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**Constitutional reform and the importance of harmonization with international treaties: cases of successes and reforms on Indigenous Peoples**

I want to thank the organizers for inviting me today. I hope my presentation honors the memory of Professor Nin Tomas, to whom this lecture is dedicated today. The teaching and research of Nin Tomas have significantly advanced the theoretical and practical understanding of Indigenous Peoples' rights, notably among the Māori People. Today, we gather to commemorate her and strive to deepen our engagement in this ongoing discourse, furthering her legacy.

Today, you have entrusted me with a rather difficult task: discussing constitutional reforms in Indigenous Peoples' rights and identifying some success stories.

Constitutional recognition of Indigenous Peoples' rights in certain countries has been pivotal in safeguarding Indigenous Peoples' collective rights. Across the globe, we witness various exemplary cases, each tailored to the unique context of its respective country. Consequently, there isn't a one-size-fits-all solution. Today, I aim to shed light on instances where constitutional recognition has propelled the implementation of international human rights instruments, such as the UN Declaration on the Rights of Indigenous Peoples.

Before discussing today's topic in detail, it's crucial to acknowledge that constitutional reforms, no matter how well-crafted, cannot yield results in the absence of a social context free from structural racism and where the principle of interculturality is understood as full respect for indigenous culture and identity on equal terms. True progress requires not only formal recognition of Indigenous Peoples' constitutional rights but also a legal framework capable of implementing them, along with constitutional courts that interpret them in accordance with international standards for Indigenous Peoples.

We have examples of constitutional courts that have done an excellent job of interpreting and advancing the implementation of Indigenous Peoples' rights, such as the Constitutional Court of Canada and the Colombian Constitutional Court. From this point of view, it is very important that the composition of these Courts is not influenced by the political power of the government of the day but that the Courts only decide based on the law. It is also essential that Indigenous Peoples are represented in the composition of the judges of the constitutional courts. For example, one of the judges in Canada is an indigenous Metis.

To promote the application of Indigenous Peoples' law and their participation in the judiciary, some Constitutions have established ad-hoc rules. As an example, in Bolivia, the constitution requires that the evaluation of qualifications for a Supreme Court justice position consider the experience in the indigenous justice system; it also requires a mixed composition of the Court based on ‘plurinationality’, with the representation of indigenous legal systems, and it requires representation of Indigenous Peoples in the Departmental Electoral Courts.

This is a good practice that can contribute to the effective implementation of Indigenous Peoples' rights.

Another critical aspect to highlight is that many Constitutions sanction international human rights treaties as a check on constitutionality, known as a ‘constitutionality block’. So, in this case, even if the Constitution does not explicitly mention the rights of Indigenous Peoples as enshrined in the UN Declaration, the courts can always protect them as a parameter of constitutionality. For example, Article 1 of the Mexican Constitution establishes that in the United Mexican States, all persons shall enjoy the human rights recognized in the Constitution and the international treaties to which the Mexican State is a party.

The case of Ecuador is particularly relevant, as Article 11 of the Constitution recognizes that human rights enshrined in international instruments, including the UN Declaration on the Rights of Indigenous Peoples, are directly applicable and justiciable. This provision serves as a vital tool for the domestic application of UNDRIP.

In some jurisdictions, such as Bolivia and Canada, the UN Declaration has been decided to be implemented domestically by law.

Bolivia was the first state in the world to adopt the UN Declaration with a national law (N. 3760 of 2007).

Most recently, in June 2021, the UN Declaration on the Rights of Indigenous Peoples Act, which implements the UNDRIP at the federal level, came into force in Canada. The Act provides a roadmap for the Government of Canada and Indigenous Peoples to work together to implement the Declaration. The Act requires Canada to harmonize its legislation, including the Indian Act, with the rights set out in the Declaration. In addition, an action plan was adopted in June 2023. The action plan includes 181 measures to implement the legislation and the Declaration in general, including action 32, concerning, *inter alia,* the development of guidance on free, prior, and informed consent about natural resource projects.

I found the proposal by Canada's indigenous organizations to establish an independent, indigenous-led human rights commission, tribunal, or ombudsman to monitor and enforce state compliance and progress in implementing the UN Declaration on the Rights of Indigenous Peoples Act particularly relevant. This may be a good model to replicate in other countries, so I invite you to follow closely the development of this proposed resolution in Canada.

Now, let's briefly examine how specific Constitutions and constitutional court decisions have applied and implemented the rights of Indigenous Peoples as outlined in the UN Declaration on the Rights of Indigenous Peoples and other international instruments.

We'll begin by discussing the recognition of perhaps the most significant right: the right to self-determination of Indigenous Peoples.

The right to self-determination is well established at the international level. For example, Article 3 of the UN Declaration on the Rights of Indigenous Peoples states, "Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and pursue economic, social, and cultural development."

As a first aspect of Indigenous Peoples' right to self-determination, about constitutional reform, it is necessary that the reform take place in consultation with Indigenous Peoples and that Indigenous Peoples have a real opportunity to participate in this reform by influencing its content. Many constitutions we have today have not gone through this consultative process. Only recently, in Chile, we have seen an excellent example of Indigenous Peoples' participation in constitutional reform. During the 2020 constitutional reform, 17 seats were allocated to Indigenous Peoples' representatives in the constituent body formed to draft the new constitution. The proposal drafted by the body, which included several provisions on Indigenous Peoples' rights, was rejected in a referendum in September 2022.

Last year, I went on a country visit to Denmark and Greenland, and I learned about the process and that the Inuit people have started to adopt a Greenland Constitution. As you know, Greenland is an extensive self-.
Governance that is an inspiring example of the implementation of Indigenous self-
Determination for many Indigenous Peoples worldwide. In 2016, the Parliament of Greenland established a Constitutional
Commission and the constitution draft was presented to the Parliament in April 2023.
The draft text asserts that: “Inuit are the Indigenous People.
of our land.” Further draft provisions underline that Greenland is based on collective rights and that the principle of the common ownership of all land, sea, and resources is inalienable. Progressive
language sets out the right to live in a clean and healthy environment protected on a
sustainable basis, and defines the notion that sustainable use entails caring for nature, the economy, and social and cultural sustainability. I invite you to follow the evolution of constitutional reform in Greenland closely.

An essential aspect of the right to self-determination is recognizing that the relationship between Indigenous Peoples and the State is on an equal footing. From this perspective, in some States, the implementation of treaties between Indigenous Peoples and the Crown is essential to ensure respect for the right to self-determination.

The 1982 Constitution in Section 35 in Canada recognizes the aboriginal and treaty rights of the First Nations, Inuit, and Métis peoples of Canada. The Canadian Government considers the inherent right of self-government of Indigenous Peoples as an existing treaty right under Section 35. This right is implemented through negotiated agreements among all the parties concerned. During my official country visit to Canada last year, I observed that the government of Canada has adopted an incremental approach to ‘modern treaty’ negotiations, which can be characterized as self-government agreements, sectoral agreements, and other constructive arrangements. Currently, there are approximately 185 self-government negotiation tables across the country at various stages of negotiation. Since 2015, 35 self-government agreements have been signed across Canada. In British Columbia, where many ongoing ‘modern treaties’
negotiations are underway, Canada worked with First Nations and the provincial government to develop the new Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia, endorsed in 2019, which states that Canada and British
Columbia endorsed the United Nations Declaration on the Rights of Indigenous Peoples as the foundation for the British Columbia treaty negotiations framework. Finally, Inuit peoples welcomed the establishment of the Inuit-Crown Partnership Committee, a forum that gathers Inuit leaders and federal ministers to work on shared priorities through structured workplans.

The Sámi parliaments and Finland, Norway and Sweden national legislatures adopted the draft Nordic Sámi Convention. The draft
convention safeguards and strengthens the right to self-determination of the Sámi, including land and resource
rights.

In detail, only a few Constitutions, such as that of the Plurinational State of Bolivia and Mexico, expressly recognize the right to self-determination of Indigenous Peoples. However, several Constitutions recognize and protect some aspects of this right. In this regard, a fundamental element of self-determination is the right to autonomy and self-government, as set out in Articles 4, and the right of Indigenous Peoples to maintain and strengthen their own political, legal, economic, social, and cultural institutions as set out Article 5 of UNDRIP.

Several Constitutions recognize the right to autonomy, such as the constitutions of Canada, Colombia, Ecuador, Nicaragua, and Panama. In Asia, Indigenous Peoples are recognized in at least five countries, for example, in the Constitution of the Philippines, which is one of the most progressive. However, this recognition seems to have had a minimal impact on the lives of Indigenous Peoples in the region.[[1]](#footnote-1)

About the right to self-government, a significant aspect is the political and administrative recognition of Indigenous Peoples’ institutions.

 Let's explore constitutions that recognize indigenous authorities, their legal and judicial systems.

The Bolivian Constitution delineates four types of autonomy: departmental, regional, municipal, and indigenous and peasant autonomy. Indigenous autonomy, as per the Constitution, is grounded in the ancestral territories currently inhabited by these peoples and nations, and it is to be exercised in accordance with their norms, institutions, authorities, procedures, powers, and competencies. These competencies include the elaboration of their Statute for the exercise of autonomy, management of their economic, social, political, organizational, and cultural development, administration of renewable natural resources, the exercise of indigenous jurisdiction, administration of taxes under their jurisdiction, and formulation, approval, and execution of their operational programs and budget. However, implementing this constitutional norm has presented significant challenges for Indigenous Peoples seeking to access autonomy and exercise the powers recognized in the Constitution.

In the Colombian Constitution of 1991, indigenous territories are considered territorial entities equal to departments and municipalities. These territories enjoy autonomy for managing their interests, the right to administer resources and establish taxes to fulfill their functions, and the right to be governed by their authorities through councils formed according to their law. Unfortunately, this norm has not yet been fully implemented.

Panama's Constitution permits the creation of 'special political divisions' by law, which has been utilized to establish the autonomous territory of Guna Yala.

The Constitution of Ecuador stipulates that Indigenous Peoples can establish indigenous territorial districts, which will be integrated into the political-administrative structure of the decentralized State. However, the intricate process of establishing indigenous territorial constituencies, the lack of state impetus, and their subordination to the administrative division and procedures of the State are factors contributing to the limited progress in their establishment.

In Peru, Indigenous Peoples can exercise certain autonomous powers through the organization of peasant and native communities and 'Ronda Campesina’. Article 89 of the Constitution recognizes that "peasant and native communities are autonomous in their organization, in the use and disposal of their lands, as well as in economic and administrative matters."

On another continent, the constitution of the Philippines creates autonomous territorial regions within the framework of national sovereignty, including the Cordillera region, with a majority indigenous population. In Sweden, since the constitutional reform undertaken in 2011, the Saami Council has been recognized in the Constitution, obligating the promotion of the maintenance and development of the Saami culture and people.

About the recognition of indigenous legal systems, the Constitution of Ecuador recognizes the exercise of jurisdictional functions by indigenous authorities and the application of their laws and procedures of justice that are not contrary to the Constitution and internationally recognized human rights. Additionally, it indicates that adequate coordination and cooperation will be established between the State and Indigenous justice systems. It also establishes the State's obligation to guarantee respect for the decisions of the indigenous jurisdiction.

In Colombia, indigenous legal systems are recognized in the Constitution. For this reason, decisions made by indigenous authorities have the same status as those made by State judges. The Bolivian constitution also recognizes indigenous justice systems.

Several Constitutions have established special bodies to facilitate the political participation of Indigenous Peoples. For example, Sámi parliaments are representative bodies created in Norway, Sweden, and Finland to facilitate consultations with the Sámi people on issues that affect them. The Ecuadorian constitution establishes the so-called ‘equality councils’ for the intersectoral mainstreaming of the rights enshrined in the Constitution.

To facilitate the political participation of Indigenous Peoples, some Constitutions have established mechanisms to ensure Indigenous Peoples’ representation in various State institutions.

For instance, Bolivia requires proportional participation of Indigenous Peoples in the national assembly based on the definition of special districts for Indigenous Peoples and elections for political representatives must follow ancestral indigenous practices.

Colombia guarantees seats in the national Senate for Indigenous Peoples. Nepal guarantees proportional representation of all groups, including Indigenous Peoples. In the USA, representatives of Indigenous Peoples' nations/tribes may be elected or appointed directly by these communities and must have a seat in the House of Representatives.

Another fundamental right that is well recognized internationally is the right to land, territory, and resources of Indigenous Peoples.

Many constitutions recognize the collective land rights of Indigenous Peoples. For example, the Guatemalan Constitution provides special protection and administration for Indigenous Peoples' territories. The Constitution of Ecuador recognizes the right of Indigenous Peoples to retain the imprescriptible ownership of their communal lands, which shall be inalienable, unseizable, indivisible, and exempt from taxes and duties.
Other Constitutions that recognize land rights include those of Argentina, Colombia, Paraguay, Brazil, Peru, Venezuela, Uganda, and the Philippines.

Several Constitutions grant Indigenous Peoples special rights to natural resources on their lands and territories and benefit sharing for activities carried out on their lands.

For example, the Colombian constitution recognizes Indigenous Peoples' right to oversee the conservation of natural resources in their territories and states that any exploitation must be carried out without harming the ‘integrity’ of Indigenous communities. Brazil requires the National Congress to consult Indigenous Peoples before approving the use of water resources or other mineral wealth on their lands. Bolivia recognizes the exclusive right of Indigenous Peoples to use natural resources on their lands and requires consultation with their own institutions prior to exploitation or other activities.

Despite the constitutional recognition of the right to land, territory, and resources, this right remains the most violated in many of these Sates. As Special Rapporteur, I have witnessed that very often local courts do not apply this right, in some cases due to pressure from parties with economic interests in indigenous lands or other cases due to disregard for the collective rights of Indigenous Peoples. Therefore, Constitutional Courts are essential to ensure an interpretation that is in accordance with international standards. From this point of view, I would like to point out some good practices.

Concerning indigenous rights over their lands, in a significant body of jurisprudence,the Canadian Supreme Court has established principles for the settlement of lawsuits concerning Indigenous land claims. In *Delgamuukw v. British Columbia,* the SupremeCourt affirmed that aboriginal title is a property right to land, including surface and subsurface resources, granted by the occupation at the time of the Crown’s assertion of sovereignty. In the milestone 2014 ruling, *Tsilhqot’in Nation v. British Columbia,* the Supreme Court, for the first time, granted a declaration of Aboriginal title to a First Nation. This was the first time
the Court had declared that Aboriginal title. The Supreme Court of Canada's decision echoed the UN Declaration by recognizing the Tsilhqot'in Nation's ancestral title to part of their traditional territory, giving them "the right to determine, subject to the limits inherent in collective ownership for future generations, the uses to which the land is put and to enjoy its economic fruits". The Court added that once the ancestral title was established, "the Crown must seek the consent of the Indigenous Peoples who own the land to carry out works on the relevant territory." These decisions are in line with the principle of free, prior, and informed consent set out in the UN Declaration.

 Moreover, in the same lawsuit, the Supreme Court addressed a historical controversy between the Canadian government and Indigenous Peoples, clarifying that " the doctrine of terra nullius (that no one owned the land before European assertion of sovereignty) never applied in Canada.”

The *terra nullius* doctrine is still an open wound for many indigenous Peoples. For this reason it was essential the step taken by the Vatican in April 2023, when the Vatican rejected the 'Doctrine of Discovery', a 500-year-old Catholic decree that was used to justify the seizure of indigenous lands by colonial powers. On that occasion, I called upon all States to reject it.

Another example of recognition of land and territorial rights is the 2015 Caribbean Court of Justice decision that ruled in favor of the indigenous Q'eqchi and Mopan Mayan communities in southern Belize. In the judgment, the Court, which also invoked Article 32 of the UN Declaration, recognized and upheld the communal ownership and traditional use of ancestral lands of Indigenous Peoples' communities and ruled that the customary ownership of Mayan land should be protected under the Belize Constitution. However, implementation of the decision has been severely delayed, as the government has failed to engage with Indigenous Peoples to establish a mechanism to ensure legal protection of the
Maya's right
to their lands and the requirement of their free, prior and informed consent, in accordance with the provisions of the UN Declaration.

In 2021, the Norwegian Supreme Court ruled that a wind farm concession in an area of the Fosen peninsula violated the cultural rights of the indigenous Sámi people, as the windmills would prevent them from herding reindeer in the area. In 2020, the Swedish Supreme Court ruled in favour of the Sámi village of Girjas and restored their exclusive rights to fishing and small game hunting in their traditional territory.

On the issue of the right to consultation and free, prior, and informed consent, the UN Declaration states that the free, prior, and informed consent of Indigenous Peoples must be obtained before adopting laws, administrative acts, or projects that may affect the rights of Indigenous Peoples.

Some Constitutions recognise the right to consultation. For example, the Bolivian Constitution requires free, prior and informed ‘consultation’ and participation in development processes, indicating that consultations with Indigenous Peoples must follow their own rules and procedures. The Venezuelan Constitution requires prior information and consultation with indigenous communities.

Ecuador's Constitutional Court issued a groundbreaking ruling recognizing the right of Indigenous Peoples to give or withhold their consent to oil, mining, or other extractive projects on their lands. This decision contributes to achieving the goals set out in the UN Declaration.

Indigenous Peoples have also mobilized domestically to protect their right to consultation. For example, in Brazil and Colombia, Indigenous Peoples developed their protocol for consultation and consent. In this regard, in a 2016 decision, the Colombian Constitutional Court required the government to consult with an Indigenous Peoples' community in accordance with its autonomously developed consultation protocol.

In conclusion, let me briefly highlight some exemplary practices for recognizing and safeguarding the cultural rights of Indigenous Peoples.

The Ecuadorian Constitution stands out as one that robustly protects the cultural rights of Indigenous Peoples, with the indigenous worldview being an integral part of the constitution itself. For instance, Sumak Kawsay, or good living—a concept rooted in indigenous philosophy—is enshrined within Ecuador's constitution. It defines critical areas such as water and food, culture and science, education, habitat and housing, health and work, the rights of communities, peoples, and nationalities, the rights of nature, the economy, and social participation and control. Moreover, according to indigenous cosmology, Pachamama is regarded as a living being, and the Constitution of Ecuador duly recognizes Pachamama as a subject of rights. Additionally, the constitution acknowledges and safeguards the knowledge of Indigenous Peoples alongside other forms of knowledge.

Bolivia serves as another exemplary case, with its constitution recognizing intercultural and multilingual education, along with imposing a positive obligation for universities to promote indigenous languages. In contrast, some constitutions, such as those of Venezuela, Colombia, and Brazil, merely acknowledge the right to bilingualism.

It is also important to mention that some constitutions protect the intellectual collective property rights of Indigenous Peoples, such as those of Bolivia, Ecuador, Venezuela, and the Philippines.

Let me conclude with some good examples of Indigenous Peoples implementing the UN Declaration on their initiative.

Let me say that the implementation of the UNDRIP required that Indigenous Peoples go through a process of Nation-building to strengthen their institutions or, in some cases, rebuild them if they were lost (e.g., of Pascua Yaqui).

In this light, it's imperative to engage in dialogue and draw insights from the experiences of U.S. tribal nations that have devoted considerable effort to fortifying their self-governance and advocating for constitutional reforms. Tribes such as the Navajo and the Pasqua Yaqui stand as exemplars, undertaking extensive and fruitful attempts to revitalize their institutions, which endured significant challenges during the era of colonization.

For instance, the Navajo tribe has the Navajo Nation Council, which has the authority to pass laws governing the Navajo Nation. The Legislative Branch contains various offices and boards, which are administered by the Speaker of the Navajo Nation Council.

Many tribes have departments dedicated to implementing specific policies, like the health and education departments.

They also have a system of courts that makes decisions based on their legal system, and in some cases, they have their own prison system. Particularly relevant is the experience of Navajo people who have “recovered” the Navajo legal system.

Some U.S. tribes have adopted their own constitutions by creating a constitutional change committee or commission.

For instance, the Yurok tribe created a constitution committee to get input from tribe members and guarantee the representation of their ancestral authorities. The resulting Yurok Tribe Constitution regulates the tribe's institutions, membership, legal system, and bill of rights.

Furthermore, the Gila River Indian Tribe has embarked on a significant initiative to fortify its institutions and territorial rights. Notably, the tribe has enacted legislation endorsing the UN Declaration on the Rights of Indigenous Peoples, affirming its commitment to upholding indigenous rights internationally.

Other tribes have taken steps to implement the Declaration on the Rights of Indigenous Peoples, such as the Muscogee (Creek) Nation, which translated substantial parts of the UN Declaration into the Muscogee language and the Principal Chief and Chairman of the
Muscogee Nation National Council
signed their own Declaration on the Rights of Indigenous Peoples in 2016.

We can have other experiences on other continents. For instance, the Indigenous Peoples of North Siberia and the Far East in the Russian Federation adopted their own strategic program, entitled "Indigenous 2021: Land, Traditions and Future." In addition, at its seventh meeting, the Congress of the Finno-Ugric Peoples adopted a resolution on sustainable development. Both documents echo many articles of the UN Declaration.

The Wampís Nation, situated in the Amazonian region of Peru, has taken a significant step by proclaiming itself a nation and enacting its Statute of the Autonomous Territorial Government. This initiative reflects years of concerted efforts by the Wampís Nation to consolidate their ancestral territory and assert their autonomy. These efforts were prompted by the limitations of national legislation, which primarily focused on individualized titling under the framework of native communities. Additionally, the proclamation of autonomy serves as a response to state policies that prioritize natural resource exploitation in the Amazon region, which have adversely impacted the territorial and cultural integrity of Indigenous Peoples, among other concerns.

Thank you for your attention, I will now leave space for your questions and comments.

1. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/215/51/PDF/G2121551.pdf?OpenElement [↑](#footnote-ref-1)