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY [CONSTITUTION] June 20, 1992, art. 140.

¹⁶⁵ International Expert Group Meeting on Indigenous Languages, *supra* note 146, para. 14.

G. Intercultural Bilingual Education

G.1. Conceptual Framework

For indigenous peoples, the right to education constitutes a key element not only as a means to rise above the exclusion and discrimination, but also for the enjoyment, maintenance, and respect of their cultures, understandings, languages, and traditions.¹⁶⁶ Historically, one of the main forms of discrimination has been the utilization of schools as an instrument to promote the assimilation of indigenous peoples to the cultural model of the dominant society.¹⁶⁷ This program contributed to the destruction and extermination of indigenous languages and cultures. In this sense, constitutional recognition of the right to receive an education through the utilization of their own language, which has been achieved in various Latin American constitutions, is considered an important advancement for the maintenance and protection of indigenous languages and cultures, and a central element in establishing the complete exercise of human rights.

Likewise, this right implies the ability to receive a quality education in the maternal language, that which is culturally suitable and responds to the fundamental needs of indigenous peoples. In practice, one speaks of intercultural bilingual education or simply bilingual education for indigenous peoples. However, bilingual education proposes an education in both languages (the indigenous language and the socially dominant language), whereas intercultural bilingual education values and reinforces the mutual identities that result in an intercultural dialogue. This, in turn, creates open spaces to live together with the aim of promoting a framework that contributes to true equality of opportunities, thus diminishing the levels of exclusion and discrimination.¹⁶⁸

Without explicitly mentioning the right to intercultural bilingual education, the right to education for indigenous peoples is recognized in numerous international instruments. First, in ILO Convention No. 169, article 26 establishes that “[m]easures 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

¹⁶⁶ RODOLFO STAVENHAGEN, *LOS PUEBLOS INDÍGENAS Y SUS DERECHOS* 98 (2008).

¹⁶⁷ *Id.* at 106.

¹⁶⁸ *Cf.* RICARDO HEVIA ET AL., *POLÍTICAS EDUCATIVAS DE ATENCIÓN A LA DIVERSIDAD CULTURAL: BRASIL, CHILE, COLOMBIA, MÉXICO Y PERÚ* 19 (2005).

community.”¹⁶⁹ Second, article 30 of the Convention on the Rights of the Child (1989) affirms that:

In those states in which ethnic, religious, or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.¹⁷⁰

Finally, within the U.N. DRIPs, article 14 states, “[i]ndigenous 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 and teachings,”¹⁷¹ and “States shall, in conjunction with indigenous peoples, take effective measures in order for indigenous individuals, particularly children, to have access, when possible, to an education in their own culture and provided in their own language.”¹⁷²

G.2. Constitutional Recognition of Intercultural Bilingual Education

Over the last two decades, numerous Latin American constitutions have made reference, in large or short measure, to indigenous peoples’ right to education. In fact, the following countries have constitutional norms that refer to this crucial issue: Argentina, Colombia, Ecuador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, and Venezuela. This achievement is principally due to the fact that the right to education constitutes a fundamental element of indigenous peoples’ aspirations and demands, in terms of equality and opportunity, equal development and maintenance, and respect for indigenous languages and cultures.¹⁷³

Nevertheless, we note a varied usage of terminology and content

¹⁶⁹ Moreover, consider that articles 28.1 and 28.2 of ILO Convention No. 169 establish that: “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, [and] 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.” ILO Convention No. 169, *supra* note 5, arts. 28.1-28.2.

¹⁷⁰ Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49), U.N. Doc. A/44/49 (Nov. 20, 1989), *available at* <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>.

¹⁷¹ DRIPs, *supra* note 11, art. 14.1.

¹⁷² *Id.* art. 14.2.

¹⁷³ Stavenhagen, *supra* note 150, at 98.

that refers to this right within the constitutional sphere. While the majority of the constitutions speak of intercultural bilingual education, others simply designate the terms education or bilingual literacy.¹⁷⁴ Moreover, in some countries, the right to a quality education and educational development programs, such as scholarships for children and indigenous students, is guaranteed.

In terms of respect, promotion, guarantee, and cultural sensitivity, in regards to indigenous peoples' right to education, the constitutions of Bolivia, Mexico, and Ecuador are those that possess the broadest constitutional recognition.

It is without a doubt that in terms of normative content the new Bolivian Constitution constitutes the most advanced and progressive within Latin America. In article 78.1, it establishes "intercultural, intracultural, and multi-lingual education in all of the educational system,"¹⁷⁵ including all levels. To effectuate this system, the Constitution foresees culturally-sensitive education, educational training, especially in the upper levels, and communal participation through the representation of indigenous peoples.¹⁷⁶ Moreover, in the field of public universities, the new Bolivian Constitution establishes the creation of intercultural training centers for human resources and programs designed to "recuperate, preserve the development, apprenticeship, and the dissemination of different cultural languages."¹⁷⁷

In the case of Mexico, the right to intercultural bilingual education figures into the Constitution in article 2.B.II, detailing the obligation of the Mexican State:

To guarantee and increment the levels of schooling, favoring bilingual and intercultural education, literacy, the conclusion of basic education, productive training and middle-upper education. Establishing a system of scholarships for indigenous students on all levels. Defining and developing education programs with regional content that recognizes the cultural heritage of their peoples, in agreement with the laws of the subject and in consultation with the indigenous communities.¹⁷⁸

¹⁷⁴ In the Constitution of Panama, article 84 speaks of bilingual literacy for indigenous communities. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ DE 1972 [CONSTITUTION] art. 84.

¹⁷⁵ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 78.1 (Bol.).

¹⁷⁶ *Id.* arts. 83, 84, 91.

¹⁷⁷ *Id.* arts. 96, 97.IV.

¹⁷⁸ Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 2.B.II, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

In Ecuador, there are two main articles in the Constitution that refer to the right to indigenous education. Article 69 recognizes, “The State will guarantee the system of intercultural bilingual education; within it, the principal language of the respective culture will be utilized, and Spanish as a language of intercultural relation.”¹⁷⁹ Also, article 84.11 assures and guarantees the collective right of indigenous peoples to agree to an intercultural bilingual education, within the totality of the system.¹⁸⁰

On the other side of the spectrum, there is a broad diversity in terms of terminology. While the constitutions of Argentina, Nicaragua, Peru, and Venezuela employ the term intercultural bilingual education,¹⁸¹ those of Colombia and Guatemala make reference to bilingual teaching.¹⁸² The Constitution of Panama mentions bilingual literacy within indigenous communities.¹⁸³ In a distinct manner, Brazil specifies the right to “utilize indigenous languages and their methods of learning” in the educational environment.¹⁸⁴ Although these constitutions employ different terms in reference to education for indigenous peoples, one should note that it is done in a superficial manner and without mentioning the existence of other types of mechanisms that guarantee the ability to exercise the right.

H. Customary Indigenous Law

H.1. Conceptual Framework

The combination of uses and customs that are considered integral parts of the legal system are known as customary rights (*derechos consu-*

¹⁷⁹ CONSTITUCIÓN POLÍTICA DE 2008 [C.P.] [CONSTITUTION] Sept. 2008, art. 69 (Ecuador).

¹⁸⁰ *Id.* art. 84.11.

¹⁸¹ Art. 75.17, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [Cn.] art. 121, *La Gaceta, Diario Oficial* [L.G.] 9 January 1987, as amended by Ley No. 527, Reforma Parcial de la Constitución Política de la República de Nicaragua, Apr. 8, 2005, L.G. Apr. 8, 2005; CONSTITUCIÓN POLÍTICA DEL PERÚ [CONSTITUTION] Dec. 29, 1993, art. 17; CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 30, 1999, art. 121.

¹⁸² CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 10; CONSTITUCIÓN DE 1985 CON LAS REFORMA DE 1993 [CONSTITUTION] Nov. 17, 1993, art. 76 (Guat.). “The administration of the education system should be decentralized and regionalized. In the schools established in zones with predominantly indigenous populations, the teaching should be imparted preferably in a bilingual form.” *Id.*

¹⁸³ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ DE 1972 [CONSTITUTION] art. 84. The Constitution recognizes that “aboriginal languages will be an object of special study, conservation and disclosure, and the State will promote bilingual literacy programs in the indigenous communities.” *Id.*

¹⁸⁴ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 21.1 (Braz.).

etudinarios). As behavioral norms have been traditionally created by indigenous peoples and been applied in a regular manner for a period of time, legal anthropologists refer to them as customary indigenous law¹⁸⁵ (*derecho consuetudinario indígena*), or simply, indigenous law.¹⁸⁶ A central element of indigenous law resides in the conviction of indigenous peoples to be obligated to respect that which, in conforming to their traditions, has been agreed upon in their community. A failure to comply or fulfill the agreements can result in sanctions by the community.¹⁸⁷ For instance, the United Nations' Development Programme has recognized that:

[T]he indigenous law is an integral part of the social structure and the culture of a people and in order to solidify its effect, it should have a repeated and generalized usage and the members of the community ought to be conscious of their obligations. Next to language, legal customs constitute an element of cultural identity.¹⁸⁸

According to Richard Adams, customary law presents characteristics that make it distinguishable from State laws. First, it is not written and it corresponds to traditional practices and adaptations that have been passed down orally.¹⁸⁹ Second, the manner in which it evolved is not uniform since indigenous peoples adapt their customs in various ways.¹⁹⁰ Third, the variations in the practices appear in all types of norms.¹⁹¹ Finally, any attempt to standardize or fix customary laws as a written norm seriously damages their adaptive quality.¹⁹²

¹⁸⁵Campbell MacLaghlan, *The Recognition of Aboriginal Customary Law: Pluralism beyond the Colonial Paradigm*, in *LAW AND ANTHROPOLOGY* 368-86 (Peter Sack & Jonathan Aleck eds., 1992).

¹⁸⁶ See José Alywin, *Derecho Indígena y Derecho Estatal en América Latina*, <http://web3.cc.utexas.edu/cola/insts/lilas/content/claspoesp/PDF/workingpapers/aylwinderind.pdf/>.

¹⁸⁷ One should not confuse indigenous law with domestic regulations about indigenous peoples. The latter refers to legal norms that have been approved in accordance with the Constitution and the laws for the vested authorities in order to create formal sources of the law. Also, one should not confuse indigenous law with customary law, which is a source of rights whose principal characteristic refers to modes of proceeding or acts that are not positive or formal in nature, but nevertheless individuals respect them because they believe they are legally obligated.

¹⁸⁸ UNDP, National Report on Human Development, *Diversidad étnico-cultural y desarrollo humano: La ciudadanía en un Estado Plural* 233 (Guat.) (2005).

¹⁸⁹ *Id.* at 234.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at Figure 10.3.

From the perspective of the importance this has for indigenous peoples, it is crucial to note that: (1) as opposed to the written tendency of legal norms on the part of national States, indigenous peoples have seen how their customs and worldviews have been repudiated by dominant sectors of society, at least how the obligations of the norms that indigenous peoples have established in their traditional manner have been rejected in an attempt to supplant them for other ethno-centric norms (registration systems and regulation of property rights, election of local authorities, rules of living and conflict resolution, etc.); and (2) it has generated important conflicts between state law and indigenous law. This is because on one side there exists positive rights that apply to indigenous peoples, without having them participate in their elaboration and thus lacking legitimacy, and, on the other side, there are customs that are not officially recognized but their observation is relevant to indigenous communities (ex. *Az Mapu* within the Mapuche people¹⁹³).

The validity and application of indigenous law and institutions is expressly recognized in articles 8 through 10 of Convention ILO No. 169, which was ratified by Chile in 2008. Article 8 proposes rules for harmonizing the application of state legislation with customary indigenous law.¹⁹⁴ Moreover, it recognizes the right of indigenous peoples to conserve their own customs and institutions, in ways that are compatible with the fundamental rights fixed in state legislation and with recognized international human rights.¹⁹⁵

Articles 9 and 10 are even more specific and they fix the relation between the customary indigenous law and state penal law in an effort to respect the methods of repression and indigenous customs in criminal cases.¹⁹⁶ The Convention states that, in the case of applying state penal sanctions to indigenous offenders, they should consider their economic, social, and cultural conditions, and favor other sanctioning mechanisms that are an alternative to incarceration.¹⁹⁷

In the following section, this article discusses how some Latin American constitutions have (1) recognized the validity of customary indigenous laws, and (2) proposed solutions that are specific to the tensions

¹⁹³ Juan Sánchez, *El Az Mapu o Sistema Jurídico Mapuche*, 2 *Revista Crea* (Universidad Católica de Temuco) 29, 29-39 (2001); Rafael Blanco, Alejandra Díaz, Joanna Heskia, & Hugo Rojas, *Justicia Restaurativa: marco teórico, experiencias comparadas y propuestas de política pública*, 4 *Revista Pena y Estado* (2000).

¹⁹⁴ ILO Convention No. 169, *supra* note 5, art. 8.

¹⁹⁵ *Id.* art. 8.2.

¹⁹⁶ *Id.* art. 9.

¹⁹⁷ *Id.* art. 10.1-2.

and conflicts between written national laws and indigenous laws, such as moving from a monistic legal system towards a more pluralistic system.¹⁹⁸

H.2. Constitutional Recognition of Customary Indigenous Law

We can distinguish two clear manifestations of the constitutional recognition of customary indigenous law in Latin America. First, some constitutions simply recognize the existence of indigenous customs, including in some occasions that the customs will be respected, protected, and/or promoted. This situation exists in Bolivia, Brazil, Colombia, Guatemala, Mexico, Nicaragua, Paraguay, and Venezuela.¹⁹⁹

Second, it is possible to find constitutional norms that also recognize the living norms and organizations that are fixed by indigenous peoples through their customs, including internal forms of governance and/or mechanisms to resolve their controversies through institutions and procedures that they define. This situation exists within the Constitutions of Bolivia, Colombia, and to some extent in Ecuador, Mexico, Nicaragua, Paraguay, Peru, and Venezuela.²⁰⁰

¹⁹⁸ See Catherine Walsh, *Interculturalidad, reformas constitucionales y pluralismo jurídico*, in JUSTICIA INDÍGENA: APORTES PARA UN DEBATE 23-35 (Judith Salgado ed., 2002); Raquel Yrigoyen Fajardo, *Reconocimiento constitucional del derecho indígena y la jurisdicción especial en los países andinos (Colombia, Perú, Bolivia, Ecuador)*, ISLA, (June 2004), <http://ilsa.org.co:81/biblioteca/dwnlds/od/elotrdr030/elotrdr030-06.pdf>.

¹⁹⁹ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 171.I (Bol.); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 231 (Braz.); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 330; CONSTITUCIÓN DE 1985 CON LAS REFORMA DE 1993 [CONSTITUTION] Nov. 17, 1993, arts. 58, 66 (Guat.); Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 2, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [Cn.] arts. 89, 180, La Gaceta, Diario Oficial [L.G.] 9 January 1987, as amended by Ley No. 527, Reforma Parcial de la Consitución Política de la República de Nicaragua, Apr. 8, 2005, L.G. Apr. 8, 2005; CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY [CONSTITUTION] June 20, 1992, art. 65; CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 30, 1999, art. 119.

²⁰⁰ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 171.III (Bol.); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 246; CONSTITUCIÓN POLÍTICA DE 2008 [C.P.] [CONSTITUTION] Sept. 2008, art. 84.7 (Ecuador); Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 2, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [Cn.] arts. 89, 180, La Gaceta, Diario Oficial [L.G.] 9 January 1987, as amended by Ley No. 527, Reforma Parcial de la Consitución Política de la República de Nicaragua, Apr. 8, 2005, L.G. Apr. 8, 2005; CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY [CONSTITUTION] June 20, 1992, art. 63; CONSTITUCIÓN POLÍTICA DEL PERÚ [CONSTITUTION] Dec. 29, 1993, art. 149; CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA

Constitutional recognition, however, clearly comes with certain limitations. First, in respect to state laws: Bolivia, article 171; Colombia, article 246; Ecuador, article 84; Mexico, article 2.II; Paraguay, article 63; and Venezuela, article 260.²⁰¹ Second, in respect to human rights or fundamental rights: Ecuador, article 84; Mexico, article 2.II; and Peru, article 149.²⁰²

As one can appreciate, and in harmony with ILO Convention No. 169, it is interesting to note the trend that Latin American constitutionalism has adopted in the last few years, moving towards a pluralistic legal structure, reconciling the validity of the state, or formal, law with customary indigenous law. Article 171.III of the Bolivian Constitution, article 246 of the Colombian Constitution, and article 149 of the Peruvian Constitution are sound examples of this pluralistic legal structure:

Article 171.III: The natural authorities of indigenous communities and First, some constitutions establish that customary law should always respect state laws (Bolivia, article 171; Colombia, article 246; Ecuador, article 84; Mexico, article 2.II; Paraguay, article 63; and Venezuela, article 260). Second, customary law must respect human rights or fundamental rights (Ecuador, article 84; Mexico, article 2.II; and Peru, article 149).rmlands will be able to exercise administrative functions and the application of their own rules as alternative dispute resolutions, in conforming to their customs and procedures, so long as they are not contrary to this Constitution and the laws. The Law will align these functions with the attributes of the State Powers.²⁰³

Article 246: The authorities of the indigenous peoples will be able to exercise jurisdictional functions inside of their territorial boundaries, in conformance with their norms and procedures, so long as they are not contrary to the Constitution and laws of the Republic. The law will establish the forms of coordination of this special jurisdiction with the national judicial

DE VENEZUELA [CONSTITUTION] Dec. 30, 1999, arts. 119, 260.

²⁰¹ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 171 (Bol.); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 246; CONSTITUCIÓN POLÍTICA DE 2008 [C.P.] [CONSTITUTION] Sept. 2008, art. 84 (Ecuador); Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 2.II, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.); CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY [CONSTITUTION] June 20, 1992, art. 63; CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 30, 1999, art. 260.

²⁰² CONSTITUCIÓN POLÍTICA DE 2008 [C.P.] [CONSTITUTION] Sept. 2008, art. 84 (Ecuador); Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 2.II, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.); CONSTITUCIÓN POLÍTICA DEL PERÚ [CONSTITUTION] Dec. 29, 1993, art. 149.

²⁰³ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 171.III (Bol.).

system.²⁰⁴

Article 149: The authorities of Native and Farmland Communities, with the support of the autonomous rural patrols (*rondas campesinas*), can exercise jurisdictional functions inside of their territorial boundaries in conformance with the customary law, so long as they do not violate the person's fundamental rights. The law establishes the forms of coordination of said special jurisdiction with the Tribunals of Peace and with other instances of Judicial Power.²⁰⁵

The new Bolivian Constitution represents the most innovative development in that it concedes a greater degree of relevance to customary indigenous law, in accordance to the recent standards in International Law. In consideration of this new development, the following part will describe the most relevant aspects of the new Bolivian model:

1. In Title II, covering rights, duties, and guarantees, there is a special chapter referring to the rights of nations and indigenous peoples. Article 30.II.2 recognizes the right to these cultural, spiritual, and customary rights, and their own worldview; also, article 30.II.14 recognizes the right "to exercise their political, legal, and economic systems according to their worldview."²⁰⁶

2. In Title III of the new Constitution, in reference to the judicial function, it establishes a novel approach in how to administer justice and align state law with indigenous law. Article 179 indicates that the authority to impart justice is sustained within the following principles: "legal pluralism, interculturality, fairness, legal equality, independence, confidence in the legal system (*seguridad jurídica*), public services, citizen participation, social harmony, and respect for fundamental rights and constitutional guarantees."²⁰⁷

3. Not only does it expressly identify indigenous jurisdiction, it also makes it equal to State courts within the jurisdictional hierarchy.²⁰⁸ In this manner, the adopted decisions within the sphere of indigenous jurisdictional functions may not be revised by ordinary State courts.²⁰⁹

4. Indigenous jurisdiction will be exercised by authorities that the

²⁰⁴ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 246.

²⁰⁵ CONSTITUCIÓN POLÍTICA DEL PERÚ [CONSTITUTION] Dec. 29, 1993, art. 149.

²⁰⁶ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 30.II.14 (Bol.). arts. 30.II.2, 30.II.14.

²⁰⁷ *Id.* art. 179.

²⁰⁸ *Id.* art. 180.II.

²⁰⁹ *Id.* art. 192.

indigenous peoples/nations determine, and they will act in conformance with their own procedures, resolving conflicts in consideration with their own principles, cultural values, and norms.²¹⁰

5. It is established that the fundamental rights mentioned in the Constitution are limits to indigenous jurisdiction.²¹¹

6. In regards to the competence of the indigenous jurisdiction, article 192 indicates that the jurisdiction extends to all types of legal relations, facts, and acts that occur within the indigenous territorial boundaries, without regard to whether the persons involved are indigenous or not.²¹² The decisions from the indigenous jurisdiction are binding to members of indigenous communities and non-indigenous people, obligating all authorities to respect them.²¹³

III. MODELS OF CONSTITUTIONAL RECOGNITIONS OF INDIGENOUS PEOPLES IN LATIN AMERICA

The majority of Latin American constitutions recognize the existence of indigenous peoples and/or their specific rights. This trend is largely a result of the emergence of indigenous peoples and their organizations as true political actors into a context of greater democratization in the region.²¹⁴ Nevertheless, several countries – Belize, Chile, Uruguay, and Suriname – completely ignore the indigenous problem in their constitutions, despite the presence of these ethnic groups in their territories.²¹⁵

Among the countries that recognize indigenous peoples in their constitutions, there exists a great normative heterogeneity in the scope, content, and formulation of constitutional norms, which makes it difficult to identify one unique and replicable model of constitutional recognition.

This diversity can be explained by a multitude of factors that are specific to each national reality, including their history, politics, legal system, socio-economic and cultural background, or the extent to which the domestic order receives international and comparative law. The demographic and political weight of indigenous peoples and their organizations in the public scene and their effective participation in Constituent

²¹⁰ *Id.* art. 191.I.

²¹¹ *Id.* art. 191.II.

²¹² *Id.* art. 192.

²¹³ *Id.* art. 193.I.

²¹⁴ CLETUS GREGOR BARIÉ, *PUEBLOS INDÍGENAS Y DERECHOS CONSTITUCIONALES EN AMÉRICA LATINA: UN PANORAMA* 548 (Bol. Ed. 2003).

²¹⁵ *Id.*

Assemblies also constitute a key tool in order to interpret the heterogeneous panorama of constitutional recognition in Latin America.

Moreover, international instruments that refer to indigenous peoples do not contain any explicit obligation of constitutional recognition upon States. Consequently, an international consensus on the significance, achievement, and features of constitutional recognition for indigenous peoples does not exist. Despite the lack of this consensus, it is possible to build a framework of minimum standards for the rights of indigenous peoples through the use of international human rights instruments, including ILO Convention No. 169 and the U.N. DRIPs. These minimum standards will serve as a basis for the recognition of indigenous peoples and the proclamation of their rights within the constitutional norms. The rights to non-discrimination, self-determination, cultural integrity, property, use, control, and access to lands, territories, and resources, and to the development, participation, and social well-being, constitute the essential elements of the international standard of indigenous peoples' rights.²¹⁶

At the present time, there exist various studies about the constitutional recognition of indigenous rights within comparative law.²¹⁷ Nevertheless, it is very rare to find an attempt to identify any model of recognition. In this context, it is important to emphasize that in Cletus Gregor Barre's work, *Indigenous Peoples and Constitutional Rights in Latin America: A Panorama*, the author proposes a classification based on three types of constitutions in twenty-one Latin American countries. The first group does not contemplate any mention of indigenous peoples (Belize, Chile, French Guyana, Suriname, and Uruguay); the second group makes reference in some way or another to the indigenous issue (Costa Rica, El Salvador, Guyana, and Honduras); and, finally, the third group represents the "vanguard" of constitutional recognition in Latin

²¹⁶ James S. Anaya, *Los derechos de los pueblos indígenas*, in Mikel Berraondo, *Pueblos Indígenas y Derechos Humanos*, 53-60 (Mikel Berraondo coord., Instituto de Derechos Humanos, Universidad de Deusto, Bilbao 2006); CEPAL, *supra* note 141, at 148-56; José Bengoa, *Relaciones y arreglos políticos y jurídicos entre los estados y los pueblos indígenas en América Latina en la última década*, 92 Serie Políticas Sociales (Santiago), Aug., 2003, available at http://www.eclac.org/publicaciones/xml/3/13273/lcl1925_P.pdf.

²¹⁷ CONSTITUCIÓN Y DERECHOS INDÍGENAS (ed. Jorge Alberto González Galván, 2002), available at <http://www.bibliojuridica.org/libros/-libro.htm?l=278>; Bartolomé Clavero, *Derechos indígenas y constituciones latinoamericanas*, in *Pueblos Indígenas y Derechos Humanos* (2006), available at <http://www.ibcperu.org/doc/isis/9002.pdf>

America.²¹⁸

In an attempt to systematize the distinct constitutional experiences in the region, an elaborated a matrix has been compiled. It includes nine variables, which correspond to the issues that we have analyzed in the previous sections, marking information with the content of fifteen Latin American constitutions that recognize indigenous peoples in some form or another. This matrix enables a more synthetic and quantitative analysis of the breadth of the constitutional recognition of indigenous peoples in the region.

Country	People	Cultural Diversity	Lands and territories	Natural Resources	Self-Determination	Indigenous languages	Bilingual education	Political participation	Customary indigenous law
Argentina	X	X	X	X			X		
Bolivia*	X	X	X	X	X(A)	X	X	X	X
Brazil		X	X	X		X			
Colombia	X	X	X	X	X(A)	X	X	X	X
Costa Rica		X				X			
Ecuador**	X	X	X	X	X	X	X	X	X
El Salvador		X				X			
Guatemala		X	X			X	X		
Honduras		X							
Mexico	X	X	X	X	X(A)	X	X	X	X
Nicaragua	X	X	X	X	X(A)	X	X	X	

²¹⁸ BARIÉ, *supra* note 214, at 548-50.

Panama		X	X			X	X(B)	X	
Paraguay	X	X	X		X	X	X	X	X
Peru		X	X			X	X		X
Venezuela	X	X	X	X		X	X	X	X

* New Bolivian Political Constitution, ratified by referendum in January, 2009.

** New Ecuadorian Political Constitution, ratified by referendum in September, 2008.

X(A) Constitutions that specifically mention indigenous peoples' right to autonomy.

X(B) The Constitution of Panama utilized the term *bilingual literacy*.

Within this matrix, the X signifies the explicit utilization of the terminology of the topics in the constitutional norms, with the exception of the topic “cultural diversity” and “customary indigenous law”. In those two cases, the X refers to the defined concept in the comparative analysis. In quantitative terms, summing up the X for each country, one can identify three groups of countries:

- The first group (between 7 and 9 X), gathers the following countries, in decreasing order: Bolivia, Colombia, Ecuador, Mexico, Nicaragua, Paraguay, and Venezuela.
- The second group, (between 4 to 6 X), is composed, in decreasing order, of: Argentina, Panama, Peru, Guatemala, and Brazil.
- The third group, (between 1 to 3 X), includes, in decreasing order: Costa Rica, El Salvador, and Honduras.

In general terms, the number of X measures the scope of constitutional recognition, which could imply, only from a formal point of view, that the greater the number of X a country has, the greater protection it provides to indigenous peoples. Thus, in the case of Costa Rica, El Salvador, and Honduras, constitutional recognition is very tenuous, since these countries only grant a generic protection to languages or indigenous cultures, without establishing indigenous peoples as subjects of collective rights.²¹⁹

²¹⁹ POLITICAL CONSTITUTION DE 1949 [CONSTITUTION] art. 76; CONSTITUCIÓN DE LA REPUBLICA DE EL SALVADOR [CONSTITUTION] Dec. 15, 1983, art. 62; CONSTITUCIÓN POLÍTICA DE LA REPUBLICA DE HONDURAS DE 1982 [CONSTITUTION] Jan 11, 1982, art 173.

This simple quantitative lesson constitutes comparative parameters, but fails to show the complexity of the Latin American constitutional panorama. As a result, within these same groups, there exists formal and substantial differences, including the amount of rights, their location, the formulation and terminology employed, and the content and achievement of constitutional norms, such as that illustrated in the following paragraphs.

The presence of a topic in the constitution can shape itself within an article or in various articles. For instance, with regard to education and indigenous peoples, the new Bolivian Constitution contains approximately ten articles, while that the Constitution of Ecuador only has two.²²⁰ Another example of this dispersion can be seen in the location of articles on cultural diversity: for instance, article 1 of the Constitution of Ecuador establishes a plural-cultural, multi-ethnic character while the Constitution of Paraguay identifies this issue in article 140.²²¹

From the perspective of the formulation and terminology used, the “customary indigenous law” variable does not receive the same semantic treatment in the Constitutions of Paraguay and Venezuela. In Paraguay, the term “customary indigenous law” is explicitly used while Venezuela’s Constitution refers to “instances of justice with a base in their ancestral traditions.”²²² Moreover, in reference to “bilingual education,” the Constitution of Panama speaks of “bilingual literacy” while the Argentine Constitution uses the phrase, “the right to a bilingual and intercultural education.”²²³

Finally, with regard to the contextual differences and achievement of constitutional norms, the Constitution of Argentina only recognizes in a general way the possession and communal property of “indigenous lands.” Brazil explicitly states the obligations of the State and the fundamental characteristics of the rights pertaining to them.²²⁴ In the field of

²²⁰ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, arts. 78.I, 79, 82, 83, 84, 86, 91, 93.IV, 96, 97.I (Bol.); CONSTITUCIÓN POLÍTICA DE 2008 [C.P.] [CONSTITUTION] Sept. 2008, art. 66, 69 (Ecuador).

²²¹ CONSTITUCIÓN POLÍTICA DE 2008 [C.P.] [CONSTITUTION] Sept. 2008, art. 1 (Ecuador); CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY [CONSTITUTION] June 20, 1992, art. 140.

²²² CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 30, 1999, art. 260; CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY [CONSTITUTION] June 20, 1992, art. 63.

²²³ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ DE 1972 [CONSTITUTION] art. 84; Art. 75.17, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

²²⁴ Art. 75.17, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 231 (Braz.).

“political participation,” the Mexican Constitution foresees, only at a municipal level, the election of council, or town hall, representatives for indigenous peoples;²²⁵ in contrast, the new Bolivian Constitution recognizes indigenous peoples’ right to political participation within the organs of the State,²²⁶ such as guaranteeing membership for two indigenous representatives in the Plural-National Electoral Council.²²⁷

IV. FINAL COMMENTS

In the last few decades the constitutions of various Latin American countries have been changed, including progressively providing for the constitutional recognition of indigenous peoples and their rights.

This article analyzed a broad spectrum of Latin American constitutions. From a quantitative point of view, there exists a variety of constitutional models, from constitutions that contain a great amount of constitutional norms referring to indigenous peoples and their rights (Bolivia and Ecuador, for example) to constitutions with a minimum level of recognition or even without any recognition at all.

Although the constitutional recognition appears very disparate and heterogeneous in the region, these changes have generated symbolic and material scenery for the definition of the position of indigenous peoples’ rights in the internal organization of each State, thus responding to one of the fundamental aspirations of indigenous peoples.

One can conclude that the amount of constitutional norms is an element of extreme relevance but it is not a key factor in achieving protection for indigenous peoples and their rights in practice. It is noteworthy, above all, that the totality of domestic legal orders show a resolute and firm willingness towards this protection, which should influence the planning, design, execution, and evaluation of public policies.

The analysis of the constitutions in this study has evidenced an impressive diversity. There exists a variety in the terminology utilized to speak about indigenous peoples. There exists diversity in the constitutionally recognized rights, especially with regard to language and culture, there exists diversity in the scope of these recognitions, etc.

It is precisely in this point where human rights can configure them-

²²⁵ Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 2.A.VII, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

²²⁶ CONSTITUCIÓN DE 2009 [CONSTITUTION] Feb. 7, 2009, art. 30.II.18 (Bol.).

²²⁷ *Id.* art. 206.II.

selves as a real possibility of being a light in the darkness, and in that manner orienting, guiding, and above all, unifying concepts and contents. One should not forget that the standards agreed by the international community are minimum norms and principles. This article has also shown the relevance of the ILO Convention No. 169 and the U.N. DRIPs. In other words, the search for constitutional recognition is not just justified by material reasons, in the sense of non-discrimination against a community or people in particular, with a determined ethnic component. Rather, the purpose is to shift domestic rights to a new standard of rights, particularly in regards to human rights, and also to incorporate developments from the advances achieved by other constitutional orders, such as those seen in Latin America.

However, evidence has shown that constitutional recognition, pure and simple, is not sufficient. Indeed, there still exists a gap between constitutional recognition on paper and the effective fulfillment of the rights in practice. More than just recognition in the constitution, Latin American societies need a firm rule of law and a determined commitment by all actors, state and private, for the protection of human rights for all, without any distinction.

From a comparative perspective, it is important to emphasize that the recognition of indigenous peoples in constitutional norms has come to fruition thanks to an arduous defense by indigenous peoples and an active pressure from non-governmental organizations. This process of claims is centered upon the argumentation and language of human rights, particularly, in the key issue of collective rights of indigenous peoples. This is consistent with the prohibition of discrimination and the principle of equality before the law, and their right to be different and, definitely, to control their own existence, which was recognized, *inter alia*, at the international level by the Declaration on Race and Racial Prejudices, adopted by UNESCO in 1978.