

Mechanisms for Indigenous Representation, Participation and Consultation in Constitutional Systems

International Examples to Inspire Chile





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Shireen Morris

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Introduction

At around 13 per cent of the population, Indigenous peoples represent a significant and highly disadvantaged minority in Chile.¹ Like many Indigenous peoples globally, they suffered dispossession and discrimination by colonizing forces, and did not have a fair say in the development of successive constitutions establishing new political systems on their land. Indigenous peoples in Chile are therefore structurally disempowered, with little voice in the political system or in the political decisions made about their rights.

The current opportunity: A new constitution

In the October 2020 referendum, Chileans voted to create a new constitution. This presents an opportunity for Indigenous peoples to create a fairer power relationship with the Chilean state. For the first time, the constitutional convention includes a specific quota for 17 Indigenous representatives. This will enable Indigenous peoples to contribute to the constitutional design process and argue for reforms to better recognize their rights and interests.

What kinds of constitutional reforms could Indigenous representatives advocate? This paper presents comparative examples of self-determinative institutional mechanisms that empower Indigenous peoples to be heard by and influence decision-making in state institutions. The focus of the paper is on options for institutional structures that enable Indigenous representation, participation and consultation with respect to Indigenous peoples' own affairs. In exploring such mechanisms, the paper seeks to support current constitutional conversations and arm Indigenous Chileans with information and options to help them negotiate a fairer place in the new constitution.

This paper should be read in conjunction with International IDEA's *Indigenous Peoples' Rights in Constitutions Assessment Tool* (IPCAT), which discusses a

number of questions paired with explanations and comparative constitutional examples to illustrate how Indigenous rights are recognized in constitutions around the world (International IDEA 2020).²

Historical and constitutional context

The contemporary constitutional position of Indigenous peoples is informed by Chile's colonial history. This history is characterized by Indigenous displacement, dispossession and discrimination by colonizing forces, as well as Indigenous resistance and survival.

The Treaty of Tiahueco of 1825 sought to end military conflict between the Indigenous Mapuche and the colonizing state. The Mapuche recognized Chilean state sovereignty and the state reciprocally recognized Mapuche rights to autonomy and self-government in their territories. By 1866, however, the Treaty's terms had been breached by the more powerful state, which appropriated Indigenous lands (Crow and Santa Cruz 2018: 39–58, 55–58). Reflecting the assimilationist policies and attitudes of the era, the 1882 Constitution empowered Congress to 'civilize' the 'Indians of the territory', demonstrating the top-down colonial relationship (Donoso et al. 2021). No constitution since has made any mention at all of Indigenous peoples. Chile and Uruguay are now the only countries in the region without any Indigenous constitutional recognition (Fernandez 2020).

Contemporary efforts to more justly recognize Indigenous peoples have yielded mixed results. While previous attempts at Indigenous constitutional recognition (albeit in weak, protectionist terms) have failed to pass Congress, the Indigenous Law (Law No. 19 of 1993) created a registry of Indigenous lands and mechanisms for state recognition of Indigenous land and communities. It recognizes Indigenous people as 'the descendants of human groups that have existed in the national territory since pre-Columbian times' and obliges the state to protect and promote 'the development of indigenous peoples, their cultures, families and communities...' (article 1).

The Indigenous Law also requires the state to 'listen to and consider the opinion of the Indigenous organizations recognized by this law' when dealing with relevant matters (article 34). The National Corporation for Indigenous Development (CONADI) was established in 1993 to facilitate this aim.³ Although composed of both Indigenous and non-Indigenous representatives, for the first time its Indigenous members were to be chosen by Indigenous people themselves. However, Indigenous turnout at elections has been low, CONADI's director is appointed by the President without Indigenous consultation, and the institution lacks independence from the state. It has not provided a robust Indigenous representative and consultative mechanism, and the reforms have

fallen short of Indigenous expectations (Rodriguez and Carruthers 2008: 3, 5–7; Gazmuri 2018; Pizarro-Escuti 2021).

Despite the Indigenous Law's lofty aims regarding Indigenous political participation, Indigenous Chileans remain significantly underrepresented in political institutions (IPU 2014).⁴ Efforts to enable Indigenous consultation and participation, including on attempts to reform the Indigenous Law, have been piecemeal and insufficient (Albert 2019).

International law

The marginalized position of Indigenous peoples in Chile appears at odds with the principles of Indigenous self-determination under international law, which require Indigenous peoples to be able to exercise agency in their affairs.⁵ Self-determination need not entail separatism: it can be achieved within a united nation that makes accommodation for Indigenous peoples to be politically empowered and meaningfully heard in decisions made about them. Facilitating this kind of 'internal self-determination', International Labour Organization (ILO) Convention No. 169 (which Chile ratified in 2009) requires Indigenous consultation and participation in the making of laws and policies that impact them (articles 6 (1)(a) and (b)). Echoing the ILO, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) calls for Indigenous participation and consultation on relevant state decision-making.⁶

A new Chilean constitution could incorporate institutional arrangements that put these principles into practice. In line with principles of self-determination, such constitutional mechanisms should be chosen, designed and implemented in genuine collaboration and consultation with Indigenous peoples.

Endnotes

1. There are 10 distinct Indigenous Peoples currently recognized in legislation: the Aymaras, the Quechuas, the Changos, the Atacameños, the Collas, the Diaguitas, the Rapa Nui or Pascuenses, the Mapuche, the Kawashkar or Alacalufes and the Yá-manas or Yaganes (Law No. 19 of October 1993, the ‘Indigenous Law’, p. 253; Donoso et al. 2021).
2. Spanish translation forthcoming.
3. CONADI aims to empower Indigenous people ‘as agents of their own political futures’ by enabling them to ‘express their own ideas about how their communities should develop’ (Rodriguez and Carruthers 2008).
4. They appear to be more underrepresented than Indigenous people in other Latin American countries such as Bolivia, Ecuador, Mexico and Peru (IPU 2014: 6; see also Hoffay and Rivas 2016).
5. Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples, to which Chile has acceded, provides that ‘Indigenous peoples have the right to self-determination’ and ‘by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.
6. Article 18 of the UNDRIP states that: ‘Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions’. Article 19 of UNDRIP states that: ‘States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them’.

1. Preliminary identification questions

A basic question relevant to the design and implementation of institutional arrangements that enable Indigenous representation, participation and consultation concerns who will be represented. How will Indigenous identity be ascertained for the purposes of the institutions?

In Chile, the current Indigenous Law defines Indigenous persons as those who have an Indigenous parent, including adoptive parents; those descended from Indigenous groups, ‘provided they have at least one indigenous surname’;¹ and those who maintain the cultural traits of an Indigenous group or whose spouse is Indigenous (article 2). It further provides that Indigenous accreditation can be conferred by CONADI, a person’s Indigeneity may be challenged by another (article 3), and penalties apply where a person pretends to be Indigenous to obtain economic benefit (article 5). (To see how this approach aligns with comparative practice in other countries, see IPCAT Question 1.)

Some countries set out their identification rules in ordinary legislation, while others entrench them in the constitution and elucidate further details (including processes for recognition by the state) by statute. For example, the **Bolivian Constitution** (2009) provides that: ‘A nation and rural native indigenous people consists of every human collective that shares a cultural identity, language, historic tradition, institutions, territory and world view, whose existence predates the Spanish colonial invasion’ (article 30(I)), and 36 Indigenous peoples are recognized by the state (International Work Group for Indigenous Affairs n.d.a). **Paraguay’s Constitution** (1992) recognizes ‘the existence of indigenous peoples, defined as cultural groups prior to the formation and organization of the Paraguayan state’ (article 62) and the Statute of Indigenous Communities of 1981 established a National Register of Indigenous Communities (Law No. 904/81). The **Canadian Constitution** (1982) defines Aboriginal peoples as ‘the Indian, Inuit and Métis peoples of Canada’ (section 35), while the evolving and

controversial Indian Act 1876 distinguishes between Status Indians (who appear on the Indian Register) and Non-Status Indians (who are not registered with the federal government) (Indigenous Foundations n.d.).

In **Australia**, a three-part definition of Indigeneity has operated since the 1980s, developed in common law and statute. It requires: (a) Aboriginal and/or Torres Strait Islander descent; (b) self-identification as an Aboriginal and/or a Torres Strait Islander; and (c) acceptance by the community as an Aboriginal and/or a Torres Strait Islander.² Where proof is required, usually for accessing Indigenous-specific services, this is provided through a 'Confirmation of Aboriginality' from an Indigenous community organization (AIATSIS, n.d.). In **New Zealand**, legislation defines a Māori as 'A person of the Māori race of New Zealand' including 'any descendant of such a person' (Māori Land Act 1993, section 4). An iwi (tribe) registration letter or other evidence of ancestry may be requested for access to Māori-specific benefits (University of Otago n.d.).

The **Norwegian Sámi Act 1987**, which established the Sámi Parliament (an Indigenous consultative body discussed below), provides that anyone who makes a declaration claiming Sámi identity may demand to be registered as a Sámi elector in their municipality, provided that they: (a) have Sámi as their domestic language; (b) have or have had a parent, grandparent or great-grandparent with Sámi as his or her domestic language; or (c) are the child of a person who is or has been registered in the Sámi electoral register (section 2.6).

In **Finland**, legislation states that a Sámi person can self-identify provided that: (a) he or she has at least one parent or grandparent who learned Sámi as their first language; (b) he or she is a descendent of a person who has been entered in a land, taxation or population register as a mountain, forest or fishing Lapp; or (c) at least one parent has or could have been registered as an elector for an election to the Sámi Delegation or the Sámi Parliament (Act on the Sámi Parliament 1995, section 3).

These examples illustrate the variety of approaches that can be taken to Indigenous identification. Identification rules should avoid unfairly excluding Indigenous people who have suffered cultural, language, land or other losses as a result of colonization (see the discussion in Morris 2021). Both the ILO Convention No. 169 and IPCAT Question 1 recognize that individuals and groups should be enabled to self-identify as Indigenous or opt out as they choose. Crucially, the rules for Indigenous identification should be developed in collaboration and consultation with Indigenous people. They should not be imposed.

Endnotes

1. It also specifies that a non-Indigenous surname will be considered Indigenous if its Indigenous origin can be proven for three generations.
2. See e.g. the definitions in the Aboriginal Land Rights Act of 1983 (NSW), section 4.

2. Constitutional mechanisms to enable Indigenous representation, participation and consultation

Realizing principles of Indigenous self-determination requires institutional mechanisms that enable Indigenous peoples to genuinely participate, be represented and be consulted in state political decision-making that impacts them. The following sections explore comparative examples of constitutional and institutional structures that facilitate these aims. They discuss Indigenous reserved legislative seats; Indigenous representation in the executive, the judiciary and fourth branch institutions; Indigenous representative and consultative bodies; state duties to consult with Indigenous peoples; and treaties and agreement-making.

2.1. Reserved seats in the legislature for Indigenous Peoples

Some countries guarantee Indigenous representation in the legislature by reserving Indigenous peoples legislative seats. There is significant variation in how this is implemented in different countries (for comparative examples, see IPCAT Question 14). Constitutional reformers should consider whether reserved seats are desirable, how many seats should be reserved and how representatives should be chosen, as well as how the Indigenous electoral population should be defined. The examples discussed below may help generate ideas.

New Zealand

Māori comprise around 16.7 per cent of New Zealand's population. The unicameral parliamentary system has incorporated reserved Māori seats since

1867 (Stats NZ 2020). These seats were initially a colonial tool of political control. Māori were in the majority in the 1860s, so their power was constrained by limiting their electoral voice to just four reserved seats (Māori Representation Act 1867; Lloyd 2009: 5) while Europeans had 72.¹ New Zealand has no entrenched constitution, so parliament can alter any constitutional arrangement through ordinary legislation.² This institutional flexibility has allowed constitutional design to evolve and facilitated increased Māori representation over time. However, their unentrenched status also means the Māori seats are vulnerable to legislative abolition.

The number of Māori reserved seats was increased from four to five in 1996, and then to seven in 2002.³ Enhanced representation was also bolstered by a change in the electoral system, when New Zealand moved from majoritarian first-past-the-post (FPTP) voting to mixed member proportional representation (MMP) in the 1980s. MMP gives electors two votes: one for a specific candidate who will represent the voter's single-seat electoral district, and one vote for their preferred political party. This results in a mixed membership in parliament, with some seats held by the winning candidates from single-seat territorial districts and the rest allocated proportionately to political parties based on their share of the party vote nationwide. The change to MMP increased the responsiveness and diversity of parliament, further bolstering Māori representation.⁴ In addition to the reserved seats, more Māori now also sit in the general seats, while the emergence of the Māori Party has helped amplify Māori interests.

There are currently 7 reserved Māori seats out of 120, one seat for each of seven Māori electoral districts (New Zealand Parliament 2020). The seven Māori electorates cover the entire country and territorially coexist with the general electorates. The Māori electoral population⁵ equates not to the total Māori population, but to the number of Māori electors registered on the Māori roll (New Zealand Electoral Commission 2020). Every Māori person can choose whether to vote on the Māori roll or the general roll (Electoral Act 1993 (NZ), section 76). Once enrolled, however, a Māori person can only change rolls during the 'Māori Electoral Option', which takes place usually every five years (New Zealand Electoral Commission n.d.). Although only Māori vote for the Māori seats, since 1967 candidates standing in those seats are not required to be of Māori descent (New Zealand Parliamentary Library 2009).

Bolivia

Indigenous peoples make up around 40 per cent of Bolivia's population (International Work Group for Indigenous Affairs n.d.a; World Directory of Minorities and Indigenous Peoples 2018). Bolivia has had reserved Indigenous seats since its Plurinational Constitution was established in 2009. Chapter IV of the Bolivian Constitution outlines the 'Rights of the Nations and Rural Native

Indigenous Peoples', which include rights to political participation. Article 147 provides that:

- I. Proportional participation of the nations and rural native indigenous peoples shall be guaranteed in the election of members of the assembly.
- II. The law shall define the special districts of the rural native indigenous peoples, in which population density and geographical continuity shall not be considered as conditional criteria.

These ambiguously worded provisions defer consideration of the institutional detail of the reserved seats to legislation. In practice, the proportional participation of Indigenous peoples was not achieved (IPU 2014). Indigenous advocates pushed for 18 reserved seats (Barié 2020: 13–14) but the Transitional Electoral Regime of 2009 (Law 4021) established seven 'special rural native indigenous districts' in the Bolivian lowlands (under articles 32 and 35), to be defined by the National Election Court (article 36). This reserved 7 seats out of 130 in the lower house for Indigenous peoples (or 7 Indigenous seats out of 166 members of the bicameral Plurinational Legislative Assembly). In the relevant rural areas, Indigenous electors can vote for an Indigenous deputy instead of participating in the general single-member district election (Election Guide 2020). However, the seven Indigenous deputies are expected to represent 41 Indigenous nations (Barié 2020: 17), and overall the reforms fell well short of Indigenous peoples' expectations. As one academic explained in a recent article:

Whereas in the early draft proposals, 42% of the deputies of a new plurinational Assembly were to be elected directly as indigenous representatives (Pacto de Unidad 2007, 214), this percentage decreased to 13.8% of deputies during the subsequent bargaining process ... and was finally set at 5.4%. This effect is even more evident in qualitative terms: in the original proposal, all indigenous peoples were considered (lowland/highland, minority/majority groups) and the election and appointment of representatives was guaranteed through a community's 'own authorities, institutions, mechanisms and procedures' without needing to register as a political organization. ... The final 2010 election law restricted participation to minorities groups in lowlands, set departmental limits, demanded registration as a political organization, and restricted the use of customary law to the appointment of candidates, leaving the election process itself unchanged. (Barié 2020: 14)

The Indigenous representatives in the reserved seats have tried to advocate for Indigenous issues, including by attempting to establish a cross-party Indigenous group, but several efforts have been blocked by the President who banned the cross-party initiative. According to one researcher, the independence of Indigenous contributions is stymied by both party loyalty and executive control (Barié 2020: 17–18). The reserved seats did not meet Indigenous ambitions for a power-sharing deal between constituent nations based on principles of self-determination and territorial autonomy (Barié 2020: 4, 13).

Other examples

Other Latin American countries also guarantee Indigenous representation in the legislature. For example, Indigenous people comprise around 3.4 per cent of the Colombian population (International Work Group for Indigenous Affairs n.d.b) and the 1991 **Constitution of Colombia** requires that 2 of the 102 Senate seats are ‘elected in a special national constituency for indigenous communities’.⁶ It also reserves one special Indigenous constituency (article 176) in the 172-seat House of Representatives (Congreso de la Republica de Colombia n.d.).

In **Venezuela**, Indigenous people comprise approximately 2.8 per cent of the population (International Work Group for Indigenous Affairs 2019). The 1999 Constitution provides that:

Native peoples have the right to participate in politics. The State shall guarantee native representation in the National Assembly and the deliberating organs of federal and local entities with a native population, in accordance with law.
(article 125)

Venezuela’s unicameral 277-seat National Assembly reserves three seats for Indigenous peoples, representing the three constituencies defined by National Electoral Council regulations (Bolivarian Republic of Venezuela 2020, article 4). Candidates must be Venezuelan, Indigenous and over the age of 21, and must speak the Indigenous language. They must also either have: (a) held a position of traditional authority in their respective community; (b) a known track record in the fight for recognition of their cultural identity; or (c) carried out actions for the benefit of Indigenous peoples and communities for a minimum of three years (article 6).

Mexico does not have reserved Indigenous seats as such, but since 2017 political parties must nominate Indigenous candidates for national elections in the 13 electoral districts (out of 500) that have Indigenous populations of more than 60 per cent. However, Indigenous peoples in Mexico remain severely underrepresented and there are moves to increase the number of districts that must nominate Indigenous candidates.

Africa provides examples of constitutional systems that guarantee political representation of ‘traditional leaders’. (In African countries, traditional leadership is usually not limited to Indigenous communities, and the term in these contexts usually refers more broadly to traditional, non-Western leadership operating in rural settings, although there is some overlap.) The **Uganda Constitution** (1995) requires its regional assembly to include ‘representatives of indigenous cultural interests in areas where there is a traditional or cultural leader, nominated by the traditional or cultural leader but not exceeding fifteen per cent of the members of the regional assembly’ (Fifth Schedule: Regional Governments, article 2(2)). Similarly, the **Zimbabwe Constitution** (2013) reserves 16 of the 80 Senate seats for traditional chiefs, to be elected by ‘the provincial assembly of Chiefs from each of the provinces, other than the metropolitan provinces, into which Zimbabwe is divided’. It also guarantees representation of the President and Deputy President of the National Council of Chiefs (see below) in the Senate (articles 120(1b) and (1c)). Chapter 15 of the Constitution details the role of traditional leaders and forbids them from participating in partisan politics (article 281(2)). As one expert notes, however, traditional leaders in practice ‘become politicians the moment they are appointed as Senator-Chiefs’, creating ‘conflicting legal demands’ (Chigwata 2016).

In Asia, the **Indian Constitution** guarantees reserved seats for the ‘Scheduled Tribes’ in the lower house of its national legislature and in state legislative assemblies. These time-limited provisions were set to expire in 2020 but were extended for a further 10 years (Indian Constitution 2020, articles 330, 332 and 334; *Economic Times* 2019). The number of seats reserved is proportional to the population (Ambagudia 2019). Scheduled Tribes form approximately 8.6 per cent of India’s population (People’s Archive of Rural India 2013), and they are allocated 47 reserved seats in the 543-seat lower house (UCA News 2021).⁷ Other Asian examples include the **Philippines Bangsamoro Organic Law** (2018), which establishes 2 reserved seats each in its 80-seat parliament for the Non-Moro Indigenous peoples (sections 6, 7 and 8), while the **Constitution of Nepal** (2015) guarantees proportional representation for all groups, including Indigenous peoples (articles 84(2) and 176(6)).

In the **United States**, the House Rules of the Parliament of the **State of Maine** reserve parliamentary ‘non-voting’ seats for local First Nations, which provides some opportunities to speak on legislation and join parliamentary committees. Further comparative examples on electoral mechanisms for ensuring Indigenous participation and representation appear in IPCAT Question 14.

Table 1. Reserved Indigenous seats in legislatures

Country	Approximate Indigenous population	No. of reserved Indigenous seats in national legislature	Total no. of seats in the national legislature	Structure of the legislature	Which house has Indigenous reserved seats?
New Zealand	16.7%	7	120	Unicameral	N/A
Bolivia	40%	7	166	Bicameral	Lower House
Colombia	3.4%	3	274	Bicameral	Both houses
Venezuela	2.8%	3	277	Unicameral	N/A
India	8.6% (Scheduled Tribes)	47	788	Bicameral	Lower House

Note: This table is only indicative; numbers may not be accurate as details of reserved seats are often in legislation or regulations which are often changed, and population estimates are difficult to verify. African examples have been omitted as these may not be strictly ‘Indigenous’ reserved seats. Further details on Nepal and the Philippines could not be obtained.

2.2. Indigenous representation in the executive, judiciary and fourth branch institutions

Many countries, such as Australia, Canada and New Zealand, have specialist Indigenous ministries and departments that enable the government to develop and administer policies, programmes and services specific to Indigenous peoples and affairs. Whether such ministries are led by Indigenous individuals is usually a matter of politics.⁸ However, Indigenous representation in the executive branch is guaranteed in some constitutions (see IPCAT Question 15).

In **Singapore**, Malays comprise around 13 per cent of the population (Index mundi 2020) and are recognized in the 1965 Constitution as the Indigenous people of the country.⁹ In 2016, Singapore implemented a Reserved Election Mechanism (REM) (article 19B), which requires that, within every five six-year term cycle, the role of elected president must be filled at least once by a member of each of the three ‘constitutionally defined’ communities. Accordingly, an election will be reserved for a particular community if no one from that group has been elected President in any of the four previous terms. Malays are defined in the REM as one of the three relevant communities (article 19B (6)).¹⁰ Legislation establishes Community Committees empowered to certify the community membership of presidential candidates (Presidential Elections Act 1993). In practice, the REM guarantees that a Malay person will be President at least once

every 30 years (Yim 2017: 1–2). In 2017, Halimah Yacob became President under the REM, which required that the election should only be open to Malays (Yong 2016). The fact that Yacob was also the only candidate to stand, as no other Malay met the other required criteria, led some to allege that the election was anti-democratic (Wong 2017).

The **Bolivian Constitution** approaches Indigenous representation in the executive in more general terms. It requires that the composition of the Cabinet must respect the ‘Pluri-National character of the country and gender equity’ (article 172) and specifies that, with the exception of elected judicial positions, candidates for public elected posts: ‘shall be proposed by the organizations of the nations and rural native indigenous peoples, citizen associations and political parties, in equal conditions and pursuant to the law’ (article 209). **Ecuador’s Constitution** (2008) requires the state to ‘adopt affirmative action measures to guarantee the participation of discriminated sectors’ in ‘its executive and decision-making institutions, and political parties and movements’ (article 65).

Indigenous peoples may also be guaranteed positions in the judiciary. (For more discussion and examples of how this has been done see IPCAT Question 16.) The **Bolivian Constitution** requires that the Pluri-National Constitutional Court must include ‘representation from the ordinary system and the rural native indigenous system’ (article 197). It also mandates Indigenous representation in Departmental Electoral Courts (article 206). The **South African Constitution** requires consideration of ethnic diversity in judicial appointments.¹¹ **Vanuatu’s Constitution** guarantees representation of the Malvatumauri Council of Chiefs (discussed below) on the Judicial Service Commission, which appoints judges (article 48(1)).

Other governmental institutions can also incorporate Indigenous representation. For example, **India, Nepal** and **Ecuador** mandate Indigenous quotas in the civil service and the military (see IPCAT Question 17). Similarly, the **Zimbabwe Constitution** requires that the Zimbabwe Gender Commission must include one member nominated by the National Council of Chiefs (discussed below) and appointed by the President (article 245 (1)(ii)).

2.3. Indigenous representative and consultative bodies

A potential downside of reserved Indigenous legislative seats and guaranteed executive positions might be that the Indigenous representatives become beholden to party politics, which can temper the extent to which they are able to independently and robustly advocate Indigenous interests.

To facilitate meaningful and independent expression of Indigenous opinions to the state, some countries use Indigenous representative, advisory and consultative bodies that are more separate from, independent of and external to the

government and legislature. Such bodies aim to provide an independent consultative mechanism for representing Indigenous views, to advise, inform and dialogue with the legislature and the executive on relevant Indigenous matters. National Indigenous institutions of this kind can be especially beneficial for uniting disparate Indigenous peoples and groups within the country, to enable them to exercise a more powerful collective national voice in their affairs—as long as the structure also allows different Indigenous groups to exercise their unique views on localized matters. These bodies may be established either complementary to or instead of reserved Indigenous seats and Indigenous quotas in established branches and institutions of the state. Some countries, such as New Zealand, for example, have both reserved legislative seats and a national Indigenous representative and consultative body, whereas others such as Vanuatu have instituted a traditional chiefs' representative and consultative body and do not reserve seats in the legislature.

Some Indigenous representative bodies have constitutional underpinnings, while others are purely creatures of legislation. Constitutional status may be sought to help ensure the institution's longevity, stability and authority, while legislative flexibility of design enables the institution to evolve. In **Australia**, for example, Indigenous advocates are calling for a constitutionally guaranteed 'First Nations voice', because the merely legislated Indigenous bodies of the past were abolished when they became politically inconvenient (Morris 2015, 2018, 2020). While in some countries legislated Indigenous bodies have developed into permanent institutions without specific constitutional underpinning, these countries usually have constitutional clauses that recognize Indigenous rights to self-determination (e.g. **Norway, Sweden and Finland**). Other countries (e.g. **New Zealand**) declare such principles in a treaty or treaties, which adds a sense of constitutional gravitas and permanency to the Indigenous institutional arrangements that flow from such recognition, and shows how mechanisms for Indigenous constitutional recognition can work together in an interconnected way.

In other instances, Indigenous bodies can be private entities. In **Australia**, one of the short-lived Indigenous bodies of the past was the National Congress of Australia's First Peoples, which was a private company. There was no legal requirement for the National Congress to be supported by the government, and no constitutional or legislative imperative for the National Congress to advise parliament or the government on Indigenous affairs. Its members often complained of a lack of engagement by political leaders (Henderson 2016) and the body closed down in 2019 due to lack of funding (Morgan 2019).

In **Canada**, the Assembly of First Nations (AFN), a national advocacy organization and deliberative assembly representing the Indigenous peoples of Canada, is not a legislated or constitutionally guaranteed body, though it relies largely on government funding (AFM n.d.; Canadian Encyclopedia 2019).

However, the AFN's sense of permanency and authority appears to have been bolstered by its history of engagement with the state. The AFN advocated for Indigenous constitutional recognition and participated in the constitutional conventions that led to recognition of Aboriginal and treaty rights in the Canadian Constitution (section 35(1)). In contrast to Australia, Canada's long history of treaty-making also creates a sense of nation-to-nation relationships (discussed further below), which seems to politically solidify the AFN's role.

In considering options for Indigenous representative and consultative bodies, constitutional reformers should consider: what structure the body should adopt and how it should be recognized by the state. Should the body be constitutionally guaranteed, with its details articulated in legislation, or established in some other way? How should its representatives be chosen? What functions should the body have? The international examples below might provide some inspiration.

New Zealand

In addition to reserved Māori seats, there is the New Zealand Māori Council, which derived from the Kotahitanga movement and the Māori parliaments of the 1800s. The structure was not recognized by the Crown until 1962, when the Māori Council's functions and purpose were articulated in legislation (Māori Community Development Act 1962 (NZ), section 18; see also New Zealand Māori Council n.d.). The Māori Council is a consultative and advisory body empowered to make representations to government on Māori affairs (Māori Community Development Act 1962, section 18). Its roles include promoting Māori social and economic advancement and harmonious inter-ethnic relations and collaborating with government departments on Māori policy.

Māori over 20 years of age are entitled—but not compelled—to vote in Māori Committee elections. Any person, Māori or not, may stand for election if they are ordinarily resident in the Committee area or have 'marae affiliations' with the area (Māori Community Development Act 1962, section 19). Māori Council districts, which may be declared at any time by resolution of the New Zealand Māori Council (Māori Community Development Act 1962, section 14), are distinct from the Māori electoral districts related to Māori reserved parliamentary seats. The representative structure is spearheaded by a smaller group of elected representatives.

The Māori Council has represented Māori in claims against the Crown and has been an important vehicle for national advocacy (see e.g. *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641). While the institution is not underpinned by a constitutional guarantee (as noted above, New Zealand has no entrenched constitution), it is anchored in the principles of the Treaty of Waitangi, which is considered New Zealand's founding document (see below). In 2014, the Waitangi Tribunal responded to a Māori Council claim that a past government review (Māori Affairs Committee 2010) of its establishing Act did

not comply with Treaty principles. The Waitangi Tribunal's report explained that the Māori Council arises from a negotiated compact between Māori and the Crown to provide an institutional structure for Māori autonomy, self-government and self-determination (Waitangi Tribunal 2014: vi). The Māori Council is one of the resulting institutional facets of the expectations of Māori empowerment that arise from the Treaty.

Sámi Parliaments

Finland, Norway and Sweden are home to minority Indigenous Sámi populations. While there are no historical treaties between the Sámi and Scandinavian governments (Allard 2018: 25, 27), rights to Sámi self-determination are constitutionally recognized. Finland's Constitution Act of 1999 recognizes and protects Sámi language and cultural rights (section 17) and provides that: 'In their native region, the Sámi have linguistic and cultural self-government, as provided by the Act' (section 121). Norway's 1814 Constitution requires that: 'The authorities of the state shall create conditions enabling the Sámi people to preserve and develop its language, culture and way of life' (article 108). Sweden's 1974 Instrument of Government requires that 'The opportunities of the Sámi people and ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own shall be promoted' (article 2).

These principles of self-determination find practical expression through the Sámi parliaments, which were established in Finland, Norway and Sweden in 1973, 1987 and 1992, respectively. These are legislated representative and consultative bodies that advise state governments on Sámi affairs, such as Sámi language, cultural, land and other Indigenous matters.¹² Generally speaking, the Sámi parliaments can issue non-binding advice on Sámi affairs but do not have legislative functions (Nordic Policy Centre 2021).

In **Norway**, the Sámi Act of 1987 was enacted 'to enable the Sámi people in Norway to safeguard and develop their language, culture and way of life' (section 1.1), echoing the constitutional provision. The Act established Norway's Sámi parliament (the Sameting) and defines its business broadly as 'any matter that in the view of the parliament particularly affects the Sámi people', noting that 'the Sameting may on its own initiative raise and pronounce an opinion on any matter that comes within the scope of its business' (section 2.1). Its duties have expanded over time, and the Sameting has taken on administrative responsibility for funding Sámi language and cultural matters (Wilson and Selle 2019: 26–27). The institution therefore fulfils a representative, consultative and administrative role.

Finland's Sámi Parliament is also an elected advisory body empowered to 'look after the Sámi language and culture' and 'take care of matters relating to their status as an indigenous people' (Act on the Sámi Parliament 1995, section 5(1)). It can also allocate state funding for Sámi affairs (Act on the Sámi Parliament 1995, section 8). Similarly, **Sweden's** Sámi Parliament is 'a blend of a popularly

elected parliament and a State administrative agency' (Sametinget 2019). It can allocate funding (Sami Parliament Act (1992), section 1) and its president is appointed by the government (Sami Parliament Act (1992), section 2), which creates 'built-in conflict' between Sámi desires for increased independence and the government's control of the institution (Sametinget 2019).

Vanuatu

The Indigenous Ni-Vanuatu make up the overwhelming majority of the population of **Vanuatu**. About 99 per cent of the population are Ni-Vanuatu (Vanuatu National Statistics Office 2016: 57). The 1980 Constitution establishes a legally plural, hybrid regime based on a Westminster parliamentary structure but also recognizes Indigenous customary law¹³ and gives Indigenous chiefs an important role in the governance of custom (see especially chapter 5 and sections 52 and 76). A national Council of Chiefs, which germinated from mixed Indigenous and colonial roots, was established by regulation in 1976 (Miles 1993: 31, 40). The Malvatumauri Council of Chiefs (MCC) was given constitutional status in 1980 (chapter 5). Constitutional recognition of the MCC arose in part as an alternative to giving traditional chiefs reserved seats in parliament or creating a second chamber or upper house—proposals which generated considerable division (Nimbtik 2020: 253–56).

The Vanuatu Constitution states that the MCC has 'general competence to discuss all matters relating to land, custom and tradition and may make recommendations for the preservation and promotion of ni-Vanuatu culture and languages' (section 30 (1)). It empowers parliament to legislate for the organization of the MCC, and 'in particular for the role of chiefs at the village, island and district level' (section 31). The Constitution further provides that the MCC shall be 'composed of custom chiefs', which means that positions are inherited through customary bloodlines (Nimbtik 2020: 243, 257–58), who must be 'elected by their peers sitting in District Councils of Chiefs' (section 29 (1)). It empowers the MCC to decide its own rules of procedure and elect its president (section 29 (2)). Under the establishing Act, MCC representatives are elected every four years by the Island Council of Chiefs and the Urban Council of Chiefs (Malvatumauri National Council of Chiefs Act, 2006, section 5). Reliance on hereditary rule and limited popular participation arguably diminish the institution's democratic legitimacy (Nimbtik 2020: 257, 259). However, one expert describes the MCC as one of the very few institutions in Vanuatu that 'connects people from rural and remote areas...to the national level' and facilitates constructive "dialogue" between traditional leaders and modern state institutions' (Nimbtik 2016: 207, 217).

African examples

The Indigenous Khoi-San of South Africa¹⁴ are a small 1 per cent minority (International Work Group for Indigenous Affairs 2020) and still suffer from ‘a lack of official recognition’ and a ‘muted political voice’ (South African Human Rights Commission 2018: 91). Indigenous peoples are recognized in the South African Constitution,¹⁵ however, and the Khoi-San have gradually achieved representation through incorporation into broader ‘traditional’ institutions.¹⁶

South Africa’s Constitution recognizes traditional leadership institutions under customary law (subject to the bill of rights).¹⁷ Section 212 states that ‘national or provincial legislation may provide for the establishment of houses of traditional leaders’ and that ‘national legislation may establish a council of traditional leaders’. The provisions use the discretionary language of ‘may’, rather than ‘must’. Despite this lack of constitutional compulsion, however, a National House of Traditional Leaders was established by legislation (National House of Traditional Leaders Act 10 of 1997)¹⁸ to ‘harmonise relationships between traditional authorities and modern government structures’ (Mashumba and Affa’a Mindzie 2009: 23). Provincial houses of traditional leaders were also created in all six provinces that have traditional leaders.¹⁹ These are intended to enhance ‘cooperative relationships within national and provincial government’ (South African Government n.d.).

The 1997 Act provided that the national council ‘may advise the national government’ and make recommendations on ‘matters relating to traditional leadership’, ‘the role of traditional leaders’ and ‘customary law’ (Council of Traditional Leaders Act 1997, section 7(2)). By 2009, reform had broadened and specified the functions of the National House to include ‘cooperating with the provincial houses to promote traditional leadership’ within constitutional parameters, as well as ‘nation-building’, ‘the preservation of the moral fibre and regeneration of society’ and ‘socio-economic development and service delivery’, among other aims (National House of Traditional Leaders Act 2009, section 11(1)(a)).

Successive reforms have sought to update hereditary selection processes (Republic of South Africa 2003: 11, 26), requiring improved gender balance and community elections for members of traditional councils.²⁰ The 2019 Khoi-San and Traditional Leadership Act, while conferring specific recognition and creating institutional representation for the Khoi-San,²¹ also repeats provisions calling for traditional leaders to reconcile their customs with constitutional rights. The Act reiterates the requirement that one-third of traditional council leaders must be women and 40 per cent must be elected by the community (section 16 (2)(b) and section 16 (2)(c)(ii); see also Baloyi 2019). The levels of compliance with these repeated legislative injunctions require further research.

Zimbabwe's Constitution also recognizes 'traditional leaders' (chapter 15). Among the functions specified are upholding cultural and 'sound family values', preserving the 'traditions, history and heritage of their communities', facilitating development and resolving community disputes in accordance with customary law (article 282 (1)). The Constitution outlines rules for the appointment and removal of traditional leaders (article 283), as well as mechanisms for determining remuneration (article 284). It also establishes a National Council and provincial assemblies of Chiefs (article 285) charged with promoting Zimbabwe's culture and traditions, representing the views of traditional leaders, defining and enforcing their 'correct and ethical conduct', and facilitating dispute resolution (article 286).

Singapore

Whereas the above countries empower Indigenous or traditional leadership bodies to engage with the state on matters related to Indigenous customs, culture, tradition, languages, land and socio-economic development, Singapore's equivalent institution advises on equivalent matters related to Islam. As noted above, the Singapore Constitution recognizes Malays as the Indigenous people of Singapore (article 152). Because the vast majority of Malays are Muslim (Kadir 2010: 156, 158), Indigenous constitutional recognition in Singapore intersects decisively with religious recognition and Islam has become strongly connected with Malay identity (Lim 2004: 117, 122). Instead of recognizing customary law, the Singapore Constitution recognizes Muslim personal law. Article 153 of the Constitution requires the creation of a Muslim advisory body: 'The Legislature shall by law make provision for regulating Muslim religious affairs and for constituting a Council to advise the President in matters relating to the Muslim religion'.

The Administration of Muslim Law Act of 1968 establishes the Majlis Ugama Islam Singapura (MUIS) and specifies its powers. In addition to advising the President on matters pertaining to the Muslim religion (section 3(2)), the MUIS administers mosques and Muslim schools (section 3(2)e), and executes the estates of deceased Muslims (section 5(3)). The MUIS has facilitated religious and cultural revivalism (Kadir 2010: 156, 161, 164), in particular by overseeing the growth of mosques (Kadir 2010: 165). It also advises on appointments to Boards of Appeal, the adjudicators of Muslim personal law.

The Act requires that the MUIS President and Mufti be appointed by the President of Singapore (Administration of Muslim Law Act 1968, section 7(1)a), while another seven members are appointed by the President of Singapore on the advice of the relevant minister (Administration of Muslim Law Act 1968, section 7(1)d), and a further seven are selected by the President of Singapore from a list of nominees chosen by prescribed Muslim societies (Administration of Muslim Law Act 1968, section 7(2)). This approach demonstrates tight governmental

control of MUIS membership, which allows for only minimal and restricted input from the Muslim community. The MUIS does not provide an independent Muslim/Malay voice (Rahim 2012: 169, 173), but instead represents a government-sanctioned Muslim elite that administers Muslim affairs (Noor Aisha Abdul Rahman 2019: 1079, 1081, 1090). Nonetheless, despite the evident ‘power asymmetry’, one expert notes that being ‘co-opted’ by the state entails some benefits, including secure government funding and spheres of genuine influence (Walid Jumblatt Abdullah 2013: 1182, 1200–01).

While several of the Indigenous bodies examined above mix representative and consultative functions with administrative functions, a distinction is required between institutions that genuinely and robustly represent Indigenous views, and state institutions that primarily oversee, monitor and administer Indigenous affairs. As explained in IPCAT Question 14, the latter bodies generally consist of state-appointed members rather than representatives chosen by Indigenous people. The IPCAT addresses these governmental institutions under Question 27. This distinction highlights the importance of representatives being chosen by Indigenous people to ensure genuine Indigenous representation, participation and consultation.

2.4. A duty to consult Indigenous Peoples on relevant matters

As noted above, Chile has ratified ILO Convention No. 169. Indigenous participation in and consultation on state decisions about Indigenous matters should therefore be mandatory: but how can this requirement be legally and politically implemented? As explained in IPCAT Question 13, the right to consultation can be protected and achieved in several ways. A duty to consult can be explicitly articulated in the constitution, in legislation or in agreements between Indigenous peoples and the state—or in all three. As shown above, the constitution might also recognize and empower traditional institutions or other Indigenous structures, and require the state to consult with these institutions on relevant matters. The constitution can also require the establishment of new or aggregate structures, such as a national Indigenous representative and consultative body. Alternatively, constitutions can establish broad principles and rights that connect to, frame and contextualize legislated institutional arrangements that enable and require Indigenous consultation.

In discussing options, Chile’s constitutional reformers should consider:

- How are current duties to consult working and how should they be improved?

- Where should the duty to consult be articulated, and what institutional mechanisms should be constructed to practically implement consultation?
- What should be the scope of the duty to consult, and how will disputes about whether consultation is required be resolved?
- How should the duty to consult be enforced? Should it be adjudicated by the courts, the political branches, both, or some other mechanism?

The international examples below might help generate ideas.

Sámi parliaments

The duty to consult in **Norway** is articulated politically through an agreement between the Sámi and the state. In 2005, the government and the Sameting signed a Consultation Agreement, which provides for Sámi input into the development of legislation and policy that affects them (Government of Norway 2018). In defining its scope, the agreement states that the consultation procedures apply in ‘matters that may affect Sami interests directly’, which may include ‘legislation, regulations, specific or individual administrative decisions, guidelines, measures and decisions’. It provides a long list of matters that may be subject to the obligation to consult, including ‘all material and immaterial forms of Sami culture, including music, theatre, literature, art, media, language, religion, cultural heritage, immaterial property rights and traditional knowledge, place names, health and social welfare, day care facilities for children, education, research, land ownership rights’ (article 2). The agreement also specifies that the Sameting can ‘independently identify matters which in its view should be subject to consultations’ (article 6), and details expectations of regular meetings (article 5), early notification of policies or decisions that might affect Sámi, and good faith engagement ‘with the objective of achieving agreement to the proposed measures’ (article 6). The agreement demonstrates a productive commitment to procedures for a state–Sámi partnership (Broderstad 2011: 893, 902; Wilson and Selle 2019: 29). It has led to Sámi consultation on the development of legislation becoming normal practice (Broderstad 2014), giving the Sámi ‘substantial influence’ in legislative processes.²²

In **Finland**, section 37 of the Finnish Parliament’s Rules of Procedure provides that, ‘When a legislative proposal or another matter specifically involving the Sámi is being considered’ by a legislative committee, the committee ‘shall reserve the representatives of the Sámi an opportunity to be heard, unless there are special reasons to the contrary’. In addition, legislation setting up the Sámi Parliament spells out the matters for which there is an ‘obligation to negotiate’ (which is defined as consultation: ‘the opportunity to be heard and discuss matters’).²³ Negotiation is required ‘in all far-reaching and important measures which may

directly and in a specific way affect the status of the Sámi as an indigenous people and which concern the following matters in the Sámi homeland'. Legislation lists the relevant matters, which include 'community planning; the management, use, leasing and assignment of state lands, conservation areas and wilderness areas'; and 'any other matters affecting the Sámi language and culture or the status of the Sámi as an indigenous people' (Act on the Sámi Parliament 1995, section 9). The duty is territorially limited to the Sámi homeland and confined to engagement with the Sámi Parliament. However, Sámi activists are advocating for the scope of the duty to be expanded (Allard 2018: 25, 31–33). According to one expert, the Finnish duty to consult does not operate robustly in practice as 'No comprehensive formal structures or joint arenas of significance have been established between the Saami Parliament and the Finnish Government' (Josefsen 2010: 8).

Canada

In **Canada**, the duty to consult emerged through judicial interpretation of section 35 (1) of the Constitution, which provides that 'existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'. The provision's broad and ambiguous wording has led to ongoing disagreement about the meaning of section 35. Before it was repealed, section 37 required that a constitutional conference with Aboriginal representatives be convened to determine the interpretation of the Aboriginal rights protected (Palmer 2006: 1, 24). Several conferences were held,²⁴ but they failed to conclusively resolve the ambiguities. While many Aboriginal people saw section 35 as encompassing rights to self-government (McNeil 1994: 113, 26; Macklem 1991: 382), the government saw any self-government as reliant on agreements negotiated with the state (Parliament of Canada 1983: 44; Palmer 2006: 1, 24). Ultimately, the meaning of section 35 was left to the courts to resolve (McNeil and Yarrow 2007: 177–78).

Judicial interpretations have tended to limit the constitutional protection afforded to Aboriginal and treaty rights. There is no express textual indication that section 35 is constrained by the balancing mechanism in section 1 of the Charter of Rights and Freedoms, which subjects Charter rights to 'reasonable limits'. Section 35 sits outside the Charter and section 25 requires that Charter rights and freedoms cannot be construed to abrogate or derogate from Aboriginal rights. These provisions mean that the constitutional protection provided to Aboriginal and treaty rights should be more powerful. However, courts have adopted balancing mechanisms akin to section 1 in interpreting section 35 (*R v Sparrow* 1990 CanLII 104 (SCC), [1990] 1 SCR 1075, 1108–1109). This means that the protection provided is not absolute and section 35 rights can be legislatively infringed (*R v Sparrow* 1990 CanLII 104 (SCC), [1990] 1 SCR 1075, 1119). One relevant factor in the infringement analysis is whether the

Aboriginal groups affected were consulted with respect to the infringing action (*R v Sparrow* 1990 CanLII 104 (SCC), [1990] 1 SCR 1075, 1119). The Canadian duty to consult therefore helps the courts determine whether a breach of section 35 rights can be justified.

The duty to consult has been elaborated in several cases.²⁵ Incorporating ideas of ‘the honour of the Crown’, it has become an important part of the Indigenous–Crown relationship. However, the court-implied nature of the duty can create uncertainty. For example, while a minister’s decision can be quashed for failure to appropriately consult,²⁶ the court has held that the duty does not apply to law-making processes. In the 2018 *Mikisew Cree* case, the majority said the duty to consult only applies to executive action, but that ‘the development of legislation by ministers is part of the law-making process’ which is ‘generally protected from judicial oversight’. The Supreme Court therefore declined to apply the duty to consult to proposed laws that affect Aboriginal rights because this would ‘require courts to improperly trespass onto the legislature’s domain’ (*Mikisew Cree First Nation v Canada* 2018 SCC 40 (CanLII), [2018] 2 SCR 765 [50]). The result is that, despite the ostensibly strong constitutional recognition of Aboriginal and treaty rights under section 35, such rights are still susceptible to legislative infringement, and the court-implied duty to consult does not require consultation on the making of laws that might infringe such rights.

This demonstrates how broadly worded constitutional rights guarantees might not always yield the robust outcomes for which Indigenous advocates might hope. If a duty to consult is desired, it may be better spelled out clearly in the text and brought to life through specific institutional arrangements and political initiatives (for a fuller discussion see Morris 2020). In 2017, the Canadian Government entered into bilateral mechanisms with the AFN and other Indigenous groups to establish ways of working together, including on the co-design of policy (Government of Canada 2021).

Vanuatu

By contrast, **Vanuatu’s Constitution** explicitly requires consultation with the MCC on relevant matters, including proposed laws. Section 30 (2) initially provided that:

The Council may be consulted on any question, particularly any question relating to land, tradition and custom, in connection with any bill before Parliament.

This conferred discretion but no obligation on the state to consult the MCC, and Chiefs subsequently expressed frustration that the legal framework did not sufficiently empower them to ‘straighten out’ the various problems they faced (Forsyth 2009). In 2013, in response to MCC advocacy (Nimbtik 2016: 108–

09), parliament amended section 30 (2), changing ‘may’ to ‘must’ (Constitution (6th Amendment) Act 2013):

The Council must be consulted on any question, particularly any question relating to tradition and custom, in connection with any bill before Parliament.

The duty of parliament to consult the MCC on land matters is also reflected in section 76:

Parliament, after consultation with the Malvatumauri Council of Chiefs, shall provide for the implementation of Articles 73, 74 and 75 in a national land law and may make different provision for different categories of land, one of which shall be urban land.²⁷

These provisions constitutionally guarantee the MCC a consultative role in the making of laws relating to traditional affairs. However, an expert commenting in 2009 observed that the Council’s role in giving advice on bills was limited, and few pieces of legislation were passed to the Council for comment (Forsyth 2009: 62). It is unclear whether the 2013 amendment, intended to strengthen the provision with a constitutional imperative, has improved consultation on relevant bills.

In 2018, the Campaign for Justice expressed concern that the MCC’s ‘critical functions cannot be fulfilled under the current circumstances’ because it was ‘currently non-existent’ (*Daily Post* 2018). This demonstrates that, despite constitutional status and regardless of whether ‘may’ or ‘must’ is used in constitutional drafting, no institution can function properly without the requisite political will. It must operate efficiently to fulfil its constitutional functions, and this requires government (and the institution’s representatives) to be proactive and committed to upholding the constitutional requirements.

Despite its weaknesses, the MCC was advocating for further powers and recognition of custom even before the 2013 amendment. Much compromise and negotiation resulted in the Malvatumauri Council of Chiefs Act (2006) and the constitutional amendment of 2013, demonstrating the capacity of the MCC to influence legislative and constitutional reform. The legislation gave the MCC a role in leading ‘sustainable social and economic development’, building on its constitutional functions.²⁸ Another example of consultation is collaboration on the draft bill on Traditional Knowledge and Traditional Cultural Expression (McDonnell 2014; Xinhuanet 2019; Cullwick 2016). Based on feedback from experts, however, consultation remains ad hoc and its impact requires further research.

South Africa

The consultative functions of the constitutionally recognized traditional leadership institutions in South Africa have also evolved over time. A 2003 White Paper envisaged that traditional leaders should play a ‘meaningful role in legislative processes and other matters affecting tradition and culture’ (Republic of South Africa 2003: 71). The language of ‘may’ under the 1997 Act was strengthened to ‘must’, to provide that:

Any parliamentary Bill pertaining to customary law or customs of traditional communities must, before it is passed by the house of Parliament where it was introduced, be referred by the Secretary to Parliament to the National House of Traditional Leaders for its comments.

(Traditional Leadership and Governance Framework Act 2003, section 18)

Traditional leaders were thus given a compulsory voice in proposed laws with respect to traditional matters, although the duty to consult was legislated for rather than in the Constitution.

Levels of compliance with this requirement are unclear. In 2020, the President referred a Liquor Products Amendment Bill back to parliament, saying traditional leaders should have been consulted as required by the 2003 legislation (Felix 2020).²⁹ While this shows political leaders taking note of the duty to consult, it also indicates that consultation was not undertaken in the first instance.

Latin American examples

Article 330 of the **Colombian Constitution** provides that on decisions about natural resource exploitation in Indigenous territories, ‘the Government will encourage the participation of the representatives of the respective communities’. This principle has been enforced by the Constitutional Court, which further detailed the procedural requirements that constitute effective consultation.³⁰ Effective consultation means that communities must be informed of the extractive project in advance, and the authorities should encourage Indigenous participation that aims to reach agreement (Iseli 2020: 259, 266–68). In contrast to Canada, the Constitutional Court also found that prior consultation is required for legislative measures that directly affect Indigenous communities (Sentencia C-187/11). In 2009, a legislative bill was declared unconstitutional due to lack of prior consultation with the relevant Indigenous communities, even though the bill contained positive benefits for the communities concerned (Judgment C-615/09, 19; Newman and Pineda 2016: 29, 31).

The **Bolivian Constitution** provides Indigenous peoples with the right to ‘be consulted by appropriate procedures, in particular through their institutions, each time legislative or administrative measures may be foreseen to affect them’ and mandates ‘prior obligatory consultation’ with respect to natural resource exploitation in Indigenous territories (article 30(15)). This operates as a political obligation that is also subject to judicial review (see e.g. Plurinational Constitutional Court, Judgment No. 0300/2012 of 18 June 2012; Due Process of Law Foundation 2015). The **Ecuador Constitution** similarly states that Indigenous peoples have a right to ‘free prior informed consultation, within a reasonable period of time’ on plans for the exploitation of non-renewable resources on their lands where an environmental or cultural impact on the Indigenous people is likely, as well as a right to ‘participate in the profits earned from these projects’ and be compensated for damage done (article 57 (7)). **Peru** has implemented a comparable duty to consult on projects that affect Indigenous communities and lands.³¹ This has been supplemented by court decisions that enforce and articulate the details of the duty (see e.g., Case 03343-2007-AA; Case 05427-2009-AC).

The issue of scope, or when the duty to consult applies, can be controversial. For example, **Bolivia’s** Mining and Metallurgy Law of 2014 excluded some mining operations from the duty of prior consultation (Mining and Metallurgy Law, Law No. 535, 28 May 2014, article 207.II). Political avoidance of the duty is also evident in **Colombia** where, as the Due Process of Law Foundation explains, a restrictive application of the duty’s scope has enabled some projects that impact Indigenous peoples to proceed without consultation—despite the fact that the Constitutional Court has adopted a broad definition of ‘directly affecting’. Lack of efficient procedures for the timely identification of measures that directly affect Indigenous peoples can also provide loopholes for avoidance of the duty to consult (Due Process of Law Foundation 2015).

This shows that details of implementation will be key to ensuring that consultation operates in a just manner in practice. Carefully articulating the scope of the duty so that all parties understand processes for deciding when the duty applies will be crucial. Understanding how Indigenous peoples should be fairly consulted is also important. In Latin America, research shows that some Indigenous consultation has been undermined by power imbalances, lack of Indigenous ownership of consultation processes and capability shortfalls, resulting in poor Indigenous defence and articulation of their views, and communication barriers (Flemmer and Schilling-Vacaflor 2016). If undertaken in the wrong way, consultation can create division and conflict within Indigenous communities, particularly when ‘divide and rule’ tactics are used to facilitate Indigenous exploitation (Schilling-Vacaflor and Eichler 2017). These risks must be properly managed to ensure fair and effective consultation.

2.5. Treaties and agreements

Treaties between Indigenous peoples and colonizing powers can articulate the terms for future relationships between the parties.³² Such treaties can contain mutual rights, obligations and promises. Treaties can also articulate agreed principles—such as principles of self-determination—that pave the way for Indigenous representation in state institutions, and the establishment of Indigenous representative and consultative arrangements.

While treaties are important political agreements, they are also subject to the vagaries of politics and power. Historic treaties were usually enacted in circumstances of deep power imbalance. In many cases, the more powerful colonizing force would subsequently breach their treaty obligations, leaving Indigenous peoples with little recourse to hold the colonizing state to account. As politics and social attitudes change, however, treaties can be useful political and moral tools to pressure the state to live up to past promises. Similarly, mechanisms for contemporary treaty-making can help reset, reform and revitalize relationships between Indigenous peoples and dominant states.

New Zealand

The 1840 Treaty of Waitangi was an agreement between around 540 Māori chiefs and the British Crown. It is considered New Zealand's founding document. Article 1 declares that the native chiefs cede their sovereignty to the British Crown, although this interpretation is disputed as the Māori text employs a concept that differs from the English concept of sovereignty.³³ Article 2 guarantees Māori property rights and has also been interpreted as giving Māori the right to live as Māori, or the right to self-determination. Article 3 grants Māori 'royal protection' and imparts 'all the rights and privileges of British subjects'. This guarantees Māori equal citizenship but may also establish a duty of protection whereby the Crown is supposed to act in the best interests of Māori people (*New Zealand Māori Council v Attorney-General* (1987) 1 NZLR, 641, 705).

Racially discriminatory views led colonial courts to declare the Treaty legally invalid. The 1877 *Wi Parata* case considered Māori 'primitive barbarians' and found that 'Māori tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilised community' (*Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC), 78, 77, 78). In 1941, the Privy Council in London fell in line with the New Zealand courts and declared that the Treaty (like other international treaties) was not enforceable unless incorporated into legislation (*Hoani Te Heuheu Tukino v Aotea Dist Māori Land Bd* [1941] AC 308 (PC)). This principle is still followed today and means that realization of

Treaty rights relies on political will, and that such rights are susceptible to political infringement.

Incorporation of the Treaty into legislation has not always been pursued by Māori. Māori advocates chose not to include the Treaty principles in the New Zealand Bill of Rights Act of 1990, fearing that this would lead to their rights being narrowed and weakened (Keith 2013: 12; McHugh 2008: 67). Some felt that incorporating the Treaty into legislation might 'diminish its status', transforming it from 'a powerful normative symbol with moral legitimacy into a mere legal instrument' that could be amended. As one expert explained:

If the Treaty is outside the law its moral and normative power can continue untouched, as a reference point for political agitation. Inside the law, it becomes an instrument of the legal system and a plaything for lawyers and judges.
(Palmer 2006: 31)

Over time, the Treaty has become symbolically, politically and morally powerful. From its principles have flowed institutional arrangements such as the Māori Council, the Māori Language Commission and arguably also reserved Māori parliamentary seats.

It has also led to contemporary Treaty settlement processes. Under the Treaty of Waitangi Act of 1975, the Waitangi Tribunal (made up of Māori and non-Māori experts) hears and recommends resolutions on addressing breaches of the Treaty. These can then inform direct negotiations between Māori and the government. The Tribunal's recommendations are generally non-binding but carry political and moral force. Settlements can involve financial and cultural redress, and recognition of past wrongs, as well as official apologies for Treaty breaches.

The settlements provide an active process for Māori recognition, truth-telling about history and reconciliation. This has yielded important practical results. For example, the Waikato-Tainui settlement addressed decades of historical warfare and failed attempts at fair negotiation. The settlement deed included compensation in land and cash. Queen Elizabeth II personally signed the Waikato Raupatu Claims Settlement Act of 1995 and delivered the Crown apology (Hill 2012). Similarly, the *Te Reo Māori* claim argued that the Māori language was a 'cultural treasure' protected under the Treaty. In 1987, the Tribunal recommended that the government recognize *te reo Māori* as an official language. This prompted government action: Māori was recognized as an official language (Māori Language Act 1987, section 3) and the Māori Language Commission was established (Māori Language Act 1987, section 6).³⁴

Other examples

Treaties were commonly negotiated between Native Americans and the early colonizers of the **United States**. The courts found that such treaties could establish ‘domestic dependent sovereignty’ for Native American tribes, incorporating spheres of autonomy which over time enabled increased Indigenous authority in their affairs (*Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831)). However, Indigenous peoples had to fight for legal recognition of their treaty rights, which were always vulnerable to being trampled by the US Government (Brennan et al. 2005: 83–87).

In **Canada**, Indigenous treaty rights were constitutionally recognized under section 35(1). As discussed above, this led to a court-implied ‘duty to consult’ Indigenous people on government actions that affected their rights. The treaties also helped to create a framework for ongoing agreement-making in the modern era. As explained in IPCAT Question 10, Canada has utilized ‘bilateral mechanisms’ to negotiate new agreements between the Canadian Government and Indigenous peoples, such as the Canada-Metis Nation Accord and the Memorandum of Understanding between the Prime Minister and the National Chief of the Assembly of First Nations (International IDEA 2020: 76–77). This shows how treaties can help create ongoing ‘nation-to-nation’ or ‘sovereign-to-sovereign’ relationships between Indigenous peoples and colonizing states. They can establish terms for engagement and partnership that can be revisited and revitalized over time. Treaty-making can thus become a living process as part of contemporary constitutional arrangements.

In **Australia**, there is not the same history of colonial treaty-making,³⁵ but Indigenous advocates consistently push for treaties. Echoing decades of Indigenous advocacy, the Uluru Statement from the Heart in 2017—a historic national statement by Indigenous peoples—called for a First Nations constitutional voice, an Indigenous representative and a consultative body guaranteed by the constitution (Morris 2018); as well as a Makarrata Commission—a treaty-making commission set up by legislation (Commonwealth of Australia 2017). While the federal government appears reluctant to take action on these requests, some states and territories are pursuing treaty talks. In the State of Victoria, for example, a Treaty Commission was established in 2018. The Commission consulted with Indigenous peoples and designed an Aboriginal Representative Body, established by state legislation in 2019 (*Advancing the Treaty Process with Aboriginal Victorians Act* (Victoria) 2018). The First Peoples’ Assembly of Victoria is intended to be the elected voice for Aboriginal Victorians in future treaty discussions (First Peoples’ Assembly of Victoria 2020).

This demonstrates how an Indigenous representative body can help enable treaty negotiations, because Indigenous peoples need an institution to represent them in order to engage efficiently with the state. It explains why Indigenous

Victorians implemented a First Peoples' Assembly before starting treaty negotiations, and why the Uluru Statement asks for a First Nations voice to represent Indigenous peoples, along with a Makarrata Commission to supervise agreement-making and truth-telling. It further demonstrates how different institutional elements for Indigenous constitutional recognition can work together as a package of reforms.

Endnotes

1. New Zealand Ministry for Culture and Heritage, Māori and the vote: Setting up the Māori seats, New Zealand History, 28 November 2016, <<https://nzhistory.govt.nz/politics/maori-and-the-vote/setting-up-seats>>, accessed 21 November 2021.
2. For example, New Zealand abolished its provincial structure in 1877 and its upper house in 1950, by ordinary legislation.
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5. A Māori person for electoral purposes is defined as a person of 'the Māori race of New Zealand' and the descendants of such a person (Electoral Act 1993 (NZ), section 3(1)).
6. Article 171 specifies that Indigenous Senate candidates 'must have exercised a position of traditional authority in their respective community or have been leaders of an indigenous organization'.
7. India's parliament also has a 245-seat upper house.
8. For example, in Australia there is a Minister for Indigenous Australians, a position that for the first time is currently filled by an Indigenous person, Ken Wyatt. Wyatt oversees the National Indigenous Australians Agency, which administers Indigenous affairs. New Zealand's Ministry of Māori Development—Te Puni Kōkiri is always led by a Māori member of the government.

9. Article 152 of the 1965 Constitution provides that: '(1) It shall be the responsibility of the Government constantly to care for the interests of the racial and religious minorities in Singapore. (2) The Government shall exercise its functions in such manner as to recognize the special position of the Malays, who are the indigenous people of Singapore, and accordingly it shall be the responsibility of the Government to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language'.
10. The Malay community is defined as 'any person, whether of the Malay race or otherwise, who considers himself to be a member of the Malay community and who is generally accepted as a member of the Malay community by that community'.
11. Section 174(2) provides that: 'The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed'.
12. The Sámi Council, which was formed in 2000, connects these Sámi parliaments internationally, as well as the permanent participation of Sámi from Russia.
13. Section 95 (3) states that customary law shall have continuing effect. See also sections 1 (2)(f), 7 (h), 47 (1), 51 and 79.
14. The Khoi-San peoples of South Africa are treated as being Indigenous (South African Human Rights Commission 2018: 18–19; see also International Work Group for Indigenous Affairs 2020).
15. South African scholarship and advocacy use the term 'indigenous' to refer to traditions more broadly than relating just to Khoi-San traditions. Traditional leadership in this sense is considered 'indigenous'. For example, the 2003 *White Paper on Traditional Leadership and Governance* notes that, 'Traditional leadership is indigenous to South Africa and to the continent of Africa. Its existence predates the colonial conquests and the apartheid era. Like other institutions and structures of governance, the institutions of traditional leadership evolved with time'. The White Paper also notes that the legislation it proposes 'dealing with traditional leadership issues will also apply to the Khoi-San and their claims to traditional leadership' (Republic of South Africa 2003: 57).
16. For example, the Khoi-San and Traditional Leadership Act of 2019 was the first specific statutory recognition of the Khoi-San. See also de Visser and Steytler (2018: 19–22, 23).
17. Chapter 12, section 211, recognizes the 'institution, status and role of traditional leadership, according to customary law...subject to the Constitution' and anticipates that a 'traditional authority that observes a system of customary law may function'.

18. Previously the Council of Traditional Leaders Act, as amended by the Council of Traditional Leaders Amendment Act 85 of 1998.
19. The Eastern Cape, Free State, KwaZulu-Natal, Limpopo, Mpumalanga and North West.
20. The Traditional Leadership and Governance Framework Act 41 of 2003, section 3, required one-third of traditional councils to be made up of women and 40 per cent of members to be chosen through community election. Likewise, section 3 of the 2009 Act established processes for the election of members to the National House by Provincial Houses, and reiterated gender and election requirements.
21. The Traditional Affairs department explains that ‘the National Khoisan Council aims to unite the Khoisan communities and create a platform through which they can raise issues affecting them as a group of communities’ (South African Government n.d.).
22. Such matters include the Finnmark Act 2005; the Reindeer Herding Act 2007; the Planning and Building Act 2008; and the Nature Diversity Act 2009 (see Allard 2018: 25, 29).
23. The legislation also clarifies that ‘failure to use this opportunity [to be heard] in no way prevents the authority from proceeding in the matter’, thereby eliminating any possibility of a veto by abstention.
24. The 1992 Charlottetown Accord sought to constitutionally recognize Aboriginal rights to self-government, but was rejected when put to Canadian voters in a referendum. There have been no constitutional conferences since.
25. See e.g. *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511; *Mikisew Cr e First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388; *Beckman v Little Salmon/Carmacks First Nation* [2010] 3 SCR 103; *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council* [2010] 2 SCR 650.
26. See e.g., *Mikisew Cree First Nation v Canada*, 2005 SCC 69 (CanLII), [2005] 3 SCR 388. Various remedies are available if the Crown fails to consult when required, such as injunctive relief, damages or an order that consultation or accommodation be carried out (*Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 (CanLII), [2010] 2 SCR 650 [37]).
27. Sections 73, 74 and 75 provide that all land belongs to the Indigenous customary owners, that the rules of custom shall form the basis for the ownership of land, and that only Indigenous citizens of Vanuatu can obtain perpetual ownership of their land.

28. The Malvatumauri National Council of Chiefs Act (2006), section 13 (1), gives the MCC further functions: '(a) to resolve disputes according to local custom; (b) to prescribe the value of exchanges of gifts for a custom marriage; (c) to promote and encourage the use of custom and culture; (d) to promote peace, stability and harmony; (e) to promote and encourage sustainable social and economic development; (f) to undertake such other functions as are conferred on them under this Act or any other Act'.
29. Like the Vanuatu example, examination of traditional institutions in South Africa would benefit from further empirical research to determine how consistently consultation on relevant bills occurs, and how effective such consultation is in practice.
30. Constitutional Court of Colombia, Sentencia SU-039/97, M.P. Antonio Barrera Carbonell (3 February 1997), <<https://www.informea.org/sites/default/files/court-decisions/sentencia-su-039-97.pdf>> [<<https://perma.cc/SE8G-CRBD>>], in Spanish
31. Law 29785 of 2011 on the Right to Prior Consultation of Indigenous or Native Peoples, as recognized in ILO Convention No. 169 (see Iseli 2020: 259, 269).
32. The UNDRIP preamble recognizes that 'treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States'.
33. In 1989, anthropologist Hugh Kawharu developed an English translation of the Māori version of the Treaty to more accurately reflect the understanding of the signing chiefs. Kawharu translated 'kāwanatanga' as 'government'. Translated meanings continue to be debated, see 'Te Tiriti O Waitangi—The Treaty of Waitangi', *New Zealand History*, <<https://nzhistory.govt.nz/files/documents/treaty-kawharu-footnotes.pdf>>, accessed 21 November 2021.
34. On the importance of Indigenous languages to Indigenous constitutional recognition see Morris and Murphy (2020).
35. However, there was the 1835 Batman Treaty, which was invalidated by the Crown, and there are also native title and land agreements, which some argue are akin to treaties (Hobbs and Williams 2018).

3. Conclusion

States can adopt various mechanisms to empower Indigenous peoples to exercise agency in their affairs and participate more fairly in state political decision-making. Indigenous advocates in Chile must now consider which mechanisms they want, and how those mechanisms should work together and with various organs of the Chilean state under the new constitution.

An integral part of the work ahead will be to decide which proposals require the permanency of constitutional entrenchment and which need the flexibility of legislative evolution. As shown above, institutions to enable Indigenous representation, participation and consultation will often be a mix of both; institutions may be constitutionally mandated but detailed and evolved through legislation. Another dilemma is whether mechanisms should be adjudicated politically and implemented through legislation, institutions, agreements and policy, or judicially adjudicated—or a mixture of both. The examples canvassed above should encourage reformers to think beyond broad declarations of Indigenous rights that are solely adjudicated by the courts to also imagine what political institutions, procedures and processes might bring those rights to practical fruition.

Once appropriate institutional arrangements have been negotiated, the overriding challenge will be constitutional implementation. Even the best constitutional design cannot guarantee that institutions will be effective in practice. As the then Indigenous Prime Minister of Greenland, Lars Emil Johansen, advised Indigenous Australians in Cape York in 1994: ‘self-determination is hard work’ (Pearson 2016). Effective implementation of institutions that empower Indigenous peoples requires human and financial resources, government support for capability-building, mechanisms to ensure accountability and transparency, and continual learning and adaptation. Above all, it will require hard work and commitment by all parties, Indigenous and non-

Indigenous, to make the institutional arrangements successful. A new constitution is just the beginning.

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About International IDEA

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

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Indigenous peoples in Chile have suffered dispossession and discrimination by colonizing forces, like many Indigenous peoples globally, and did not have a fair say in the development of successive constitutions establishing new political systems on their land.

In the October 2020 referendum, Chileans voted to create a new constitution. This presents an opportunity for Indigenous peoples to create a fairer power relationship with the Chilean state. For the first time, the constitutional convention includes a specific quota for 17 Indigenous representatives. This will enable Indigenous peoples to contribute to the constitutional design process.

This paper presents comparative examples of self-determinative institutional mechanisms that empower Indigenous peoples to be heard by and influence decision making in state institutions. The focus of the paper is on options for institutional structures that enable Indigenous representation, participation and consultation with respect to Indigenous peoples' own affairs.



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