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Protection of Indigenous Rights in Mexico and Brazil: a Comparative Perspective

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List of Abbreviations

Abbreviation	Definition
API	Indigenous People's Party
APIB	Articulação dos Povos Indígenas do Brasil
CDI	Commission for the Development of Indigenous People
CESCR	UN Committee on Economic, Social and Cultural Rights
CNI	Indigenous National Congress in Mexico
COIAB	Coordination of Indigenous Organizations of the Brazilian Amazon
ECLAC	Economic Commission for Latin America and the Caribbean
ECOSOC	UN Economic and Social Council
EIAs	Environmental Impact Assessments
EZLN	Ejército Zapatista de Liberación Nacional
FPIC	Free, Prior and Informed Consent
FUNAI	National Indian Foundation
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IBAMA	Brazilian Institute of Environment and Renewable Natural Resources
ILO	International Labour Organization
INALI	National Institute of Indigenous Languages
INPE	National Institute for Space Research
INPI	National Institute of Indigenous Peoples

IPOL	Research and Development in Language Policy
OAS	Organization of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
HR	United Nations Human Rights Office of the High Commissioner
ONIC	National Organization of Indigenous Peoples of Colombia
PAN	Partido de Acción Nacional
PNGATI	National Policy for the Environmental and Territorial Management of Indigenous Territories
PRD	Partido de la Revolución Democrática
PRI	Partido Revolucionario Institutional
PUP	Popular Unity Party
SIA	Social Impact Assessment
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous People
UNPFII	United Nations Permanent Forum on Indigenous Issues

Introduction

In the book "American Holocaust: The Conquest of the New World" (1992), David E. Stannard defined the incredible number of deaths of the Indigenous population in the Western Hemisphere after 1492 caused by the invasion and conquest of these lands by Europeans and their descendants to constitute "*the worst human holocaust the world had ever witnessed*".[1] Throughout the history of Latin America, indigenous people have been among the groups whose human rights have been most systematically denied and violated.

Notwithstanding the process of decolonization that started in Latin America in the 19th century, colonialism cannot be considered a "closed chapter". Indeed, as noted by Shawt (1996), decolonization was not a simple process and it had important limitations. Indigenous people were not completely free in the choice of their future and they had to adapt to the "lines of demarcation" designated by the colonizers. [2]

In addition, colonization has still an impact on the daily lives of indigenous populations also today.[3] Loss or endangerment of languages and cultural practices[4] and devastating health effects are only simple examples of them.[5] The legacies of colonialism are still visible in the limited economic participation, low level of schooling, lower life expectancy, high rates of youth suicide, poor social and emotional well-being and substance abuse that Indigenous people experience.[6]

Consequently, a part of the literature defines the marginalization, oppression and discrimination that the Indigenous population experience today in the name of development as a new form of colonialism.[7]

There are thousands of indigenous cultures, each with its unique history and experience. No single person or story can speak for all of them. Consequently, this analysis starts from the assumption that the situation of indigenous peoples is different from country to country and even from region to

[1] Stannard, DE (1992). American Holocaust: The Conquest of the New World, Oxford University Press, p. 146
[2] Shawt, MN. (1996). The Heritage of States: The Principle of *Uti Possidetis Juris* Today , *British Yearbook of International Law*, Volume 67, Issue 1, pp. 75–154, https://doi.org/10.1093/bybil/67.1.75
[3] Blackstock, C. (2016). The complainant: The Canadian human rights case on frst nations child welfare. McGill Law Journal, 62, (2), 285–317.
[4] Haebich, A. (1988). For their own good—Aborigines and government in the Southwest of Western Australia 1900–1940. Nedlands, Western Australia: University of Western Australia Press.
[5] Holland C, Dudgeon P., & Milroy, H. (2013). The mental health and social and emotional wellbeing of Aboriginal and Torres Strait Islander peoples, families and communities. Supplementary paper to: A contributing life: the 2012 national report card on mental health and suicide prevention. Sydney, NSW: National Mental Health Commission. https://healthinfonet.ecu.edu.au/key-resources/publications/24980/
[6] Philpott, J. (2018). Canada's eforts to ensure the health and wellbeing of Indigenous peoples. The Lancet, 391(10131), 1650–1651. https://doi.org/10.1016/S0140-6736(18)30179-X.
[7] Galeano, E. (1973). Open Veins Of Latin America: Five Centuries Of The Pillage Of A Continent. Monthly Review Press.

region and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.[8]

Taking this in mind and considering that there are more than 350 million indigenous in the world divided into at least five thousand groups (most of them living in remote areas), this research thesis assumes that the violations of rights and the challenges they face are quite similar. Even in advanced countries and in countries where they represent a consistent percentage of the population (as is the case for Mexico in which 21 per cent of the population is indigenous), they continue to be at the borders of the society.

The relevance of the topic lies in the fact that the situation of indigenous people in the world, and consequently also in Brazil and Mexico, is dreadful and efforts made by states since the start of decolonization have not been enough to guarantee them decent living conditions.

Consequently, one of the objectives of this work of research is to show the current legal, political and institutional framework existing on indigenous rights at international and state levels, specifically in Mexico and Brazil, to understand its weak points and strengths.

Another objective is also to try to fill a gap in the literature. Indeed, there is surprisingly limited literature on indigenous matters and particularly on topics like indigenous political participation and representation. In addition, the existing research is mainly of anthropological and sociological nature rather than legislative or institutional. This makes it an opportunity and a challenge at the same time. The lack of some data for example on indigenous participation and representation complicates the study, but the possibility to discuss a topic that passes quietly is stimulating.

In addition, this research thesis attempts to show that current Western societies can draw lessons from indigenous ways of life. An example is their respectful approach towards the environment and biodiversity that many Western societies seem to have lost.

It also tries to prove that, for many expert mechanisms, forums and special rapporteurs instituted on the matter, the governments have to commit more to guarantee the Indigenous populations adequate protection.

Finally, the works would like to provide the reader with food for thought about his/her own rights and to reflect on the complex reality that indigenous people live in every day.

[8] UNDRIP (2007). Preamble. https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

In addition, it is interesting to realize how recently legislation on indigenous rights has evolved and how far the journey still is. Indeed, it is thought-provoking that even if colonialism officially does not exist, new forms of it have taken hold.

At this point, it is time to explain the focus of this research thesis and what it tries to prove. It will attempt to answer the following research question: "*In light of their differences and similarities, do the legal and institutional systems of Brazil and Mexico can be considered protective of indigenous rights at normative and practical levels*?".

This master's thesis will attempt to demonstrate that, even if there are differences between the two systems, nevertheless, none of them can be considered as really protective of indigenous rights both on the theoretical and the practical side. Overall, the thesis will try to prove that, although many important steps forward have been made from a legislative, political and institutional point of view, nevertheless many others still have to be made. Even more, the thesis will try to show that, even when the legislative framework is quite advanced, there are problems in its implementation.

To this must be added that, especially in Brazil, several strategies and an increasing number of projects are approved to make indigenous rights enshrined by the Constitution more "flexible" and less protective of indigenous communities.[9]

Finally, following the line of thought of González Casanova (2007)[10], this research works aims at corroborating the theory according to which colonization is not a concluded historical episode and that rather it has been replaced by an "*internal colonialism*" which develops with the economic mobilization of indigenous territories and their wealth. This thesis finds the reasons for it mainly in the lack of political will in acting in favour of indigenous rights.

To corroborate this hypothesis will be analysed the Constitutions of Brazil and Mexico and the international commitments they have accepted showing their strengths but mostly their weaknesses and above all their lack of implementation. This will be done by analyzing some case studies that have been chosen among many considering their significance to prove the lack of implementation of some rights. The indigenous groups analysed like the Munduruku or Sai Cinza, as well as the others cited in the text, are taken as an example since considered more explicative for the research.

[9] Alkmin, FM. (2022). The legislature and the anti-indigenous offensive in Brazil: An analysis of the proposals in the Brazilian congress concerning indigenous lands *(1989-2021)*. Criminological Encounters. https://criminologicalencounters.org/index.php/crimenc/article/view/101

[10] González Casanova, P. (2007). Colonialismo interno (uma redefinição) in A teoria marxista hoje. Problemas e perspectivas. CLACSO, Consejo Latinoamericano de Ciencias Sociales. Campus Virtual.

Since it would have been impossible to analyse all the laws and projects that have an impact on indigenous, only some deemed more relevant have been taken into consideration. In addition, the analysis will contain considerations on the wording of some relevant articles of constitutions, national laws and international documents.

This research work assumes that it is quite difficult to quantify the measure of protection of some rights in a legal and institutional system and that consistent differences exist between contexts and communities. For this reason, the hypothesis has to be considered as applicable to the national contexts, the time frame and the indigenous communities specifically analysed.

The indicators used to quantify the measure of protection will vary from right to right analysed and will be chosen considering what authoritative experts on the matter have taken as such. In the case of land rights, the indicators considered will be the number of land invasions and forced displacements, the deaths of indigenous environmental defenders, and the number of projects and activities carried out on indigenous lands without their consent.

In the case of political rights, the indicators will be elements that a joint report of the Inter-Parliamentary Union and the United Nations Development Programme considered as indexes of the political representation of minorities.[11] The number of indigenous parties, indigenous "quotas" namely the number of indigenous representatives that must be present in parliament, the number of specialised governmental agencies or consultative bodies with negotiating powers in which directly participate indigenous, if there are ad hoc parliamentary or local assemblies' procedures and how electoral districts are designed are the elements which will be primarily taken into consideration.

In the case of linguistic rights, instead, the indicators are the status accorded to indigenous languages (namely if they are official languages), if bilingual education is offered, whether legal documents are available and whether the information is broadcasted in indigenous languages.

As regards the structure of the work, Chapter 1 will give a context on indigenous matters. First, will be defined the concept of indigenous population and minority to explain what indigenous and minority rights are. Second, will be made an historical background on colonialism, making particular reference to the experiences of Mexico and Brazil which will be analysed more in detail in the following chapters, and on how indigenous rights progressively gained ground. Third, will be introduced the main documents existing on indigenous rights and the role of benchmark played by Australia, New Zealand and Canada regarding legislation on indigenous matters. Furthermore, will

[11] Protsyk O. (2010). Representation of Minorities and Indigenous Peoples: A global Overview, IPU and UNDP

be analysed the national and international documents that threat the topic of indigenous rights and the institutions that are committed to the protection of indigenous rights.

Chapter 2 will make a comparison from the perspective of comparative public law between the forms of government and the constitutions of Brazil and Mexico to show their similarities but also their differences. Clearly, much more space should be dedicated to describing exhaustively the forms of government of a country and its constitution but will be considered only the elements useful for the analysis. This Chapter is also important to frame the following comparisons and to make some premises. In particular, it is useful to provide the framework in which laws and policies are approved. It will also explain why the choice has fallen on these two countries and what makes them comparable.

Finally, will be explained the rationale behind the choice of these rights and what hinders their protection. When explaining why these rights are important, will be also mentioned the interconnection between them. When explaining why the choice feel on these countries, will be a bit described the constitutions and legal systems of these countries. These elements are also useful to better understand chapter 4 which goes into more detail on political rights.

From Chapter 3 to Chapter 5 there is the "body" of the work, namely the comparative analysis of the protection of indigenous rights in Mexico and Brazil. The separation among rights is artificial and it is done to make a deeper analysis of them easier. Indeed, all rights are interconnected and pivotal to the development of the human person.

The third, fourth and fifth chapters will include an analysis of the legislative frameworks at national and international levels existing on these particular rights. While doing it, will be also mentioned some commentaries of scholars on their strengths and weaknesses.

The analysis will start in Chapter 3 with a focus on the indigenous right to land and natural resources. These are the first to be treated since they are essential for the physical and spiritual survival of these populations. This Chapter will analyse also 2 ways in which land rights can be guaranteed, namely through demarcation and free, prior and informed consent (FPIC). While demarcation guarantees indigenous the exclusive usufruct over their lands, through FPIC they participate in processes that concern their lands by giving their consent to whatever activity is carried out on them. This Chapter will also address 2 case studies, one about the impact of mining activities in Brazil and the other about energy projects in Mexico. These will allow the reader to get into two of the main challenges to the implementation of indigenous rights to land and natural resources.

Chapter 4, instead, will analyse the political rights of indigenous people. Guaranteeing them these rights means defending democracy, helping indigenous to integrate into society and giving them

a voice to defend their interests. It is assumed that it is not enough to affirm that indigenous people have political rights and that special measures are needed to guarantee them, thus these will be mentioned highlighting critical points and strengths. Afterwards, it will be considered if Brazil and Mexico have adopted these measures and how their implementation works in practice. In particular, it will be analysed if there are indigenous quotas in Parliament, if the electoral system adopted is protective of minorities, whether there are indigenous parties and if traditional parties bring forward the demands of the indigenous and if practices such as redistricting (gerrymandering) are present.

In its turn, Chapter 5 will focus on linguistic rights. These rights are pivotal since they guarantee education, participation in political rights, healthcare and access to justice. Here the study will focus on if indigenous languages are granted the status of official languages, if those who speak indigenous languages suffer from discrimination in the fields of employment, health, education and daily life, whether bilingual education is guaranteed and if there are institutions tasked with the protection of indigenous languages.

Finally, the conclusions will summarize the evidence collected along the previous chapters and answer the research question.

As regards the methodology, the *comparatum* is the legal and institutional system of protection of indigenous rights in Mexico, the *comparandum* is the legal and institutional system of protection of indigenous rights in Brazil and the *tertium comparationis* are the features of the legal and institutional system of protection of indigenous rights. In Chapter 2 the comparison will be between the forms of government of the countries and their legal framework on indigenous rights. Afterwards, in Chapters 3, 4 and 5 the comparison will be on how these countries protect indigenous rights.

The methodology adopted will be qualitative as it is typically adopted in the field of comparative public law. In addition, the reason behind this choice is also linked to a common problem when dealing with indigenous matters. As noted by Van Cott (2010), the majority of the work on these matters adopts qualitative methods exclusively, owing to the poor quality and noncomparability of demographic data on the indigenous, the strong influence of ethnographic and interpretive research methods, and the complexity and diversity of the contexts in which indigenous political activity unfolded.[12]

[12] Van Cott, DL. (2010). Indigenous Peoples' Politics in Latin America, Annual Review of Political Science, 13:1, 385-405

In the analysis of the compliance of the states with the constitutions and international treaties they ratified, an inductive approach will be adopted so, from a series of cases will be drawn conclusions. Even if the research is qualitative, this thesis will also analyze and explain graphs and tables whenever it is considered useful for the purposes of the analysis.

The comparison is synchronic since the focus of the analysis are considered the constitutions, laws and international documents currently in force in the two countries.

The sources used are both primary and secondary. The primary sources on which the research draws most are the constitutions of Brazil and Mexico, the United Nations Declaration on the Rights of Indigenous People, the Indigenous and Tribal Peoples Convention (also known as ILO No.169), the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and core UN treaties. In addition, the thesis draws a lot on the jurisprudence of international courts, in particular that of the Inter-American Court of Human Rights. The fact that some rulings of this court will be analysed in different chapters will be additional proof of the interconnection existing among these different rights. Some passages of these documents will be quoted directly given their relevance.

Some national laws and agreements will be considered as the General Law on the Linguistic Rights of Indigenous People, the San Andrés Accords, the General Law on the Rights of Indigenous Peoples and the Federal Code of Electoral Institutions and Procedures.

The secondary sources analysed will be mainly articles written by experts on indigenous rights like Tomaselli and Anaya, the Handbook of Indigenous Peoples' Rights, and reports of NGOs like Global Witness, Minority Rights Group International, IWGIA, Cultural Survival and Amnesty International. Indeed, independent monitoring mechanisms, such as human rights organizations, civil society groups, and indigenous-led initiatives, play a crucial role in shedding light on the treatment of indigenous peoples since they provide alternative sources of information to those of nation states which are not always trustable.

Fundamental are also reports and commentaries of the United Nations, of the Commission of Venice and the commentaries made by renowned scholars on the legal framework existing at the national and international level on these rights.

The reason to treat indigenous rights “through the lens” of comparative public law is that it allows the reader to understand which are the best practices and what can be done at the national and international levels to improve the situation of indigenous. Indeed, comparative public law can help to identify gaps in legal protection and provide insight into how these gaps can be addressed. In

addition, it can be used also to protect human rights as it enables to identify strengths and weaknesses in legal systems. It can advocate human rights and promote the development of legal systems that are more responsive to the needs and interests of citizens.[13] Lastly, as noted by Fuentes & Fernández (2022) the systematization of rights at the constitutional level is an important legal element as it reflects the social and political fights for recognition.[14]

[13] Dixon, R. (2013). Comparative Constitutional Law and Constitutional Design. Annual Review of Law and Social Science, 9, 105-126. https://doi.org/10.1146/annurev-lawsocsci-102612-134014

[14] Fuentes, CA. & Fernández, JE. (2022). The four worlds of recognition of indigenous rights. Journal of Ethnic and Migration Studies, 48(13), 3202-3220. https://doi.org/10.1080/1369183X.2020.1797478

Chapter 1

Context and Definitions

1.1 Minorities, Indigenous People and Related Rights

Before starting this dissertation on indigenous rights, it is fundamental to define "indigenous people". It is necessary because, as emphasized by Griffiths (2018), in order to monitor the implementation of indigenous rights, it is important to have high-quality statistics which can be made only if there is an accurate identification of who is considered Indigenous. [15] Due to the diversity among indigenous people, it is complicated to find an agreed definition. Nevertheless, different attempts have been made.

Currently, as stated by Sylvain (2002), the only definition of indigenous peoples that is legally binding to ratifying states is the one included in Article 1.1 of the International Labour Organization number 169 on Indigenous and Tribal Peoples. [16] According to it, the Convention applies to:

> *"(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;*
>
> *(b) peoples in independent countries who are regarded as indigenous on account of their descent from populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions".*

This definition puts particular emphasis on the historical context and the impact that colonization has on indigenous and tribal peoples. In particular, it acknowledges the historical displacement and marginalization experienced by indigenous peoples as a result of colonization and recognizes that indigenous peoples have distinct social, economic, cultural, and political institutions that have been shaped by their pre-colonial heritage. It also highlights the distinctive social, cultural, and economic conditions of these groups, which set them apart from other sections of the national

[15] Griffiths, K. (2018). Statistics, rights and recognition: the identification of Indigenous peoples, Centre for Big Data Research in Health, University of New South Wales, https://www.oecd.org/iaos2018/programme/IAOS-OECD2018_Griffiths.pdf

[16] Sylvain, R. (2002). "Land, Water, and Truth": San Identity and Global Indigenism. *American Anthropologist, 104*(4), 1074–1085. http://www.jstor.org/stable/3567097

community. Furthermore, the text recognizes that the status of these groups is regulated, either entirely or partially, by their own customs or traditions, or by special laws or regulations. This acknowledges the existence of unique legal frameworks and governance systems within these communities. Finally, it acknowledges that colonization played a role in shaping the legal status and conditions of Indigenous communities, often leading to the loss of their lands, rights, and autonomy.

Afterwards, in Article 1.2 it is stated that self-identification is considered as a criterion for determining the groups to which the provisions of the Convention apply. This criterion has been adopted also by the American Declaration of the Rights of Indigenous People which, in Article 1.2 affirms that self-identification as indigenous peoples will be a fundamental criterion for determining to whom the Declaration applies and invites States to respect this right to self-identify as indigenous.

As affirmed by Daes (1996), it is essential to include elements in the definition to make it as much inclusive as possible. [17] However, this criterion was also criticised. As will be explained afterwards, membership of an indigenous group bears particular rights, so self-identification is considered a non-objective criterion since it allows a wide range of groups to claim certain rights and benefits deriving from belonging to these groups.[18]

Based on this definition, the United Nations Permanent Forum on Indigenous Issues (UNPFII) elaborated seven features to identify Indigenous people. Firstly, its members individually identify as indigenous and also the community accepts them in the group. Secondly, these groups display a historical continuity with pre-colonial and/or pre-settler societies. Thirdly, they are connected to territories and surrounding natural resources. Fourthly, they have distinct social, economic or political systems. Fifthly, they speak a distinct language and have distinct cultures and beliefs. Sixthly, they are groups within society and occupy a non-dominant position. Lastly, they can maintain and reproduce their ancestral environments and systems as distinctive peoples and communities. [19]

Another noteworthy definition is the one given by the ex-Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Jose R. Martinez Cobo. Different from the definition provided by the UNPFII, this emphasizes the experience of colonialism. According to it:

[17] Daes, EI. (1996). Standard-Setting Activities: Evolution of Standards Concerning Indigenous People: Working Paper by the Chairperson-Rapporteur, Mrs Erica-Irene A Daes, on the Concept of 'Indigenous People', UN Doc E/CN.4/Sub.2/AC.4/1996/2

[18] Quane, H. (2005). The Rights of Indigenous Peoples and the Development Process. *Human Rights Quarterly*. 27 (2): 652, 656. 10.1353/hrq.2005.0024

[19]UNPFII (2006). Who are Indigenous peoples?. Indigenous people, indigenous voices, https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf

"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."[20]

Nevertheless, some authors like Wiessner (1999), believe that this definition does not embrace the variety of existing indigenous groups.[21] Indeed, by linking indigeneity to colonisation or invasion, the experience of Indigenous groups living in Africa or Asia where oppression has occurred by dominant neighbouring societies is completely excluded. In this regard, Kingsbury (1995) underlined that the definition of the ILO Convention 169 is more inclusive since the adjective 'tribal' that accompanies 'Indigenous' broadens the definition and includes those people whose lands were not colonised but dominated by neighbouring societies or states, many of which have claimed that Indigenous peoples only exist in former European colonies.[22]

People	Objective Criteria	Subjective Criteria
Indigenous	• Historical continuity • Territorial connection • Distinct political, cultural, economic and social institutions	• Self-identification • Identitarian self-consciousness
Tribal	• Economical, cultural conditions, social organization and distinguishing forms of life; • Traditions and customs and/or special legal recognition	• Self-identification • Identitarian self-consciousness

Table 1: Criteria for the Application of ILO Convention 169 (Rodríguez, 2015)[23]

[20] Martinez Cobo, JR. (1986). Study of the Problem of Discrimination Against Indigenous Populations, [379], UN Doc E/CN.4/ Sub.2/1986/7/Add.4

[21] Wiessner, S. (1999). Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis. Harvard Human Rights Journal 57, 98

[22] Kingsbury, B. (1998). "Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy. *The American Journal of International Law*, *92*(3), 414–457. https://doi.org/10.2307/2997916

[23] Rodríguez, GA. (2015). *Los derechos de los pueblos indígenas de Colombia: luchas, contenido y relaciones*. Universidad del Rosario.

Explicative and useful in understanding the definition of indigenous and tribal people provided by ILO 169 can be this table. It shows that the definition of Indigenous and Tribal are united by subjective criteria but differ on objective ones.

Another criticism that has been brought forward is that considering the connection with ancestral lands would exclude those who have been forced to leave their territories and move elsewhere. Finally, mentioning '*non-dominant sectors of society*' could keep out those peoples who have achieved prominence in their nation-state.

Elements useful to complete the frame are also included in the Mexican Constitution. In particular, it makes a distinction between indigenous peoples and communities. According to it, communities are a species of the broader genus represented by indigenous peoples. Actually, in legal instruments, this definition is often not considered and they are used interchangeably. Interestingly, Article 2 of the Constitution also contains a definition of Indigenous people who are "*descendants of those inhabiting the country before colonization, and that preserve their own social, economic, cultural, and political institutions or some of them*".

Even if this definition contains features underlined by other above-mentioned definitions, it contains also a political component and a qualification that makes the final collection of elements non-exclusive, thus broadening the definition of indigenous identity. Consequently, social, cultural, and economic standards are not enough to define someone as indigenous, and some of their pre-colonial characteristics are necessary to receive this qualification. It recognizes and accepts that certain traditions and practices can evolve and change, either as a consequence of an innate desire or in response to outside forces.[24]

To simplify, indigenous peoples are those who can show descent and maintain their own institutions while indigenous communities are given official recognition on the basis of the above as well as their establishment in a given territory governed by those institutions.[25]

As far as the definition and identification of an indigenous community are concerned, the issue is specifically addressed in Article 2 of the Constitution which states that for a community to be

[24]Fimbres, D. C. (2019). Collective Territorial Rights of the Indigenous Peoples of Mexico: A Path to Increased Self-Determination.https://www.proquest.com/dissertations-theses/collective-territorial-rights-indigenous-peoples/docview/2387253663/se-2

[25] De Costa, R. (2016). States' Definitions of Indigenous Peoples: A Survey of Practices. Indigenous Politics (1st ed.). Rowman & Littlefield International. https://www.perlego.com/book/573503/indigenous-politics-institutions-representation-mobilisation-pdf

regarded as indigenous it must necessarily belong to one of the indigenous peoples of the Mexican nation and, in addition, possess its own organisation, territories and language.

Several terms are used as synonyms of indigenous, such as “Aboriginal”, “Autochthones” and “First Nations” in legislation and official documents. Each of these terms has its connotations and they are often inaccurate from the anthropological or historical point of view. In addition, they are often used in English-speaking countries but rarely in Latin American ones. This terminological confusion in addition to the lack of a formal legal definition generates problems in the interpretation of legal statements.

Another terminological clarification concerns the fact that, whenever possible, it is preferable to use the term “people” rather than “populations”. The reason lies in the fact that the word "people" implied that such groups of people had their own identities and better reflected how they saw themselves, whereas the expression "populations" just implied a grouping of individuals.[26]

After having dealt with the definition of what the term “indigenous” means, it is of the utmost importance to examine what kind of rights are specifically associated with this notion.

Indigenous rights are human rights that explicitly recognize the unique status of Indigenous peoples and their right to govern themselves and control their lands and resources. They are different from traditional Western rights. Indeed, social structures like clan, kinship and family play a bigger role in the definition of one’s identity in indigenous society. Thus, rights and duties exist only as part of the network in which the individual is inserted.

In addition, it must be considered that the structure of indigenous society is different from that of Western societies since it is generally horizontal rather than vertical. Consequently, the concept of the State is different since it is conceived as inseparable from the single person.

From all this derives that indigenous rights are generally conceptualized as collective or group rights. Where they are held, they are held by and for the indigenous group as an ongoing social and legal entity, and not by any specific individual within that group. Consequently, besides the rights that are guaranteed to all people, indigenous have special rights that derive from their condition of indigenous both at the individual and at the collective level as people and communities.

[26] Rodríguez, GA. (2015). Los derechos de los pueblos indígenas (1st ed.). Editorial Universidad del Rosario. https://www.perlego.com/book/1922284/los-derechos-de-los-pueblos-indgenas-luchas-contenido-y-relaciones-pdf

As we will see, how to guarantee political representation in the presence of an organization of society different from the Western one is a thorny issue which will be analyzed more in detail in Chapter 4.

Since indigenous rights are connected to minority rights, it is useful also to define what we mean by minority and minority rights. Article 1 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities links it to nationality, ethnicity, culture, religion and language. Nevertheless, there is no agreement on what a minority is. What can be affirmed for sure is that, as for indigenous, their identification is based on and/or alternative to the self-identification of an individual as part of a minority.

An alternative or, better, complementary definition is the one provided by the ex-Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Francesco Capotorti. In his words, a minority is:

"A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language".[27]

As emphasized by Khan and Rahman (1999), this definition underlies a series of elements. Firstly, it implies numerical inferiority.[28] Indeed, minorities, as the name suggests, are numerically inferior to the rest of the population of the state.

Secondly, minorities often have a non-dominant position in society in the political, social and economic spheres.[29] The above-mentioned scholars have also noted that minorities are endangered not only by their inferiority in numbers but also by the weaknesses that derive from their exclusion from power.

Thirdly, the grounds for differentiation from the rest of the population are based on ethnicity, religion, culture, nationality or language.[30]

[27] UN. Subcommission on Prevention of Discrimination and Protection of Minorities. Special Rapporteur to carry out a Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities (1979). Study on the rights of persons belonging to ethnic, religious and linguistic minorities / by Francesco Capotorti, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. E/CN.4/Sub.2/384/Rev.1, para. 568.
[28] Khan BU. & Rahman MM. (2012). Protection of Minorities: Regimes, Norms and Issues in South Asia. Cambridge Scholars Publishing. https://www.cambridgescholars.com/resources/pdfs/978-1-4438-3992-1-sample.pdf
[29] *Ibidem*
[30] *Ibidem*

Finally, only those individuals who have the nationality of the state they live in are considered minorities. [31] On this ground, there has been some disagreement since this element would exclude non-citizens such as migrants and refugees.

As stressed by the United Nations Human Rights Office of the High Commissioner (OHCHR) (2010)[32], in many cases a minority group can also be not a numerical minority, but, in the majority of cases, it occupies a non-dominant position in society, as has been the case for the black population during the apartheid regime in South Africa.

Arriving at a commonly shared definition is complicated by the heterogeneity among minority groups. Indeed, in some cases, they are completely integrated with the majority, while in others they live in clusters separated from the rest of the population.

1.2 Literature Review on Indigenous People as Minority Groups

After this definition of indigenous and minority rights, it is worth investigating the relationship between them. Generally speaking, minority rights are considered to englobe also indigenous rights since indigenous people are usually national, ethnic, linguistic, and religious minorities in the countries in which they reside.

Furthermore, both groups typically hold a non-dominant status in the society in which they reside, and usually, their cultures, languages or religious beliefs differ from those of the majority or the dominant groups. In addition, indigenous populations are often a "minority" in terms of population number in the countries in which they reside.

Some authors believe that another feature that minorities and indigenous share is that they were both prior occupants and sovereigns in the states in which they reside.[33]

However, the strong link with the ancestral lands that usually indigenous experience is often lacking for minorities. While minorities mainly fight to have their existence as a group protected, their identity recognized, their effective involvement in public life, and respect for their cultural, religious, and linguistic plurality, indigenous peoples are focused also on the recognition of their

[31] *Ibidem*
[32] OHCHR (2010). Minority Rights: International Standards and Guidance for Implementation. https://www.ohchr.org/sites/default/files/Documents/Publications/MinorityRights_en.pdf
[33] Arrese, D. (2020). The right of political participation of indigenous peoples and the UN Declaration on the Rights of Indigenous Peoples. Max Planck Yearbook of United Nations Law Online, 23(1), 109–144. https://doi.org/10.1163/18757413_023001005

rights to land and resources, their self-determination, and participation in decisions. This last consideration lies behind the choice of the particular indigenous rights that will be analysed later in this thesis.

Another difference that has been highlighted by Eide (2009) is related to the right to political participation.[34] Indeed, while Articles 2.2 and 2.3 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities emphasised the effective participation of minorities within the larger society, Articles 7 and 8 of ILO Convention No.169 and Articles 4, 23 and 31 of the United Nations Declaration on the Rights of Indigenous People (UNDRIP) gave more importance to the allocation of authority upon indigenous peoples. Hence, the right to participate in legislative or administrative measures for indigenous peoples was considered "*secondary*" and just an "*optional right*".

Indigenous peoples do certainly enjoy minority protection if they freely opt for it, but they have strenuously refused to be treated as minorities. They are protected under the Declaration on Minorities but they strongly fought to have their own Declaration, the UNDRIP.

The application of the notion of minorities to indigenous peoples has been hotly debated in international law. Indigenous representatives have rejected the idea of being a minority ever since the 1970s, when they first started to participate in the international human rights system, claiming that they are "peoples" just like the other peoples whose rights have been recognized by international law instruments. For this reason, international law has seen the formation of a unique legal regime connected to the rights of indigenous peoples that is separate from the legal system controlling minorities as a result of their resistance to being labelled as a "minority." [35]

Nevertheless, in the literature, the rights, challenges, and experiences of Indigenous peoples have been treated as part of minority rights. These focus on several different fields.

Firstly, the literature when talking about the impact that colonization and modernization have on Indigenous communities. Historical and ongoing colonial policies, such as land dispossession, forced assimilation, cultural repression, and residential schools, have significantly affected Indigenous people's social, economic, and political position in society. A remarkable example is the book "Open Veins of Latin America" by Eduardo Galeano.[36]

[34] Eide, A. (2009). Indigenous Self-Government in the Arctic, and their Right to Land and Natural Resources, *The Yearbook of Polar Law Online*, *1*(1), 245-281. doi: https://doi.org/10.1163/22116427-91000014
[35] Arrese, D. (2020). The right of political participation of indigenous peoples and the UN Declaration on the Rights of Indigenous Peoples.
[36] Galeano E. (1971). Open Veins of Latin America. Monthly Review Press.

Secondly, this literature emphasises the importance of Indigenous rights and self-determination. To do it, it stresses the ground-breaking step forward represented by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which seeks to protect and promote the rights of Indigenous people. This is the case, for instance, of the volume "Making the Declaration Work" edited by Claire Charters and Rodolfo Stavenhagen.[37]

Thirdly, scholars have tended to progressively recognize the contribution given by Indigenous peoples' knowledge, values, and practices to global knowledge production and sustainable development. In their view, Indigenous knowledge and perspectives can help address global challenges such as climate change, biodiversity loss, and social inequities. This is the case for "Land's End: Capitalist Relations on an Indigenous Frontier" by Tania Murray Li.

Finally, the literature highlights the diversity within Indigenous communities and the intersectional nature of Indigenous identities. Indigenous peoples face multiple forms of discrimination and marginalization, including sexism, racism, and homophobia, among others. To cite one of the books "When the Other is Me: Native Resistance Discourse, 1850-1990" by Emma LaRocque.[38]

In summary, the literature on Indigenous peoples as minority groups sheds light on the complex and multifaceted experiences of Indigenous peoples, and the socio-political and economic factors that influence their lives. This research underscores the need for greater recognition of Indigenous peoples' rights, cultures, and knowledge, and for more inclusive and equitable societies that respect the diversity and intersectionality of all their members.

In this respect, a milestone in the literature on indigenous rights is represented by the Handbook of Indigenous Peoples' Rights.[39] This handbook offers a comprehensive, multidisciplinary examination of indigenous peoples' rights. In this work, Chapters authored by subject-matter experts address a wide range of problems at the centre of disputes on the rights of indigenous peoples, including legal, philosophical, social, and political challenges. Differently from most of the literature existing on indigenous rights, it not only tries to answer questions on who are the indigenous, which are their rights, and how are they protected at the national and international level, but also addresses issues like genocide, globalization, the environment, culture, and identity.

[37] Charters C. & Stavenhagen R. (2009). Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples.
[38] LaRocque E. (2010). When the Other Is Me: Native Resistance Discourse, 1850 – 1990. Univ of Manitoba Pr.
[39] Lennox C. & Short D. (2016). Handbook of Indigenous Peoples' Rights. (1st Edition). Routledge.

Two other scholars whose work is crucial in the field of indigenous rights are Alexandra Tomaselli and James Anaya. The former has focused on the political rights of indigenous people. By adopting a holistic approach and analysing them in all their shapes, also in connection with self-determination, the scholar offered many useful hints for this work. The latter, who is a legal scholar that has held the position of United Nations Special Rapporteur on the Rights of Indigenous Peoples, has written extensively on indigenous rights and has played a key role in the development of international law on the subject.

Notwithstanding this existing literature that addresses indigenous rights under the hat of minority rights, indigenous rights are hardly broadcasted by the media and are mostly ignored by academia. As an example of how neglected the matter is, in the majority of Brazilian Law Schools indigenous rights are not part of the curriculum to be studied or simply worked upon. Law students often do not know institutes such as the demarcation of lands and the human rights of indigenous communities.[40]

1.3 Colonialism and Historical Roots of Indigenous Rights

During the 16th and 17th centuries in Europe, modern states, after a series of international wars and revolutions, started to be created. These entities were based on religious, linguistic, legal, and ethnical uniformity. This means that whatever was conceived as different was perceived as a threat and considered to undermine the unity and security of these states. Consequently, minorities in different territorial realities have been "put in the corner" and nationalism used to promote the cohesion of the state and its citizens. [41]

Cultural difference has been dealt with through oppression, conquest, displacement and annihilation. This is exactly what happened during colonization when European powers established their control over other territories and people and tried to destroy or change the aboriginal populations living in these places. The lands of these populations were considered *terra nullius* so belonging to no one and their cultures were considered retrograde.

[40] Akerman Sheps, AP. (2010). The Dispute over the Raposa Serra do Sol Reserve Demarcation: A Matter of Indigenous Constitutional Rights or National Sovereignity?. *Anuario mexicano de derecho internacional*, *10,* 279-303. http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1870-46542010000100008&lng=es&tlng=en.

[41] Odello, M. (2012). Indigenous rights in the constitutional state. In *Emerging Areas of Human Rights in the 21st Century* . Routledge. 116-137

Using this as justification, indigenous people were dispossessed of their lands since colonizers claimed large pieces of land for themselves. In the words of Thornton (1987), many Indigenous communities were *"removed, relocated, dispersed, concentrated, or forced to migrate at least once after contact with Europeans or Americans."*[42]

Pseudo-religious and scientific theories based on the concept of indigenous as less than humans and the need to civilize and integrate these populations into a more advanced society were used as a justification for acts that were only based on economic interest.

Many indigenous populations were killed due to genocides and battles with European populations. Forced to work in mines and plantations, they often died from European and African diseases like smallpox, typhus, and measles. Many others died due to widespread starvation and malnutrition, the deleterious effects of forced labour, alcoholism, demoralization and despair, and declining fertility.[43]

Those who survived had to abandon their traditions, practices, beliefs and cults. These were replaced by elements of Western culture such as the Catholic religion, European styles of architecture, and other cultural practices. In the words of Poets (2020), colonizers followed a process which aimed to transform indigenous individuals into *homo nullius*, bodies emptied of knowledge, cultures, and sovereignty that could then be "filled" with Europeanness/civilisation.[44] This ethnocide deeply shaped the economic, cultural and political structure of these societies and persists today.

Colonization also shaped the dynamics of powers existing among the countries of the world. For instance, Latin America still is "dominated" by European-North American powers.

Clearly, the experience of colonialism presents common features but also strong differences from place to place, and therefore cannot be thought of as homogenous from a social, economic or political point of view. As an example, even in Brazil and Mexico, which are the two countries which will be analysed more extensively in the following chapters, colonialism showed huge differences, particularly in terms of the numbers of indigenous populations, the role of religion, and the impact of slavery.[45]

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[42] Thornton, R. (1987). American Indian Holocaust and Survival: A Population History since 1492, Norman: University of Oklahoma Press.
[43] *Ibidem*
[44] Poets, D. (2020). Settler colonialism and/in (urban) Brazil: black and indigenous resistances to the logic of elimination, Settler Colonial Studies, https://doi.org/10.1080/2201473X.2020.1823750
[45] Duce, A. (2016). Storia della politica internazionale (1945-2013). Il tramonto degli imperi coloniali. Edizioni Studium S.r.l.https://www.perlego.com/book/1080548/storia-della-politica-internazionale-19452013-il-tramonto-degli-imperi-coloniali-pdf

In the first place, it must be considered that they were colonized by two different colonizing powers, Spain in the case of Mexico and Portugal in that of Brazil. This had an impact on how the process of colonization was led.

In the second place, the indigenous populations in Mexico were more numerous and organized than those in Brazil. As a result, the indigenous populations in Mexico were able to resist colonization to a greater extent than those in Brazil and, still today, there is a bigger percentage of the indigenous population in Mexico than in Brazil.

In the third place, while Mexico had remarkable state and ecclesiastical structures that ruled over a predominantly indigenous population[46], Brazil was characterized by a rural, slave-based economy with little control from the colonial administration and church.[47] The church and the evangelizing mission played a far bigger role in Mexico than in Brazil where the Portuguese were more focused on the economic exploitation of the colony. Conversely, the slave trade was far more important in Brazil where it represented a major economic activity and millions of Africans were forcibly brought to Brazil to work on plantations and in other industries. Remarkably, still today the descent of Afro-Americans brought there represent an important percentage of the Brazilian population.

1.4 Sensibilization on the Protection of Indigenous Rights

Considering the background of colonization, international law on indigenous matters developed slowly and, above all at its beginning, was marked by an integrationist, conservative and assimilationist perspective that protected the interests of the colonizers. A problem was represented by the fact that international law only recognized two types of subjects, namely states and individuals. Indigenous people, which had societies organized as communities, could not be put under any of the two categories and struggled to find a place in the legal arena.[48] In this process, pivotal was the role

[46]Chávez, AH. (2006). Mexico (1st ed.). University of California Press. https://www.perlego.com/book/552110/mexico-pdf

[47] Smith, J. (2014). A History of Brazil (1st ed.). Taylor and Francis. https://www.perlego.com/book/1557027/a-history-of-brazil-pdf

[48] Iorns Magallanes, CJ. (2003). Dedicated Parliamentary Seats For Indigenous Peoples: Political Representation As An Element Of Indigenous Self-Determination. Victoria University of Wellington Legal Research Paper No. 23/2017. https://deliverypdf.ssrn.com/delivery.php?ID=729001022114010018095102082026029094026006014001084049030125082018118065064105090099122024127099030044044015013117117107071099021029063058010103125030110016095073072007013054084120113118074120118125105081019072090107107088013096022087083029084116015119&EXT=pdf&INDEX=TRUE

of the American Indian Movement which, aside from several NGOs, associations, and human rights organizations, brought forward the interest of indigenous in the political arena.

The struggles were mainly focused on three dimensions. A socio-economic one, related to the mode of production and the link between natural resources and collective agents, a socio-cultural one which refers to the acceptance of indigenous traditions and visions of the world and a political one that only conceives the oneness of the nation-state.[49]

This struggle led to some advancements in the field of protection of indigenous rights. Indeed, from the late 1980s, indigenous people started to be recognized as subjects of rights, individual citizens but also collectives with specific group rights different from those of the rest of the population.[50]

The 1990s represented an important period for indigenous rights. Indeed, 1993 marked the beginning of the "Decade of Indigenous Peoples" which was adopted by governments and the UN system in 1994. The initiative was intended to give visibility to the reality of indigenous peoples around the world, fight against injustices committed against them, and recognize their civil, social, cultural, and economic rights.

This internationalization of indigenous demands took particular relevance in the context of Latin America. In the view of Rodríguez-Piñero Royo (2007), this happened mainly for three reasons.[51] The first reason is connected to the historical complicity between Latin American states and international law doctrines that justified the subjugation of indigenous peoples during the construction of these states, particularly during the colonial and post-colonial periods. This complicity perpetuated the marginalization and discrimination of indigenous peoples, denying them their rights and subjecting them to cultural and economic exploitation.[52]

The second reason is connected to the socio-political transition that many Latin American countries have undergone since the late 1980s, which has led to the inclusion of indigenous peoples' rights on the reform agenda.[53] This transition has been characterized by democratic reforms, decentralization, and the recognition of cultural diversity and the need for social inclusion.

[49] Fuentes, CA. & Fernández, JE. (2022). The four worlds of recognition of indigenous rights
[50] Sieder, R. (2016). Indigenous peoples' rights and the law in Latin America. *Handbook of Indigenous Peoples' Rights*, 414–423.
[51] Rodríguez-Piñero Royo L.(2007). La internacionalización de los derechos indígenas en América Latina¿el fin de un ciclo? in Pueblos indígenas y política en América Latina: el reconocimiento de sus derechos y el impacto de sus demandas a inicios del siglo XXI, Salvador Martí Puig, 181-200
[52] *Ibidem*
[53] *Ibidem*

The third factor refers to the high level of openness of these countries to the international human rights system, which has facilitated the internationalization of indigenous issues in the region.[54] Latin American countries have ratified various international human rights instruments that recognize indigenous rights, such as Convention No. 169 of the International Labour Organization (ILO), which focuses specifically on indigenous issues.

1.5 The Condition of Indigenous Populations in the World: A Primer

It can be affirmed that, although there have been improvements in the living conditions experienced by indigenous people in the world, they still face challenges. Indeed, indigenous experience the worst measures on all indicators of health, education, and social and political participation, including nutrition, employment and income [55]. Indeed, extreme poverty, debt, poor health care, unemployment, poor housing, preventable diseases, drug abuse, suicide high infant mortality and low life expectancy affect Indigenous peoples disproportionately.[56]

Clearly, as has been already underlined in Paragraph 1.1, since there is no agreed definition of who is "indigenous", it must be considered as an estimate and not as a precise picture of reality. Furthermore, there is a shortage or, sometimes, even an absence of official statistical data on the realities of indigenous experience.[57] Only a small number of countries enumerate indigenous residents in their censuses or include ethnic identifiers in other official statistics such as labour force surveys. As affirmed by Peters (2011), Indigenous peoples often remain invisible in public statistics and the implications of their histories of marginalization and exclusion continue to be undocumented.[58]

According to the estimates of the World Bank in 2022, Indigenous populations have a life expectancy 20 years lower than that of non-indigenous worldwide. This is a pivotal indicator since having a long and healthy life means living in a country or being part of a group with a high degree

[54] *Ibidem*
[55] Mitchell, T., & Enns, C. (2014). The UN declaration on the rights of indigenous peoples: Monitoring and realizing indigenous rights in Canada. CIGI.
[56]UNPFII (2009). State of the World's Indigenous Peoples. ST/ESA/328. https://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf
[57] ILO (2019). Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an inclusive, sustainable and just future. https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_792208.pdf
[58] Peters, EJ. (2011). Still invisible: Enumeration of indigenous peoples in census questionnaires internationally, in Aboriginal Policy Studies, Vol. 1, No. 2, pp. 68-100. https://journals.library.ualberta.ca/aps/index.php/aps/article/view/11685/8916

of social development.[59] This indicator is so important for describing population conditions that, together with the Education Index and the Gross Domestic Product (GDP) index, it forms the Human Development Index (HDI) used by the United Nations Development Programme (UNDP). As shown by Figure 1, this estimate varies a lot from country to country but, altogether, as in high-income as in low and middle-income countries it has the same tendency.

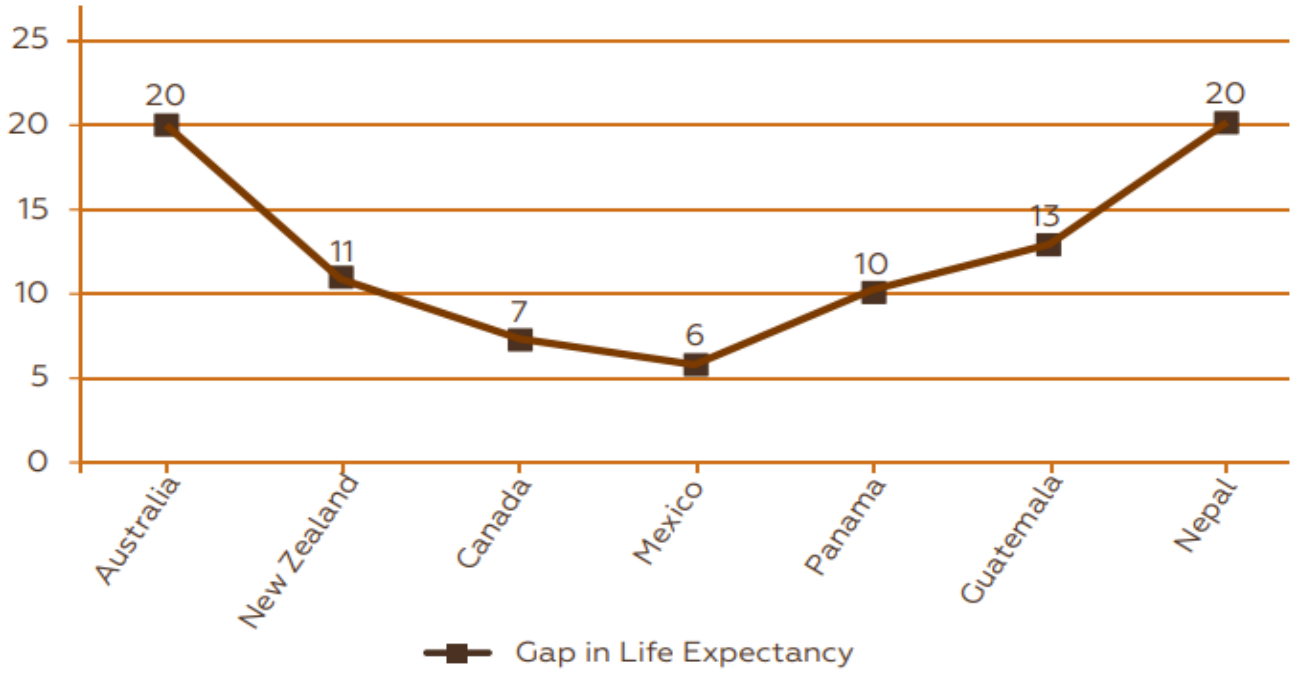

Figure 1: Gap in Life expectancy: Comparing Indigenous and Non-Indigenous Populations, with States in Order of 2009 HDI Rating (MacIntosh, 2012)[60]

In addition, indigenous people are also less likely to receive public investments for their basic services and infrastructures and face multiple barriers to participating fully in the formal economy, enjoying access to justice, and participating in political processes and decision-making.

Among the indigenous communities, some are more fragile than others. This is the case for the populations living in Latin America which are among those who live in the greatest poverty, according to all socioeconomic indices. Remarkably, even though just 8% of Latin Americans are indigenous, they account for 20% to 25% of the region's poor population and an even greater

[59] Lebrusán Murillo I. (2019). The life expectancy: what is it and why does it matter. https://cenie.eu/en/blogs/age-society/life-expectancy-what-it-and-why-does-it-matter

[60] MacIntosh, C. (2013). The Role of Law in Ameliorating Global Inequalities in Indigenous Health. *Journal of Law, Medicine and Ethics Spring:* 74-88

proportion of the 17% living in extreme poverty.[61] According to ILO estimates, indigenous peoples are nearly three times more likely to be in extreme poverty than non-indigenous people.[62]

When in wage and salaried work, indigenous peoples face a wage gap. Across regions and income groups, indigenous persons earn 18.5 per cent less than non-indigenous persons. The reasons behind this wage gap are connected mainly to the discrimination they face, lower educational attainment, over-representation in the rural economy (where wages are normally lower), a high burden of unpaid care work, and also over-representation in the informal economy.[63]

ILO data indicates that indigenous peoples may have fewer educational opportunities than their non-indigenous counterparts. 46.6 per cent of indigenous adults in employment have no formal education compared to 17.2 per cent of their non-indigenous counterparts, making indigenous individuals almost 30 percentage points more likely to have no formal education compared to non-indigenous persons.[64]

This legacy of inequality and exclusion makes indigenous populations also more exposed to events like climate change and pandemics. It has been the case for the COVID-19 pandemic when vulnerabilities related to the pandemic were exacerbated in some cases by the lack of access to national health, water, and sanitation systems, the shutting down of markets, and mobility restrictions that have greatly impacted their livelihoods, food insecurity, and well-being.[65] Remarkably, indigenous persons work in sectors that have been hard hit by the pandemic, sectors ranging from services, including domestic work, hospitality and tourism, to commerce, transport, manufacturing and construction.[66] As a result of lockdown measures, indigenous day labourers have lost their income and run the risk of falling into extreme poverty.[67]

This situation of vulnerability is particularly strong for indigenous peoples living in voluntary isolation. Indeed, the pressure on natural resources in their territories or nearby areas made them at risk of extinction. This is the case particularly for Brazil where it has been found that 70 indigenous

[61] Sieder, R. (2016). Indigenous peoples' rights and the law in Latin America. *Handbook of Indigenous Peoples' Rights*, 414–423. https://doi.org/10.4324/9780203119235-27
[62] *Ibidem*
[63] ILO (2019). Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an inclusive, sustainable and just future.
[64] *Ibidem*
[65] The World Bank (2023). Indigenous people. https://www.worldbank.org/en/topic/indigenouspeoples
[66] ILO (2020). COVID-19 is devastating indigenous communities worldwide, and it's not only about health– UN expert warns. https://www.ohchr.org/en/press-releases/2020/05/covid-19-devastating-indigenous-communities-worldwide-and-its-not-only-about
[67] ILO (2019). Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an inclusive, sustainable and just future.

peoples, which represent almost the 23% of the country's indigenous peoples, are in an extremely fragile situation, with a population of less than 100 individuals. [68]

1.6 The Benchmarks: Canada, New Zealand and Australia

In the field of indigenous rights Canada, Australia, and New Zealand represent an important legal, political and institutional benchmark. There are several reasons why these countries have such a pivotal role in this. In the first place, they are all countries in which British colonization has displaced, marginalized and oppressed the indigenous population that was living there.[69]

In the second place, in all these countries indigenous people have fought for their self-determination and the recognition of their lands. These battles have led to legal and political developments, including the recognition of indigenous titles and the establishment of treaty rights.

In third place, the Canadian, Australian and New Zealander governments have in recent years recognized the damages caused by colonization on indigenous people and tried to repair them. Significant examples are the establishment of the Truth and Reconciliation Commission in Canada and the Uluru Statement from the Heart in Australia.

In fourth place, being all three members of the Anglo-Commonwealth, they have similar colonial and cultural backgrounds and similar laws and procedures concerning incorporating international law in their domestic laws.

Finally, these are all countries that have an influence on the global stage and that have represented a model to be emulated by other countries.[70]

At the same time, it must be kept in mind that they have incorporated international human rights standards at different rates and to varying extents, depending on domestic circumstances and that, as poetically affirmed by Iorns Magallanes (1999), "*the relative strength of the Aboriginal voice varies in each country*".[71]

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[68] ECLAC (2014). Guaranteeing indigenous people's rights in Latin America. Progress in the past decade and remaining challenges. https://repositorio.cepal.org/bitstream/handle/11362/37051/4/S1420782_en.pdf

[69] Armitage, A. (1995). *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand*. Vancouver: University of British Columbia Press

[70] *Ibidem*

[71] Iorns Magallanes CJ. (1999). International Human Rights And Their Impact On Domestic Law On Indigenous Peoples' Rights In Australia, Canada And New Zealand in *Indigenous Peoples' Rights in Australia, Canada and New Zealand, P Havemann, ed. (Auckland: Oxford University Press, 1999), 235-276.* https://deliverypdf.ssrn.com/delivery.php?ID=020102027024075104126119074086029014122017071012062030101002071122112064067006127029056029020062102033001066102028092117121113015072091036076110093004000 02

Now that it has been explained why Australia, Canada and New Zealand are considered benchmarks in the field of indigenous rights, it is necessary to address some specific features of the institutional and legal framework on indigenous rights existing in these countries.

As regards Canada, it has been among the first states to recognize Aboriginal rights. Even though there is no general agreement on what these include, they are generally considered the rights that Aboriginals have always practised and enjoyed, since before the arrival of European colonizers. For many, the concept of Indigenous rights can be summed up as the right to independence through self-determination regarding governance, land, resources and culture. Aboriginal rights are not granted from external sources but are a result of Aboriginal peoples' occupation of their home territories as well as their ongoing social structures and political and legal systems. To Aboriginal Rights is dedicated an entire section, Section 35, in the Canadian Constitution and Section 25 in the Charter of Rights and Freedoms.[72] In addition to this, there is the Canadian Human Rights Act, which protects First Nations living in reserves, and court cases.

Remarkably, all indigenous rights are not absolute under Canadian Law. Therefore, it means that government can infringe on them for purposes of economic development, power generation or the protection of the environment or endangered species. Nonetheless, the limitation of the rights must be justified and has to be guaranteed constitutional protection of the affected rights.

What constitutes an Aboriginal right and, above all, the grounds on which it can be limited are established in the 1990 *R. v. Sparrow* decision and the 1996 *R. v. Van der Peet* ruling. The former created the "Sparrow test" which set forth the parameters of what constituted an Aboriginal right and the extent to which the Canadian government may lawfully restrict or infringe upon it. Even though it was highly contentious, this case was important in that it demonstrated that there are limits to Aboriginal rights. The latter established the "Van der Peet test," which further established guidelines for courts to decide what constitutes a valid Aboriginal claim. In particular, the Supreme Court has established that for resource rights, besides the Aboriginal title, it is needed to demonstrate that the right was integral to their distinctive societies and was exercised at the time of first contact with Europeans. As an example, to consider fishing and hunting as rights, Indigenous people have to prove that they practised these activities already before the arrival of the colonizers.

70720690670850660400130060660710031081131051160751011031251110840061260880941180860840100760100720&EXT=pdf&INDEX=TRUE

[72] Hanson E. (2009), Aboriginal rights, First Nations&Indigenous Studies, The University of British Columbia, https://indigenousfoundations.arts.ubc.ca/aboriginal_rights/

These tests have been criticized by both Indigenous and not indigenous populations since, by firmly establishing what an Aboriginal right is, the courts can reduce the adaptability and fluidity of Aboriginal rights. For example, the Van der Peet test only recognizes as valid Aboriginal rights those that were practised before European contact. Some scholars and legal experts caution that this test then "freezes" Aboriginal rights in a post-contact era without considering that Aboriginal societies have had to change over time. Some scholars and legal experts, such as political scientist Eisenberg (2006), argue that the perception of "legitimate" rights as only those that existed pre-contact is ethnocentric since it is not applied to non-Aboriginal rights.[73]

Other cases have contributed to shaping the borders of Aboriginal rights. Among them, there is the *Delgamuukw v. British Columbia* case (1997). The case established the principle of "Aboriginal Title" in Canadian law, which recognizes indigenous peoples' rights to their traditional lands based on their historical occupation and use of the land and stated that it is a right protected under the Constitution. In addition, there have been in Canada important judicial decisions confirming Indigenous rights, such as the *R. v. Marshall* decision (1999) regarding fishing rights and the *R. v. Gray* decision (2006) regarding the right to harvest wood on Crown lands for domestic uses.

Finally, it is pivotal to mention the forms of reparation addressed by Canada to its indigenous population. Indeed, after the Royal Commission on Aboriginal Peoples examined the social, economic, legal and health status of Indigenous peoples, the Canadian government prompted a statement of reconciliation in which it acknowledged the role it played in the development and administration of Indian residential schools in which Indigenous rights were continuously violated.[74] Afterwards, Canadian courts approved payment and funding for programmes for former students and their families for healing, truth, reconciliation, and commemoration of the residential schools and the abuses suffered [75].

As regards Australia, there is no mention of Indigenous people in the Australian Constitution but there are several acts that have granted Indigenous with different types of rights. One of the most important is the Aboriginal Land Rights Act (1976) which recognizes the right of Aborigines to own the land but also provides in effect the right to veto mining for 5 years. Furthermore, a mining grant or road construction may not be undertaken unless the traditional owners of the land understand the

[73] Blanchard M. (2006). An interview with Avigail Eisenberg : "Reasoning about the Identity of Aboriginal People. http://hdl.handle.net/20.500.12424/610715
[74] Canada (1997). Gathering Strength: Canada's Aboriginal Action Plan.
[75] Canada (2007). Residential Schools Settlement: Official Court Notice.

nature and purpose of the proposed mining or road construction proposals as a group and consent to them.[76]

In this regard, it is necessary to stress that in Australia not all the indigenous groups are granted the same protection. Indeed, the Indigenous groups that have signed treaties with the federal government or that have won court cases enjoy particular rights. It is the case, for example, of the First Nations which are guaranteed "privileges" like annual cash payments or the Meriam people which can exercise more control over lands and populations than others. Strikingly, the Indian Act identifies two categories, Status and Non-Status Indians, and guarantees only to the first group certain rights, like not paying federal or provincial taxes on certain goods and services while living or working on reserves.

Also case law in Australia has represented an important step forward in the field of Indigenous rights. In this regard, it deserves to be mentioned the *Mabo v. Queensland* case (1992). In this case, the High Court of Australia overturned the doctrine of *terra nullius* and recognized the native title rights of the Meriam people to their traditional lands in the Torres Strait. The decision paved the way for similar claims by other indigenous groups throughout Australia.

To address this decision, in 1994 came into operation the Native Title Act 1993, a Commonwealth statute. The main purpose of the Native Title Act 1993 is to recognize and protect native title. The act provides for the recognition of pre-existing rights to land and waters and addresses the acts that impact native title and the resolution of compensation claims. It established a legal basis for land claims.

Finally, an important place in the field of Indigenous rights is occupied also by New Zealand, particularly in the field of political rights. Indeed, historical circumstances, political will and Maori struggles have resulted in relatively significant Maori political participation in elective and administrative bodies. This participation takes different forms. In the first place, there is a system which guarantees Maori seats in Parliament in numbers proportionate to the number of Maori choosing to register on the Maori electoral roll. This system, established already in 1867 and increased in 1995[77], has proved to be effective for the protection of Maori interests in Parliament over the years[78]. In the second place, there is the system of Mixed Member Proportional Representation (MMP), which has increased the number of Maori candidates obtaining party selection in winnable

[76] Kaufmann, P. (1998). Wik, Mining and Aborigines, Allen and Unwin, pp. 15-16.
[77] Armitage, A. (1995). *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand*.
[78] Iorns Magallanes, CJ. (2003). Dedicated Parliamentary Seats For Indigenous Peoples: Political Representation As An Element Of Indigenous Self-Determination.

positions. In the third place, there is the Maori Party "*Te Pāti Māori*" which since 2004 has been able to carry out the demands of the Maori group.[79]

The guarantee of Aboriginal Rights can be considered as somehow "historical" in New Zealand since, already in 1840, was promulgated the Treaty of Waitangi which shapes the relationship between the Maori and non-indigenous population. Under Article 2, the Maori are guaranteed "*the full exclusive and undisturbed possession of their lands and estates, forests, fisheries, and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession*". The document also establishes recompense for land alienation.

Another field in which New Zealand has been a forerunner is languages. Indeed, the Maori Language Act of 1987 declared the Maori language to be the official language of New Zealand. This act gives Maori the right to speak Maori in legal proceedings[80] and establishes the Maori Language Commission to promote the Maori language, and, in particular, its use as a living language and as an ordinary means of communication.

1.7 National and International Instruments of Protection

At the national level, the protection of indigenous rights generally comes from Constitutions, laws or acts having the same validity as laws, the system of courts and other mechanisms for the protection of human rights, such as ombudsmen and national human rights commissions.

In the first place, there are the Constitutions as national norms which protect indigenous rights. The Brazilian Constitution, which will be analysed more in detail in the next chapters, is considered among the most protective of socio-economic rights. [81] Indeed, it contains provisions on education, culture, sports, science, technology and innovation, as well as social communication, environmental protection, family and indigenous people. A robust pension system and guidelines for social assistance for the most vulnerable are among the strongest "socialist" features of the 1988 Constitution.

It has been considered to represent a paradigmatic shift in the government's policies towards indigenous people. Being influenced by documents of ILO and UN towards recognition of indigenous

[79]Xanthaki A. & O'Sullivan D. (2009). Indigenous Participation in Elective Bodies: the Maori in New Zealand. International Journal on Minority and Group Rights. 16:2.181-207. http://dx.doi.org/10.1163/157181109X427734n

[80] It is necessary to point out that this does not imply the right of any person to insist on being addressed or answered in Maori.

[81]Neder Meyer, EP. (2021). Constitutional Erosion in Brazil (1st ed.). Bloomsbury Publishing. https://www.perlego.com/book/2787863/constitutional-erosion-in-brazil-pdf

rights, it acknowledges indigenous socio-cultural diversity and sets forth several specific rights and policies for indigenous people. It dedicates an entire chapter, Chapter VIII, and one article of the Acts of the Transitory Constitutional Regulations to indigenous matters. This recognition of fundamental rights, including education, health, work, freedom, equality, and social rights, was an achievement of the Indigenous Movement of Brazil, which had a pivotal role in the elaboration and writing of the Constitution.[82]

The 1988 Brazilian Constitution represented an important step forward since it abandoned the assimilationist and integrationist logic and adopted an "interaction paradigm", by recognizing the Indians' customs, beliefs and traditions and the original rights over the lands they traditionally occupy. The relationship of the Indians, their communities and their organizations with the national community began to take place on a horizontal plane and no longer on a vertical plane.[83] The advances brought about by the Constitution and other legislation related to indigenous rights strengthened indigenous autonomy and suppressed the institute of guardianship thus recognizing the Indians as subjects capable of exercising their rights, without the need to be represented or assisted.

Nevertheless, the Constitution has its drawbacks as well. Indeed, also multiculturalism, to which Brazil turned in its 1988 Constitution and which officially broke with the integrationist and assimilationist paradigm existing until that moment, is considered by some scholars as a state technique of managing difference while enforcing a subtler form of assimilation – a differentiated political assimilation/elimination.[84] The scholar Charles Hale labelled this the "*permitted Indian*", [85] the Indian who is granted recognition and rights within the constraints of dominant interests and institutions.

In its turn, the Mexican Constitution recognises that Mexico is a multicultural nation originally sustained by its indigenous peoples who are descended from populations that inhabited the current territory of the country at the beginning of colonisation and who preserve their own social, economic, cultural and political institutions, or part of them. [86] It also mandates that the constitutions and laws

[82] Politize! (2021). Os direitos indígenas no Brasil, Equidade, https://www.politize.com.br/equidade/blogpost/direitos-indigenas-no-brasil/
[83] Barreto, HG. (2003). Direitos Indígenas vetores constitucionais. Curitiba: Juruá, p.104
[84] Poets, D. (2020). Settler colonialism and/in (urban) Brazil: black and indigenous resistances to the logic of elimination.
[85] Hale,C. (2004). Rethinking Indigenous Politics in the Era of the "Indio Permitido"', NACLA Report on the Americas 38, no. 2.
[86] Constitution of Mexico, Article 2, https://www.constituteproject.org/constitution/Mexico_2015.pdf?lang=en

of the federal entities must promote equal opportunities for the indigenous population, eliminate any discriminatory practices and determine the necessary policies to guarantee their rights.[87]

Besides the Constitutions, also national legislation addresses indigenous matters. This is the case for Brazilian Law No. 6,001/1973 also known as Indigenous Peoples' Statute which contains many provisions on indigenous rights. This law has been criticized on many grounds and it contradicts many articles of the Constitution which grant greater rights to indigenous peoples. Indeed, it has been shaped on the basis of the integrationist precepts of ILO Convention 107 and the Brazilian Civil Code of 1916.

It was written under the military dictatorship and regards indigenous people as "relatively incapable" to exercise their rights, which violates various international and national guidelines. Remarkably, Article 1 of the Statute declares that the indigenous population should be integrated harmoniously and progressively into Brazilian society. Conversely, the Constitution gives indigenous peoples cultural autonomy and explicitly contradicts the Statute. This has created a confusing national judicial system to the detriment of the affected communities. Until now the constitutional revision of the document has been blocked for some time in Parliament.

At the international level, there are Declarations, Conventions, systems of International Courts and Human Rights Commission tasked with the protection of indigenous rights. An analysis is specifically needed for the Indigenous and Tribal Peoples Convention, also known as Convention 169 of the International Labour Organization (ILO), the Indigenous and Tribal Populations Convention, also known as Convention 107 of the ILO and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

These documents contain interesting provisions on indigenous rights but, like almost all international documents, they do not put on states strong duties since States often try to safeguard their sovereignty, national security and territorial integrity. A significant example comes from Brazil. Indeed, it adhered to the ILO Convention 169 in the early 1990s, but Congress only approved it in 2002, after much controversy over whether or not the convention restricted national sovereignty. The military power, in particular, opposed the Convention. It considered it an undue interference by an international body in decisions about infrastructure projects in Brazilian territory and as a pretext to internationalize the Amazon and its coveted resources in the name of the defence of indigenous rights.

[87] Vázquez Correa L. (2020). Political representation and actions indigenous affirmative action: the pending agenda. Mirada Legislativa. No. 192. http://bibliodigitalibd.senado.gob.mx/bitstream/handle/123456789/4956/ML_192.pdf?sequence=1&isAllowed=y

Even though the Supreme Federal Court ruled that it would not call national sovereignty into question, the Bolsonaro government proposed a Bill of Legislative Decree, the 177/2021, which aimed at denouncing the Convention affirming it was an interference in the internal affairs of the country.[88]

Once made this premise, the ILO Convention 169 marked an important advancement in the field of norms related to indigenous peoples and their rights. Together with ILO Convention 107, which can be considered its antecedent and that still binds some states that have not ratified the subsequent convention, they represent the only international instrument on indigenous rights binding on ratifying state parties and, they pone on subscribing states a duty to reform their legislation to comply with its provisions.

ILO Convention 169 marks a significant shift in the ILO's approach towards indigenous and tribal peoples, embracing an approach founded on respect for their existence, ways of life, identity, traditions, and customs. It recognises the aspirations of indigenous peoples to control their own ways of life and development and to maintain and strengthen their identities, languages and religions. Stavenhagen (2008), has defined it as "*the most comprehensive instrument of international law to protect, in law and in practice, the rights of indigenous and tribal and tribal peoples to enable them to retain indigenous customs and practices vis-à-vis those of the national society in which they live*".[89]

The primary aim of Convention 169 is to combat the assimilation and integration of indigenous which has been the norm since colonial times.[90] It covers a wide range of subjects, including provisions on health, education, traditional occupations, social security, and most importantly, it recognizes the rights to traditionally owned or occupied land and natural resources connected to these lands. It promotes self-government and autonomy for indigenous and tribal peoples and establishes obligations by state parties to consult with them through appropriate procedures when considering legislative or administrative measures that may affect them directly. The Convention has attracted criticism, but its normative prescriptions are connected to the overarching human rights framework, and its influence has extended beyond the actual number of ratifications. It has stimulated debate and studies on the situation of discrimination suffered by indigenous peoples and has provided an important source to help define indigenous rights within national jurisdictions. It has been ratified by

[88]Fundação Fernando Enrique Cardoso, Povos indígenas: protagonismo na luta por preservação de suas terras e cultura, https://fundacaofhc.org.br/linhasdotempo/questao-indigena/

[89] Stavenhagen, R. (2008). Los pueblos indígenas y sus derechos. Informes temáticos del Relator Especial. www.unescomexico.org

[90] Panzironi, F. (2006). Indigenous peoples' right to self-determination and development policy. (Doctoral dissertation). University of Sydney, Faculty of Law. https://ses.library.usyd.edu.au/bitstream/handle/2123/1699/02whole.pdf?sequence=2&isAllowed=y

most Latin American countries, among whom there are Brazil and Mexico, and it has been one of the primary mechanisms for defending territorial rights by indigenous peoples, as it allows access to international law.

To implement this convention, allegations of its violations are heard by the ILO Committee. The main supervision procedure for the implementation of the ILO Convention 169 is the periodic review of reports by states conducted by the Committee of Experts on the Application of Conventions and Recommendations of the ILO. This committee examines the implementation of the Convention's provisions by states that have ratified it and publishes "individual observations" as well as confidential requests directed at concerned states. The Committee of Experts began receiving many communications from indigenous organizations in the early 1990s, which exceeded its formal framework of functioning limited to examining communications from states, employers, and workers. The presentation of the first reports to the Committee of Experts during the initial years of the Convention's validity also generated the practice of presenting "alternative reports" by indigenous organizations. In some cases, these reports were the product of internal consultations within the indigenous movement, in coordination with trade unions and civil society organizations.

Another mechanism which has been established to implement the Convention is the complaints procedure which is foreseen in Article 24 of the Convention. It allows the Governing Body of the ILO to receive allegations of specific violations of ratified conventions by countries. The mechanism is more flexible than other contemporary dispute resolution procedures, but its active legitimacy is limited to states, employers' organizations, and workers' organizations due to the tripartite character of the majority of the organization's procedures.

According to Rodriguez (2015), this Convention responds to the demands of indigenous peoples and their aspirations to take control of their own institutions, ways of life, and economic development and to make their own decisions. [91] On the other hand, Convention 107 responded to assimilation policies seeking to bring indigenous groups into a position of self-government to promote better social and economic conditions generally. The integrationist ideology of the latter convention is deemed to have been reflected in public policies towards indigenous populations in countries like Mexico and Peru between the 1930s and 1970s.

In its turn, the UN Declaration on the Rights of Indigenous Peoples is the most comprehensive instrument concerning the rights of Indigenous peoples in international law. It establishes a standard that states have to respect to protect and promote indigenous rights. It has been drafted with the

[91] Rodríguez GA (2015). The rights of the indigenous peoples of Colombia. Struggles, content and relationships. Universidad del Rosario. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662178

participation of indigenous populations and recognizes innovative rights. An example is the right to redress namely to rectify and remediate historical deprivations. In the Declaration are also considered ways to implement it.

At the same time, it is necessary to highlight some flaws of the UNDRIP. Above all, it is a declaration, so a non-binding document that is not legally enforceable against nation-states. This makes state participation voluntary and makes states not accountable when they disrespect it. Consequently, even if states are supposed to take measures to implement it and adopt laws and policies in line with those standards, it cannot be directly enforced against the states if they do not respect the duties enshrined by the convention. According to Fuentes (2017), even if it is not a binding instrument, nevertheless it relates to the already existing international human rights standards and obligations that have been assumed by the Member States. [92] In this sense, it represents a commitment made by the United Nations and its member states towards non-discriminatory protection, and promotion, of indigenous peoples' rights. The countries that since the beginning ratified the declaration and also those that did it later, namely Australia, New Zealand, Canada, and the United States, which at the beginning had voted against the declaration, all endorsed UNDRIP, but only in a non-legally binding and informal way.

The Declaration that serves as the denouement of these negotiations comprises a bill of rights which reflects the commitment of signatory states to provide effective legal and political recognition, protection and support to the cultures of their local indigenous peoples. It also serves as a politically and morally significant standard by which to evaluate, critique and reform the laws and actions of all nation-states as far as the treatment of their indigenous peoples is concerned.

In the view of Panzironi (2006), two particular features of this declaration emerge.[93] It is the first international instrument which has developed through a standard–setting process in which has intensively participated civil society. Indeed, indigenous representatives, NGOs with or without consultative status to the UN Economic and Social Council (ECOSOC), scholars, experts, government representatives, international institutions and agencies have all worked on the draft of the document.

Furthermore, in this Declaration there is the affirmation of indigenous people as a collective subject. As underlined in Paragraph 1.4, it was precisely the collective dimension of indigenous

[92] Fuentes, CA. & Fernández, JE. (2022). The four worlds of recognition of indigenous rights.
[93] Panzironi, F. (2006). Indigenous peoples' right to self-determination and development policy.

groups that prevented them from becoming subjects of international law. In addition, in some provisions, aside from the collective subject, is mentioned the indigenous one.

Both the Convention and the Declaration also addressed the issue of dealing with indigenous and traditional peoples respectfully and affirmed that "*all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust*". [94] These theories, like that of *terra nullius*, spread during colonialism and were used as a justification for the brutalities carried out over that centuries.[95] On the contrary, both documents advocate the importance of cultural diversity and the pivotal contribution that indigenous give to the diversity and richness of civilizations and cultures.

Notwithstanding these valuable declarations of principles, these documents are not flawless. As affirmed by Ovalle & Vásquez Salazar (2022), the ILO Conventions and the UNDRIP only offer a low-intensity democracy.[96] According to their view, these documents shape an idea of participation that does not consider practical effects in case of dissent from the Indigenous population. This is a problem since it risks reducing participation to a formal element. The idea of participation without effective dissent allows governments and private capital to deprive Indigenous people of their lands, environment, and culture without effective political and democratic resistance. They believe that political participation deprived of conclusive dissent is aimed at consolidating a low-intensity democracy since excludes them from the possibility of appealing decisions like that of relocating an indigenous community and that imposes on them the obligation of accepting the terms under which they are to be compensated. A deterministic description of social actors reinforces such comprehension of democracy, given that they appear only as government co-operators, recipients of measures to encourage political participation, and objects of public policies. Indigenous and Tribal Peoples are never mentioned within the documents under analysis as decision-makers over their territories.

The American Convention on Human Rights also known as the Pact of San Jose is another legal instrument used to protect indigenous peoples' rights. Differently from those mentioned until now, it does not have a universal scope but rather a regional one since it only applies to the state parties of the Organization of American States (OAS). Even if, differently from the others, it has not been

[94] UNDRIP (2007). Preamble. https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf
[95] Almeida, AC. (2018). Aspects of indigenous policies in Brazil. *Interactions (campo Grande)*, *19* (3), 611–626. https://doi.org/10.20435/inter.v19i3.1721
[96] Ovalle, M. & Vásquez Salazar, J. (2022). Limitations on Democracy in Multilateral Policies to Regulate the Political Participation of Indigenous and Tribal People. Colombia Internacional. 111. 111-133. http://dx.doi.org/10.7440/colombiaint111.2022.05

specifically written to protect indigenous rights, nevertheless, it has turned out to be a useful instrument to guarantee their rights. The OAS, which has elaborated this Convention, has also established two bodies, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) that check the state compliance of the petitions in case of allegations of violations of the human rights of indigenous peoples under the American Declaration on Human Rights and the American Convention on Human Rights, and it is applied to those states that have accepted the court's jurisdiction by ratifying the American Convention.

The IACtHR, together with the ILO and the IACHR, has been turned to by Indigenous peoples and their supporters after appealing to national courts and receiving scarce protection from them. The Court has contributed to fostering legal and institutional change in the states that have accepted its jurisdiction.[97] This includes the adoption of specific laws regarding indigenous rights, the creation of specialized governmental ministries or agencies on indigenous rights, as well as the adoption of national policies.

The jurisprudence of the IACtHR on the rights of indigenous peoples has addressed different types of violations of the American Convention, including cases regarding forced disappearances, sexual violence, freedom of expression, and lack of due process, among others. However, its main contribution has been in the field of land rights and consultation.[98] Indeed, cases like the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* have an effect that goes behind the community directly involved. As a matter of fact, one judgment of the IACtHR has a chain effect on other pronouncements of the Commission and the Court in the area of indigenous peoples' rights. Nevertheless, it must be noted that even if the decisions of the court have represented important legal precedents, in most instances governments have failed to respect them in practice.

1.8 Conclusions

The present Chapter has attempted to frame the analysis of indigenous rights in Mexico and Brazil, which will become more detailed in the following chapters. These definitions and the historical background are useful to understand the legal, political and institutional evolution that has taken place

[97] Antkowiak TM. & Gonza A. (2017). The American Convention on Human Rights: Essential Rights. Oxford University Press.263–284.
[98] Corradi, G., de Feyter, K., Desmet, E., & Vanhees, K. (Eds.). (2018). Critical Indigenous Rights Studies (1st ed.). Routledge. https://doi.org/10.4324/9781315189925

on indigenous matters. They are also pivotal to analysing in what fields there have been more advancements and in what instead there is still a lot of work to do.

Chapter 2

The Logic behind Case Selection

2.1 Introduction

Since it is impossible to examine deeply all the rights entitled to indigenous populations, this research thesis will focus on three different rights: land rights, political rights and linguistic rights.

The distinction among these categories of rights has been questioned on many occasions since all these rights are interconnected and connected with the request for a greater degree of autonomy and self-determination. As noted by Cismas (2014) who referred to the verdict of the African Commission on Human and Peoples' Rights in the *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions* v. *Sudan,* the intersectionality of rights not only at the normative but also at the practical level allows a larger protection of them. [99] Nevertheless, although sharing this point of view, for a comparative analysis it is useful to analyse them separately.

The following paragraphs will explain the importance of these rights, how they are interconnected, what are the implications of their violation and the challenges they face today. Subsequently, will be explained why the choice has fallen on Brazil and Mexico and which features make them comparable.

2.2 Land rights: fundamental and threatened

The third chapter will focus on land rights. According to the UN (2018)[100], the lack of guarantees of land rights is one of the main causes of violations of the rights of indigenous peoples.[101] Land and natural resources are essential for survival. Nevertheless, their importance is not only related to that. Indeed, culture, beliefs and traditions require a territorial space to develop, and this contributes to defining the identities of the community that inhabit them. Consequently, not only the physical but also the spiritual well-being of indigenous depends on their lands.

[99] Cismas, I. (2014). The Intersection of Economic, Social, and Cultural Rights and Civil and Political Rights. *Economic, Social, and Cultural Rights in International Law,* 448–472. https://doi.org/10.1093/ACPROF:OSO/9780199685974.003.0016

[100] OHCHR (2018). Informe de la Relatora Especial sobre los derechos de los pueblos indígenas.

[101] Monteiro, G.F.A., Yeung, L.LT., Caleman, S.M.Q. et al. (2019). Indigenous land demarcation conflicts in Brazil: Has the Supreme Court's decision brought (in)stability?. Eur J Law Econ 48, 267–290, https://doi.org/10.1007/s10657-019-09628-3

When we talk about land rights, we refer to rights to use, control and transfer a piece of land. According to a definition provided by the Food and Agriculture Organization of the United Nations[102], these include rights to occupy, enjoy and use land and resources; restrict or exclude others from the land; transfer, sell, purchase, grant or loan; inherit and bequeath; develop or improve; rent or sublet; and benefit from improved land values or rental income. [103]

As noted by Gilbert (2013) [104], a problem connected to land rights is that they often are not perceived as human rights. Internationally, no treaty or declaration specifically refers to a human right to land. In the nine core international human rights treaties, land rights are only marginally mentioned once, in the context of women's rights in rural areas.

Strictly speaking, there is no human right to land under international law. Nonetheless, as also stressed by the author, land rights are pivotal not only by themselves, but also because they constitute the basis for access to food, housing and development, and without access to land many peoples are bound to suffer from economic insecurity. Moreover, rights that at first sight may not seem connected to land rights, actually are. Indeed, the right to self-determination, the right to participate in decision-making and the right to a healthy environment cannot be safeguarded if land rights are not.

Right to a healthy environment, for example, is in great part protected by indigenous communities. Although controlling 80% of the world's biodiversity, they only own, occupy, or use a quarter of its surface. Their millenarian knowledge and expertise make them a highly valuable resource to adapt, mitigate, and reduce climate and disaster risks. [105] The close and traditional dependence of many indigenous communities on biological resources is also recognized in the Preamble of the Convention on Biological Diversity.

In addition, as noted by Schwartzman, Nepstad & Moreira (2000) [106], the areas indigenous occupy are of environmental relevance. Suffice it to say that indigenous areas cover approximately 20 per cent of Amazonia and thanks to it they are virtually the only areas effectively protected from frontier expansion pressures. In international law, Principle 22 of the Rio Declaration on Environment and Development (1992) establishes the crucial role of Indigenous peoples in environmental management because of their traditional knowledge. The jurisprudence of international courts as well has underlined the interconnection between the protection of indigenous lands and the environment

[102] FAO (2002). Land Tenure Studies, 3, https://www.fao.org/3/Y4307E/y4307e00.htm
[103] University of Pretoria. (2018). Protected areas and land rights for local communities: the case study of Luki Reserve. https://repository.up.ac.za/handle/2263/67787
[104] Gilbert J. (2013). Land Rights as Human Rights, SUR, https://sur.conectas.org/en/land-rights-human-rights/
[105] The World Bank (2022). Indigenous people, https://www.worldbank.org/en/topic/indigenouspeoples
[106] Schwartzman, S., Nepstad, D. and Moreira, A. (2000). Arguing Tropical Forest Conservation: People versus Parks. Conservation Biology, 14, 1370-1374. http://dx.doi.org/10.1046/j.1523-1739.2000.00227.x

and cases like *Yanomami* v. *Brazil*[107] show it clearly. Worth mentioning are the studies of BenYishay et al. (2017) according to which financing indigenous land rights programs may not show results in the short to medium term but may be an investment for a future in which indigenous territories are threatened by deforestation. [108]

It should be further noted that also the health of indigenous people depends heavily on the ownership and status of their lands and resources. As noted by the Committee on Economic, Social and Cultural Rights in its General Comment on the right to the highest attainable standard of health, displacement of indigenous people from their traditional territories against their will "*has a deleterious effect on their health*". [109]

In the Inter-American legal system, the relevance of this right has been equally stressed. Indeed, the IACtHR[110] has stated that denying indigenous people their historical territories is a violation of their right to life[111]. Invading the land of some indigenous groups can and historically has led to their disappearance. This is particularly the case for indigenous groups living in voluntary isolation. For this reason, the IACHR in its recommendations to protect indigenous peoples in voluntary isolation has called upon states to protect their lands, territories and natural resources and ensure respect for and safeguarding of the principle of no contact by any person or group.[112]

Another case in which the IACtHR has dealt with the implications of the violation of land rights is the *Maya indigenous community of the Toledo District* v. *Belize*. [113] In this case, the Commission observed that the failure of the State to engage in meaningful consultations with the Maya people in connection with the logging and oil concessions in the Toledo District, and the negative environmental effects arising from those concessions, constituted violations of, among

[107] IACHR (1985). Yanomami v. Brazil, Case 7615, Report No. 12/85, OEA/Ser.L./VJII.66, doc. 10 rev. 1
[108] BenYishay, A., Heuser, S., Runfola, D., & Trichler, R. (2017). Indigenous land rights and deforestation: Evidence from the Brazilian Amazon. *Journal of Environmental Economics and Management*, *86*, 29–47. https://doi.org/10.1016/j.jeem.2017.07.008
[109] CESCR, General Comment No.14: Article 12 (Right to the highest attainable standard of health), Twenty-second session, adopted 11 August 2000, UN Doc E/C.12/2000/4, https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1AVC1NkPsgUedPlF1vfPMJ2c7ey6PAz2qaojTzDJmC0y%2B9t%2BsAtGDNzdEqA6SuP2r0w%2F6sVBGTpvTSCbiOr4XVFTqhQY65auTFbQRPWNDxL
[110] IACtHR (2005). *Case of the Yakye Axa Indigenous Community v Paraguay*, para. 160 – 178, Merits, reparations and costs, Series C No. 125, https://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf
[111] American Convention on Human Rights, Article 4 §1, https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm
[112] IACHR (2013), Indigenous Peoples In Voluntary Isolation And Initial Contact In The Americas: Recommendations For The Full Respect Of Their Human Rights , OEA/Ser.L/V/II., Doc. 47/13, http://www.oas.org/en/iachr/indigenous/docs/pdf/report-indigenous-peoples-voluntary-isolation.pdf
[113] IACtHR (2004), Maya indigenous community of the Toledo District v. Belize, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727

others, right to life[114], right to religious freedom and worship[115], rights of a family and its protection[116], right to the preservation of health and well-being[117], right to consultation[118][119]implicit and the principle of free determination.[120]

The Office of the High Commissioner for Human Rights and the UN Human Settlements Programme has also published a joint report which draws the links between indigenous peoples' access to their land, the right to self-determination and the right to housing.[121] According to the report, the dispossession of indigenous peoples from their lands has robbed them of the ability and opportunity to use their resources to control and determine their economic, social and cultural development. If they had access to their land and control over their own and public resources, they would be in a better position to solve their housing problems themselves.[122]

Furthermore, the link between the protection of land rights and traditional knowledge should not be underestimated. Potential land disputes that can arise can lead to forced displacement and the loss of traditional knowledge and cultural practices. In turn, this can also affect the use and transmission of indigenous languages. The connection between cultural rights and land rights has been acknowledged by the HRC in its interpretation of Article 27 of the ICCPR, which concerns cultural rights for minorities. Article 27 does not allude to land rights per se but emphasizes the connection between cultural rights and land rights. The HRC has thus developed a specific protection for indigenous peoples' land rights by acknowledging the evidence that, for indigenous communities, a particular way of life is associated with the use of their lands. In a general comment on Article 27, the HRC stated:

"With regard to the exercise of the cultural rights protected under Article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples. That right may include

[114]American Declaration of the Rights and Duties of the Man, Article I, https://www.cidh.oas.org/basicos/english/basic2.american%20declaration.htm#:~:text=Article%20I.,life%2C%20liberty%20and%20personal%20security.
[115]American Declaration of the Rights and Duties of the Man, Article III
[116]American Declaration of the Rights and Duties of the Man, Article VI
[117]American Declaration of the Rights and Duties of the Man, Article XI
[118]International Covenant on Civil and Political Rights, Article 27, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights
[119] American Declaration of the Rights and Duties of the Man, Article XX
[120] IACtHR (2004) Maya indigenous community of the Toledo District v. Belize, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727
[121] UN-HABITAT & UNCHR (2005). Indigenous peoples' right to adequate housing: a global overview, Report No.7, HS/734/05E, https://www.ohchr.org/sites/default/files/Documents/Publications/IndigenousPeoplesHousingen.pdf
[122] *Ibidem*

such traditional activities as fishing or hunting and the right to live in reserves protected by law."[123]

The connection between cultural protection and land rights for indigenous peoples has been reiterated in several concluding observations on States' reports and in individual communications[124]. The approach is that, where land is of central significance to the sustenance of culture, the right to enjoy one's culture requires the protection of land. The IACtHR has stressed this link in the *Mayagna (Sumo) Indigenous Community of Awas Tingni* v. *Nicaragua* case, considering that without the enjoyment of their traditional lands, indigenous people would lose the possibility to practice, conserve and revitalize their cultural habits, which contributes to give a sense to their existence at both individual and group level. [125]

Another landmark case that has emphasized the link between land rights and, in particular, the right to cultural preservation for indigenous people is the *Yakye Axa Indigenous Community* v. *Paraguay*. In particular, the IACtHR recognized that if the indigenous community did not have access to their ancestral lands, the possibility to maintain their traditional way of life and cultural practices (in this including their language, spiritual practices and traditional knowledge) was hindered. This comes from the fact that, as already said, indigenous peoples enjoy a unique relationship with their lands and that their cultural and spiritual practices are intimately tied to their territories.

Recently, the UN Committee on Economic, Social and Cultural Rights (CESCR)[126] has adopted several statements in which highlights the need to respect land rights, explicitly referencing them in relation to other areas such as housing, forced evictions, food, water, health and cultural life. Nevertheless, despite the focus on land rights from CESCR and other UN human rights institutions, there is still no clear and comprehensive statement on the fundamental importance and content of the right to land. Currently, land rights are still considered part of the realization of other fundamental rights, such as the right to food or the right to water.[127]

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[123] Gilbert, J. (2013). Land Rights as Human Rights.

[124] Scheinin, M, (2000). The right to enjoy a distinct culture: indigenous and competing uses of land. In: ORLIN, Theodore. S.; ROSAS, Allan; SCHEININ, Martin. 2000. The jurisprudence of human rights law: a comparative interpretive approach. Turku/Abo: Abo Akademia University.

[125] IACtHR (2001). Case of the Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua. Judgment of 31 August 2001 (Merits, Reparations and Costs). (Para. 138). Retrieved from https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf

[126] Committee On Economic, Social And Cultural Rights. (2002). General Comment No. 15. https://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf

[127] Minority Rights Group International (2015). Moving towards a Right to Land: The Committee on Economic, Social and Cultural Rights' Treatment of Land Rights as Human Rights, https://minorityrights.org/publications/moving-towards-a-right-to-land-the-committee-on-economic-social-and-cultural-rights-treatment-of-land-rights-as-human-rights/

The rationale for addressing this right does not only lie in its importance but also in the ongoing disputes regarding its protection. Indeed, indigenous lands are often contented between indigenous and non-indigenous groups. These disputes have often resulted in bloody battles such as the Bagua massacre[128] and led to the death of environmental defenders.[129] Significatively, in the decade 2012-2022, 1,733 land and environmental defenders have been killed, approximately one person every two days.[130]

Not only the number of activists but also indigenous people killed in general is something that raises concerns. As emerges clearly from Figure 2, the number of assassinated indigenous people has increased by approximately 170% from 2003 to 2019. A reason behind many of these deaths is the contentiousness of indigenous lands. [131] Proof of that is that, of the 113 indigenous people murdered in Brazil in 2019, 40 were from Mato Grosso do Sul and 26 were from Roraima which are states where agribusiness and mining/logging are expanding.

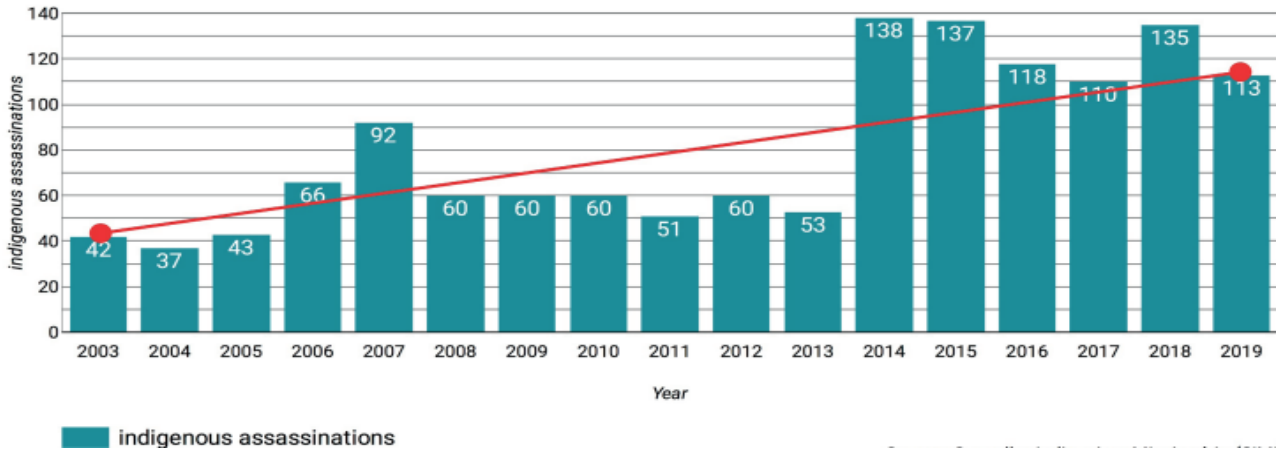

Figure 2: Indigenous peoples assassinated in Brazil from 2003 to 2019 (Alkmin, 2022)[132]

According to Amnesty International, it is due to the government's failure to act effectively to protect indigenous communities if there has been an escalation in the number of indigenous killed for land contentious. In addition, the NGO also links the unprecedented suicide rates amongst some

[128] Bagua massacre is a clash that took place in 2009 between Amazonian Indians and Peruvian police and that led to the death of 33 indigenous.

[129] Torres Wong, M. (2018). Natural Resources, Extraction and Indigenous Rights in Latin America: Exploring the Boundaries of Environmental and State-corporate Crime in Bolivia, Peru, and Mexico.

[130] Global Witness (2022). Decade of defiance, https://www.globalwitness.org/en/campaigns/environmental-activists/decade-defiance/

[131] The exponential increase that can be seen from 2014 onwards is due to a change in the source of the data, as they began to be provided by the Special Secretariat for Indigenous Health (SESAI), based on the Access to Information Law (12.527/2011).

[132] Alkmin FM. (2022). The legislature and the anti-indigenous offensive in Brazil: An analysis of the proposals in the Brazilian Congress concerning Indigenous lands (1989-2021).
Graph elaborated on the basis of data reported by the Conselho Indigenista Missionário (CIMI) in 'Violence against the indigenous peoples in Brazil' annual reports (CIMI), from 2003 to 2019. https://criminologicalencounters.org/index.php/crimenc/article/view/101

indigenous groups to the lack of legal security, land grabs and violent evictions that are a direct consequence of the government's negligence.[133]

Land rights are often threatened by activities like illegal logging[134], mining, deforestation, tourism, advancing agricultural frontiers and construction of infrastructures. Significantly Indigenous people refer to hydroelectric, waterways, railways, ports, and other development projects as "death projects". In these projects usually, private companies and government share responsibilities. Indeed, governments often give concessions to companies and displace indigenous without resettling them or offering fair compensation for the land or the adverse effects of the displacement.[135] Often the government accepts these projects since they are seen as an opportunity for growth for the country. This makes it clear that even if concepts typical of colonialism like that of *terra nullius* have been "abolished", they still exist in a modern form.

Another effect of the activities carried out by private actors on indigenous lands is that they often end up deteriorating the social fabric of entire communities. Indeed, by using the narrative that human rights defenders prevent their communities from further socio-economic development, they turn one group against the other. The "divide and rule" strategy in conjunction with local allies and the creation of tensions between those who accept financial and economic incentives from the companies and those who fight to protect their lands is exactly what has been done in Mexico by the companies Electricité de France and Demex with the Piedra Larga and Gunaa Sicarú wind farm. The reason is that divided communities are easier to manipulate.

Not to be forget is that, even though these projects generate economic benefits, they are often not shared with the communities on whose lands they are developed.

As will be explained more deeply in the next chapter, an instrument to guarantee land rights is free, prior and informed consent. This means that indigenous people are consulted when activities that will have a deep impact on their lives are carried out on their lands. The importance of this right, how much it matters for indigenous people and the fact that it is in many cases not respected have been among the reasons behind the choice to analyse it.

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[133] Sieder R.(2016). Indigenous Peoples' Rights and the Law in Latin America" in Corinne Lennox and Damien Short (eds). *Routledge Handbook of Indigenous Peoples' Rights*. Routledge: New York: pp. 414-424. ISBN: 978-1-85743-641-9:

[134] Illegal logging implies the cutting down of trees without a permit, often on protected indigenous lands.

[135] Lewis C. (2012). Corporate responsibility to respect the rights of minorities and indigenous peoples, *State of the World's Minorities*

2.3 Rights to Political Representation

The fourth chapter is dedicated to the right of indigenous people to enjoy political representation.

This right is fundamental for a series of reasons. It ensures that every citizen has an equal say in government decision-making, regardless of race, gender, religion, or socioeconomic status. It gives citizens representatives who are accountable to the people who elected them, and the right to representation ensures that citizens can hold their elected officials responsible for their actions. In addition, if citizens can exercise this right, they are encouraged to participate in the political process and engage with their government, which strengthens democracy. In this regard, Tennant (1994) affirmed that "*the greater the participation by indigenous peoples in an institutional process, the more legitimate is the process and its result*".[136] Of the same view is Allen (2009) according to which the inclusion of indigenous peoples enhances the equality of international law and policy-making.[137]

The numbers regarding the representation of marginalized groups in national legislatures matter because these organs are in charge of making policy, checking the president's authority, and communicating who has full membership in the body politic.[138]

As regards the connection with other rights, it is connected to land rights since, with better representation in institutions, Indigenous peoples have more chances to win in the fight for the protection of their lands. Representing the interests of all citizens and ensuring that their voices are heard guarantees the democratic nature of political processes. This avoids that some individuals are marginalized or ignored by those in power and ensures that diverse perspectives are considered in the decision-making process. If this right is protected, policies are more balanced, inclusive and just.

The exercise of self-determination is also guaranteed by the right to the political representation since the strengthening of the relevant institutions, as well as the potential and capacities to engage with the State, and honouring even treaties or agreements concluded in the past are fundamental requirements for this right. As majority political parties generally shape public policy, minority groups can often be discriminated against when it comes to decision-making. By not allowing minority groups any say on national matters, governments prevent them from partaking and from

[136] Tennant, C. (1994). Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993, 16 Human Rights Quarterly, p.1, p.49

[137] Allen, S. (2009). The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project in the Indigenous Context, in S. Allen and A. Xanthaki (eds.), Reflections on the United Nations Declaration on the Rights of Indigenous Peoples and International Law, Hart Publishing

[138] Piscopo, J., & Wylie, K. Gender, Race, and Political Representation in Latin America. *Oxford Research Encyclopedia of Politics.* https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1745.

feeling a sense of co-ownership. Such participation can benefit the entire society.[139] It can help to strengthen democracy, greatly improve the quality of political life, facilitate societal integration, and prevent conflict.[140] Indeed, Indigenous Peoples' right to self-determination is multifaceted[141] and thus includes the dimension of Indigenous political participation among others, but is not exclusively focused on or restricted to it.[142] In the view of the ILO Committee consultation and involvement foster social cohesion, respect for cultural diversity, and discussion, all of which aid in dispute resolution and the alleviation of tense interpersonal relationships.[143]

Many recurrent issues hinder Indigenous political participation at the national level in different states. Inter alia, these issues are related to uncertain legal statuses and thus access to Parliament and other public offices, lack of special electoral measures, lack of information and knowledge about Indigenous cultures and methods of participation and a general lack of genuine dialogue and venues in which Indigenous Peoples concerns can truly be heard and taken into consideration. As already mentioned in Chapter 1, Indigenous People's poor access to education and information, their high rates of poverty and, in general, their subordinate positions in society coupled with the lack of willingness by the states to involve them in political processes are among the elements that more hinder the guarantee of their political rights.[144]

2.4 Language Rights

The fifth chapter is dedicated to language rights. These fall into the broader category of cultural rights.

Ethnic groups express their culture and social identity through language, because language is deeply connected to mental and ideological processes and the perception of the internal and external world. Language is a fundamental point of reference by which an ethnic group finds its own identity. Many indigenous cultures transmit their traditional knowledge only orally.[145]

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[139] Protsyk O. (2010). Representation of Minorities and Indigenous Peoples: A global Overview, IPU and UNDP

[140] *Ibidem*

[141] Tomaselli A. (2020). Political participation, the International Labour Organization, and Indigenous Peoples: Convention 169 'participatory' rights. *The International Journal of Human Rights*, 24:2-3, 127-143, DOI: 10.1080/13642987.2019.1677612

[142] Tomaselli A. (2016). Exploring Indigenous Self-governments and Forms of Autonomies, *Handbook of Indigenous Peoples' Rights*, ed. Corinne Lennox and Damien Short (London, New York: Routledge), 83–100.

[143] ILO, Report of the Committee set up to examine the representation alleging non-observance by Guatemala, par. 53 and 59

[144] Lux de Cojti O. (2006). Indigenous Peoples, Democracy, and Political Participation, Political Database Of The Americas, http://pdba.georgetown.edu/ IndigenousPeoples/introduction.html

[145] Aguilar Cavallo G. (2006), La aspiración indígena a la propia identidad. *Universum (Talca)*, 21(1):106–19.10.4067/S0718-23762006000100007

Indigenous languages are not only methods of communication but also extensive and complex systems of knowledge that have developed over millennia. They are central to the identity of indigenous peoples, the preservation of their cultures, worldviews and visions and an expression of self-determination. When indigenous languages are under threat, so too are indigenous peoples themselves.

Language rights refer to the rights of individuals and communities to use, maintain, and develop their languages without discrimination. This includes the right to use one's own language in public and private life, to teach and learn a language, to receive education in a language, to promote one's own language and to access information and public services in one's language.

As affirmed by Kymlicka & Patten (2003), language rights allow the protection of individual and group identity and expression and are often closely linked to other human rights, such as the right to education, the right to participate in political life, and the right to access justice. [146] Indeed, for example, to allow access to justice it is essential to communicate with lawyers and judges, complete forms and do whatever is necessary to carry out their claims.

"It is precisely in the field of access to and administration of justice that the vulnerability of indigenous peoples, who complain of being victims of discrimination, harassment and abuse, is most evident"[147].

In fact, very often they find themselves defenceless before the judge because they do not speak and understand the Castilian idiom, they do not have an interpreter in their own language and very rarely find a public defender.[148]

The right to health can also be jeopardized by an ineffective guarantee of language rights. Indeed, access to healthcare can be undermined if indigenous and non-indigenous populations are unable to communicate with each other. This is interestingly shown in a case study conducted by the World Health Organization. According to it, women who speak an indigenous language are less likely to have an institutional delivery and are more likely to attend fewer than four prenatal visits.[149]

The respect of language rights is also tied to guaranteeing the right to free, prior and informed

[146] Kymlicka, W., & Patten, A. (2003). Language Rights And Political Theory. *Annual Review of Applied Linguistics, 23*, 3-21.
[147] APF and OHCHR (2013). The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions, https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf
[148] Magneschi C. (2009). Una riflessione sull'articolo 2 della Costituzione messicana: i "diritti indigeni", Jura Gentium, https://www.juragentium.org/topics/rights/it/magnesch.htm
[149] Paulino NA, Vázquez MS, Bolúmar F.(2019). Indigenous language and inequitable maternal health care, Guatemala, Mexico, Peru and the Plurinational State of Bolivia, Bull World Health Organ;97(1):59-67.

consent. Indeed, if consultation is carried out in a language not spoken by the indigenous group, this cannot be considered effective.[150]

Protecting linguistic rights means also protecting the right to education. Education is often not accessible to minorities because classes are taught in a language they are not familiar with. Children facing such problems may be unable to participate fully due to linguistic problems and may face potential expulsion either for lack of participation or failure to attend classes in which they feel unable to contribute. The school has been and still is used as an instrument to forcedly assimilate minorities into the dominant language and culture. Education can probably be considered the most promising indicator of language sustainability.[151] Therefore, early immersion in the mother tongue language is vital for an endangered language's survival.

If education is not guaranteed, then also the participation of indigenous people in political processes is jeopardized since education, information and training programs build capacity for political participation and advocacy.

Linguistic rights can undermine voting rights, both in terms of active and passive electorate. For instance, if election materials are not provided in indigenous languages the participation of indigenous people in the political process can be hindered. Also, during consultations with the state, if the government insists that discussions are carried out in the national language, this can result in a lack of dialogue and understanding for the minority. Indeed, the inclusion and application of indigenous languages in official acts are fundamental to ensure the political participation of these communities. In this regard, it suffices to think that, for example, in Brazil, 17,5 % of the indigenous people do not speak Portuguese and this represents an additional obstacle to the creation of an indigenous group.

The denial of language rights can lead to discrimination, marginalization, and the erosion of cultural diversity. Indeed, linguicism is a form of racism which deprives individuals or groups of linguistic human rights.[152]

[150] IACHR (2010). Application of the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against Ecuador. Case 12.465, Kichwa Indigenous Peoples of Sarayaku and its members. April 26, Para. 145.

[151] Barrena, A., Amorrortu, E., Ortega, A., Uranga, B., Izagirre, E., & Idiazabal, I. (2007). Small languages and small language communities: does the number of speakers of a language determine its fate? International Journal of the Sociology of Language, 186, 125–139

[152] Skutnabb-Kangas, T., Phillipson, R. (1994). Linguistic human rights, past and present. In T. Skutnabb-Kangas & R. Phillipson (Ed.), *Linguistic Human Rights: Overcoming Linguistic Discrimination* (pp. 71-110). Berlin, New York: De Gruyter Mouton. https://doi.org/10.1515/9783110866391.71

Language plays a vital role in employment and occupation and, depending on how it is used, it can exclude or empower someone in many cases indigenous peoples' experiences show that language is used as an instrument for exclusion in employment and occupation. Often indigenous groups have been forced to assimilate and change their identity to adapt to the colonizers' societies. Skutnabb-Kangas, T. & Phillipson, R. (1994) have reconnected the act of assimilating through languages to genocide since, in a broad definition, it can be considered as the physical or psychological transfer of children to another community or group.[153]

In a similar fashion to the right to land, linguistic rights are also related to the right to an environmental right since indigenous languages contain within them a wealth of ecological information that will be lost as the language is lost.

Not to be underestimated is also the connection between the right to land and linguistic rights. This link is shown in the already-mentioned *Delgamuukw* v. *British Columbia* case in which the Supreme Court of Canada recognized that Aboriginal title includes the right to use and control the land in accordance with the distinctive cultural practices and traditions of the indigenous group. The Court also recognized that the cultural practices and traditions of indigenous groups are often closely tied to their language, and therefore language rights are an essential aspect of Aboriginal title. At the national level, we can see that also the Constitution of Brazil in the same Article 231, recognizes the rights of indigenous peoples to their traditional lands and the right to maintain and develop their cultures, customs, and traditions, and mandates that the state consults with them in decisions that affect their interests.

Finally, there is also a connection between linguistic rights and the right to religion. Language plays a crucial role in the expression and transmission of religious beliefs and practices. Suffice it to think that all religious traditions have their sacred texts, rituals, and practices that are passed down through language. Therefore, linguistic rights are important for the preservation and practice of religious beliefs and practices.

For all these reasons, Indigenous Peoples globally consider the right to learn and use their mother tongue as a significant part of the process of decolonisation (Disbray et al. 2018).[154]

To understand the importance that language has for indigenous people, it suffices to think that in Mexico, two criteria are used to determine whether a person is indigenous, and one is linguistic. According to this classification, a person qualifies as indigenous if he/she speaks an indigenous

[153] *Ibidem*

[154]Disbray, S., Barker, C., Raghunathan, A., & Baisden, F. (2018). Global lessons: Indigenous languages and multilingualism in school programs. Canberra: First Languages Australia.

language. Following this classification there are about 7 million people of indigenous in the country. Remarkably, if the criterion followed is that of self-ascription, namely based on the question of whether the person considers him/herself part of an indigenous community or people, there are about 25 million people, constituting 21% of the total population of the country. This huge difference is significant to understand the process of loss of indigenous languages that has occurred in recent years.

Today, the survival of indigenous languages is deeply challenged. Indeed, of the approximately 6,7000 world languages, more than 4000 are spoken by indigenous even if they represent less than 6% of the global population. Unfortunately, estimates suggest that more than half of the world's languages will become extinct by 2100 and the majority of them will be indigenous. It is estimated that one indigenous language dies every two weeks.[155] The cultures and knowledge systems attached to these languages are at risk as well. Due to colonialism and colonial practices like policies of assimilation, dispossession of lands, and discriminatory laws and actions, the lives, cultures and languages of indigenous groups have been deeply jeopardized. This is further exacerbated by globalization and the rise of a small number of culturally dominant languages. In addition, languages are no longer transmitted by parents to their children.

The fact that indigenous languages are at risk of extinction is linked to a series of reasons. Here will be mentioned a number of them. Firstly, discrimination and racism since indigenous languages are often stigmatized and devalued in both Mexican and Brazilian societies, leading to discrimination against indigenous people. This discrimination can make it difficult for indigenous communities to access services and opportunities, including education and employment. Secondly, language endangerment, namely the fact that many indigenous languages are endangered, meaning that there are very few speakers left. This can make it difficult to preserve and promote these languages and can lead to their eventual extinction. Thirdly, the lack of political will and resources. Indeed, despite efforts by the Brazilian government to promote and preserve indigenous languages, there is often a lack of political will and resources dedicated to this issue. This can make it difficult to implement policies and programs to support linguistic rights for indigenous communities. Finally, education and media which have concentrated on the process of teaching and learning other languages like Spanish, Portuguese and English, without giving any importance to indigenous languages.

[155]UNPFII(2019).Recommendation on Indigenous Languages, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2019/07/Recs_Indigenous_Languages_2019.pdf

2.5 Brazil and Mexico: a Comparative Perspective

The reasons that lie behind the choice of Brazil and Mexico are multiple.

Brazil and Mexico share several commonalities in terms of population and geographical extension. In terms of population, both Brazil and Mexico are among the most populous countries in the world. Brazil has a population of approximately 213 million people, while Mexico has a population of approximately 128 million people. Both countries have diverse populations, with indigenous and Afro-descendant communities, as well as people of European, Asian, and Middle Eastern descent. In terms of geographical extension, both Brazil and Mexico are large countries with diverse geography. Brazil is the fifth largest country in the world by both land area and population, with a total land area of approximately 8.5 million square kilometres. Mexico is the 13th largest country in the world by land area and the third largest in Latin America, with a total land area of approximately 1.9 million square kilometres.

Another element that makes them comparable is that in both countries many indigenous languages are endangered or at risk of extinction, due to factors such as assimilation, displacement, and lack of support for language revitalization efforts. Indeed, until thirty-two years ago Brazil was a military dictatorship and Mexico an authoritarian, single-party state. [156]

The two countries also share commonalities from a comparative public law point of view. Mexico and Brazil are both civil law systems which means that their legal codes are primarily derived from written laws and statutes passed by legislative bodies, rather than from judicial decisions or common law principles. However, even if both countries' legal systems are primarily based on civil law, they also have elements of common law and other legal traditions that have influenced their legal systems over time. For example, they have incorporated elements of indigenous law and tradition, as well as aspects of the common law systems inherited from their colonial past. [157] However, these elements are not as prominent as the civil law tradition.[158] According to Barker (2012), these countries bridged the gap between the Common Law and Civil Law systems through the writ of *amparo* which

[156] Barker, RS. (2012). Latin American Constitutionalism: An Overview. Montgomery Sociedade de Advogados. *Willamette Journal of International Law and Dispute Resolution*, *20*(1/2), 1-17. http://www.jstor.org/stable/26211704

[157]Montgomery N. (2022). Legal Systems in Brazil: Overview Practical Lawhttps://uk.practicallaw.thomsonreuters.com/7-638-1325?transitionType=Default&contextData=(sc.Default)&firstPage=true

[158] Martínez Pérez, M. & Von Wobeser y Sierra, SC. (2022). Legal Systems in Mexico: Overview, Practical Law, https://uk.practicallaw.thomsonreuters.com/w-017-6016?transitionType=Default&contextData=(sc.Default)

empowered judges to grant protection to individual victims of unconstitutional statutes or actions, while limiting the judges to granting relief in the particular case.[159]

In both Brazil and Mexico, the current Constitution is the product of negotiations and concessions between different groups, rather than the product of broad popular mobilizations marking a moment of strong political discontinuity.[160] Both countries have a written constitution which is contained in a single document and not fragmented into many texts. Clearly, laws and amendments have been added to the original constitution in both cases over time. These have been incorporated into the original document, making it unitary constitutions. Both constitutions are rigid since they can be amended only with the approval of large majorities.[161] Provisions related to the federal form of government, the separation of powers, individual rights and guarantees, and the procedure for amending the Constitution itself cannot be amended in each of the countries. Both Constitutions are among the most detailed and comprehensive constitutions in the world. The Brazilian one is composed of 250 articles while the Mexican one of 136 articles and 19 transitional articles. A catalogue of fundamental rights and freedoms is contained in their Constitutions. These are not absolute since can be limited under a series of circumstances. An example that will be analysed more deeply in Chapter 3 is the right to land of indigenous populations which can be touched upon under a series of circumstances. [162]

The two countries share commonalities in terms of systems of government and territorial distribution of powers. In light of both countries' extended territory and numerous populations, they are structured as federations. Nevertheless, there is a difference in the distribution of powers since the Brazilian Constitution establishes a federal system with three levels of government, federal, state, and municipal, while the Mexican Constitution establishes a federal system with two levels of government, federal and state.

As affirmed by Vezbergaite (2016) [163], Brazil's decentralisation led to increased subnational autonomy[164], while Mexico's preserved or even increased federal executive power.[165]

[159] Barker, RS. (2012). Latin American Constitutionalism: An Overview.
[160] Pou Giménez, F. (2018). Constitutionalism and rights protection in Mexico and Brazil: comparative remarks. Revista de Investigações Constitucionais, Curitiba, v. 5, n. 3, p. 233-255
[161] Constitution of Mexico, Article 135 & Constitution of Brazil, Article 60
[162] Constitution of Brazil, Article 131
[163] Vezbergaite, I. (2016). Decentralisation policies, subnational autonomy and federal executive power: A comparison of Brazil and Mexico. *Hrvatska i komparativna javna uprava: časopis za teoriju i praksu javne uprave*, *16*(1), 55-76.
[164]Constitution of Brazil, Article 1
[165]Constitution of Mexico, Article 40

As most of the states of Latin America, Mexico[166] and Brazil[167] are presidential systems in which the leader is directly elected. Nevertheless, the length of the tenure is different since the Brazilian president stays in power for a 4-year term, while the Mexican one serves a 6-year term.

Furthermore, both countries are democratic republics.

Another element that makes them comparable is the lack of an effective approach towards indigenous issues by recent Mexican and Brazilian presidents. If Bolsonaro has openly shown his disregard for indigenous communities, Obrador, as argued also by Aguilar Gil (2021), has supported Indigenous autonomy only when it was politically convenient. [168] Following this paternalistic discourse, López Obrador has expanded social support programs for the rural population, which is largely also an Indigenous population. On the other hand, acting with a vision decidedly against Indigenous autonomy and self-determination, his government has attempted to implement three large megaprojects, currently, under heated debate, that will have considerable consequences for the lives and territories of Indigenous peoples. Nevertheless, the study of Indigenous victimization lacks a nuanced exploration of whether the violence directed at Indigenous peoples correlates with the political leanings of governments. As underlined by a study by Carvalho et al. (2020), the political leanings of governments have not only an impact on the policies and programmes directed to them but actually also on the violence that will be directed to them.[169]

Another feature that makes them comparable is that they share participation into some international organizations. Indeed, besides being part of universal organizations like the United Nations and its specialized institutes like the International Labour Organization and World Health Organization, they are part of regional organizations like the Organization of American States, the Union of South American Nations, Mercosur and the Community of Latin American and Caribbean States, the South American Defence Council and the Pacific Alliance. This last specification is useful to understand which are the commitments at the legal and political levels that the two countries assumed in the international arena.

As already indicated in Paragraph 1.7, both countries in their Constitutions have opened to international sources of rights, in particular the Inter-American system.[170] This is a really important element in this analysis because it binds them to respect the ILO Conventions and other treaties that

[166]Constitution of Mexico, Article 80
[167]Constitution of Brazil, Article 76
[168]Aguilar Gil, YE. (2021). Indigenous Rights, AMLO's Wrongs, NACLA Report on the Americas, 53:2, 118-120, DOI: 10.1080/10714839.2021.1923196
[169] Carvalho, S.D., Goyes, D.R., & Weis, V.V. (2020). Politics and Indigenous Victimization: The Case of Brazil. *The British Journal of Criminology*. DOI:10.1093/bjc/azaa060
[170]Constitution of Mexico, Article 1 & Constitution of Brazil, Article 5

protect indigenous rights. An example is the Brazilian Constitution which includes also a clause according to which "*the rights and guarantees established in this Constitution shall not exclude others derived from the regime and principles adopted by it, or from international treaties to which the Federative Republic of Brazil is a party*".[171]

In both countries, a clear separation of powers and coordination among the different branches is an essential principle.[172] Both countries establish a strong and independent judiciary as an essential component of the country's democratic system of government.[173] The federal structure of government is reflected in the type of judicial control of laws since it is not entirely centralized so also courts at the state or provincial level have jurisdiction over certain legal matters, such as state-level criminal offences or civil disputes. Not having established specialized constitutional tribunals or chambers, the countries have tended toward the European model of specialization by limiting the non-constitutional jurisdiction of its Supreme Court, as is the case for Mexico, or by enhancing the authority of its Supreme Court in constitutional matters, as has happened in Brazil.[174]

When it comes to legislative power, also in this field there are commonalities. They are both bicameral systems with a lower and upper house, namely the Chamber of Deputies and the Senate.

Despite these similarities, there are also differences between the two countries, including variations in their legal traditions, institutional structures, and political cultures. An example is the extension of the powers of the President. Indeed, although both countries have presidential systems of government, the President has more room for manoeuvre in Brazil where he/she can initiate legislation and manage the executive branch. On the other side, in Mexico, the President has more limited powers because, for the way in which the system of checks and balances is structured, the other two branches can exercise more authority over it, with greater checks and balances on executive authority.

Concerning the attribution of legislative competence over indigenous matters, in Mexico it belongs predominantly to the federal level, insofar as the indigenous issues refer to land, water, and agrarian reform, namely matters within the competence of the Federation. Nevertheless, both the federal government and the individual states have the authority to legislate on indigenous matters. On the other side, in Brazil, it is the primary responsibility of the federal government to legislate on indigenous matters. More specifically, according to Article 20.11, the state is the only competent to

[171]Constitution of Brazil, Article 5
[172] Constitution of Brazil, Article 2 & Constitution of Mexico, Article 80
[173] Constitution of Mexico, Article 2 & Constitution of Brazil, Article 95
[174] Barker, RS. (2012). Latin American Constitutionalism: An Overview.

legislate over native populations. This difference is connected to the fact that, even though they are both countries endowed with a federal structure, there are differences in the degree of decentralization of power to sub-national governments. Brazil has a more centralized federal structure, with a strong federal government and relatively weaker state governments. In contrast, Mexico has a more decentralized federal structure, with greater autonomy for states and municipalities. In Mexico, the federal government has primary responsibility for indigenous policies and legislation, as well as the protection and promotion of indigenous rights. In Brazil, the Constitution recognizes the rights of indigenous peoples and establishes the framework for their protection and representation.

At this point, it is worth noting that, as noted by Ferreira Santos (2016), being the Mexican constitution antecedent to the Brazilian one (respectively 1917 and 1988), the former has influenced the latter. [175] Indeed, Mexico was the first country in the world to constitutionalize social rights and deeply influenced the codification of them in the Brazilian constitution.

In both Mexico and Brazil, there are government agencies responsible for indigenous affairs at the federal level. In Mexico, the National Institute of Indigenous Peoples (INPI) is in charge of designing and implementing policies and programs that support indigenous development, culture, and rights. It does this work in collaboration with indigenous communities and organizations. On the other hand, in Brazil, the National Indian Foundation (FUNAI) deals with the demarcation and protection of indigenous lands, the promotion of indigenous rights and culture, and the support of indigenous development programs.

According to a classification made by Fuentes & Fernández (2022), Brazil is among the countries with medium-high levels of recognition in the land, an intermediate position on the socio-cultural dimension and low recognition of political rights. [176] On the other hand, Mexico is rated among the countries with high levels of recognition in political, territorial and cultural rights. However, a classification made by Barié (2003) groups their constitution among the multi-ethnic and multicultural nations which explicitly recognizes the pre-existence of indigenous peoples and gives them a new set of rights, including those related to their cultural identity. [177] Indeed, as noted by Rodríguez-Piñero Royo (2010), like many other Latin American countries, since the 1990s both

[175] Ferreira Santos, G. (2016). La constitucionalización de los derechos sociales: puentes entre Brasil y México. *Revista IUS*, *10*(38)

[176] Fuentes, C.A., & Fernández, J.E. (2022). The four worlds of recognition of indigenous rights.

[177]Barié CG. (2003). Pueblos Indígenas y derechos constitucionales en América Latina. México. Instituto Indigenista Interamericano. Editorial Abya Yala;

Endere, ML. (2014). Archaeological Heritage Legislation and Indigenous Rights in Latin America: Trends and Challenges. *International Journal of Cultural Property*, *21*(3), 319-330.

countries have undergone a process of 'multicultural constitutionalism', namely implementing, at a constitutional level, the collective rights of indigenous peoples.[178]

Many authors hold that, even if indigenous rights are constitutionally protected in the two countries, there are differences in the degree of recognition and protection of these rights. Mexico has a longer history of recognizing and promoting indigenous rights, with specific provisions for indigenous representation in the legislature and the judiciary. In Brazil, there have been ongoing challenges related to the recognition and protection of indigenous lands, cultures, and rights.

According to a classification made by Roldán Ortiga (2004)[179], Mexico can be categorized among the "*Countries with a Legal Framework in Progress*" that have made a high-level commitment to indigenous rights in their constitution or adopted international legal agreements or both, but they have not followed through with an adequate regulatory framework. Despite this, they offer some interesting insights into the process of land regularization. In its turn, Brazil is classified among the "*Countries with a Superior Legal Framework*". In the view of the scholar, it has high-level judicial instruments (constitutions or international agreements) recognizing indigenous land rights, as well as some national legal and regulatory framework operationalizing the high-level instruments. These countries provide the best practice models for land legalization, despite their shortcomings.

At the state level, many Mexican states have laws and policies regarding indigenous peoples, which may vary in scope and approach. Some states have established special institutions or councils to address indigenous issues, while others have integrated indigenous representatives into their legislative bodies or governing structures. In Brazil the state and municipal level, there is also some authority to legislate on indigenous matters, particularly regarding the provision of social services and support for indigenous communities. However, these actions must be consistent with federal law and respect indigenous rights and sovereignty. Another important difference lies in the constitutional approach to indigenous rights. While the Mexican Constitution has more explicit provisions related to indigenous self-determination and autonomy, the Brazilian Constitution has more explicit provisions related to indigenous land rights.

An important difference is the percentage of indigenous people compared to the total population. Indeed, according to data collected by the World Bank, the percentage of the indigenous population in Brazil is estimated to be around 0.5% of the total population, which amounts to approximately 1.06

[178]Rodríguez Piñero-Royo L. (2010). Political Participation Systems Applicable to Indigenous Peoples', in M. Weller and K. Nobbs (eds.), Political Participation of Minorities: A Commentary on International Standards and Practice (Oxford University Press, Oxford) pp. 308–342

[179] Roldán Ortega, R. (2004). Models for Recognizing Indigenous Land Rights in Latin America, Biodiversity Series, Paper, nº 99, The World Bank Environment Department, Washington.

million people. Differently, indigenous people in Mexico represent 21% of the total population, which amounts to approximately 25.7 million people.[180] This percentage makes Mexico the country with the largest indigenous population in numerical terms.

Clearly, as noted also in the Paragraph 1.1, since there is not a commonly agreed definition of what indigenous means, these estimates are approximate. The different percentage of indigenous people compared to the total population has also impacted the approach adopted towards indigenous populations. Brazil is a typical representative of those countries that in the past combined genocide with segregation and paternalistic tutelage in the past reducing the indigenous population from some 5 million at the time of colonization to 200.000 today.[181] On the other side, in Mexico native people represented the majority of the population so systematic genocide was not an option. Consequently, they had to integrate them through approaches like direct Hispanization or transitional bilingual education.[182]

Even if indigenous represent a smaller percentage of the total population in Brazil compared to Mexico, nevertheless, the Brazilian Amazon has the highest concentration of indigenous peoples in the world and it is home to that rare indigenous people group represented by those living without contact with other groups or in voluntary isolation (also known as uncontacted people).

As regards indigenous languages**,** there are approximately 240 indigenous languages spoken in Brazil, representing about 0.2% of the total number of speakers of any language in the country. The most widely spoken indigenous language in Brazil is Nheengatu, which is spoken by around 27,000 people. On the other side, in Mexico there are approximately 68 indigenous languages spoken, representing about 6.1% of the total number of speakers of any language in the country. The most widely spoken indigenous language in Mexico is Nahuatl, which is spoken by around 1.4 million people.

2.6 Conclusions

All these elements that have been highlighted are useful to frame the following more detailed analysis of the rights of indigenous people and to understand the weaknesses and the strengths of these two

[180] World Bank Group (2015). Indigenous Latin America in the Twenty-First Century: The First Decade, https://www.worldbank.org/en/region/lac/brief/indigenous-latin-america-in-the-twenty-first-century-brief-report-page
[181] Ribeiro D. (1970). Os índios e a civilização: a integração das populações indigenas no Brasil moderno, *Colecao Retratos do Brasil*, Volume 77

legal systems from the political, legal and institutional points of view. In addition, they explain why a comparative public law approach can be used for Mexico and Brazil.

Moreover, they allow the understanding of what are the main challenges to guaranteeing these rights and what can be done to improve them. Finally, by explaining by general lines the functioning of the legislative, executive and judicial bodies, there can be made a deeper reflection on case laws and legislative measures that are adopted and what they should be.

Chapter 3

Enforcing the Right to Land and Natural Resources

3.1 Introduction

Before going into the analysis of the right to land and natural resources, some important considerations must be made. Much of the land occupied by Indigenous Peoples is under "customary ownership" and this means that it is not owned by individuals, but rather by the community as a whole. Consequently, the decisions about land use and management are made at the community level, often through traditional leaders or elders. Individual members of the community may have the right to use the land for specific purposes, but they do not have the right to sell or transfer ownership of the land. For this reason, before entitling Indigenous people to some rights it is pivotal to consider that they have a different culture from that of Western people and also to consider the collective dimension of some rights besides the individual ones. For example, in Mexico is recognized the presence of formal legal pluralism. The implication of this is that indigenous legal systems are valid and equal to any other, as are their authorities and resolutions regardless of whether or not they coincide with the authorities and resolutions of the official legal system.[183]

This element was underlined for the first time in the *Mayagna Indigenous Community of Awas Tingni v. Republic of Nicaragua* case. In this case, the IACtHR made an evolutionary interpretation of Article 21 of the American Convention which protects property rights, extending this provision to include the communal property of indigenous peoples administered according to their own forms of law. To protect the indigenous people's collective right to their land, they asserted that the demarcation and titling of indigenous lands should be done "*in accordance with their customary law, values, customs and mores*".[184] The Court surpassed the individualistic view on private property typical of systems of civil law and looked at the collective dimension of indigenous communal property. It thus recognized both the validity of indigenous customary law in general and its role in defining the content of a collective right to property. Thanks to this sentence, the IACtHR was the first human rights body to interpret the right to property to be understood as including the right of indigenous people to communal property and not merely the right to private property. In addition, this case together with the campaign of the Western Shoshone against the taking of their sacred lands,

[183] Correas, O. (2007). Derecho Indígena Mexicano I. México: UNAM, CONACYT, Ediciones Coyoacán, CEIICH.
[184] IACtHR (2001). Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua case. Judgment of 31 August 2001 (Merits, Reparations and Costs). (Para. 149). https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf

reaffirmed the original assessment, based on recent state practice, that the lands traditionally held by indigenous peoples are theirs as a matter of right under customary international law.[185]

This case has opened the way to a type of interpretation that the Court has adopted on many other occasions. In *Aleoboetoe* v. *Suriname*, for example, the Inter-American Court considered Saramaka customary law on family relations and succession when determining the compensation due as reparation for the massacre of Saramaka villagers and in identifying the beneficiaries of that compensation.[186]

The IACtHR and the IACHR have made an important contribution to the matter since they have defined the concept of 'natural resources'.[187] This notion encompasses living and non-living resources that lie on and within ancestral lands. According to this definition, natural resources include air, land, water, natural gas, coal, oil petroleum, minerals, wood, topsoil, fauna, flora, forests, and wildlife. To be included in the definition, natural resources have to fulfil two conditions. First, these are resources that have been used since time immemorial by the indigenous populations. Second, they are pivotal to guaranteeing the survival, development and continuation of the indigenous peoples' cultural identity and way of life. These requirements must be objectively proved in each case and the burden of proof is carried by those communities that claim such ownership.

Another clarification that must be made before entering the merits of the analysis is that indigenous peoples are not homogeneous, and their attitudes toward different projects may vary depending on different factors of utility and relation with state and non-state actors.

Two are the main tools that protect Indigenous Peoples' rights over their lands: demarcation and free, prior and informed consent.

3.2 Demarcation

The recognition of the institute of demarcation presented in the Brazilian Constitution corroborates a tendency that can be observed internationally. Indeed, it has been recognized also by section 25 of

[185] Wiessner S. (2008). Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples. Vanderbilt Journal of Transnational Law .Volume 41. Issue 4. https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1430&context=vjtl

[186] IACtHR (2006). Saramaka v. Suriname people case, para.122.https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf

[187] IACHR (2009). Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System, para. 40, OEA/Ser.L/V/II., Doc. 56/09, https://www.oas.org/en/iachr/indigenous/docs/pdf/ancestrallands.pdf

the Canadian Charter of Rights and Freedoms and Australian jurisprudence, especially in the already-mentioned *Mabo vs. Queensland* case.

From Article 231 of the Brazilian Constitution is possible to deduce that they are considered as "*first and natural owners of Brazilian land*", and that they hold a primary right to remain in their traditional territories. Being a primary right, it does not depend on formal recognition, hence all of the lands that indigenous peoples have historically occupied would be theirs without any further question. However, this primary right in reality requires a mechanism to be recognized: land demarcation. Through time this has become the main way to ensure Indigenous permanence in their lands. Consequently, to accomplish a theoretically primary and unalienable right, indigenous people have to wait for juridical rites, state authentication and other fleeting temporalities.[188]

The land demarcation system is regulated in Brazil by Decree 1.775/96. It establishes clear procedures for the creation of Indigenous Lands, boundary-demarcation, ratification and registration. It states that demarcation should be made under the initiative and following the guidelines delineated by the federal organ competent for indigenous matters, the FUNAI.

Before demarcation starts, the area has to be identified. Afterwards, legal, anthropological, environmental and historical studies are carried out. An anthropologist makes investigations on the duration of the land occupation, which should be based on juridical, environmental, sociological and ethnohistorical data. These anthropological reports should be used to highlight indigenous perceptions and lifestyles during this process.[189] Clearly, all the parties involved can manifest their opinions. Indigenous communities should participate, and have adequate information and influence on this procedure. The anthropological part is followed by the bureaucratic one which is necessary for the authentication of the demarcated land. The anthropological study needs to be approved by the FUNAI before it can be published and brought into the debate in the municipal hall where the indigenous land is located. If there are no objections, the Minister of Justice has 30 days to announce the demarcation's limits, specify the diligences that must be taken or reject the report. If there are contestations on the procedures of demarcation, they are presented up to ninety days from the release of the original information regarding the area that has to be demarcated by the Federation. Some contest this part since they believe that contestations should not be allowed to refute inherently

[188] Neves, M. B. C., & Machado, M. A. C. (2017). Nationalising indigenous peoples, legalising indigenous lands: a (post)colonial critique of the land demarcation process in Brazil by the analysis of the Guarani-Mbyá case. Postcolonial Studies, 20(2), 163-175. https://doi.org/10.1080/13688790.2017.1360723

[189] Santilli, M. (1999). Natureza e situação da demarcação das Terras Indígenas no Brasil, in C. Kasburg and M. Gramkow (eds), Demarcando Terras Indígenas. Experiências e desafios de um projeto de parceria, Brasília: FUNAI; PPTAL; GTZ.

indigenous rights. Judicial challenges to anthropological reports and other aspects of demarcation processes are frequent. Some cases reach the STF.

The land can be physically delimited after receiving the approval of the Minister of Justice and the homologation of the President of the Republic. Finally, the land is registered if all requirements are satisfied. Some indigenous lands have to wait years for this recognition and all of these processes have deadlines that are frequently missed. From all this, it can be noticed how complex and lengthy are the juridical and judicial proceedings to recognize a primary right.

After this process, lands are assigned for exclusive usufruct to Indigenous Peoples. Nevertheless, the legal nature of this act is still contented. Some deem it constitutive, while others believe it is declarative. According to Akerman Sheps (2010) and Leitão (1993), it is declaratory since indigenous rights to own lands do not come from an administrative act intending the demarcation of the territory, rather it is a mere act of recognition. [190]

A case that needs to be analysed when talking about land demarcation is the *Raposa Serra do Sol Indigenous Land* case. In this case, the indigenous peoples of the Raposa do Sol in the state of Roraima, in Brazil, were fighting to obtain the demarcation and exclusive use of their territory. The Supreme Court recognized the right to have their lands demarcated and, in general, stated the importance of demarcation. This decision was pivotal since this territory was contended by rice farmers who also fought against the decision by submitting an application to the Supreme Court and demanding the abolition of the legal recognition of the territory by the government. Nevertheless, this case is often considered by the literature to have also hindered indigenous rights. Indeed, even if the Court rejected the claim of the rice farmers and gave the indigenous peoples the exclusive right to use the reserves, it made clear that national sovereignty and public interest are above the law. In the case of military facilities, health or educational institutions, road construction, dams or other alternative methods of electricity production and mining, the Parliament is entitled to decide whether or not such projects may be carried out in the reserves.

Since demarcation is one of the few tools that indigenous communities have to guarantee their rights, when it is not carried out, sometimes indigenous communities do it by themselves. A community that has piloted self-demarcation is the Munduruku, which will be analysed more in detail

[190] Akerman Sheps AP. (2010). La Disputa sobre la demarcación de la reserva Raposa Serra do Sol: ¿Una cuestión de derechos indígenas constitucionales o de soberanía nacional? *Anuario Mexicano de Derecho Internacional.*, *1*(10). https://doi.org/10.22201/iij.24487872e.2010.10.325 ;
Leitão, A. V. (1993). Direitos Culturais dos Povos Indígenas –Aspectos do seu Reconhecimento. In: Santilli. J. Os Direitos Indígenas e a Constituição. Porto Alegre: Núcleo de Direitos Indígenas e Sergio Antônio Fabris Editor

in Case Study 1. Indeed, considering the negligence of the government towards their land situation, the lengthy process (which has already received the approval of the indigenous federal organ and the completion of the anthropological report), and the impending construction of a hydroelectric power plant on their territory, they decided to begin the physical demarcation of their land on their own. Nevertheless, they do not hold the same legal value of demarcations carried out by the state and so cannot be considered a proper solution to the problem of the lack of land demarcations.

3.3 National and International Framework on Right to Land and Natural Resources

There is no international or regional human rights instrument which specifically deals with the right of indigenous peoples to their ancestral lands. Instead, the relevant provisions on this issue are scattered in international conventions, constitutions and case-law of international courts.

At the national level, Article 231 of the Constitution of Brazil recognizes the rights of indigenous peoples to their traditional lands and creates a framework for their protection and use. It also establishes that the demarcation of indigenous lands is a responsibility of the executive branch and that the lands are inalienable and imprescriptible, meaning that they cannot be sold or transferred to third parties. The subsections of the article specify what indigenous lands are.

"The lands traditionally occupied by Indians are those on which they live on a permanent basis, those used for their productive activities, those indispensable to the preservation of the environmental resources necessary for their well-being and for their physical and cultural reproduction, according to their uses, customs and traditions."

From reading the device, the difference between civil possession and indigenous possession can be deduced. Indigenous ownership has the specificity of providing for the maintenance and development of the ethnic and cultural activities of the indigenous community and is outlined according to the intrinsic characteristics of each community. There are no rules for delimiting indigenous ownership; the text refers to the main functions of ownership that are interpreted according to the ethnic-cultural framework of each community. Indigenous possession is, therefore, a form of protection for the unity of the indigenous community.[191]

As mentioned above, in the definition provided by the IACtHR, the concept of territories includes also the natural resources present in them. In addition, it has been extensively interpreted to

[191] Menezes, JB. (2007). O direito dos índios à terra e a mineração em áreas de ocupação indígena. Fortaleza: Pensar, p. 96.

encompass not only physically occupied spaces but also those used for their cultural or subsistence activities, such as routes of access.

For protective reasons, the property of these identified traditional lands is assigned to the Federal Union.[192] Changes in the ownership or deviations from its original scope or aim are expressly prohibited, based on the general constitutional guarantee that traditional lands are *"inalienable and indisposable and the rights thereto are not subject to limitation*".[193] In the view of Ferraz Junior (2004), the Constitution contains the means to resolve potential conflicts between private landowners and indigenous people. [194] The scholar argues that the document recognized both property rights and the "*vested rights*"[195] of indigenous over their lands. For this reason, he considers it useless to talk about which one predominates over the others.

Potential conflicts must be explored when discussing how these rights are exercised, just as they are when addressing conflicts that eventually implicate basic rights. A problem that has derived from this provision is that, although the government recognizes indigenous social and political organizations, no official governing framework has been formed for the Indigenous Lands. To enable them to manage their Indigenous Lands, no authority has been transferred from the Brazilian state to indigenous groups or indigenous leaders. Traditional leaders and communities administer their communities' lands on a daily basis, while the state retains the power to rule. The connection with the state is fragmented and is based on informal agreements with a number of sectoral government organizations, including the FUNAI, the Ministry of Health, the Ministry of Education, regional and municipal governments, the Environmental Agency (IBAMA), and others.[196]

The subsequent paragraph assigns these lands for permanent possession. In this way, the Brazilian Constitution tries to recognize and ensure the right to both possession and use of lands, as well as to the social organisation of indigenous peoples. As already mentioned in Chapter 2, this right is not absolute and can be limited under certain circumstances. According to Article 49, XVI which deals with the exclusive powers of the National Congress, the legislative power can authorize the exploitation and use of water resources and the exploration and exploitation of mineral wealth in indigenous lands. It specifies that acts aimed at the occupation, control and possession of the lands or

[192] Constitution of Brazil, Article 20, XI, https://www.constituteproject.org/constitution/Brazil_2017.pdf?lang=en
[193] Constitution of Brazil, Article 231.4
[194] Ferraz Junior, TS. (2004). A demarcação de terras indígenas e seu fundamento constitucional.
. Revista Brasileira de Direito Constitucional, 3, 689–699
[195] Vested rights is a term used to refer to a right belonging completely and unconditionally to a person as a property interest which cannot be impaired or taken away (as through retroactive legislation) without the consent of the owner.
[196]Braathen E. & Inglez de Sousa C. (2016). Semi-Autonomy: Contemporary Challenges for Indigenous Peoples in Brazil. Indigenous Politics (1st ed.). Rowman & Littlefield International. https://www.perlego.com/book/573503/indigenous-politics-institutions-representation-mobilisation-pdf

the exploitation of the natural wealth of the ground, rivers and lakes that exist there are considered valid only if they guarantee an important public interest of the state.[197] In other words, while the right to the possession and use of indigenous lands is included in Brazil's Constitution, it is not fully guaranteed to the extent that, if warranted by national public interest and after consultation in the National Congress, dispossession is possible. A consequence of this is that Indigenous in Brazil cannot exploit subterranean resources (such as minerals), because these are owned and controlled by the Brazilian state, which determines exploration and exploitation of these resources.[198]

This idea is at odds with the principles enshrined in Article 16 of ILO Convention 169. It states that indigenous peoples may not be removed from their lands and that, if this is necessary, they must be relocated after a decision of the National Congress and the free and informed consent of the involved communities.

In addition to that, the Constitution also affirms in Article 176.1 that specific conditions for mineral exploration and water resources in Indigenous Lands are established through ordinary law. The Constitution establishes that the rights of the indigenous over the lands they traditionally occupy are "*original*"[199] in the sense that they existed already before the formation of the Brazilian state or government and are thus independent of any official recognition. This stems from the recognition of the historical fact that the Indians were the first occupants of Brazil. Also under Article 15.2 of ILO Convention 169, Indigenous Peoples do not have to hold an ownership title on the lands they occupy or otherwise use to be fairly consulted on the exploitation of the natural resources on such lands.[200] This also applies to their right to participate in the use, management, and conservation of natural resources. This means that Indigenous Peoples have the right to participate in those benefits that are produced by exploration or exploitation activities, or that they must receive fair compensation for any damage or loss caused by such activities, even if they do not hold an ownership title on the concerned lands.

According to Article 231.5 of the Brazilian Constitution, indigenous peoples cannot be removed from their original territories, except in the event of a catastrophe or epidemic that places the population at risk or in the interest of national sovereignty, after deliberation of the National Congress, guaranteeing, under all circumstances, immediate return as soon as the risk ceases. This formulation has avoided in many cases the forced removal of indigenous people from their territories

[197] Fuentes C.A. & Fernández J. E. (2022). The four worlds of recognition of indigenous rights.
[198] Braathen E. & Inglez de Sousa C. (2016). Semi-Autonomy: Contemporary Challenges for Indigenous Peoples in Brazil.
[199] Constitution of Brazil, Article 231.4
[200] Tomaselli A. (2020). Political participation, the International Labour Organization, and Indigenous Peoples: Convention 169 'participatory' rights, The International Journal of Human Rights.

but, it has also been circumvented in many others. Indeed, forced removal has often occurred in a "hidden" form by making the indigenous keep the ownership of their territories while the natural resources that guarantee their survival are depleted.

The formulation of the Brazilian Constitution has been criticized because, even if it formally accepts the rights of indigenous peoples over the lands they have traditionally inhabited and respects their cultural use, however, the right of access to these territories is reserved for the dominant actor, namely the State or private companies, leaving indigenous peoples in a position of subordination, and creating a source of potential conflict. Finally, this article puts the FUNAI in charge of the protection of indigenous and their properties. They are assigned the task to carry out studies and surveys before demarcation starts. [201] Even if the formulation of this and of the subsequent article of the Constitution reveals that without the authorization of the indigenous people, no external organization is allowed to enter, nevertheless the absence of regulating entities has made it impossible for indigenous people to exercise this type of control. The administrative and managerial acknowledgement of indigenous peoples has not accompanied the constitutional recognition of their social and political organization. The judgments and definitions made by indigenous groups are not binding on any government agencies. [202]

In addition to granting indigenous land rights, the Constitution in Article 67 of the Temporary Provisions further required the demarcation of all 532 recognized indigenous areas by 1993. The *de jure* rights afforded by the Constitution thus required implementation via a formalization process that included demarcation, approval, and registration to become *de facto* rights. Formally, the rights provided in the Constitution could not be applied until a community had completed this process. At the moment the territories demarcated represent 12.5 per cent of the Brazilian territory, about 106.7 million hectares, of which almost one-fourth is constituted by Amazonian regions.[203]

A little detail that should be noted is that in the Constitution as in the speeches of Bolsonaro is used the word "Indians" which is considered pejorative by some indigenous populations. Indeed, as stated by Sonnleitner (2020) [204], the word "Indio" is considered to stigmatize improper behaviour. Indeed, as noted also by the Economic Commission for Latin America and the Caribbean, the term "Indian", was created by European colonizing countries during the colonisation period to define the

[201] Constitution of Brazil, Article 242, https://www.constituteproject.org/constitution/Brazil_2017.pdf?lang=en
[202] Braathen E. & Inglez de Sousa C. (2016). Semi-Autonomy: Contemporary Challenges for Indigenous Peoples in Brazil.
[203] *Ibidem*
[204] Sonnleitner, W. (2020). Participation, Representation and Political Inclusion. Is There an Indigenous Vote in Mexico?. Política y gobierno, 27(2), ePYG1282, http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1665-20372020000200009&lng=es&tlng=en.

inhabitants of the American continent to subordinate them to the conquerors and to create a homogenous identity, thereby neglecting their linguistic and cultural diversity and, therefore, their ethnic identity.[205] On the other hand, the term indigenous is used neutrally to refer to the native populations, even though it still has unclear and discriminatory implications.

As concerns Mexico, it is Article 27 which recognizes the collective property rights of indigenous communities over their lands and territories and establishes a framework for their use and management. In turn, Article 2 envisages the right to the collective use of common lands as well as the exploitation of natural resources in the territories of the traditional settlement of indigenous peoples and communities. It recognizes the right of indigenous peoples to self-determination and establishes preferential access for indigenous peoples to the natural resources in the areas they inhabit. This article has been harshly criticized since it would attribute multinational corporations the rights over the natural resources of territories inhabited by indigenous people.[206]

At the international level, the right of Indigenous people to own and control lands and natural resources is at the core of Article 10 and Articles 25 to 32 of the UNDRIP. According to Article 25, indigenous people have a claim to the land, territories and resources they have historically utilized because of the inherent relationship between their cultures and those "goods". The clause affirms that indigenous peoples have the right to preserve and develop their unique spiritual ties to their LTRs.

In the framework of the above-mentioned convention, Articles 26 are 28 are crucial. According to the former, Indigenous peoples have the legal and unrestricted right to own, use, develop and control the lands, territories and resources that they have traditionally owned or otherwise occupied or used. To guarantee it, Governments have to recognise and protect these lands, waters and resources. The duties of the states are quite limited since they only have to give legal recognition and protection to their lands, territories and resources. Thus, the clause refers to "rights" in a general sense without specifying what kind of rights they are. Therefore, it is presumable that the clause applies to land rights as both cultural and property rights. This is made evident by reading Article 26.1 in connection with Article 25 in relation to cultural rights. The following paragraph states that indigenous peoples are also attributed land rights in the sense of property rights. In its turn, Article 28.1 grants indigenous peoples the right to restitution of traditional lands "*which have been*

[205]ECLAC (1995). El etnodesarrollo de cara al siglo XXI. Social Development Division, LC/R.1578. https://repositorio.cepal.org/handle/11362/30523.
[206] Ficorilli G. (2010). La situazione giuridica degli indigeni in Messico, in F. Marcelli, (cur.), I diritti dei popoli indigeni, Roma, 2010, spec. 223.

confiscated, taken, occupied, used or damaged" [207]. In the case in which it is not possible, it foresees resorting to other ways of just, fair, and equitable compensation, for the lands, territories, and resources that they have traditionally occupied or used, and which have been taken away from them without their free, prior, and informed consent. Nevertheless, as noted by Gilbert (2013), restitutions should be preferred since lands are not only important for the economic support they give, but also because they are important for indigenous culture.[208] This article, like Article 28, recognizes the rights of indigenous people to the territories they have long utilized or otherwise occupied.

It is worth noting that Article 29.2 categorically states that Indigenous have to give their prior consent before storing hazardous materials on Indigenous territories. In contrast to this, the successive American Declaration on the Rights of Indigenous People in Article XVIII. 6 affirms Indigenous Peoples have the right to protection from the introduction of toxic waste or hazardous substances onto their territories.[209]

Similar provisions to those of the UNDRIP can be found in the commentaries of the CERD Committee on the content of the CERD. According to it, the Convention can be interpreted as calling on states to take measures to return lands and territories to indigenous peoples that have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent. Also, according to the Committee, when restitution is not feasible, compensation should be awarded, and in the case in which it is possible, in the form of lands and territories. Considering this and other elements it is possible to deduce that, on some grounds, the Declaration is simply codifying existing international law.[210]

In this regard, a reference should be made to the ILO Convention No. 169. Its Articles 13 to 19 deal specifically with it. The Convention requires the participation of Indigenous Peoples in the use, management, and conservation of those natural resources that pertain to their lands.[211] This includes the right to participate in the benefit-sharing of exploration and exploitation activities of mineral or sub-surface resources or to receive compensation for damages or lost land. An interesting case is the content of Article 13, which puts a duty on the states to recognize the unique significance

[207]UNGA (2008). United Nations Declaration on the Rights of Indigenous Peoples, Article 28. https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html

[208] Gilbert J. (2013). Land Rights as Human Rights.

[209] IWGIA (2016). OAS: Regressive elements in the American Declaration. https://iwgia.org/en/news/2422-oas-regressive-elements-in-the-american-declaratio.html

[210] Committee on the Elimination of Racial Discrimination. General Recommendation XXIII (51) concerning Indigenous Peoples. UN Doc CERD/C/51/Misc.13/Rev.4 (18 August, 1997), para 5.

[211]ILO (1989). Indigenous and Tribal Peoples Convention, Article 15, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

of the relationships that the peoples involved have with the lands or territories, or both, that they occupy or otherwise use, especially the communal aspects of these relationships. Article 16 focuses on relocation and on the consequent compensation that Indigenous should receive. Nevertheless, it does not explicitly declare in which cases, to what extent, and under whose responsibility Indigenous Peoples should be compensated for their relocation. The inclusion of a clause that mentions "*in all possible cases*" opens the possibility that in some cases there could be no compensation if it is not possible to provide them with lands. [212]

A case in which exploitation of indigenous territories is prohibited, not even in exchange for compensation, is when it regards indigenous populations living in voluntary isolation. This is stated by the OHCHR Guidelines for the Protection of Indigenous Peoples in Voluntary Isolation[213] which consider the land of the isolated people as inviolable.

Indigenous peoples' rights to communal property on traditional land and territories are also recognised and protected by the abovementioned Article 21 of the American Convention.

Even if it does not address specifically indigenous, Article XXIII of the American Declaration of the Rights and Duties of the Man protects the right of every person to his private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and the home.

Several interesting provisions are also contained in the OAS Declaration on the Rights of Indigenous Peoples, in particular in Articles 17, 21 and 22. Article 17 protects the right to own, develop, control, and use their lands, territories, and resources, the 21 the right to determine the use, development, and exploitation of their lands, territories, and resources and the 22 the right to be compensated for the lands, territories, and resources that they have traditionally owned, occupied or otherwise used, which have been confiscated, taken, occupied, used or damaged without their prior and informed consent.

Further information about the right to land and relocation is also given by Article 10 of the UN General Resolution 61/295, which was approved by Brazil. According to it, indigenous peoples cannot be forced to leave their lands and territories. Relocation can happen but has to be voluntary and take place with the prior consent of the indigenous peoples concerned with knowledge of the

[212] Ovalle M.C. & Vásquez J.C. (2022). Limitations on Democracy in Multilateral Policies to Regulate the Political Participation of Indigenous and Tribal People.
[213] OHCHR. (2012). Guidelines for the protection of indigenous peoples in voluntary isolation of the Amazon region, the Gran Chaco, and Eastern Paraguay: Result of the consultations by OHCHR in the region: Bolivia, Brazil, Colombia, Ecuador, Paraguay, Peru, and Venezuela.

facts issued and after agreement on just and fair compensation, and an option to revoke such decisions must exist".

Besides national and international laws, also jurisprudence has played an important role in the definition of the protection of the right to land and natural resources. Among the most relevant cases, there is the *Moiwana Community* v. *Suriname.*[214] In this, the IACtHR clarified that a community does not have to be indigenous to the territory they inhabit to have the right over the land. It upheld that Moiwana Community was entitled to the land they inhabited even though it was undisputed that they were not indigenous to the region. This interpretation was reaffirmed a few years later in the *Saramaka People* v. *Suriname* case.

3.4 The Right to Free, Prior and Informed Consent (FPIC)

When it is not limited to something procedural, the right to free, prior and informed consent guarantees the right to self-determination, the right to land and natural resources and the right to autonomy of indigenous people. This right gives Indigenous people the possibility to effectively and meaningfully participate in decisions that affect them, their communities and their territories. Concretely, it consists in listening to the views and concerns of affected Indigenous groups and, where necessary and possible, modifying the action or decision to avoid infringements of their rights. Consequently, its scope encompasses both the procedure and the binding nature of its outcome. Even if at first glance it may not seem so important, its incompliance jeopardizes the physical and cultural existence of indigenous communities. According to the National Organization of Indigenous Peoples of Colombia (ONIC), this consultation is aimed at protecting the life and integrity of indigenous peoples, avoiding the threats that can negatively affect them, provoking their cultural or physical extermination, and ensuring that indigenous participate effectively as full subjects of rights in processes of decision making that affect them. In the view of Colombia's Constitutional Court, FPIC is a fundamental right, deriving from the constitutional protections extended to the cultural and ethnic identity of the country's indigenous peoples (ECLAC, 2014).[215]

The right to FPIC can be framed in the analysis of land rights since it is mainly in this field that it finds a practical application. Indeed, it allows indigenous people to give or withhold consent

[214]IACtHR (2005). Moiwana Community v Suriname. https://www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf
[215] ECLAC (2014). Los pueblos indígenas en América Latina: avances en el último decenio y retos pendientes para la garantía de sus derechos, p.28.

to a project that may affect their territories and enables them to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated.[216]

At this point, it is important to analyse the main features of the FPIC. The word Free refers to the fact that consent should be given by the community without any force, intimidation, manipulation, coercion or pressure by any government or company. Prior means the indigenous peoples' consent should be asked before the government allocates land for particular land uses and before approving specific projects. Informed means that all the relevant information is in a language they understand, and that information is independent and unbiased.

According to the principle of FPIC, the consultation with indigenous peoples should be carried out by the government, in consultation with the indigenous peoples themselves. Private actors may be involved in development projects that affect indigenous lands, territories, and resources, but they are not responsible for carrying out the consultation process themselves. Rather, it is the responsibility of the government to ensure that private actors consult with indigenous peoples in a manner that is consistent with the principles of FPIC.

Above all, the consultation process must be culturally appropriate, consider the traditional decision-making processes of indigenous and be undertaken considering their representative institutions. For the IACHR, this requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.[217] The Inter-American Court, the ILO, and the UN Special Rapporteur on the rights of indigenous peoples have indicated that consultation processes must respect the internal decision-making processes of indigenous peoples and their organizations.

The legal basis of this right is present in a series of national and international documents. Reference to it is made in Article 232 of the Brazilian Constitution which establishes that the exploitation of natural resources on indigenous lands can only be carried out with the prior approval of the National Congress and after consultation with the affected communities.[218] In Mexico, the right to prior consultation is recognized under Article 2, section B, fragment IX which affirms that the government should consult with the indigenous peoples when implementing development plans at the national, state, and municipal level. As regards national laws, there is no single comprehensive

[216] FAO (2016). Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities. Manual For Project Practitioners. I6190E/1/10.16. https://www.fao.org/3/i6190e/i6190e.pdf
[217] IACHR (2004). Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 140; and, Maya Indigenous Communities of the Toledo District (Belize), Merits Report, October 12, 2004, para. 142
[218]Constitution of Brazil, Article 232

law that defines how prior consultation should be implemented in the country. [219] Nevertheless, reference to this right can be found in several laws. For instance, the law that instituted the National Commission for the Development of Indigenous People (CDI) required consultation with indigenous peoples for the creation of development plans.[220] Similarly, the Law of Sustainable Forest Development stipulates that indigenous groups must be permitted to take part in the creation of forest programs where forests are situated in regions where they reside. Nonetheless, the law does not clarify how the views of indigenous peoples should be included in the initiatives.

The right to prior consultation has been included in the hydrocarbon legislation and the energy reform laws. However, it has been pointed out that those same regulations would permit businesses to occupy certain areas even in the absence of the approval of native populations. From this emerges a "flaw" of the FPIC which is that protections for prior consultation do not guarantee that proposed projects will be rejected in the case in which they have a negative impact on indigenous populations.

At the international level, FPIC is protected under Articles 19 and 32 of the UNDRIP which impose on the States the obligation to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their FPIC before adopting and implementing legislative or administrative measures and before undertaking projects that affect them.[221] On the same topic is Article 2.3 of the UN Minorities Declaration which contains a more general right to participate in decision-making and mandates that the legitimate interests of people belonging to minorities should be taken into account.[222] Moreover, ILO has expressed how to guarantee this right and has affirmed that:

> *"the process of consultation must be specific to the circumstances and the special characteristics of that group or community. Thus, a meeting with village elders conducted in a language they are not familiar with, e.g. the national language, English, Spanish etc, and with no interpretation, would not be a true consultation."*[223]

Consequently, if consultation is carried out in a language not spoken by the indigenous group, this cannot be considered effective. Ineffective are also consultations which do not involve the

[219] Global Americans (2017). Indigenous political representation in Mexico. https://theglobalamericans.org/2017/10/indigenous-political-representation-mexico/
[220] *Ibidem*
[221] UN (2007). United Nations Declaration on the Rights of Indigenous Peoples. https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf
[222] OHCHR (1992). Declaration on the rights of persons belonging to national or ethnic, religious and Linguistic Minorities,https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-rights-persons-belonging-national-or-ethnic
[223] ILO (2003). Convention No 169 concerning Indigenous and Tribal Peoples: A Manual, p. 16.

representative group from the community or the community is not given a chance to raise their concerns about the government's proposals. The ECOSOC as well has indicated that the "*information should be accurate and in a form that is accessible and understandable, including in a language that the indigenous peoples will fully understand*," and that "*consent to any agreement should be interpreted as indigenous peoples have reasonably understood it*". [224] The IACtHR and ILO contend that the appropriateness of the consultation process also entails that the consultation has a time component, which depends once again on the particular conditions of the proposed action, taking into account respect for indigenous methods of decision-making. According to this statement made by the former UN Special Rapporteur on the rights of Indigenous peoples, "*Indigenous peoples must be given the necessary time to conduct their decision-making processes and to effectively participate in the decision-making in a manner that adapts to their cultural and social models [...] if these are not taken into consideration, it will be impossible to comply with the fundamental requirements of a prior consultation and part*". [225]

For the consultation to be meaningful, it should take into account local complexity to prevent power dynamics from favouring one side over the other and leading to an unfair process. The local complexities are, however, seldom or never taken into consideration in top-down participatory venues, such as the FPIC and similar "public informative sessions" organized by the government or developers themselves. In addition, as will be highlighted also in the exposition of Case Study 2, owing to past experiences of marginalization and prejudice brought by colonialism, many individuals struggle to speak up in public. They are singled out as "opponents of development" or even threatened in the case in which they oppose a project and, consequently, do not participate in the consultation process due to this embarrassment or fear. These worries emerged also in the Yucatán Solar photovoltaic project, which will be analysed more in Case Study 2, where some signatories of the lawsuit against the project disclosed publicly that they had been threatened and harassed. [226] These intimidation tactics dissuade the people from participating more actively, especially when it comes to speaking out against initiatives that are thought to enjoy strong political backing.

The state's duty to consult indigenous peoples is established also by Articles 6, 7 and 15 of ILO 169. Such consultation to find an agreement must be provided to indigenous communities when are considered legal or administrative measures that may affect them. This consultation is necessary

[224]ECOSOC(2005). Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples. E/C.19/2005/3, pp. 12-13.
[225] Anaya J. (2009). UN Report on the situation of human rights and fundamental freedoms of indigenous people, A/HRC/12/34/Add.6, Annex A, para. 33.
[226] Barragan-Contreras, SJ. (2022). Procedural injustices in large-scale solar energy: a case study in the Mayan region of Yucatan, Mexico. Journal of Environmental Policy & Planning, 24(4), 375-390.

also in case of development projects that affect them and has to be done before their approval and initiation. The consultation should be carried out through appropriate procedures and in particular through their representative institutions.

The already mentioned Final Report of the study on indigenous peoples also emphasizes the importance of FPIC as a key element of Indigenous peoples' right to participate in decision-making. It stresses that governments and other decision-making bodies must obtain the informed consent of Indigenous peoples before making any decisions that affect their lands, resources, or livelihoods.

Finally, there is a related article also in the OAS Declaration on the Rights of Indigenous Peoples. Article 14 attributes to indigenous the right to be consulted and participate in decision-making processes that may affect their rights, lands, territories, and resources.

As is the case for land rights, also for FPIC jurisprudence has contributed to defining the matter. In the *Saramaka People* v. *Suriname* case, the IACtHR stipulated that the state is obliged to not adopt any measure without the consent of the community. In addition, in the *Kichwa indigenous people of Sarayaku* v. *Ecuador*, the Court analysed developments in international norms and jurisprudence and concluded that the obligation of states to consult with indigenous peoples is now a general principle of international law. In the ruling of this case, the Court set out the minimum standards for FPIC. First of all, states must actively consult and inform indigenous communities. Secondly, consultations must be carried out in accordance with the customs and traditions of the communities affected. Thirdly, consultations must be carried out in good faith, through culturally adequate procedures with the expressed purpose of reaching an agreement. In this sense, good faith means that there must be a "*climate of mutual trust*"[227] and there should not be any type of coercion by the state or agents or third parties acting with its authorisation or acquiescence. Fourthly, consultation should be carried out in the first stages of a development or investment plan, and not simply when it is necessary to have the community's consent. Lastly, the state must ensure that the members of the population are aware of the possible benefits and risks of the proposed development.[228]

Worth mentioning, in this case, is also the already mentioned *Maya Indigenous Communities of the Toledo District v. Belize case*. In this case, the court affirmed that the Belizean government had violated the right to FPIC by granting numerous logging, mining and other resource extract concessions on Maya lands without consulting or obtaining the consent of the communities and

[227] IACtHR (2012). Kichwa Indigenous People of Sarayaku v. Ecuador. Judgment of 27 June 2012 (Merits, Reparations and Costs). https://www.corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf
[228] *Ibidem*

ordered the Belizean government to develop a mechanism for recognizing and protecting Maya land rights.

According to the Court, before issuing logging and mining concessions within indigenous peoples' lands, States should verify that there is effective participation of the involved communities, according to their own traditions, in any investment or development project within their lands. In addition, the benefits of the projects should be shared with these communities. Finally, should be made a prior and independent environmental and social impact assessment. The IACHR as well has affirmed that informed consultations require the sharing of full and precise information on the nature and consequences of the process on the people and communities consulted and that this information must be sufficient, accessible and timely.[229]

In the view of Anaya (2009), the FPIC does not give indigenous a sort of 'veto power', but rather establishes the need to make consultations to have a consensus from all the concerned parties.[230] It is important also to distinguish it from "participatory" rights which will be addressed in the following chapter. Indeed, participation goes far beyond consultation which requires a lower involvement of the indigenous community.

FPIC is not a one-time consent but must be further negotiated throughout the entire project. In particular, the flow of information must be guaranteed along with the constant involvement of indigenous communities. If new information arises, or if any information turns out to be incorrect, communities can withdraw their consent and back out again.[231]

Even if it is a valuable instrument, scepticism about its respect in Latin American countries has been expressed by Baluarte (2004) and Gaete (2012) [232]. According to them, mechanisms such as prior consultation and free, prior and informed consent have been slow and ineffective in defending the rights of Indigenous Peoples. In this regard, it deserves to be mentioned the case of Brazil where the government has overridden the right to FPIC by defining exceptional situations in which this does not apply. An example is Directive 303/2012 by the Attorney General of the Union which establishes that topics that are considered as "*strategic to national defence*" will be implemented independently of consultation of the indigenous communities involved or FUNAI. These include: "*the installation*

[229] IACHR (2015). Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities', oea/ Ser.l/v/ii.Doc.47/15, para. 83
[230] Anaya, J. (2009). International Human Rights and Indigenous Peoples. Kluwer Publications, New York
[231] Lewis, Jerome et al. (2008). Free, Prior and Informed Consent and Sustainable Forest Management in the Congo Basin, http://assets.gfbv.ch/downloads/fpic_congo_report_english.pdf
[232]Baluarte D. (2004). Balancing Indigenous Rights and a State's Right to Develop in Latin America: The Inter-American Rights Regime and ILO Convention 169. *Sustainable Development Law and Policy*, 9-15;
Gaete Uribe L.A. (2012). Convention 169. An Analysis OF Their Problematic Categories in the Light of its History Rules Lucía, *Revista Ius et Praxis*, Año 18, Nº 2, , pp. 77 – 124

of military bases, units and posts and other military interventions, the strategic expansion of the road network, the exploration of alternative strategic energy sources and the protection of strategic resources, at the discretion of the competent bodies". [233]

Other factors that rise doubts about the efficacy of FPIC are linked to the legal ambiguity on who has a right to be consulted, how long the consultation process should last, the lack of compulsory consultations after the Social Impact Assessment (SIA) process, unclear responsibilities among the different public and private actors, a weak monitoring mechanism and a lack of sanctions for non-compliant companies. [234]

To incentive the respect of this right, the Amazonian Cooperation Network launched the proposal to elaborate Autonomous Consultation and Consent Protocols, formulated by the indigenous peoples and communities in an autonomous and independent form, as part of a process of preparing to exercise the right to be adequately consulted by the Brazilian state.

Another interesting initiative has come from several lending institutions like the European Bank for Reconstruction and Development and the International Finance Corporation which accept financing companies only if they respect FPIC. Additionally, more than 70 banks who have embraced the Equator Principles, a set of guidelines that enables banks to identify, evaluate, and manage environmental and social risks in projects they finance, have adopted FPIC and demanded its respect for their clients.

Indigenous peoples themselves have started to adopt measures to be guaranteed their right to FPIC. They have started to draft their own autonomous rights-based consultation and consent protocols and policies, also known as FPIC protocols, in which they highlight how they are to be consulted and their FPIC obtained. In these protocols, they indicate how, where and with whom hearings must be conducted regarding any bill-related initiatives, "ventures," or development projects, and any measures affecting the involved communities. Through these protocols, indigenous people can establish their specific preconditions for what they consider good faith consultation. These protocols can also require active involvement in consultation processes of governmental bodies like the FUNAI or the Federal Prosecutors Office (MPF). [235] Like self-demarcations, FPIC protocols are considered "informal" instruments and are not granted full legal status by the institutions.

[233] Directive 303/2012 (V), Attorney General of the Union
[234] World Resources Institute (2021). Mexico Policymaking to Ensure Energy Justice in Renewables Development. https://www.wri.org/update/mexico-policymaking-ensure-energy-justice-renewables-development
[235] Doyle C., Rojas Garzon B, Weitzner V., Okamoto T. (2019). Free Prior Informed Consent Protocols as Instruments of Autonomy: Laying Foundations for Rights Based Engagement, Köln, Institut für Ökologie und Aktions-Ethnologie, https://enip.eu/FPIC/FPIC.pdf

A case worth mentioning in which it was used is the one regarding the Juruna, an indigenous population living in the area of the Xingu River in the State of Para in Brazil. They resorted to this instrument when in 2017 started the Belo Sun mining project without prior consulting them. A peculiarity of this protocol is that it places a strong focus on their involvement in creating participatory environmental impact assessments as a result of their unpleasant experience with the Belo Monte Dam. The Belo Sun mining project was suspended in 2018 when the Juruna won a significant legal battle in the Federal Court, reiterating the necessity of respecting their FPIC Protocol. Its following application resulted in the invalidation of environmental approval for the Belo Sun mine.

Other instruments that can be considered helpful in the implementation of the right to land and natural resources are the Environmental Impact Assessments (EIAs) and the Human Rights Impact Assessments (HRIAs). Through EIAs, governments can evaluate the possible negative effects of each extractive project. However, as argued by Merino (2018), these are mainly self-regulatory instruments because corporations order and pay for them and the main responsibility of the State is to establish an administrative procedure for approval or disapproval.[236] Thus, this instrument facilitates the work of the State and limits its responsibility to oversee extractive industries. On the other side, as also noted by MacNaughton and Hunt (2011), HRIAs represent a good solution to address and prevent human rights violations in the development of large projects is to conduct before a project is implemented.[237] This is the process of predicting the potential consequences of a proposed policy, program or project on the enjoyment of human rights. If carried out in the early stages of company decision-making processes, in their view could represent a big step forward.

3.5 Comparative Analysis of Compliance with Land Rights in Brazil and Mexico

Even if Article 67 of the Temporary Provisions required the demarcation of all 532 recognized indigenous areas by 1993, five years later, only 50% of indigenous lands had been demarcated. The missed deadline was largely due to inadequate resources for the FUNAI. Over the years the situation

[236] Merino, R. (2018). Re-politicizing participation or reframing environmental governance? Beyond indigenous' prior consultation and citizen participation, World Development, 111, 75–83, https://reader.elsevier.com/reader/sd/pii/S0305750X18302171?token=59081CCF7C28C57D2CAE2FFFAA4F95D5BC4762DEA2D1ACCB7CC7D073E0B9017464C259D29B7AED9A4F114B0943C81712&originRegion=eu-west-1&originCreation=20230420180722

[237] MacNaughton, G., & Hunt, P. (2011). A human rights-based approach to social impact assessment. In F. Vanclay & A. M. Esteves (Eds.), New directions in social impact assessment: Conceptual and methodological advances (pp. 355-368). Cheltenham: Edward Elgar. https://www.elgaronline.com/display/edcoll/9781849801171/9781849801171.00034.xml

has not improved and, at the moment, demarcation is still pending for 241 Indigenous territories[238] and, significantly, since the beginning of the Bolsonaro Administration in January 2019, no demarcation has been approved. This situation emerges clearly from Figure 3 which shows the negative trend in the number of lands demarcated in the last years.

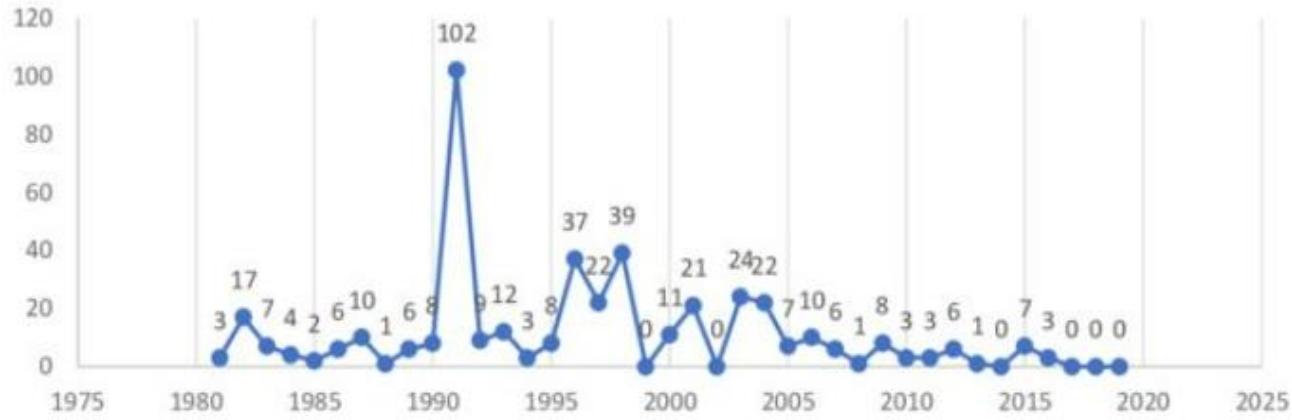


Figure 3: Number of Indigenous Lands Demarcations in Brazil per year between 1981-2019 (Grant Baines, 2021)[239]

This represents a violation as well under Article 23 of the American Declaration and Article 21 of the American Convention of Human Rights which grant indigenous people the right to delimit their territory. It also goes against the recommendations addressed to Brazil by the IACHR already in 1985 when it asked the State to proceed with demarcation to avoid a situation like that of the Yanomami people[240] could happen again.[241] In addition to that, also new indigenous reserves are hardly being designated.

The problem of the lack of land demarcations is part of a bigger trend of disrespect towards indigenous rights. Indeed, also some bills proposed under the Bolsonaro government make it clear. Among these emerges Bill 191/2020. It regulates mining in indigenous lands by, actually, opening them for economic exploitation. The proposed legislation sets conditions for private activities in these areas with a particular focus on commercial mining. It sets conditions for the mining of mineral resources in indigenous lands and financial compensation to indigenous peoples. The proposed legislation does not consider social, cultural, or healthcare services, fails to include environmental or social protections, and does not provide compensation for indigenous peoples. According to the Bill, indigenous populations would be consulted before the start of activities; however, they would have no veto power to extensive mining. In addition, the project also allows initiatives to be conducted

[238]Human Rights Watch (2022). Brazil: Indigenous Rights Under Serious Threat, https://www.hrw.org/news/2022/08/09/brazil-indigenous-rights-under-serious-threat
[239] Graph based on data collected by the FUNAI, http://dx.doi.org/10.30612/videre.v13i28.15236
[240]Yanomami people saw the construction of a highway in their territory
[241] IACHR, Report on the situation of the Yanomami people, in the Brazilian states of Mato Grosso and Roraima

without the consent of indigenous communities, which is clearly against the provisions of ILO Convention 169 (Angelo, 2021).[242]

According to scientific research, if passed into law, the proposed bill could have a significant negative social and environmental impact on more than 863,000 square kilometres of tropical forests, leading to the loss of biodiversity and extensive deforestation, both of which would worsen climate change on a global scale.[243]

Bill 191/2020 is part of a broader set of "attacks" by the Bolsonaro administration against indigenous lands and environmental agencies. These attacks include, for example, administrative manoeuvres allowing land leasing, the emptying of the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA) budget, the clash with the National Institute for Space Research (INPE) regarding deforestation data on the Amazon and the misuse of public resources from the Armed Forces to address this problem. Nevertheless, what arouses the most fear are the direct cuts in budgets and staff of the FUNAI and in the general funding allocated to Indigenous people. The budget approved in the Budget Administrative Law 2022/LOA 14303 includes only 31% of what was approved for the same activities in previous years. In addition, the government was alleged to have substituted specialists with trustworthy government officials with ties to the agricultural, mining, and logging industries in an effort to loosen regulations and oversight.[244] 98% of the deforestation notifications sent between January 2019 and March 2022 were unanswered by the federal government. Through a provisional measure, President Bolsonaro tried to transfer the demarcation of indigenous lands to the Ministry of Agriculture, Stockbreeding and Supply which is generally occupied by representatives of the agribusiness who are firmly against the demarcation of indigenous lands. In the end, the Federal Supreme Court subsequently declared that the presidential measure was unconstitutional but it is nevertheless explicative of the trend towards indigenous rights that exists in Brazil today. [245]

Worrying about the condition of indigenous populations is also Decree 10,966. Through this is established the category of "artisanal mining" which has to be "stimulated" in the Amazon region. This document also established the Inter-ministerial Commission for the Development of Artisanal

[242] Angelo, M. (2021). Jair Bolsonaro pede a Arthur Lira prioridade na aprovação do PL que libera mineração em terras indígenas. Observatório da Mineração, http://bit.ly/2ZhOYLP

[243]OHCHR. (2021). Brazil: UN experts deplore attacks by illegal miners on indigenous peoples, alarmed. https://www.ohchr.org/en/press-releases/2021/06/brazil-un-experts-deplore-attacks-illegal-miners-indigenous-peoples-alarmed

[244]Mamo, D. (2023). The Indigenous World 2023: Editorial, 37th Edition, https://www.iwgia.org/en/indigenous-world-editorial/5140-iw-2023-editorial.html

[245]Meyer, EPN. (2021). Constitutional Erosion in Brazil (1st ed.). Bloomsbury Publishing. https://www.perlego.com/book/2787863/constitutional-erosion-in-brazil-pdf

and Small-scale Mining, which does not foresee any kind of representation for Indigenous Peoples, traditional communities or social movements. Furthermore, this decree legitimates illegal mining in the Amazon.

Over the years, indigenous communities have not only been threatened by the "direct activity" of the governments but also their inactivity. The lack of protection of indigenous lands by the Brazilian government has left the open field to loggers, farmers, squatters, and gold miners who have extensively established illegal occupation in several Indigenous lands in the Amazon. Their action has intensified conflicts and environmental degradation and is placing indigenous peoples in a vulnerable situation (CIMI, 2019).[246]

Moreover, statistical and numerical data further seem to point out the dramatic situation of indigenous people in Brazil. Only in 2021, there have been 305 incidents of Indigenous lands invaded by land grabbers, miners, and loggers, 226 incidents of gunfire attacks from illegal miners, drug cartels, and loggers in 22 states, 871 demarcation processes suspended by the president, 1,294 cases of indigenous property attacked and/or destroyed via arson and vandalism, 176 indigenous activists murdered for defending the environment or their human rights, 148 suicides,744 child deaths from forced mobilizations, water contamination, and malnutrition, 355 cases of violence against Indigenous community members.[247] Not surprisingly, there is a widespread perception that the violence against indigenous peoples increased during the Bolsonaro government because perpetrators find encouragement in the president's prejudicial assessments regarding such populations and his frequent appeals to invade indigenous lands. [248]

At this point, it is interesting to consider the aforementioned Belo Monte case in light of additional elements. To generate energy, it has reduced the 70-87% flow of the Volta Grande do Xingu River. These have deeply affected the Juruna and Arara communities since their lands have lost productive capacity and resources related to their traditional way of life. Indeed, with the building of the plant, they lost artisanal fishing and the catching of ornamental fish which represent their primary source of food and income. On 2 March 2012, the Commission of Experts of the ILO published a report on the implementation of this convention, in which it asked Brazil to take the necessary measures to carry out consultations with indigenous peoples concerned under Article 6 and Article 15 of Convention 169 for the construction of the Belo Monte hydroelectric plant, before

[246] CIMI (2019).Violence against Indigenous Peoples in Brazil, https://cimi.org.br/wp-content/uploads/2021/01/Report-Violence-against-the-Indigenous-Peoples-in-Brazil_2019-Cimi.pdf
[247]CIMI (2021). Violence against indigenous people in Brazil, https://cimi.org.br/wp-content/uploads/2022/08/executive-summary-violence-indigenous-peoples-brazil-2021-cimi.pdf
[248] Barros Soares, L., & Grant Baines, S. (2021). "They are almost humans like us": Indigenous politics and policy dismantling under Bolsonaro's government. *Revista Videre*, *13*(28). https://doi.org/10.30612/videre.v13i28.15236

potential adverse impacts of this project are irreversible and to work together in consultation with indigenous peoples to determine whether the priorities of indigenous peoples are being respected. In addition, the Brazilian government should plan measures to mitigate risks and properly compensate the affected people. The IACHR has also criticized the Brazilian government due to its noncompliance with the ILO Convention 169 because of the power plant in Belo Monte. Brazil reacted angrily and suspended its financial contribution to the OAS. At the regional level, the ILO Convention, however, appears to have wider support. Lawyers in the State of Pará, for example, have repeatedly filed complaints against the approval process of the dams and drawn attention to the lack of implementation of Convention 169. Before the construction of the hydroelectric plants Belo Monte and Teles Pires as well as most other construction projects in the Amazon, the indigenous people on the ground were not at all or insufficiently informed about the projects and were not involved in their implementation. Belo Monte is one of the many dams that threaten indigenous rights. Indeed, in Brazil, more than 250 hydroelectric dams are planned for development in the Amazon region, even if adequate environmental safeguards or consultation with Amazonian indigenous peoples are almost absent in all cases.[249]

The violation against indigenous rights is so deep and repeated that some indigenous have arrived to denounce Bolsonaro for crimes against humanity. This has been the case for the Raoni Metuktire and Almir Suruí communities which, at the end of 2020, appealed to the International Criminal Court (Oliveira, 2021).[250] This accusation was taken also by the Articulação dos Povos Indígenas do Brasil (APIB) in August 2021.

The implementation of indigenous rights is not much better in Mexico. In the first place, in 1994 it ratified the North-America Free Trade Agreement (NAFTA) which, since then, has damaged indigenous communities that benefit them. Indeed, promoting the expansion of industries such as mining, logging, and tourism has caused the displacement of many indigenous communities which has made them lose their lands and resources. The Mexican Commission on Defence and Promotion of Human Rights reported 25 incidents of forcible displacement of communities in 2017, affecting over 20,000 people, 60% of them affecting indigenous communities and linked to NAFTA.[251] In addition, even if land rights have a place also in the San Andres Accords negotiated and signed by the EZLN and the Mexican government in 1996, many scholars point the finger at their lack of

[249]Watts J. (2015). Amazonian Tribes Unite to Demand Brazil Stop Hydroelectric Dams. The Guardian. www.theguardian.com/world/2015/apr/30/amazonian-tribes-demand-brazil-stop-hydroelectric-dams

[250] Oliveira, R. (2021). Exclusivo: Raoni denuncia Bolsonaro em corte internacional por crimes contra a humanidade. A Pública – Agência de jornalismo investigative.

[251]Minority Rights Group International (2018). Indigenous People. https://minorityrights.org/minorities/indigenous-peoples-4/

implementation.[252] Also the Special Program for Indigenous Peoples adopted in 2013 recognizes a deficiency on the part of the government on the grounds of the right to prior consultation which has not been fully implemented in Mexico and calls for its active implementation.

Not more respectful of indigenous people's rights are four megaprojects approved by the Obrador government. In the first place, there is the Mayan Train which is causing the territorial reorganization of the Yucatán Peninsula. In a region already deeply impacted by aggressive tourism, this train and other real-estate projects heralded as development hubs are likely to cause considerable consequences on indigenous lands and territories. In addition, as reported by the OHCHR, the indigenous population has not been adequately consulted on it. Concerns over the project have come also from other UN Experts in a press release where they have affirmed that the construction of 1,500 km of rail on the Yucatán peninsula jeopardizes "*the rights of indigenous peoples and other communities to land and natural resources, cultural rights, and the right to a healthy and sustainable environment*".[253] The project has created much discontent in society and led civil society organizations to organize demonstrations and campaigns against this megaproject, including court-issued legal injunctions owing to the absence of environmental impact studies, to name only one breach of State and federal regulations. This pushed the state to designate the project as a "priority for national security," allowing it to forego several environmental and social protections. In the same press release, the UN experts stressed that the Mexican government could not disobey international conventions and treaties governing the preservation of human rights and the environment. The involvement of the Mexican army in the project's administration and construction, the rise in threats and assaults against human rights advocates, and respect for the FPIC of the area's Indigenous Peoples are all issues that the rapporteurs find to be concerning.

With regard to the Indigenous consultation process on the "Train Maya Development Project," the Office of the United Nations High Commissioner for Human Rights in Mexico (OHCHR-Mexico) made clear observations to the Mexican government between November 15 and December 15, 2019, noting that "*it has so far not complied with all international standards on the matter*."[254]

In second place, the Interoceanic Corridor, a railway corridor that will connect the Pacific and Atlantic is a project that raises many concerns. It includes the construction of industrial parks,

[252]Minority Rights Group International (2008). *World Directory of Minorities and Indigenous Peoples - Mexico : Indigenous peoples*, https://www.refworld.org/docid/49749ce423.html
[253]UN (2022). Mexico: Government and business must address negative impacts of Train Maya project, say UN experts. https://www.ohchr.org/en/press-releases/2022/12/mexico-government-andbusiness-must-address-negative-impacts-train-may
[254] UN-HR (2019). ONU-DH: el proceso de consulta indígena sobre el Tren Maya no ha cumplido con todos los estándares internacionales de derechos humanos en la materia.

transport infrastructure, and economic activation. This project has militarized the region and is displacing many communities. There are well-founded fears that it will also industrialise the area. The supervision of the project has been given to the Secretariat of the Navy, even if well documented are the abuses and acts of violence against Indigenous peoples at the hands of the Armed Forces. Also, in this case, have been denounced serious problems and irregularities in the project's consultation with Indigenous groups.

In third place, there is the Morelos Integral Project which foresees the building of a gas pipeline and a thermoelectric plant. It has faced the resistance of the Nahua peoples of the states of Morelos, Puebla, and Tlaxcala which have not been properly consulted.

Lastly, there is the Independencia Aqueduct in the State of Sonora. It was constructed on the land of the Yaqui tribe without consulting it and affecting its access to 50% of the water flow of the "La Angostura" dam which is its property due to the endowment of land and water, under the Presidential Decree of 30 September 1940. The governors of the tribe filed the *amparo en revisión* (631/2012) against the project which authorised the construction of the "Independencia Aqueduct". The SCJN decided in favour of them by confirming that they should be guaranteed their procedural human rights, mainly access to information, participation in decision-making, the right to consultation and access to justice.

Since indigenous communities often do not receive a fair part of the economic and energy-generating advantages, the energy megaprojects implemented in the area tend to socialize the environmental and social consequences. The projects have also weakened the social fabric and made it risky to preserve the lands and territories, especially for indigenous women who have spearheaded the opposition to these extractive ventures.[255] These projects have favoured financial speculation and land privatization, generating further changes in land use, harming the local ecology and way of life, and provoking community opposition to the construction of renewable energy infrastructure.

The criticality of the situation has been recognized on many sides. The National Human Rights Commission has asserted that these "megaprojects" not only displace indigenous peoples from their land; they also seize valuable natural resources.[256] Remarkable are also the commentaries of Michel Forst, UN Special Rapporteur on the situation of human rights defenders which, during his country visit to Mexico in 2017, drew particular attention to the situation of indigenous land and

[255] Gi-Escr (2022). Significant victory of the women of the Mexican indigenous community over a transnational company that violated their rights. https://gi-escr.org/en/our-work/on-the-ground/significant-victory-of-the-women-of-the-mexican-indigenous-community-over-a-transnational-company-that-violated-their-rights

[256] Melesio Nolasco J.M. (2015). Megaproyectos Y Derechos Humanos De Los Pueblos Indígenas. http://www.cndh.org.mx/sites/all/doc/cartillas/2015-2016/02-DH-Pueblos-indigenas.pdf

environmental activists in the context of extractive, energy and infrastructure megaprojects, calling them '*one of the most criminalized groups of defenders, facing most court proceedings and arbitrary detentions in Mexico*' and expressing consternation in front of '*the number of on-going conflicts that are the direct consequences of the lack or misuse of consultations processes with indigenous communities'*.[257]

3.6 Case Study 1: the Violation of the Right to Land in the Munduruku and Sai Cinza Indigenous Territories

"*The Yanomami and Munduruku peoples are highly vulnerable and among the indigenous communities most affected by the pressure from illegal mining in the Amazon*".[258]

The case study addressed focuses on the Munduruku, Apiaká and other indigenous communities living in voluntary isolation in the Munduruku and Sai Cinza indigenous lands in Brazil. It is largely based on a report written by the National Committee in Defense of Territories Against Mining.[259] The territory in question is in the southwestern part of the Brazilian State of Pará and has been facing the problem of *garimpagem* namely illegal gold mining. The Munduruku and Kayapo people are among those that have suffered the most due to illegal mining in their territories. The data speak for themselves: among 551 illegal mining areas detected in indigenous territories between 2017 and 2019, 497 were in the Munduruku and Kayapo Indigenous Lands in Pará.[260] To put an end to the threat represented by illegal mining, the Munduruku have legalized indigenous land titles, fought against intrusions and illegal extractive activities within these areas, and opposed what they refer to as development projects. They have also opposed bills and other normative proposals that would weaken the protection of indigenous lands and the original rights of indigenous peoples.

These activities have caused deleterious effects on the health of indigenous people and also on the environment. Indeed, to extract gold, miners contaminate the rivers and soil and destroy the forest. Indigenous groups have tried to fight against illegal mining but have faced threats and violence from miners and criminal organizations which often coordinate mining activities. The case of the Munduruku people is emblematic since illegal mining is among the activities that threaten indigenous

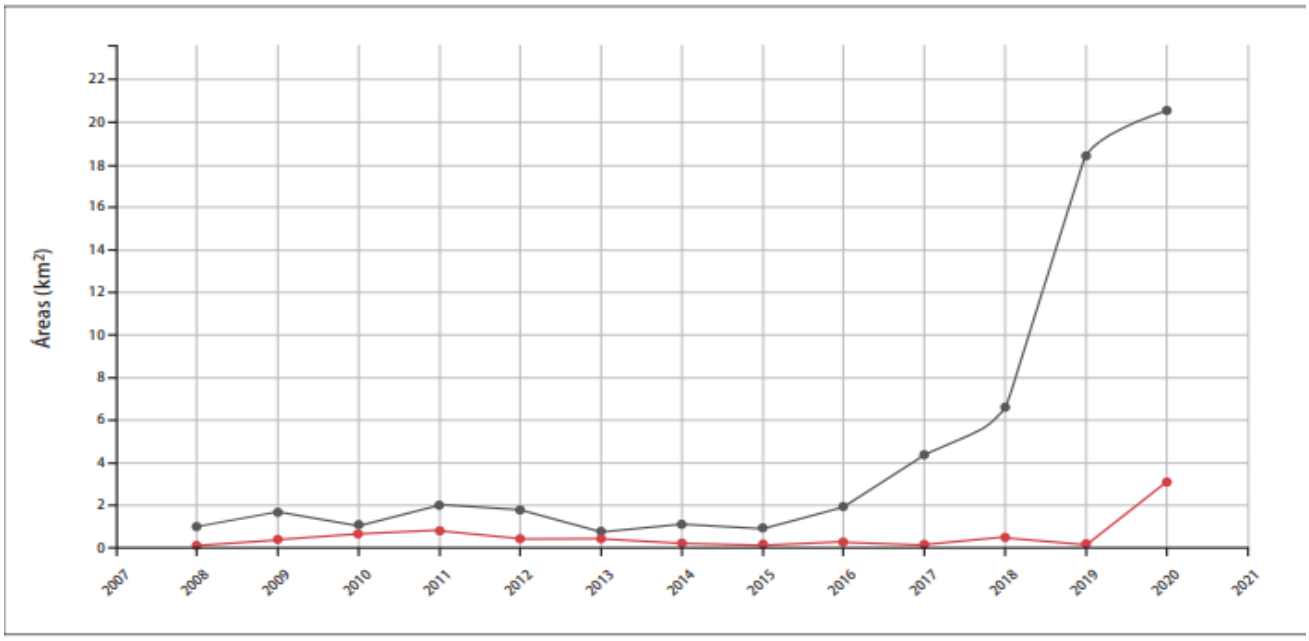
[257] Forst, M. (2018). Report of the special rapporteur on the situation of human rights defenders on his mission to Mexico. United Nations, https://digitallibrary.un.org/record/1483920
[258] OHCHR (2021). Brazil: UN experts deplore attacks by illegal miners on indigenous peoples, alarmed by proposed new bill.
[259] Wanderley, L.J., Molina, L., Vega, A., Loures, R.S.P., & Silva, L.S.C. (2021). Encircled by Gold: Illegal Mining, Destruction, and Struggles on Munduruku Land. Comitê Nacional em Defesa dos Territórios Frente à Mineração. ISBN: 978-65-00-33159-2.
[260] CIMI (2019). Violence against Indigenous Peoples in Brazil

lands and that has more impact on indigenous people. Significantly, surveys show that the mining illegal area in Brazil is larger than the area occupied by industrial mining.[261] In addition, the area of Pará is among the most affected by mining activities. The encroachment of illegal mining in indigenous territories has been increasing in the last years owing to the rise in the value of gold, the favourable attitude towards these activities by the national government (as proved by the above-mentioned Bill 191/2020) and reduced surveillance of the indigenous lands. All the indigenous groups living in the area agree on the threat represented by mining. In the words of Milena Mura, an indigenous representative at the UNPFII 21: *"Mining on Indigenous lands is genocide for us because it affects us directly, generating environmental and social impacts, affecting our traditions, culture and customs."*

The federal government holds many responsibilities for what has happened. It has indeed encouraged mining activities in the Munduruku territory, thus violating the constitutional provisions according to which mining requires prior strict procedures of approval[262]. It has not consulted with the indigenous community before approving development projects. It has not ensured that miners and criminal organizations were held accountable for the damages caused to the environment and indigenous communities have not obtained their free, prior and informed consent before approving development projects, and it has not supported their initiatives to reobtain their self-determination.

The above-mentioned report enumerates the negative consequences that these activities have had on indigenous lands. First of all, has increased the rate of deforestation. Significantly, according to the estimates made by the National Institute for Space Research (INPE), in 2020 the Munduruku and Sai Cinza IT lost respectively 2,052 and 304 hectares of their forest area to mining activities.

[261]Instituto Esclohas (2022). Gold above the law: protected areas endangered in the Amazon. https://escolhas.org/wp-content/uploads/2022/12/Gold-above-the-law.pdf
[262] Constitution of Brazil, Article 231.4



Source: Inpe/Prodes, 2020.

Figure 4: Annual deforestation at the Munduruku and Sai-Cinza Indigenous territories (Instituto Nacional de Pesquisas Espaciais, 2020)

This impact of deforestation activities on Munduruku lands represents a clear violation of Article 231.3 of the Brazilian Constitution since mineral mining has to be subject to regulation.

Another consequence of gold mining is the periodic malaria outbreaks in the area of the Tapajós River. They are caused by the pools of stagnant water created during the mining process. They are highly conducive to the proliferation of Anopheles, the mosquito that transmits the disease. The Special Indigenous Sanitary District of the Tapajós River recorded 3,264 cases of malaria in 2020.[263] They quintupled between 2018 and 2020. This rise is likely related to the advancement of mining within the Indigenous Territories and the accelerated increase in deforestation. Besides the direct effect of deforestation, it also has a deleterious effect on biodiversity by causing forest fragmentation and degradation.

The report found that the increase in the levels of mercury among the Munduruku of the Tapajós Valley had to be connected as well to illegal mining. In 2018, experts estimated that miners poured seven million tons of tailings into the Tapajós River per year, the majority of which was mercury. [264] This metal poisons both fishes and indigenous that eat them causing irreversible damage

[263] Ministério Da Saúde (2020). Malária 2020. Boletim Epidemiológico, Brasília, https://www.gov.br/saude/pt-br/media/pdf/2020/dezembro/03/boletim_ espe cial_malaria_1dez20_final.pdf
[264] GEISER (2018). Laudo de Perícia Criminal Federal n. 091/2018 – UTEC/DPF/SNM/PA.

to their health. In this way, the government has violated the Constitution, the ILO Convention and the UNDRIP.

Illegal mining has also caused conflicts and insecurity for indigenous people. Leaders opposing mining have received death threats and human rights defenders programs have been ineffective. Indigenous associations opposing illegal mining have also faced retaliation, and in 2021, miners destroyed one organization's headquarters. Tensions in the region have escalated, with increased access to weapons amongst miners and hate speech against indigenous organizations opposing invasions within their lands. The recruitment of indigenous peoples into mining, the spread of diseases (including sexually transmitted infections), the circulation and consumption of alcoholic beverages, prostitution among Munduruku women, arms trafficking, and the use of child labour are some additional effects of illegal mining on the Munduruku and Sai Cinza territories.

To solve the problem, in 2014 and again in 2018 and 2021, these indigenous communities have undertaken autonomous territorial inspections, also known as auto-demarcations, without the support of official authorities. Also, they have written several open letters to the government and Brazilian society and carried out actions in several municipalities.

The analysis of this case study wants to prove that the legislation and institutions existing to prevent the violation of land rights of indigenous people are not sufficient and that those existing are not complied with. Clearly, the author is also aware that only stopping mining cannot solve the problem and that it is crucial to address the root causes of illegal mining, such as poverty and inequality, and to support Indigenous communities in their struggles to protect their land and rights. Nevertheless, the Brazilian Government should at least conduct investigations into the attacks suffered by these populations and bring perpetrators to justice.

3.7 Case Study 2: The Violation of the Right to Land by the Yucatán Solar Photovoltaic Project

"I have always said that these companies from the renewable energies and its projects are like when the Bible came to us. It had a message of hope, but if you do not accept it they will kill you, so today these clean energies do not understand if they are clean because it will clean us all or they are clean because it will do justice to all".

These are the words of Pablo, a Mayan activist who has been threatened for opposing the Yucatán Solar Photovoltaic Project. He makes an analogy with historic colonial impositions to show that even if some projects, like that of employing more renewable energy, are beneficial, imposing them without considering the will of indigenous people is never a good idea.

This case study addresses the violation of indigenous land rights caused by development projects, particularly renewable energy-related, in Mexico. The energy reform of 2013-2014 allowed private actors to enter the hydrocarbon and electricity value chains by making investment projects. Even if these projects have ideally tried to combine development with sustainability and human rights, they have failed in this attempt. Indeed, the regulatory framework that included social consultation procedures in the development of energy projects has not been successfully implemented.[265] Since the approval of the 2015 Energy Transition Law, in Mexico it has become legally mandatory to employ more renewable energy and, by 2024, it must account for 35% of energy generation. To achieve this goal, the government has instituted the Long-Term Auction mechanism, which provides stability and long-term contracts to investors interested in producing large-scale energy capacity (SENER, 2016).[266] Consequently, many initiatives have been directed towards the construction of more than 20 massive wind and solar power parks only in the Yucatán Peninsula. If approved, these are likely to take more than 14,000 hectares of land, 30% of which are community lands (Sanchez et al., 2019).[267]

Although indigenous communities are aware of the benefits of renewable energy, they contest the social, environmental, or economic impacts that these projects can have. The concerns are mainly linked to the harm that these can cause to local ecosystems, communities' livelihoods, and cultural heritage like deforestation to clear land for solar panels or flood risks created by new hydroelectric dams.[268]

[265]Cruz, I., Duhalt, A., & Cruz, P. L. (2019). Social conflicts and infrastructure projects in Mexico. https://www.researchgate.net/publication/333451068_Social_Conflicts_and_Infrastructure_Projects_in_Mexico
[266]SENER. (2016). Prospectiva de energias renovables 2016 a 2030 secretaria de energia, Mexico. https://www.gob.mx/cms/uploads/attachment/file/177622/Prospectiva-de-Energ-as-Renovables-2016-2030.pdf
[267] Sanchez, J., Reyes, I., Patino, R., Munguia, A., & Deniau, Y. (2019). Expansion de proyectos de energia renovable de gran escala en la peninsula de Yucatan. Consejo Civil Mexicano para la Silvicultura Sostenible, 1(1), 1–29.
[268]World Resources Institute. (2021). Mexico Policymaking to Ensure Energy Justice in Renewables Development. https://www.wri.org/update/mexico-policymaking-ensure-energy-justice-renewables-development

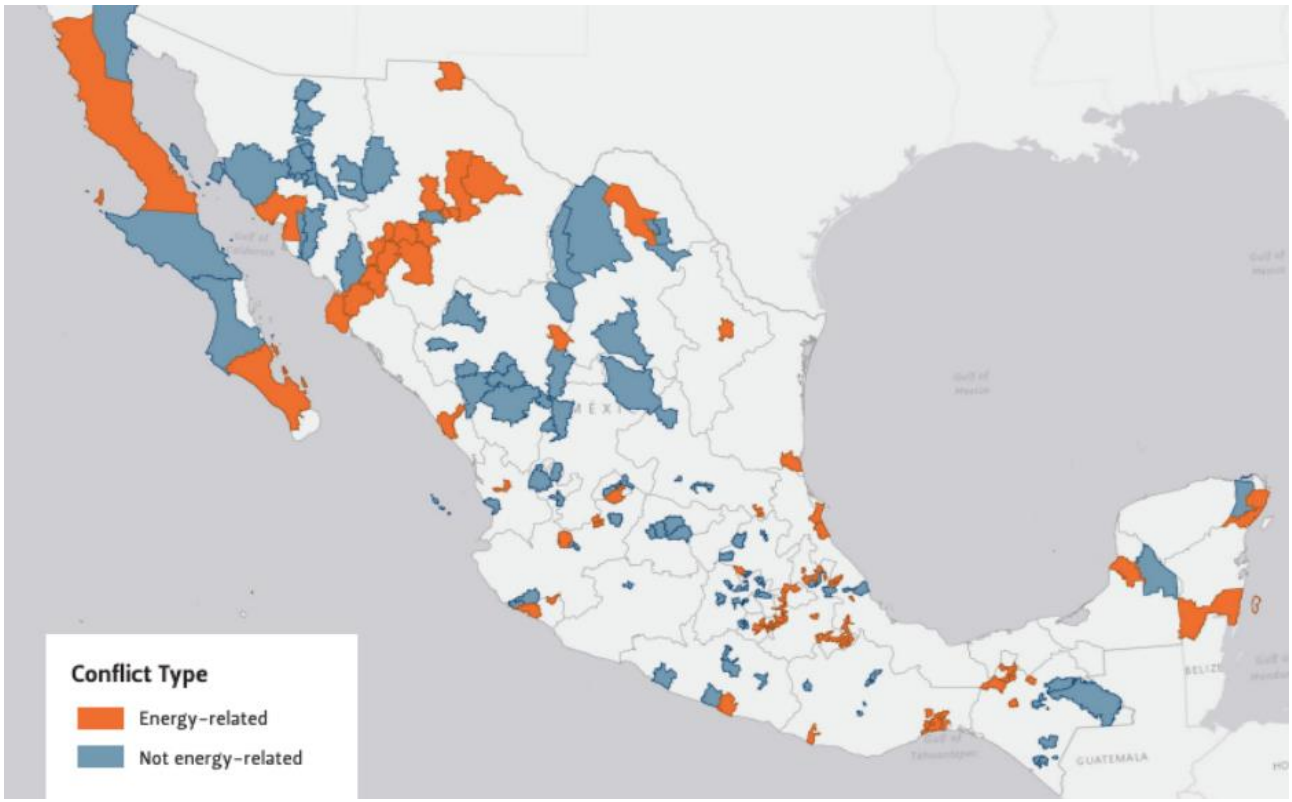


Figure 5: Geography of Social Conflicts in Mexico from 2000 to 2017 (Cruz, 2019) [269]

From this map emerges that many conflicts in Mexico are caused by energy-related projects. In 2017, the UN Special Rapporteur on the Rights of Indigenous Peoples found consultation with Indigenous communities on a range of energy projects was inadequate, leading to "*land dispossession, environmental impacts, social conflicts and criminalization of indigenous community members opposing them.*"[270]

[269] Map produced with assistance from the Rice University GIS/Data Center, using data from Mexico's Ministry of the Interior and GMI Consulting

[270] OHCHR (2017). End of Mission Statement by the Special Rapporteur on the Rights of Indigenous Peoples on her Mission to the United States of America, https://www.ohchr.org/en/statements/2017/11/end-mission-statement-special-rapporteur-rights-indigenous-peoples-her-mission?LangID=E&NewsID=22411

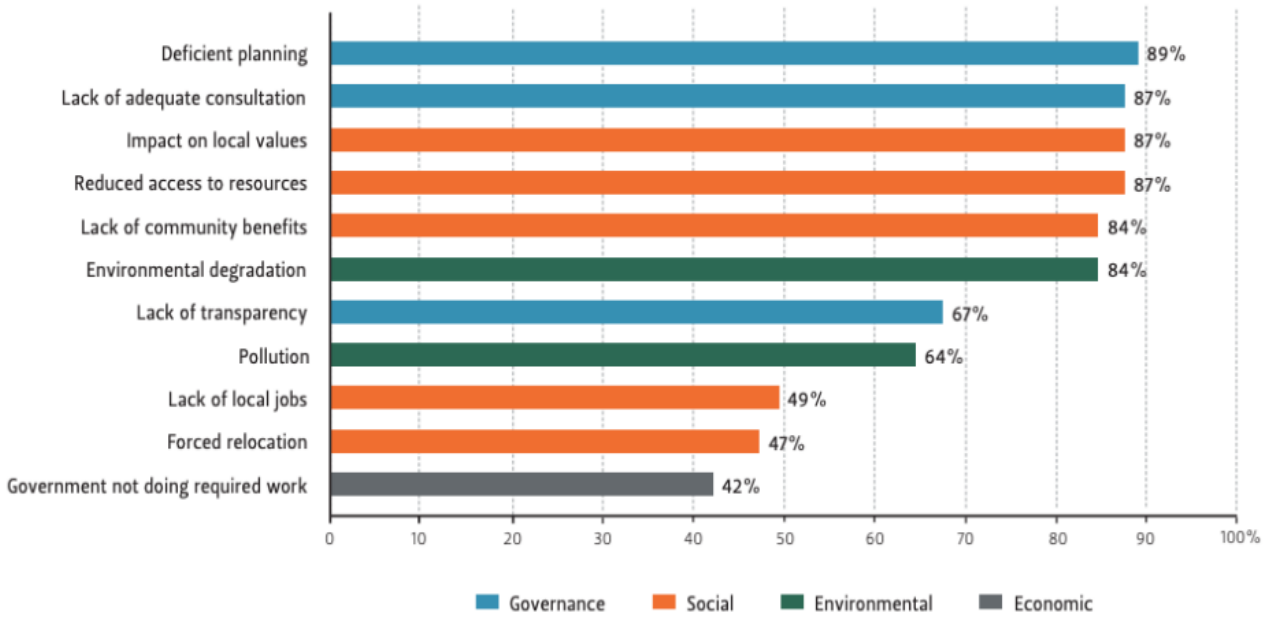


Figure 6: Top Conflict Drivers in Energy Projects in Latin America (Inter-American Development Bank, 2017)[271]

From this graph emerges why energy-related projects create troubles in Latin America and, by analysing this case study, it will emerge that the same problems were present in Yucatán Solar photovoltaic project.[272]

At this point, it is time to discuss one project in particular that threatens indigenous land rights, the Yucatán Solar photovoltaic project by the Lightening PV Park. This analysis is based on a research paper by Sandra Jazmin Barragan-Contreras, "Procedural injustices in large-scale solar energy: a case study in the Mayan region of Yucatan, Mexico, Journal of Environmental Policy & Planning". [273]

As mentioned above, Yucatán is an interesting region to analyse since there is both a great potential for renewable energy implementations and strong opposition to energy projects, particularly wind and photovoltaic parks.

The reasons why local communities oppose this project are many. Among the main ones, there is the fact that the company has cleared 206.51 hectares of land which are part of a "protected jungle" to construct it. This removal is likely to cause an increase in the temperatures which, in the warmer season, already reach 40 to 50C. In addition, this deforestation has destroyed plants and wildlife habitats and contributed to the extinction of some species.

[271] Watkins, G. G., Mueller, S. U., Meller, H., Ramirez, M. C., Serebrisky, T., & Andreas, G. (2017). Lessons from Four Decades of Infrastructure Project-Related Conflicts in Latin America and the Caribbean. Inter-American Development Bank. https://bit.ly/2R2BJta

[272] A problem that specifically occurred in Mexico was the neglect of corporate social responsibility for large infrastructures and energy projects

[273] Barragan-Contreras, S.J. (2022). Procedural injustices in large-scale solar energy: a case study in the Mayan region of Yucatan, Mexico.

Another problem linked to this project is that the right to FPIC has been violated on many grounds. Indeed, indigenous have complained about the timing of consultations since they have been carried out not at the beginning of the process, but after it was already financed, and all the necessary permits received. A previous agreement was signed between landowners and the company before residents were fully consulted and thus put indigenous under pressure to complete the consultation and give consent. The Indigenous populations have not been duly informed about the project, the few meetings held have been manipulated in favour of it, technical material was not translated into Mayan and so many residents have been prevented from participating. In addition, those opposing the project faced intimidation. Finally, the sacrality of some lands has not been taken into consideration and the processes of social and environmental impact assessment have not been coordinated. This situation has been denounced by representatives of the UN High Commission for Human Rights in an observation note.[274]

The EIA regarding the project indicated that it would have 98 impacts, of which only 15 were beneficial and 83 were adverse. Even though it was aware of it, the Ministry of the Environment and Natural Resources which was in charge of the evaluation of the project's feasibility, ignored it and authorized the project.

To stop the realization of the project, the indigenous people living in the municipalities of Cuncunul and Valladolid sued Jinkosolar Investment Pte. Ltd., the Chinese company managing the project, for violating the right to FPIC. The Second Chamber of the Mexican Supreme Court ruled in favour of them on the grounds of the lack of consultation and information of the concerned communities and ordered the suspension of the project. It revoked the permit and ordered the establishment of a new process for assessing social impact and consulting indigenous communities, stating that the project must include "fair and equitable benefits" for these communities.

3.8 Conclusions

This Chapter has tried to define the legal basis of the right to land and natural resources. This is probably the right on which more requests from indigenous people come and whose protection is most hindered. Indeed, Indigenous peoples are engaged in a "conflict" on two fronts. On the front

[274] ONU-DH (2019). Observaciones y recomendaciones de la ONU-DH sobre el proceso de consulta de la Secretaría de Energía a la comunidad indígena maya de San José Tipceh en relación con el proyecto solar Ticul A y Ticul B. https://files.constantcontact.com/83b41ac7001/80c0c036-82fb-4166-9b19-6f9d64887b28.pdf

lines of institutional politics, against the Brazilian State itself, as well as within their own borders against several illegal or criminal actors.

The conflicting interest of parties like public and private actors makes it difficult to arrive at a solution that can satisfy everyone. It has for sure been considered that development necessities coming from high rates of poverty and underdevelopment can push the government to approve projects that can impact indigenous people. At the same time, governments often "forget" the commitment coming from national and international documents. A significant case is that of the ILO Convention 169 which is violated on many grounds.

Luckily enough, the sensibilization towards indigenous issues that has started in the last years has promoted the creation of tools through which indigenous communities can act in favour of their right to land and FPIC. The fact that they can appeal to courts and that, in some cases, they vote in favour of them, is pivotal in the fight for advocating for their rights.

Nevertheless, the "favourable" judicial decisions do not compensate for the fact that state and private companies keep on putting in the first place their interests rather than considering balancing them with indigenous ones.

Chapter 4

Protection of the Right of Political Representation

4.1 Introduction

An important preliminary consideration that must be made before starting the analysis of the matter is that often indigenous communities have methods of organization and representation that are distinct or separate from those of the mainstream society or culture. Consequently, to guarantee the "representativity" of these representatives, they should be elected or chosen as a result of a process carried out by the indigenous peoples themselves.

Due to the historical exclusion and marginalization of these groups, merely acknowledging the right to participate in domestic legal systems is insufficient to ensure that indigenous populations fully realize their right. States must instead take proactive actions to address the structural prejudice that affects indigenous peoples.[275] There are several mechanisms through which the representation of indigenous communities can be guaranteed in the State and local bodies. These can be also used in combination since the adoption of a mechanism does not exclude the adoption of others. In addition, despite critiques, each of these policy instruments contributes to the execution of the international standards entrusted with the rights of indigenous peoples.

These tools are deeply analysed in two reports, one by Protsyk (2010)[276] and another by Ríos (2015)[277]. These are usually referred to as "affirmative action". These are temporary measures designed and implemented so that excluded sectors and groups can be systematically integrated into broader processes, structures and institutions, to correct the historical situation of inequality of members of these groups in accessing spaces or benefits of social life and thus achieve substantive equality.[278]

Among these tools, there are seats reservation or "quotas" in bodies that carry out indigenous instances and the existence of indigenous parties. As regards indigenous parties, since they have a small electorate, it is necessary the presence of a low threshold of votes to have access to elective

[275] Arrese, D. (2020). The right of political participation of indigenous peoples and the UN Declaration on the Rights of Indigenous Peoples.
[276] Protsyk, O. (2010). The representation of minorities and indigenous peoples in parliament. IPU & UNDP. https://www.agora-parl.org/sites/default/files/agora-documents/A%20global%20Overview_The%20representation%20of%20minorities%20and%20indigenous%20peoples%20in%20parliament-1.original.pdf
[277] Ríos, M. (2015). Representación Indígena en Poderes Legislativos. Claves desde la Experiencia Internacional. PNUD. Serie Más y Mejor Democracia No. 2. https://www.undp.org/es/latin-america/publicaciones/representacion-indigena-en-poderes-legislativos-claves-desde-la-experiencia-internacional
[278] IIDH (2017). Diccionario electoral. Vol. 1. Tercera edición: IIDH/CAPEL y TEPJF, Costa Rica/México.

bodies since, otherwise, they would not be admitted to them. Exemption from reaching the threshold is another declination of it. In this regard, while in Mexico parties must reach 3% of votes to have access to Congress, in Brazil there is no national electoral threshold, for parties threshold is 80% of the natural threshold in the district; for candidates 20% of the natural threshold in the district.[279]

Nevertheless, it must be pointed out that this method has not been widely used to ensure the right of political participation of indigenous peoples. Alternatively, indigenous should be involved in deciding processes of other parties and be allowed to include matters of their interest in the agenda.

In the view of the Commission of Venice, similar measures, such as reserving seats for indigenous or making exceptions to the normal rules of seat distribution, do not violate the principle of equality and should thus be considered.[280]

Notwithstanding the "noble aim" of election quotas to force political parties to include candidates who would otherwise face additional barriers when seeking public office, they present criticalities. Indeed, they are not always a good way to support the cultural identity of indigenous because they force indigenous to participate through already established institutional mechanisms, like political parties, rather than adopting methods that follow their unique customs and practices.

The problems with electoral quotas can be also of another type. Indeed, even if they are present, they do not guarantee that indigenous candidates will be nominated and elected. Obstacles can come, for example, from the lack of a proper registry that identifies communities with an indigenous population, from the absence of provisions governing the order in which candidates must be presented in a given list, and from the overlaps between different types of quotas (like that for women, youth, and indigenous people).

On the other side, the practice of reserving legislative seats and assuring executive positions for indigenous representatives has a potential drawback: these representatives are subject to party dynamics and so may be limited in advancing the interests of indigenous people. Consequently, some nations use indigenous representative, advisory, and consultative bodies that are more independent and have a more external connection to the government and the state to facilitate the meaningful and independent expression of indigenous views to the state. Nevertheless, reserved seats are deemed to be more compatible with the political autonomy of indigenous peoples, as well as their traditions and

[279] Law Nº 14.211, of 1 of October of 2021

[280] Venice Commission (2013). Opinion On The Electoral Legislation Of Mexico. CDL-AD(2013)021. https://www.venice.coe.int/webforms/documents/?pdf=cdl-ad(2013)021-e

ways of life since they are intended to protect minorities' unique characteristics rather than attempt to integrate them into the majority culture.

Another mechanism is the establishment of ad hoc parliamentary or local assemblies' procedures like veto or reinforced enactment procedures to be used when measures likely to affect indigenous peoples are discussed and voted on.

Favourable of minorities in general, and so also of indigenous, is the presence of a proportional rather than a majoritarian party system since it allows access to parliamentary seats to parties that receive "few" votes. In this regard, both Mexico and Brazil have proportional representation systems, where the number of seats a political party holds in the legislature is proportional to the number of votes it receives in elections.

Other instruments that can make the voice of the indigenous populations heard are specialised governmental agencies or consultative bodies with negotiating powers to which they directly participate.

Moreover, how electoral districts are designed can foster or neglect their political participation. Remarkably, this is taken into consideration in Article 2 section III of the Mexican Constitution. By recognizing that indigenous have the right to self-determination, this Article mandates the creation of a series of institutions and public policies to guarantee the social inclusion and sustainable development of the indigenous peoples. It states that when uninominal districts are designed, it should be taken into consideration where indigenous communities are located. In addition, it considers that sometimes it may be needed redistricting to create indigenous voting territories (gerrymandering). Notwithstanding it could theoretically be effective, the Mexican districting system has been said to be overly intricate and has been criticized for its lack of success, as it has not promoted indigenous participation until now.[281]

In addition, for gerrymandering to work, the indigenous community has to be concentrated in one place. Consequently, it does not work when indigenous communities are scattered on national territory. Furthermore, gerrymandering, like electoral quotas, does not guarantee that candidates will be able to run for a particular public office.

[281] Singer Sochet, M. (2013). Justicia Electoral: México, Participación y Representación Indígena. Tribunal Electoral del Poder Judicial de la Federación, https://www.te.gob.mx/defensoria/media/pdf/38_justicia.pdf

Not to be underestimated is also the importance that the training of civil servants and public officials has on indigenous cultures since their ignorance can lead to harmful choices for indigenous populations.

A problem usually reported regarding these measures is that indigenous groups do not know about their existence and so do not take advantage of them as they could. In addition, one thing is the existent institutional framework, and another is the actual use of these institutions. This is the reason why positive policy changes emerge only after some time that a certain policy is implemented.

These provisions imply that mechanisms are required to ensure that the diversity of society about minority groups is reflected in public institutions such as national parliaments, the civil service sector, including the police and the judiciary and that persons belonging to minorities are adequately represented, consulted and have a voice in decisions which affect them or the territories and regions in which they live.

Not strictly connected to affirmative action but that can be considered as a way to promote indigenous political participation is the recognition, aside from the traditional system of representation based on political parties, of the indigenous system of uses and customs. This is what has been done, for example, in the state of Oaxaca, in Mexico. There, out of 570 municipalities, 417 have adopted a system of selection of representatives through traditional and ancestral norms. According to a study by Ramirez (2003) [282], the adoption of this system to elect does not exempt the indigenous population from exerting their right to vote in any other type of election.

Interesting is the functioning of this system. According to it, members of the indigenous community "earn" their right to participate, both as candidates and electors, thanks to public service and activities called *tequios* (communal labour that a person owes to his or her community), rather than utilizing a secret ballot or having political parties. Members who successfully finish the *tequios* can vote in the assembly that selects the municipal leaders. Depending on the population and local customs, each community chooses the voting method (show of hands, ballots, drawing a mark next to the candidates' names on a chalkboard, etc.) and the number of positions. Members often hold lower-ranking roles before being considered for the more crucial ones. [283]

Clearly, the system of uses and customs can be very different from one community to another since Indigenous peoples have various social and political structures. Consequently, some groups can

[282] Ramirez Romero, S. (2003). The Inclusion of Forms of Political Representation of Oaxaca's Indigenous. *Nueva Antropologia*, *19*(63), 91-113. https://www.proquest.com/scholarly-journals/inclusion-forms-political-representation-oaxacas/docview/60477451/se-2

[283] Global Americans (2017). Indigenous political representation in Mexico.

adopt a centralized power structure with powerful leaders and live in sizable towns or communities, while others have very decentralized leadership and live in small groups dispersed over different lands. In addition, some people have just lately begun to communicate with people from different ethnicities and the outside world, while others may be in touch with other groups for centuries.[284] These features make some of these measures more suitable to include an indigenous community rather than another.

As will be explained in Paragraph 4.3, aside from formal mechanisms of representation will be considered also "informal" ones. Indeed, there are informal ones which can be even more effective. This is the case, for example, of NGOs or indigenous organizations which can bring the instances of indigenous to public attention sometimes in a more impactful way than governmental ones.

A final consideration that must be made is that the level of success of any particular policy depends a lot on the peculiarities of the nation in question and the willingness of the political actors. In addition, the degree to which these communities are involved in the design of decision-making processes, the extent to which a particular mechanism respects indigenous' traditional forms and uses, and whether the measure enables these collectives to have a significant impact in decision-making processes, particularly in matters that affect them, are all elements that must be and will be kept into consideration in Paragraph 4.3.

4.2 National Framework on Indigenous Political Rights

As has been done in the previous Chapter for indigenous land rights, also in this Chapter there will be an analysis of legislation existing on indigenous political rights at the national and international level in both Brazil and Mexico.

At the national level, the Mexican Constitution in Article 2 establishes the indigenous right to self-determination, autonomy, and participation in decision-making processes. It recognizes that the right of self-determination is defined by the election and exercise of their forms of governance.

> *"Indigenous peoples have the right to elect, in accordance with their own norms, procedures, and practices, their representatives before the authorities and bodies of their own communities, municipalities, and regions."*

[284] Cardoso de Oliveira, R. (1996). Os Índios e o Mudo dos Brancos, Editora Unicamp: Campinas.

This Article gives indigenous peoples the autonomy to decide their internal forms of living and social, economic, political, and cultural organization, choose the authorities or representatives to carry out their internal forms of government, and ensure that both women and men have the opportunity to exercise their right to vote and be elected. Constitutions and laws are then entrusted with the task of governing the exercise of this right at the municipal level. Likewise, in the exercise of their political rights, as part of the Mexican State, they can participate and be representatives in elections for popular office based on the electoral legislation in force.[285] Interestingly, indigenous are granted the right to hold elections, to vote and to be voted according to traditional customs and practices. Consequently, this indigenous political-electoral right depends on the recognition of indigenous systems of government. This means that indigenous communities can choose to elect their representatives through community assemblies or other traditional methods, rather than through the regular electoral system.

All these above-mentioned dispositions refer to the internal affairs of indigenous peoples and communities. Differently, paragraph VII, stating the right of indigenous to elect representatives of indigenous peoples in municipal councils, is the only one that refers to action by indigenous as participation in the spheres of political representation.

A distinct feature in the application and exercise of the indigenous political rights compared to that of the rest of the population is that the constitutionally established vote is direct, secret, individual and free, while the indigenous vote is generally exercised in a different way in each community, based on its uses and customs, and therefore sometimes does not comply with the above-mentioned principles of the vote. Since indigenous people are varied, the election of their representatives varies in each village and community. Unlike the party system, some indigenous peoples have ways of implementing the political rights of their people, which often involve a system of civil and religious office, also recognised as electoral uses and practices.[286]

Even if this Article encompasses various aspects of indigenous political rights, it still has some criticalities. Indeed, it considers indigenous as public interest entities rather than public law entities. This wording is less demanding both for the federal government and the federated entities since it does not attribute to indigenous people the ownership of subjective legal positions definable as rights, and especially political rights, but simply the protection of collective or super-individual interests.[287]

[285] González, M. & Martínez F. (2002). El derecho y la justicia en las elecciones de Oaxaca, Tomo II. México: TEEO.
[286] Bustillo Marín R. (2015). Lineas jurisprudenciales. Derechos politico-electorales de los indigenas. Tribunal electoral del poder judicial de la Federacion. https://www.te.gob.mx/ccje/Archivos/Derechos_politico_electorales_indigenas.pdf
[287] Ficorilli G. (2010). La situazione giuridica degli indigeni in Messico, in Marcelli F., I diritti dei popoli indigeni, Roma, 2010, spec.223.https://www.dpceonline.it/index.php/dpceonline/article/download/1124/1080/

Considering the importance of political rights, they have been codified also by some regional constitutions. An example is the one of Oaxaca, which in Articles 16 and 25 recognizes the right of indigenous peoples to elect and nominate their authorities and representatives in municipalities in conformity with their legal and political systems. Interestingly, this Constitution has taken the ILO Convention 169 as a reference to pass electoral laws on indigenous rights. [288] Among them, there is Oaxaca which has formally recognized the political autonomy of indigenous communities.

At the level of ordinary law, deserves to be mentioned the General Law on the Rights of Indigenous Peoples. Its articles 2, 9, 10 and 11 address the issues of political participation of indigenous communities. In particular, they recognize the right of indigenous peoples to maintain and strengthen their own political, social, economic, and cultural systems, to participate fully and on an equal basis in all aspects of political, economic, social, and cultural life, to participate in the formulation, implementation, and evaluation of government policies and programs that affect them, including in the design and implementation of electoral systems, to elect their representatives and to participate in the decision-making processes of local and national governments.

It is worth also mentioning the General Law on Electoral Institutions and Procedures. In Article 26 it establishes that "*the constitutions and laws of the federal entities shall recognise and regulate the right of indigenous peoples and communities to elect their authorities, guaranteeing the principle of gender parity, in a gradual gender parity, in a gradual manner, in accordance with the provisions of Article 2 of the Constitution*". From this article emerges the progressive implementation of gender parity in the election of authorities in indigenous peoples and communities following the applicable norms and the recognition of the right to elect representatives to municipal councils with indigenous populations, observing the principle of parity.[289]

Some indications on how to guarantee political rights to indigenous are contained in the Federal Code of Electoral Institutions and Procedures which establishes that at least 2% of the total number of candidates for the Congress must be indigenous. In addition, political parties are also required to allocate at least 50% of their campaign advertising budget to promote the participation of indigenous peoples in the electoral process. The Code also establishes that in municipalities where indigenous people represent more than 40% of the population, political parties must nominate at least one indigenous candidate for mayor or municipal council member positions.

[288] Jiménez J.J. (2000). Tesis electoral. Los municipios de usos y costumbres en Oaxaca: su sistema electoral. Revista del Tribunal Estatal Electoral de Oaxaca, 1, pp.15-44.
[289] Vázquez Correa L. (2020). Political representation and actions indigenous affirmative action: the pending agenda.

Other details on the practical implementation of indigenous political rights are contained in Agreement INE/CG508/2017. This document, which has been approved by the National Electoral Institute on the occasion of the 2017-2018 electoral process, has led to the introduction of indigenous affirmative action. In particular, it mandates political parties to present indigenous candidates for federal legislative seats in 12 of the 28 single-member districts with more than 40% of the indigenous population. This provision has been modified by the SUP-RAP-726/2017 ruling, in which the Superior Chamber of the Electoral Tribunal of the Judiciary of the Federation expanded the mandatory candidacies to 13 districts having a majority of indigenous residents. In its final version, the agreement establishes that in 13 districts where the indigenous population is more than 60%, political parties must nominate only indigenous candidates, and only 7 could be of the same gender. [290]

Through its rulings, the Electoral Tribunal has defined also other practical aspects of the guarantee of indigenous political rights. It is the case of SUP-JDC-61/2012 in which the Tribunal affirmed that if in indigenous community citizens who are entitled to vote because of certain traditional practices are not allowed to vote, then such a restriction represents a violation of their right to vote, and, consequently, of their principle of equality.

Furthermore, the Tribunal established as mandatory for those who intend to run for office a qualified self-ascription based on objective elements to ensure the authenticity of the political representation of the indigenous population and to prevent affirmative action from being emptied of content through the nomination of citizens who self-ascribe as such, even if they are not. In other words, candidates must show that they have a connection to the district for which they are running. [291]

This requirement of accreditation of indigenous self-ascription has been criticized, among others, by Vázquez (2018), who has noted it is due to an unfinished process of recognition and accreditation of the institutions and forms of organisation of these territories. [292] Indeed, the Catalogue of Authorities is a necessary condition to determine the membership of the respective indigenous peoples and communities, as well as to certify that one is part of them.

The Agreement was contested also by many political parties who deemed this form of indigenous quota unconstitutional or, at best, not sufficient to guarantee the effective representation

[290] Pisaneschi, A., Bindi, E. and Groppi, T. (2019). La democracia a juicio. Pacini Editore. https://www.perlego.com/book/1080375/la-democracia-a-juicio-estudio-comparativo-de-la-jurisprudencia-del-tepjf-en-el-Proceso-Electoral-20172018-Pdf

[291] Otálora Malassis J. M. (2018). Fortaleciendo La Representación De La Población Indígena, UNAM, Www.Cronicaelectoral.Juridicas.Unam.Mx/Posts/Post_Index/308-Fortaleciendo-La-Representacion-De-La-Poblacion-Indigena

[292] FILAC (2018). Report of the First International Indigenous Electoral Observation Mission, Mexico, pp. 1-20.

of the indigenous population. In its rulings, the Tribunal recognized the validity of these measures, although affirming that they could be ineffective since indigenous and non-indigenous people were allowed to run in the same district. This means that applicants must demonstrate that they have an effective link with the indigenous community.[293]

Provisions on the political rights of Indigenous are also contained in Articles 1, 2, 3, 8, 9, 10, 11, and 12 of the San Andres Accords on Indigenous Rights and Culture. These articles establish the right of indigenous peoples to participate in political life, including the creation of new political institutions and mechanisms for the recognition of indigenous authorities, and the establishment of consultation and decision-making processes in matters that affect indigenous communities. In these documents, the federal government compromises itself to guarantee indigenous self-determination.

The importance of indigenous peoples' political involvement in the National Congress and indigenous towns is repeatedly cited in the Agreement. Finally, the text requires state governments to ensure and follow indigenous standards for filling positions at the local level.

Even if these are documents that do not have the legal status of the above-mentioned ones, nevertheless the basic documents of the main parties of the country are also interesting in order to understand the condition of indigenous people in Mexico. In this regard, there is no mention of indigenous people in the basic documents of the *Partido de Acción Nacional* (PAN). Indigenous peoples are just briefly mentioned in its 2012 Declaration of Principles. In this Declaration the party accepts that local governments should decide on their characteristics to ensure the advancement and respect of indigenous communities and peoples. The PAN pledged in their election platform for 2014 to uphold indigenous institutions, customs, and traditions to preserve the rights of indigenous populations. To support Indigenous candidates, the party established the "Indigenous Peoples Council" in 2011. However, there is no mention or reference to the council on the party's website.

Differently, in its basic documents, the *Partido Revolucionario Institutional* (PRI) compromises itself to the promotion of indigenous causes and establishes the functioning of a Commission of Indigenous Affairs which being part of the National Political Council shares the attribution of approving the electoral platforms that the Party must present. In its 2013 Declaration of Principles, the PRI recognized the protection of indigenous peoples' rights and respect for their normative systems of uses and customs as a fundamental tenet of the statement. The 2013 Action Plan recognized the indigenous right to self-determination, the promotion of bilingual intercultural

[293] Favela A. (2022). Acciones afirmativas aceleran la participación de personas de pueblos y comunidades indígenas, Central Electoral, https://centralelectoral.ine.mx/2022/11/11/acciones-afirmativas-aceleran-la-participacion-de-personas-de-pueblos-y-comunidades-indigenas-adriana-favela/

education, the significance of indigenous peoples' political participation, and the promotion of affirmative action policies in the nation are all emphasized. To do it, the party would have established a Secretariat for Indigenous Action. Nevertheless, since 2015, the website has not been updated.

Finally, there is the *Partido de la Revolución Democrática* (PRD) which considers indigenous in its documents and establishes mechanisms to guarantee the presence of indigenous candidates in the leadership of the party and the offices of popular representation. The PRD guarantees that indigenous people are represented in the party's governing structures. Additionally, they promise to follow uses and customs, even when picking party representatives. Furthermore, they explicitly acknowledge the indigenous peoples' right to self-determination.

In Brazil, indigenous politics is protected under Articles 231 and 232 of the Brazilian Constitution. According to the former:

> "*The Indians are recognized for their social organization, customs, languages, beliefs and traditions, and the original rights over the lands they traditionally occupy, with the Union responsible for demarcating them, protecting and ensuring respect for all their assets*".

This means that indigenous peoples have the right to choose their own leaders and to govern themselves according to their own cultural and political systems. However, unlike Mexico, Brazil does not have a system of traditional *usos y costumbres* that allows indigenous peoples to elect their representatives through their own traditional methods. Instead, indigenous communities participate in regular elections, although they have the right to be represented by candidates from their own communities or who are committed to defending their rights.

The latter, instead, focuses on how indigenous can make their voices heard in the political arena. It attributes to indigenous the right to the full exercise of their procedural capacity to defend their interests. According to Article 232:

"The Indians, their communities and organizations are legitimate parties to file a lawsuit in defence of their rights and interests, with the Public Ministry intervening in all acts of the process."

In the view of Barreto (2003), this provision finds a justification in the historical omissions on the side of the Union and of its tutelary body, namely the Indian Protection Service and, after, the FUNAI, in the face of violations of indigenous rights.[294]

[294] Barreto, HG. (2003). Direitos Indígenas vetores constitucionais. Curitiba: Juruá, p.101

These two constitutional devices are meant to break with the logic of integration and indigenous guardianship that dominated during the colonization period and which considered the Indians to be incapable of civil life and the exercise of their rights. Basically, according to these provisions indigenous peoples can participate, discuss and organize themselves politically without having to ask the State for authorization. Furthermore, it is important to point out that the indigenous policy, under no circumstances, will constrain the Indian to leave his tradition and culture to join the Nation-State as in the past.[295]

Another provision linked to indigenous political rights is the Sole Paragraph of Article 4. It considers the economic, political, social and cultural integration of the people of Latin America to form a Latin-American community of nations. As it can be seen, it is a rather generic reference that does not commit the government to the protection of the political rights of the indigenous.

Overall, while both the Mexican and Brazilian constitutions recognize the political rights of indigenous peoples, Mexico provides more specific recognition and protection of indigenous political systems, including the use of traditional *usos y costumbres* to elect representatives, and the right to participate in decision-making processes that affect their territories and resources.

More detailed than the Constitution is the Indigenous Peoples' Statute. Differently from the Constitution, in Article 6 it recognizes the right of indigenous peoples to elect their own representatives and leaders, in accordance with their own customs and traditions. Besides it, it contains the general rights of indigenous to govern themselves according to their own social and political organization, to participate in the formulation, implementation, and evaluation of policies and programs that affect their lives and territories, at all levels of government and to be consulted on issues that may affect their rights, interests, and well-being, and to seek their free, prior, and informed consent.

Overall, these articles reflect the importance of political rights in the context of indigenous rights and self-determination in Brazil. They recognize the right of indigenous peoples to govern themselves according to their own traditions and to participate in decision-making processes that affect their lives and territories, while also acknowledging the obligation of the Brazilian government to respect and protect their rights and interests.

At the level of ordinary law, the Electoral Code (Law 4.737/1965, with subsequent amendments) contains several rules on the political rights of indigenous peoples. According to Article 91, Indigenous people, like other Brazilian citizens, must vote if they are over 18 years old and literate

[295] Almeida, AC. (2018). Aspects of indigenous policies in Brazil.

in Portuguese. It will only be in this condition (literate in Portuguese) that the Indigenous people can vote. Indeed, Article 5 of the Code affirms that those who are not able to speak the national language cannot enlist. However, if the Indians who live in the villages choose not to vote, this individual decision prevails over the obligation of Brazilian law. Regarding this condition, it must be noted that it is in contrast with Article 231 of the Brazilian Constitution.[296]

For the electoral enlistment of Indigenous people, they must follow the same procedure as other citizens, but with some peculiarities. An indigenous person who does not have the required official documents must present the corresponding administrative record issued by the FUNAI as a valid document. However, there are details brought in the Electoral Code that continue to make it difficult for indigenous people to enlist, like those contained in Article 42 on the electoral domicile. It so happens that there is no regulation on how to determine the electoral domicile of the Indigenous person, creating a vacuum that can affect this right that not even the Statute of the Indigenous Person eliminates in its Articles 22 and 23.

Article 10. 3 of the Electoral Law No. 9.504/1997, amended by Law No. 13.165/2015, establishes that at least 30% of the candidates nominated by each party or coalition must be indigenous, in proportion to the number of party members of the same gender and ethnic group.

4.3 International Framework on Indigenous Political Rights

At the international level, ILO Convention No. 169 in Article 6 affirms that States have to take the appropriate steps to guarantee that indigenous peoples may exercise their right to participate "*to at least the same extent as*" the rest of the population of a particular nation. Therefore, a State's mere recognition of the right to participate is insufficient and affirmative action is required. It recognizes their right to participate in the development, implementation, and evaluation of state policies and programs that may affect them directly, as well as their right to obtain redress for any damage suffered as a result of decisions that harm them. It guarantees that indigenous peoples can take part in government decision-making at all levels, including national, regional, and local/municipal. According to some scholars, the international order, including UN agencies and other international organizations, is included in the right to participate at all levels. The provision refers to both institutional and administrative processes, particularly those involving policies and programmes that

[296] Santano AC. (2019). Uma Abordagem Sobre Os Direitos Políticos Dos Indígenas No Marco Das Normativas Internacional E Brasileira. Https://Doi.Org/10.53323/Resenhaeleitoral.V23i2.29

address them. Until today, this article has been used mainly to guarantee indigenous participation in administrative and other bodies, rather than elective bodies.

Other articles of the Convention specify for the adoption of which measures is participation required. Among them there is the realization of actions regarding the protection of Indigenous rights and respect for their integrity[297], the preparation of policies that aim to mitigate the difficulties Indigenous Peoples face regarding new conditions of life and work[298] and the organization of special vocational training programs and facilities when those addressed to the other citizens do not meet the needs of Indigenous Peoples[299].

The cooperation of Indigenous Peoples is required for the development of Indigenous handicrafts, rural and community-based businesses, subsistence economies, and traditional activities (such as hunting, fishing, trapping, and gathering)[300], the planning, coordination, execution, and evaluation of measures adopted to comply with ILO Convention 169 requirements, the proposals of additional measures and their application and supervision[301] as well as the adoption of special measures that aim to ensure effective protection concerning the hiring and the conditions of employment of Indigenous Peoples.[302]

In its turn, Article 7 protects the rights of Indigenous Peoples to establish their priorities. It is intended to be a right to a voice in matters affecting the lives, beliefs, institutions, spiritual well-being, and lands of Indigenous Peoples, as well as their economic, social, and cultural development. Criticism has also been raised concerning the formulation of Article 7. According to Ovalle et al. (2022) [303], the way it is written imposes limits on the participation and self-determination of people. Indeed, it says that indigenous "*have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development*". Using the expression "*to the extent possible*", the article imposes a boundary beyond which only the mentioned political institutions are allowed to determine when and how it is feasible for the peoples to control their own destinies.

[297]ILO (1989). Indigenous and Tribal Peoples Convention, Article 2.1, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169
[298] ILO (1989). Indigenous and Tribal Peoples Convention, Article 5 (c)
[299] ILO (1989). Indigenous and Tribal Peoples Convention, Article 22.2
[300] ILO (1989). Indigenous and Tribal Peoples Convention, Article 23.1
[301]ILO (1989). Indigenous and Tribal Peoples Convention, Article 33.2
[302] ILO (1989). Indigenous and Tribal Peoples Convention,Article 20.1
[303] Ovalle M. C. & Salazar J.C. (2022). Limitations on Democracy in Multilateral Policies to Regulate the Political Participation of Indigenous and Tribal People.

It is also worth mentioning Article 15. It mandates that Indigenous Peoples take part in the use, management, and protection of the natural resources that are related to their territory. This includes the right to get compensation for damages or lost land or to take part in the benefit-sharing of mining or subsurface resource exploration and exploitation operations.

Notwithstanding the criticalities they present, these provisions represent an important step forward, especially if we consider the antecedent of this convention, the ILO Convention 107. This convention, which is still in force for the states that have not ratified the 169, has only Article 5 which focuses on the duty of the governments to seek the collaboration of indigenous populations and their representatives in applying the provisions of the convention on the protection and integration of the populations concerned.

It should be noted that also the UNDRIP has addressed the matter of indigenous political rights. It has done so in Articles 3,4 and 5. The first of these articles establishes that political rights, in particular the right to freely determine their political status, are a way of expressing self-determination. The second article is more focused on the practical side, namely the exercise of the provision and establishes that indigenous people have the right to self-government in matters relating to their own or self-government in matters relating to both their internal and local affairs. Finally, the third of these articles affirms the right of all indigenous peoples to participate fully in the political, economic, social, and cultural life of the State "*if they so choose*." This formulation is interesting and protective since, in this way, indigenous are not forced to participate. Consequently, indigenous peoples living in voluntary isolation are protected from the constraint to enter into contact with indigenous people. Doing so, the Convention openly recognizes the voluntary nature of participation in the political life of the "dominant" culture. On the other side, another way to read it is that if indigenous peoples enjoy full authority and are enabled to take their own decisions, their participation in their national political arenas would not be required.[304]

Article 18 also focuses on the matter. It states that Indigenous peoples have the right to participate in the decisions on matters that could have an impact on their rights through representatives they chose in accordance with their own procedures. Furthermore, they are entitled to the right to maintain and develop their own indigenous decision-making institutions.

[304] Eide, A., & Daes, E.-I. (2000). Working Paper on the Relationship & Distinction between the Rights of Persons Belonging to Minorities & Those of Indigenous Peoples (E/CN.4/Sub.2/2000/1o). Retrieved from United Nations website: http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/8b49ebad4ad79f07802568cd0054e40f/$FILE/G0010132.pdf

According to Henriksen (2008), in these articles, it is possible to find 2 forms of the right of participation, an "internal" and an "external" one. [305] Internal right of participation refers to the right of indigenous peoples to create and maintain their own institutions for making decisions. The external right of participation, in its turn, is the right to take part in processes that have an impact on their rights under national political systems.

A contribution to the field of Indigenous political rights has come also from the Final Report. Indeed, it affirms the right of Indigenous peoples to participate in decision-making processes that affect their lives, lands, and resources. It recognizes that Indigenous peoples' participation in decision-making is critical for the protection of their human rights.

The Report also stresses the importance of a participatory and inclusive approach to decision-making that takes into account Indigenous peoples' knowledge, values, and perspectives. It suggests that decision-making processes should be designed in a way that ensures the meaningful participation of Indigenous peoples.

Relevant articles are also contained in the OAS Declaration on the Rights of Indigenous Peoples. Article 4 gives Indigenous the right to maintain and strengthen their separate political, legal, economic, social, and cultural institutions. In its turn, Article 13 attributes them the right to participate fully, if they so choose, in the political, economic, social, and cultural life of the State.

Finally, the Report acknowledges the significance of Indigenous peoples' customary laws and governance systems in decision-making processes. It emphasizes that governments and other decision-making bodies should respect and recognize these systems and work collaboratively with Indigenous peoples to develop decision-making processes that are consistent with these systems.

Focused on organizational and political rights is also the entire fourth section of the American Declaration on the Rights of Indigenous Peoples. Article XX, in particular, affirms that indigenous people have the right to associate, assemble, organize and express without external interference and follow their cosmovision, values, uses, customs, ancestral traditions, beliefs, spirituality, and other cultural practices.

Not specifically tailored to indigenous but applicable to them are Article 25 of the International Covenant on Civil and Political Rights, Article 21 of the Universal Declaration of Human Rights and Article 23 of the American Convention which guarantee the right of every citizen

[305] Henriksen J. B. (2008). Key Principles in Implementing ilo Convention No. 169. Research on Best Practices for the Implementation of the Principles of ilo Convention No. 169, Case Study No. 7, https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_118120.pdf

to take part in the conduct of public affairs, to vote and to be elected and the right to have access to public service. Interesting is the formulation of Article 25 which covers the right to participate "*in the conduct of public affairs*", which encompasses participation in a variety of participatory organizations in addition to political institutions.[306] This Article, like other human rights instruments that recognize this right, requires the State to ensure that everyone has the opportunity to participate in society without obstacles of any kind, including those based on race, colour, sex, language, religion, political opinion, national or social origin, property, birth, or other status. As a consequence, the human right to political participation has to be safeguarded on an equal treatment basis, that is, without prejudice. Even if it may not seem so important, actually the proscription of discrimination is pivotal in guaranteeing political participation to certain groups that are often marginalized in majoritarian democratic processes. Therefore, under this definition of the right to participate, involvement in civil society groups as well as in public cultural and social events would be covered.

Focused on political rights and non-discrimination is also Article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. This covers political rights, including the freedom to cast a ballot and run for office based on universal and equal suffrage, to participate in government and the conduct of affairs of state at all levels, and to be treated equally by the government.

Of the same content but with a particular emphasis on minorities is Article 2 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities. It also states the importance of creating an inclusive framework that allows for the effective participation of minorities in cultural, social, economic, and political spheres. This declaration also highlights that minorities should be given a significant role in the formulation, passage, and implementation of public policies. Article 5 of this declaration, instead, affirms that to protect and promote the rights of persons belonging to minorities, States have to take measures to consider the legitimate interests of minorities in developing and implementing national policies and programmes, and international programmes of cooperation and assistance. Generally speaking, this document affirms that persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life. In this context, public life is intended to include rights related to election and to being elected, the holding of public office and other political and administrative domains. Also, the right to participate effectively in decisions on the national, and where appropriate regional level, concerning

[306] UNHRC (2011). Expert Mechanism Advice No. 2:Indigenous Peoples and the Right to Participate in Decision-making, A/HRC/EMRIP/2011/2, https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/Advice2_Oct2011.pdf

the minority to which they belong or the region in which they live. This right, according to the Declaration "*in fact essential to preserving minorities' identity and combat social exclusion*".

What has been repeatedly criticized of these documents is that they do not specify how such participation may be materialised and thus operationalised and exercised as a right and effective.

International and domestic practices acknowledge that special mechanisms are necessary to facilitate access of indigenous groups to national political structures. International and state practices also accord indigenous peoples the right to participate under their traditional forms of organization and customs so that one-size-fits-all electoral laws do not arbitrarily discriminate against groups with different organizational and electoral practices.

This has been affirmed particularly in the ruling of the IACtHR in the *Yatama* v. *Nicaragua* case. It has been an important step forward in the path to guaranteeing indigenous peoples the right to political participation. The case marks the first time an international tribunal has found that a state violated political rights and equal protection rights by denying the political participation of an indigenous group. In addition, the general human right to political participation is interpreted in a way specifically tailored to indigenous people. Consequently, the Court has interpreted it to include the more specific rights to special remedial measures and procedural safeguards to ensure effective participation and to make them participate in national political systems following their customary forms of organization and customs. Furthermore, by recognizing the rights of indigenous peoples to effectively participate in the national politics of the state, following their traditional forms of organization and practices, this case has helped advance the right to self-determination and equality of indigenous peoples. Interestingly, in this case, the Court has also required that the political representation of the indigenous population was ensured by accepting their organisation in alternative to a classical political structure.

The IACHR has commented on indigenous right to political participation. It has done it in the *Sarayaku vs. Ecuador* case, in which affirmed that the rights to political participation and access to information are part of the right to prior consultation.[307]

Interesting in the elaboration of measures that allow the participation of minorities, and that can be applied also to indigenous, is the Geneva Declaration of Experts on Minorities. According to this document, it can be useful to include advisory and decision-making bodies in which minorities are represented, to create bodies and assemblies of national minority affairs, to establish consultative,

[307] Quintana K. & Flores R. (2017). Los Derechos de los Pueblos Indígenas: Una Visión Desde el Sistema Interamericano de Derechos Humanos. https://www.corteidh.or.cr/tablas/r37412.pdf

legislative and executive bodies which work on a local level to ensure minority participation, local and autonomous administration, to secure autonomy on a territorial basis, including the existence of chosen through free and periodic elections and to give space to self-administration for aspects concerning minority governance when autonomy on a territorial basis is not applicable.[308]

In this context deserves mention also the Framework Convention for the Protection of National Minorities is a legally binding document. Article 15 requires states to ensure the guarantee of adequate involvement of minorities in decision-making. Nevertheless, it must be pointed out that all these documents are focused on ensuring the right to participation at an individual rather than at a collective level.

4.4 Comparative Analysis of Compliance with Indigenous Political Rights in Brazil and Mexico

To start the analysis of how governments in Brazil and Mexico act to guarantee their indigenous citizens their political rights, it must be considered that different types of bodies work in this field. Indeed, there are "formal" bodies namely the governmental ones, "hybrid" bodies which are those formed by members of the government and of the civil society and "informal" ones like NGOs and indigenous organizations.

In Brazil, the Federal Government in 2007 established the National Council for Indigenous Policies (CNPI). Composed by officials from the government, indigenous regional organizations, and pro-indigenous NGOs, it makes recommendations for the "indigenist" national policy, keeps an eye on how federal agencies are collaborating with indigenous peoples, and supports legislative activities. In 2012, it created a National Policy for the Environmental and Territorial Management of Indigenous Territories (PNGATI) through Federal President Decree 7747/12. This policy is supervised by a national committee and run by regional and local committees in which sit members of indigenous organizations. Nevertheless, it is deemed to have not made substantial contributions on indigenous rights.

The lack of a body committed to the protection of indigenous people has led current president Lula to propose the creation of a Ministry of Indigenous Peoples. This organ has been tasked with the recognition, guarantee and promotion of the rights of indigenous peoples, the protection of isolated

[308] Xanthaki, A., & O'Sullivan, D. (2009). Indigenous Participation in Elective B. Instituto de Estudios Constitucionales de Queretaro odies: the Maori in New Zealand. *International Journal of Minority and Group Rights*, *16*(2), 181-207. https://doi.org/10.1163/157181109X427734

and recently contacted peoples, the demarcation, defence and management of territories and indigenous lands, the monitoring, supervision and prevention of conflicts in indigenous lands and promotion of actions to remove invaders from these lands.[309] In addition, this ministry should collaborate with the FUNAI and CNPI. This is a particularly relevant intention considering that FUNAI's function has been reduced and the CNPI has even been extinguished during the Bolsonaro government.

To fill the gap left by the government, national and international pro-indigenous NGOs have committed themselves to the fight for guaranteeing indigenous constitutional rights and providing essential services to ensure the survival of the indigenous communities. They have funded Native American empowerment programs and ethno-development[310] projects.

On the same line, there are indigenous organizations which, to enhance their own rights and welfare status, have increasingly negotiated with the government directly. NGO funding is still crucial, but they now play a more and more complementary role to that of indigenous organizations.[311] Deserves mention as bearer of the claims of the indigenous the Coordination of Indigenous Organizations of the Brazilian Amazon (COIAB) which coordinates several grassroots organizations in the Brazilian Amazon and has received political legitimacy from the Brazilian government. This organization participates in decision- and policymaking but is recognized only as de facto rather than de jure representative of indigenous organizations.

As regards governmental bodies that are committed to the protection of indigenous in Mexico, deserves to be mentioned the National Commission for the Development of Indigenous Peoples (CDI). It has been tasked with many responsibilities, but because it is a decentralized organization inside the federal public administration structure, is incapable of intervening over federal level ministries. It is in charge of designing and executing public policies, initiatives, and projects about indigenous peoples, but it is deemed to focus mainly on small social development programs.[312]

In both countries, some instances are carried out by indigenous parties. It is the case for the Indigenous National Congress in Mexico (CNI) and for the Indigenous People's Party (API) in Brazil. Both have participated in national elections and nominated candidates for public office. Significantly, in Mexico, the National Indigenous Congress has even put forward indigenous candidates for the

[309] Modelli L. (2023). How the unprecedented Ministry of Indigenous Peoples will work. https://www.dw.com/pt-br/como-funcionar%C3%A1-o-in%C3%A9dito-minist%C3%A9rio-dos-povos-ind%C3%ADgenas/a-64269096
[310] Sustainable economic development based on indigenous knowledge of natural resource management
[311] *Ibidem*
[312] Global Americans (2017). Indigenous political representation in Mexico.

presidency. It was María de Jesús Patricio who, however, did not manage to gather the number of signatures necessary to register officially.

It is worth noting, however, that both the CNI and the API have found difficulties in achieving some sort of electoral success and have faced challenges in gaining broader support beyond the indigenous electorate. Generally speaking, no indigenous political parties have emerged in both countries, even as minor players. In addition, in both countries have almost always dominated traditional political parties that rarely were committed to addressing the demands and concerns of indigenous communities.

Also, indigenous parties that run at the state level rather than at the federal level have received modest results. This is the case of the Popular Unity Party (PUP) in Oaxaca. The PUP seeks to provide a voice for indigenous communities through all branches of the government and to create a national political party exclusively for indigenous peoples. It has been presenting candidates for state elections since 2004 but, for example, in the last elections, it only received 2.6% of the votes for its candidate for governor, and won only 5 out of 153 municipalities.[29] In the Oaxacan state legislature, PUP only has one deputy out of 42 seats.

At this point, it is necessary to analyse some figures about Mexico and Brazil and to make some considerations.

As regards Brazil, in 2020, 234 representatives of indigenous peoples were elected – 10 mayors, 11 deputy mayors and 213 councillors.[313] In 2022 there was a record number of indigenous candidacies which jumped from 134, which were registered in 2018, to 178. According to the IPU's data, there were 4 indigenous members out of 513 total members of the Chamber of Deputies in Brazil as of 2021, which represents a percentage of approximately 0.8%. In the Senate, there were 2 indigenous members out of 81 total members, which represents a percentage of approximately 2.5%.

According to data from the Superior Electoral Tribunal, 178 indigenous people were candidates for the positions in dispute in 2022, which means 0.63% of the candidates.[314] Compared to the past, the number of elected Indigenous people increased in the last elections, in October 2022, when five Indigenous members of different parties have been voted into the Chamber of Deputies.[315]

[313] Saint Martin J. (2023). Qual a importância dos indígenas na política brasileira? Politize! https://www.politize.com.br/indigenas-na-politica/

[314] Superior Electoral Tribunal (2018). Facilitar o voto de povos indígenas é preocupação da Justiça Eleitoral. https://www.tse.jus.br/comunicacao/noticias/2018/Abril/facilitar-o-voto-de-povos-indigenas-e-preocupacao-da-justica-eleitoral

[315] These representatives were Celia Xacriabá from the PSOL-MG, Juliana Cardoso from the PT-SP, Paulo Guedes from the PT-MG, Silvia Waiãpi from the PL-AP and Sônia Guajajara from the PSOL-SP.

The unprecedented number of Indigenous people elected is also a result of the *Bloque del Cocar*, the Indigenous Peoples' united parliamentary bloc. Until 2022, only two indigenous had been elected to the Senate.[316]

Moreover, there have been significant changes among the ministers. Indeed, in 2022, Lula's government appointed four Afro-Brazilian national ministers, three of them women: Benedita da Silva, Minister of Social Services; Marina Silva, Minster for the Environment; and Matilde Ribeiro, who heads the Secretariat for the Promotion of Racial Equality, a cabinet-level ministerial position.

To promote the expansion of the presence of these groups in spaces of power the Superior Electoral Court through Ordinance N. 367/2022 instituted the Committee for the Promotion of Indigenous Participation in the Electoral Process, aiming at preparing studies and projects to promote and extend the presence of these peoples in the many stages of the elections.[317]

Notwithstanding these above-mentioned improvements, there are structural difficulties in Brazil in the protection of indigenous political rights. A difficulty regards, for example, the right to vote for indigenous living in villages. Indeed, as noted by Electoral Justice (2018) [318], when there are elections, technicians face hours of travel to take to the villages, by land or by the river, all the necessary structures for these citizens to be able to vote.

As noted by Joênia Wapichana, elected indigenous deputy, political rights in Brazil are also hindered by the fact that many indigenous live in rural areas and depend on river or air transport, often do not have documents, do not have an internet system to be informed about electoral issues, do not have ballot boxes in their communities, which often move to the headquarters of municipalities. She also observed that the increased interest of indigenous people in running for office, registered in 2018, reflects the need for these people to defend their own interests and needs.[319]

Another issue that jeopardizes indigenous political rights is connected to the inequality in the distribution of the electoral fund. Indeed, data from the JOTA portal estimates that 29.6% of the

[316] Scotfield L. (2022). Only two indigenous people have held an office in the Chamber and none have been elected to the Senate. https://apublica.org/2022/04/indigenas-se-articulam-para-formar-bancada-indigena-no-congresso-e-parlamentos-estaduais/#Bancada

[317] Superior Electoral Tribunal (2022). Practical Guide 2022 Brazilian Elections. https://international.tse.jus.br/en/assuntos-internacionais/guia-pratico-para-pessoas-estrangeiras_ingles_digital-1.pdf

[318] Tribunal Superior Eleitoral (2018). Facilitar o voto de povos indígenas é preocupação da Justiça Eleitoral.

[319] Peixoto G. (2010). Cresce a representação indígena na política brasileira com eleições. Estado de Minas. https://www.em.com.br/app/noticia/politica/2021/02/22/interna_politica,1239592/cresce-a-representacao-indigena-na-politica-brasileira-com-eleicoes.shtml

Indigenous women who ran for the Federal Chamber did not receive any public funds to finance their campaigns.[320]

A final remark that must be made is that indigenous political rights are subjected also to the organization of the state. In the case of Brazil, a difficulty is represented by institutional fragmentation which complicates the indigenous relationship with the Brazilian state. Indeed, indigenous peoples have to interact with three constitutional tiers, namely the municipal, federated state and federal union levels, and also with the system of checks and balances existing between legislative, executive and judicial authorities.[321]

At this moment, it is worthwhile to consider the situation in Mexico. In this country, there have been problems in the implementation of the Federal Code of Electoral Institutions and Procedures. Indeed, only seven indigenous candidates were elected in 2018 despite the affirmative action policies.

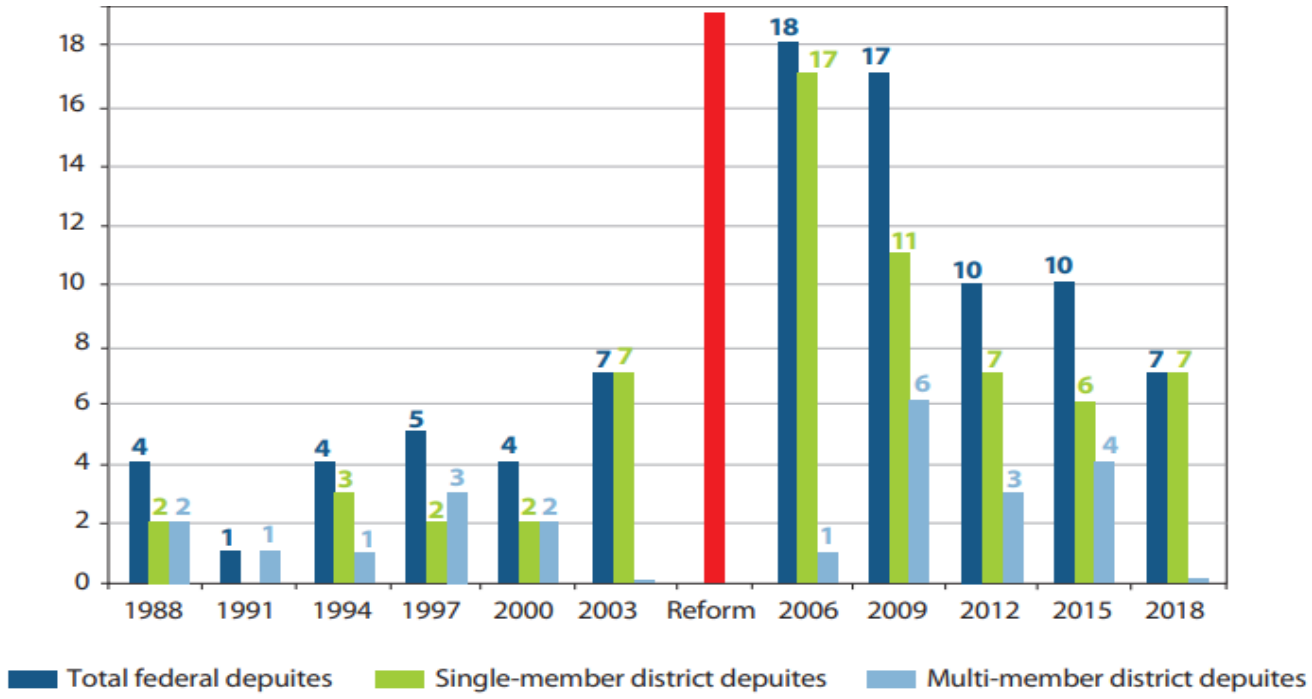


Figure 7: Number and Percentage of Deputies of Indigenous Origin from 1988 to 2018. (Sonnleitner, 2020)[322]

As can be seen also in Figure 7, after the introduction of the 28 indigenous districts under the 2004 reforms, the number of elected parliamentarians of indigenous descent did not increase as was foreseen. It reached 18 members in the House of Deputies in 2006 (one by proportional representation

[320] Base Dos Dados (2022). Plataforma traz mais transparência para a prestação de contas de candidaturas e partidos nas Eleições. https://basedosdados.org/estudos-de-caso/jota

[321] Berg-Nordlie M., Saglie J. & Sullivan A. (2016). Introduction: Perspectives on Indigenous Politics Indigenous Politics (1st ed.). Rowman & Littlefield International. https://www.perlego.com/book/573503/indigenous-politics-institutions-representation-mobilisation-pdf

[322] Sonnleitner W. (2020). Participation, Representation and Political Inclusion. Is There an Indigenous Vote in Mexico?

and 17 via relative majority), and 17 were re-elected in 2009, keeping the same percentage (eleven by relative majority and six by proportional representation). The results of this campaign, nevertheless, were short-lived. Their number was drastically cut to ten in 2012 and 2015, while the number of indigenous representatives elected in single-member districts decreased steadily between both Legislatures from seven to six, and then back to seven in 2018. Remarkably, since 2009, there have been fewer elected parliamentarians of indigenous origin.

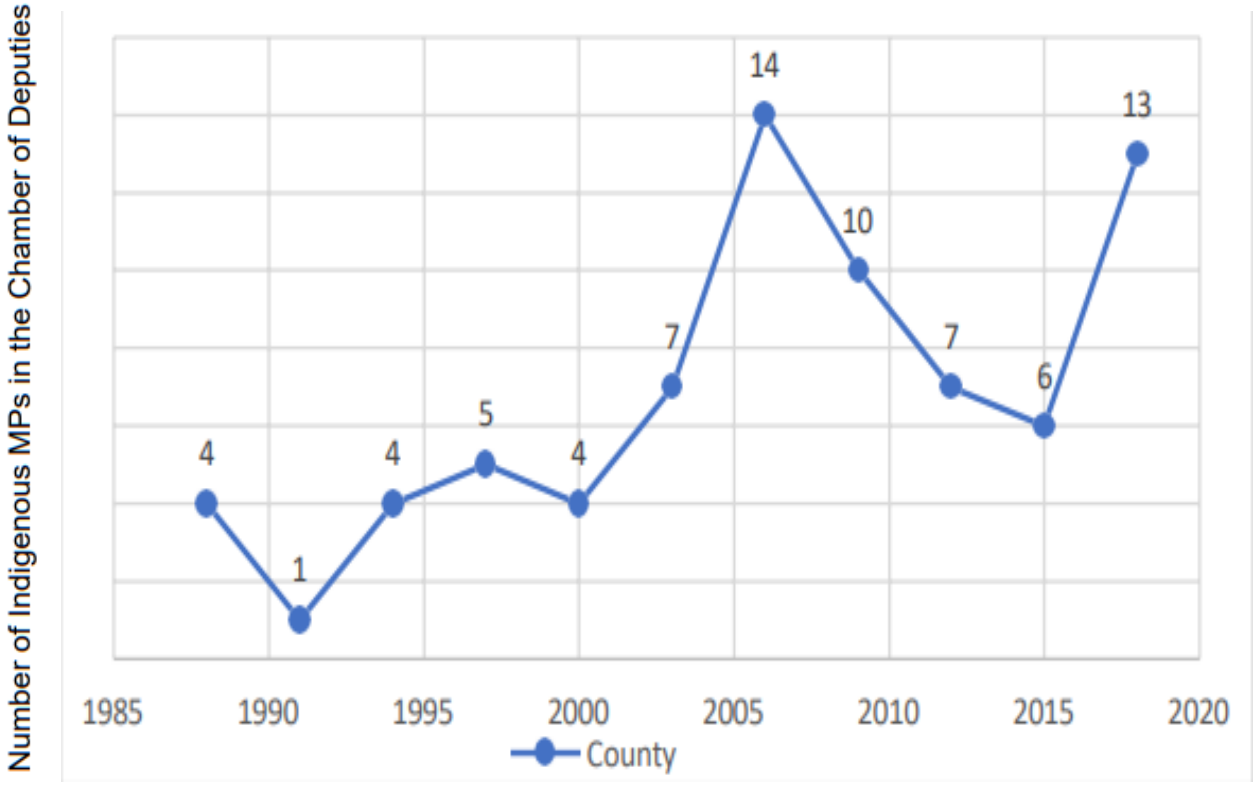


Figure 8: Indigenous Representation in the Chamber of Deputies from 1988 to 2018 (Correa, 2020)[323]

Differently from Figure 7, Figure 8 does not make a distinction between single-member and multi-member district candidates but clarifies the trend of under-representation of indigenous in the Chamber of Deputies. It was precisely to reverse it that the National Electoral Institute approved the implementation of affirmative action measures through the above-mentioned Agreement INE/CG508/2017.

Another problem of implementation, which has been noted also by Singer (2013)[324], is that Article 2 Paragraph VII of the Constitution is not fully complied with, as only a few states of the Federation have established procedures for indigenous participation in the election of municipal authorities, and in very few cases these procedures include or recognise the principles of indigenous law.

[323]Vázquez Correa L. (2020). Representación política y acciones afirmativas indígenas: la agenda pendiente.
[324] Singer Sochet, M. (2013). Justicia Electoral: México, Participación y Representación Indígena. Tribunal Electoral del Poder Judicial de la Federación.

The under-representation of Indigenous Peoples in Mexican democracy has been highlighted also in the Report of the International Indigenous Mission for Electoral Observation of Indigenous Peoples by various indigenous organisations. Critics point out the fact that Indigenous federal deputies should not be elected only in districts with 60% of the Indigenous population, but in every district. In addition, the organization asked for more transparency in the mechanisms for counting and auditing signatures or support for independent candidacies, in the processes and the rulings. This document also calls on political parties to incorporate the fulfilment of the rights of Indigenous Peoples in their programmes.[325] As evidenced in Paragraph 4.2 this does not seem a priority for the main Mexican parties which do not even mention indigenous in their political programmes. In addition, the report invites political parties to adopt measures that allow them to participate as candidates for representative positions at the highest level.

Finally, it asks to generate real indicators that contemplate areas of opportunity in the performance of Indigenous Peoples' life in the electoral process and their decision-making mechanisms and appointment of representatives.

The criticality of indigenous representation in Congress in Mexico has been expressed also by the Venice Commission in its above-mentioned opinion on Mexico's electoral legislation. On this occasion, the Commission stressed that even though Mexico proclaims itself as a multicultural country based on its indigenous peoples, indigenous groups have not, historically, had proportional representation in Congress. In addition, the opinion stresses that it is the Constitution itself which by instituting single-member districts, affirms that should be taken into consideration indigenous peoples and their communities to promote their political participation.

4.5 Conclusions

This Chapter has outlined how indigenous are granted political rights in Mexico and Brazil. What probably emerges more, also from the graphs, is that although there have been advancements in the application of affirmative actions to reverse the historical under-representation of the indigenous population, there are still challenges to improving the application of these mechanisms. Moreover, as can be noted in the Federal Code of Electoral Institutions and Procedures, the presence of affirmative action policies does not guarantee their effective implementation. Indeed, the representation of indigenous peoples in the Parliament remains low compared to their share of the population.

[325] FILAC (2018). Report of the First International Indigenous Electoral Observation Mission, Mexico, pp. 1-20.

Therefore, there is still a need to address the challenges and obstacles that indigenous communities face in achieving political representation.

On the other hand, even though the current Brazilian government headed by Lula is more committed to indigenous rights, it should not be left to the discretion of the elected government to decide whether to guarantee indigenous rights or not. It should be a commitment of all governments to respect national and international laws regarding indigenous political rights.[326] Furthermore, despite a 32% growth in their political representation, the number of indigenous people who participated in the elections in Brazil does not represent even 1% of the total number of candidates.[327]

To sum up, even though national legislation and constitutional provisions in both countries have tried to guarantee indigenous representation through different mechanisms like affirmative action policies, and the creation of *ad hoc* institutions for indigenous engagement and integration in the political establishment of the countries, there are still huge gaps both on the normative and practical side that need to be addressed to consider these nations as effective protectors of indigenous political rights.

[326] Polga-Hecimovich, J. (2021). The Bureaucratic Perils of Presidentialism: Political Impediments to Good Governance in Latin America. Korean Journal of Policy Studies, 36(4), 1–14. https://doi.org/10.52372/kjps36401

[327] Manchineri A. & Manchineri R. (2022). Candidaturas indígenas eleitas crescem, mas sub-representação ainda é um problema. Carta Capital. https://www.cartacapital.com.br/blogs/intervozes/candidaturas-indigenas-eleitas-crescem-mas-sub-representacao-ainda-e-um-problema/

Chapter 5

The Guarantee of the Right to Use Indigenous Languages

5.1 Introduction

Before starting the analysis of the protection of indigenous languages in Brazil and Mexico, some preliminary considerations must be made. Indeed, as noted by Phillipson et al. (1995)[328], linguistic rights can be considered both in their individual and collective dimension. The individual dimension is the one that attains to the right that every person holds to identify with their mother tongue and be respected by those who do not hold the same linguistic identity, the right to learn their mother tongues and use them in diverse official contexts and the right to learn the official languages of one's country of residence. It also implies the right of a person to be educated in their language and to learn the official language of one's country of residence. Following this line of thought, bilingualism is a faculty of the individual but also a right that the state must guarantee.[329]

On the other hand, there is the collective level which alludes to the right of minorities to exist, the right of people to use and develop their languages, the right of the groups to own autonomy to maintain their languages and the right to count on the State's support to administer internal matters of the group such as culture, education, religion, information, and social affairs. This collective dimension is the one that has been more challenged since nation-states have been reluctant to recognise the status of their minorities as peoples or nations and have denied them territorial rights. Indeed, governments have often conceived collective autonomy as a threat to the political structure of the State since the exercise of these rights implies that the State delegates power to linguistic minorities.[330]

It must be pointed out that, since linguistic rights are part of the broader area of cultural rights, they are enjoyed mostly in a group context. Indeed, culture is generated and manifests itself in group dynamics. Culture, ordinarily, is an outgrowth of a community, and, to that extent, affirmation of a cultural practice is an affirmation of the cultural group.[331] For instance, it would be impossible or

[328] Phillipson, R., Ranmut, M. & Skutnabb-Kangas, T. (1995). Introduction. In Skutnabb-Kangas T. and Phillipson, R. (eds.) Linguistic Human Rights: Overcoming Linguistic Discrimination. 1-22. Berlin and New York: Mouton de Gruyter.
[329] Blanco Gómez R. (2010). Legislación en materia de derechos lingüísticos y educación indígena en México. TINKUY n°12. https://www.inee.edu.mx/wp-content/uploads/2018/12/dialnet-legislacion-materia-derechos-linguisticoseducacion-mex.pdf
[330] Carranza, A. V. (2009). Linguistic rights in Mexico. *RaeL Revista Electronica de Linguistica Aplicada*, 199+. https://link.gale.com/apps/doc/A350783372/AONE?u=anon~17b88e5d&sid=googleScholar&xid=e98b05e0
[331] Anaya J. (2004). *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13 (2004), https://scholar.law.colorado.edu/faculty-articles/844.

meaningless for an indigenous person to participate in a traditional indigenous system of dispute resolution alone, to speak an indigenous language alone or to participate in a religious event alone.

In the view of Hamel (1997), the legislation on linguistic rights applies both to subordinate minorities and to dominant groups who want to perpetuate their linguistic rule and privileges. [332] Linguistic rights are usually completely enjoyed by speakers of official languages who are the dominant groups in the State which fully exercise these rights. On the contrary, minority groups, especially indigenous, usually are deprived of some or all of these rights.

5.2 National and International Framework on Indigenous Language Rights

According to Skutnabb-Kangas and Phillipson (1995), among the legal instruments that grant the strongest degree of protection of linguistic rights, there are national constitutions and national legislation.[333]

In this regard, in part A, section IV of Article 2 of its Constitution, Mexico guarantees the right of indigenous peoples and communities to preserve and enrich their languages, cultures, knowledge and all the elements that constitute their culture and identity. This requires positive actions of promotion on the part of the various public authorities. According to the National Commission on Indigenous Rights of Mexico[334], recognizing this right means allowing and encouraging the use of languages, recognizing and respecting indigenous languages as languages that have the same validity as Spanish, especially in institutional processes and promoting these languages both in educational and institutional spaces.

In its turn, Article 2.A.VIII focuses on the judicial implication of the respect of linguistic rights and affirms that, in all trials and proceedings in which they are party, individually or collectively, indigenous people have the right to be supported by interpreters and defenders who know their language and culture.

Article 2.B.II emphasizes the importance of bilingual and intercultural education and mandates that the education system promote the preservation and development of indigenous languages and cultures. The guarantee of this right is connected to the elimination of all

[332] Hamel, R.E. (1997). Introduction: Linguistic Human Rights in a Sociolinguistic Perspective, International Journal of the Sociology of Language, Vol. 127, pp. 1-24.
[333] Skutnabb-Kangas T. and Phillipson, R. (1995). Linguistic Human Rights, past and present. In Linguistic Human Rights: Overcoming Linguistic Discrimination. 71-110. Berlin and New York: Mouton de Gruyter.
[334]CNDH México (2016). Derechos lingüísticos de los pueblos indígenas. https://www.cndh.org.mx/sites/all/doc/cartillas/2015-2016/19-dh-linguisticos.pdf

discriminatory practices, and it compels public authorities (namely the Mexican Federation, the States, and the Municipalities) to guarantee the right to education and to increase schooling.

In Part B, section VI of the same article, the Mexican Constitution requires the authorities to establish conditions for indigenous peoples and communities to acquire, operate and manage means of communication. It also requires the State to take positive measures to protect this right. According to Cossío J.R. (2001), the ownership of the right to culture is recognized in this article but in a "*somewhat hidden*" way. [335] It is also interesting to note what was written by Clavero (2006), that even if Mexico's constitution recognises multiculturalism, it does not specifically recognize the individual and collective right to own culture of a person, and this facilitates the disconnection between the proclamation of principles and the provision of possibilities. [336]

In its turn, Article 4.1 establishes the multilingual and multicultural character of the nation and recognizes indigenous languages as part of the cultural heritage of the country.

The idea that the plurality of indigenous languages is one of the main expressions of the multicultural composition of the Mexican Nation can be found also in Article 3 of the General Law of Indigenous Peoples' Linguistic Rights which contains interesting provisions for the recognition and protection of the linguistic rights of Mexican indigenous peoples. This legislative text is interesting since not only it frames the linguistic rights of indigenous peoples, but it also clearly establishes the relationship of languages within a framework of the linguistic and cultural diversity of the Mexican country.

To start, the Law defines indigenous languages. According to the definition provided in Article 1, they are "*those that come from the indigenous peoples that existed in the national territory before the establishment of the Mexican State, together with those coming from other Indo-American peoples, equally pre-existing, that have rooted in the national territory later on, and that have a systematic and patterned group of functional and symbolic oral forms of communication*."

Focal points of the Law include the right of indigenous peoples to use their languages in all spheres of life, namely education, media, and government, the promotion of the use of indigenous languages in public services, including health care and legal proceedings and the obligation of the Mexican state to promote and support the preservation and development of indigenous languages.

[335]Cossío J.R. (2001). La reforma constitucional en materia indígena. Este País, 127, https://archivo.estepais.com/inicio/historicos/127/5_ensayo1_la%20reforma_cossio.pdf
[336]Clavero B. (2006). Derechos Indígenas y Constituciones Latinoamericanas. https://idus.us.es/bitstream/handle/11441/69267/Derechos%20Ind%C3%ADgenas%20y%20Constituciones%20Latinoamericanas.PDF?sequence=1&isAllowed=y

This law establishes the right of all Mexicans to communicate in the language they speak without restrictions, in the public or private sphere, in oral or written form, and in all their social, economic, political, cultural, religious and other activities.

Some articles should be mentioned. For instance, Article 4 stipulates that indigenous languages are national languages and that Spanish and Indigenous Languages have equal status, and both are valid in any public or private sector and any kind of social activity. Specifically, it recognizes 69 national languages, namely 68 indigenous languages and Spanish. This means that, although Spanish is used for most official purposes, namely government communications, media, and education, it is considered equal to indigenous languages in terms of their status, therefore governmental documents and services must be available in both languages.

Article 5 establishes that the State will recognize, protect and promote the preservation, development and use of national indigenous languages.

Article 6 indicates the duty of the State to adopt and implement the necessary measures to ensure that the mass media broadcast the linguistic and cultural diversity of the Mexican Nation, and to allocate a percentage of the time available in the concessioned mass media, following the applicable legislation, for the broadcast of programs in the various national languages spoken in their areas of coverage, and cultural programs in which literature, oral traditions and the use of the national indigenous languages of the various regions of the country are promoted.

Article 7 protects the right to information, particularly in its declination as transparency of information. It states that Indigenous languages are considered acceptable along with Spanish for any public matter or procedure, as well as for accessing public management, services, and information. The implication of this is that the Federation and the state governments must make available and distribute through written, audio-visual, and digital means, the laws, regulations, programs, works, and services intended for indigenous communities in their respective languages.

Articles 8 and 9 recognize the right of all Mexican people to communicate in their languages without restrictions and discrimination.

The right to have access to the judicial system using indigenous languages is attributed under Article 10. It recognizes the right of indigenous peoples and communities to have access to the courts of the State in their language and to be assisted free of charge, always, by interpreters and defenders who know their indigenous language and culture. This provision is meant to ensure that indigenous people enjoy due legal process and, in particular, the possibility of access to justice in terms of effective and not merely formal equality. This should ensure that indigenous persons implicated in a

crime can be heard and effectively attended to by the bodies of justice without delays, bureaucratic obstacles, financial obstacles and racial or other prejudices.

Article 12 recognizes the right of indigenous peoples to access information and communication technologies in their languages and through culturally appropriate means, to participate in political life. It establishes the use of the indigenous language as an integral part of compulsory education programmes, which must be bilingual and intercultural. The focus on education is pivotal since the use of the mother tongue is a precondition and a necessary condition for the preservation and development of one's own culture since the language is not only a resource for communication but also part of the cultural heritage and a sign of identity.

Relevant is also Article 13 on capacity building which requires public institutions, agencies and offices to be staffed by personnel with knowledge of the national indigenous languages required in their respective territories. It provides for the use of indigenous languages for access to public information and the diffusion of laws, regulations, as well as the contents of programmes, works, services and of programmes, works, and services aimed at indigenous communities, in the language of the corresponding beneficiaries. The State and its three governmental orders (Federation, States, and Municipalities) are required to protect, preserve, promote and develop indigenous languages by involving the indigenous population and their communities.

According to Article 131, in the case of indigenous communities, the health education programmes shall be divulgated in Spanish and the corresponding indigenous language or languages.

From this short list of Articles two clear implications can be derived concerning the guarantee of the right to protection of indigenous languages – which have been highlighted also in Chapter 2. Namely, these are education and the provision of justice. Indeed, it is believed that high levels of illiterate people and high representation in prisons of indigenous can also be caused by linguistic barriers.[337]

Focused on education and languages is the General Law of Education. Its peculiarity is that it puts a duty on the Mexican state to offer bilingual education in indigenous communities, ensuring that students receive instruction in their mother tongue and Spanish[338] and outlines the requirements

[337] IACHR (2017). Preliminary Report On Poverty, Extreme Poverty, And Human Rights In The Americas. OEA/Ser.L/V/II.164. Doc. 147. https://www.oas.org/en/iachr/reports/pdfs/poverty-humanrights2017.pdf
[338] General Law of Education, Article 71, https://www.global-regulation.com/translation/mexico/560278/law-education-general.html

for the development and implementation of educational programs for indigenous communities, including the participation of community members and respect for their cultural diversity.[339]

Another law which treats the topic of indigenous language rights, but with a specific focus on discrimination, is the Federal Law to Prevent and Eliminate Discrimination. Its objective is to eliminate all forms of discrimination, particularly discrimination linked to being a speaker of an indigenous language and to protect the enjoyment of all rights and freedoms enshrined in the Constitution, laws, and international treaties. The State shall take measures to promote equal opportunities for the indigenous population, such as promoting bilingual educational programmes, and cultural exchanges, as well as campaigns to inform and promote respect for their cultures.

Articles related to the linguistic rights of indigenous people are also present in the San Andrés Accords on Indigenous Rights and Culture, one of the agreements that forms part of the San Andrés Accords. According to Hidalgo (2006), the content of these agreements has represented a turning point in national language policy since the text raised a problem existing since colonial times, namely the relationship between the indigenous peoples and the new authorities that were denying their existence.[340]

Several articles of the agreement are devoted to it. The most important ones are Articles 4, 12, 13 and 14. Pursuant to Article 4, indigenous peoples have the right to preserve and enrich their languages, knowledge, and culture. Article 12, instead, recognizes the right of indigenous peoples to receive education in their own languages and in accordance with their cultural practices. The successive articles, Art. 13 and Art.14, are more focused on the promotion and protection of indigenous languages, which occurs through the creation of programs to develop and strengthen these languages and through the recognition of the pivotal role that they play in the cultural and historical identity of Mexico.

These safeguards derive from the requests of the EZLN who demanded equal social value of Spanish and Indigenous Languages in order to create language policies that could protect indigenous lands. The EZLN further required the states to raise national awareness of indigenous policies and their culture and stipulated the right of participation of indigenous communities in the planning of educational content with the purpose of revitalizing Indigenous Languages.[341]

[339] General Law of Education, Article 79
[340] Hidalgo, M. (2006). Mexican Indigenous Languages at the Dawn of the Twenty-First Century. Berlin: Mouton de Gruyter.
[341] Pellicer, D., B. Cifuentes & C. Herrera. (2006). Legislating Diversity in Twenty-first Century Mexico. In M. Hidalgo (ed.) Mexican Indigenous Languages at the Dawn of the Twenty-First Century. 127-157. Berlin: Mouton de Gruyter.

Finally, the Pact for Mexico deserves to be mentioned. This is an agreement stipulated among the leaders of the main indigenous parties in 2012 which contains provisions also on indigenous languages and cultures. According to Commitment 36 of the Pact, the State must ensure that indigenous languages and cultures are not a limitation to the exercise of rights such as access to justice and education. For this reason, it will guarantee that the indigenous population has access to quality public defenders and bilingual translators for their defence processes, as well as to access to quality bilingual and intercultural education.

From all of these provisions – and in particular those contained in national legislation rather than in the Constitution – it can be affirmed that in Mexico the existing framework is highly detailed and tries to cover wide areas related to linguistic rights.[342]

For its part, the Brazilian Constitution in Article 13 establishes the statute of officialdom of Portuguese. It is thus possible to notice a difference in the legal status of indigenous languages in Mexico which are recognized as official languages of the nation. The recognition of the co-officiality of official languages is important since it not only guarantees a right to access information and services in the language but is also an instrument of preservation. A language used in everyday situations and recorded in official acts is not at risk of extinction.[343]

Article 210 recognizes the right of indigenous peoples to preserve and develop their languages and cultures. This provision recognizes that language is not only a means of communication but also bears cultural values and traditions and that the preservation of indigenous languages is essential for the preservation of indigenous cultures.

Furthermore, Article 210 also recognizes the right of indigenous peoples to enjoy an education which respects their cultural and linguistic identities. This means that indigenous peoples have the right to education that is delivered in their own language, and that promotes their cultural values and traditions, while also providing access to mainstream education. It mandates that the education system promote the preservation and development of indigenous languages and cultures and ensure their access to higher education. In the first paragraph, it states that although elementary education will be in general taught in Portuguese, nevertheless indigenous populations will be guaranteed the right to use their mother tongues and their own learning processes.

Article 215 of the Constitution protects the manifestation of popular cultures, including indigenous ones, of which clearly languages are part. From this emerges that indigenous linguistic

[342] Carranza, AV. (2009). Linguistic rights in Mexico.
[343] Ferreira Santos G. (2009). Língua oficial e direitos linguísticos na Constituição Brasileira de 1988. https://dialnet.unirioja.es/descarga/articulo/3199457.pdf

heritage is protected within the constitutional text as "*cultural property*" and therefore deserving guardianship and protection.[344] It promotes the forms of expression, that is, languages, as an element in Brazilian cultural heritage, which carries references to identity, action, and memory of the different groups that form the Brazilian society. It also incentives the production and information about cultural property and values.[345]

From this, it can be seen a difference between the Mexican Constitution in which indigenous languages are granted the status of official languages and the Brazilian one where indigenous languages are recognized as cultural property which is part of the national heritage.

Article 231, which has already been analysed in the context of the right to land, protects the so-called right to difference by guaranteeing the recognition of the social organisation, customs, languages, beliefs, and traditions of the Indians. This provision acknowledges that the survival and well-being of indigenous communities are closely linked to their cultural and linguistic heritage. In the view of Sarmento (2014), this Article accords indigenous very extended guarantees, which the scholar calls "*ironclad clauses*".[346]

Two reflections on these Articles must be made. In the first place, the Constitution is the first document in Brazilian history which recognizes the multilingual nature of the country. Until then, the use of languages other than Portuguese in formal education for the indigenous was omitted or prohibited. In the second place, it must be noted that the Constitution recognizes indigenous languages in the document but not as national, official languages. Indeed, if we follow the definition of official language given by Guimarães (2005)[347], an official language "*is the language of a state, that which is obligatory in formal state activities, in its legal acts*" and, in this view, only Portuguese can be considered as the official language.

The Brazilian Indigenous Peoples' Statute, also known as Law No. 6.001/1973, includes several articles that focus on the linguistic rights of indigenous peoples in Brazil. Some of the key articles are: a) Article 19, which establishes that indigenous peoples have the right to use their own languages in all official acts and documents of the government, as well as in educational institutions; b) Article 26, which establishes the obligation of the Brazilian government to provide bilingual and intercultural education to indigenous peoples, in accordance with their specific cultural and linguistic

[344] Nunes dos Anjos Filho, R. (2008). Breve balango dos direitos das comunidades indigenas: alguns avangos e obstciculos desde a Constituigdo de 1988. Revista Brasileira de Estudos Constitucionais, 8, 93, 95-97.
[345] Constitution of Brazil, Article 216.3
[346]Sarmento D. (2014). Nota Técnica: A PEC 215/00 e as Cláusulas Pétreas. https://mobilizacaonacionalindigena.files.wordpress.com/2014/12/pec-215_nota-tc3a9cnica-mpf.pdf
[347] Guimarães, E. (2005).Brasil: país multilíngüe. Revista da Sociedade Brasileira para o Progresso da Ciência: Línguas do Brasil, São Paulo, ano 57, n.2, p. 22-23

characteristics; c) Article 28, which establishes that indigenous peoples have the right to use their own languages in any legal or administrative proceedings that may affect them; d) Article 30, which establishes that indigenous peoples have the right to access information and communication technologies in their own languages; e) Article 35, which establishes that the Brazilian government must respect the cultural and linguistic diversity of indigenous peoples, and promote measures to protect and strengthen their languages and cultures.

Overall, while both Mexico and Brazil have constitutional provisions that recognize the linguistic rights of indigenous peoples, Mexico's Constitution provides more comprehensive protection in this regard, particularly with respect to the right to use their own language in public and private settings and the recognition of indigenous jurisdiction.

At the level of ordinary law, the National Policy on Indigenous Education (Decree 6.861/09) guarantees Indigenous peoples the right to an intercultural multilingual, community-based education, respectful of their traditions and beliefs. In its first Article, it enshrines that "*Indigenous school education has to be organized with the participation of indigenous peoples, observing their territoriality and respecting their needs and specificities."* Significant provisions are also contained in Articles 2, 4, 6 and 9.

Article 2 establishes that the education of Indigenous peoples must be intercultural and bilingual, respecting the cultural and linguistic diversity of each community. This article recognizes the importance of Indigenous languages and cultures in the education process, as well as the need to promote communication and understanding between different cultures.

Article 4 emphasizes the importance of participatory education, involving Indigenous communities, organizations, and leaders in the planning, implementation, and evaluation of educational activities. This article recognizes the agency and knowledge of Indigenous peoples, ensuring their active participation in the education process.

Article 6 prioritizes the formation of Indigenous teachers and educational agents, ensuring their participation and representation in the educational process. This article recognizes the importance of Indigenous peoples in the education system and promotes the development of Indigenous leadership and knowledge.

Article 9 establishes the education of Indigenous peoples should be guided by the principles of respect, equality, diversity, and human rights, combating all forms of discrimination, prejudice, and violence. This article recognizes the historical discrimination and violence experienced by Indigenous peoples in Brazil and promotes a more inclusive and equitable education system.

Following what the Federal Constitution of 1988 and the Law of Guidelines and Bases of National Education (Law nº 9.394/96) say, the national coordination of Indigenous School Education policies is the responsibility of the Ministry of Education while the states and municipalities are entitled of the operationalization of these rights. It establishes that the Federal Education System, with the collaboration of federal agencies for the promotion of culture and assistance to the indigenous, will develop integrated teaching and research programs to offer bilingual and intercultural school education to indigenous peoples.

More focused on education, and in particular on how to guarantee higher levels of education for indigenous people, is Law 12.990/2014. This law establishes the reservation of 20% of the vacancies offered in public universities and federal technical schools for students who have attended all of their high school years in the public school system and who self-identify as Black, mixed-race (*pardos*), or Indigenous. It considers the difficulty for black people, indigenous people, and low-income people to access higher levels of education and thus adopts a sort of affirmative action policy. The rationale behind this choice is that, according to the 2018 census on higher education, 57,706 indigenous people are enrolled in several higher education courses, which is an element that stimulates reflection on the degree of difficulty to enter these courses.[348]

In the view of Skutnabb-Kangas and Phillips (1995), language rights are less protected in multilateral and universal instruments since language is mentioned: "*only by passing*".[349] Nevertheless, as it can be noted from the following analysis, in the last years more attention and more provisions have been dedicated to indigenous languages.

The UNDRIP in Article 12 deals with the right to education in the indigenous language, including determining that, where possible, the right is extended to persons living outside their communities. Article 13 specifically addresses language rights for indigenous peoples. It states:

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

This paragraph recognizes the importance of language rights for indigenous peoples and their right to use and preserve their own languages, as well as the right to have access to interpretation and other language support in legal and administrative proceedings. It reflects the need to address the

[348] Kayapó, A. N. K. L. , Kayapó, E. B. & Pereira, F. L. B (2022). Indigenous peoples' access to higher education. https://diplomatique.org.br/o-acesso-dos-povos-indigenas-ao-ensino-superior/
[349] Skutnabb-Kangas T. and Phillipson, R. (1995). Linguistic Human Rights, past and present.

historical marginalization and suppression of indigenous languages and to promote linguistic diversity and cultural heritage.

Although Article 13.2 of the Declaration does not require Member States to provide access to Indigenous Peoples to social services in Indigenous languages, it affirms that States shall take effective measures to ensure that Indigenous Peoples can understand and be understood in political, legal, and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14.1 guarantees Indigenous Peoples' right to establish and control their educational systems and institutions, providing education in their own languages in a manner appropriate to their cultural methods of teaching and learning.

In its turn, the second paragraph stresses that states not only have the duty to respect but also to take action to guarantee this right. They are invited to adopt measures to ensure that indigenous peoples can understand and be understood in political, legal, and administrative proceedings. This can be done through interpretation, drafting of materials in indigenous languages or other means.

The two provisions are particularly worthy to be mentioned, especially in states that have historically adopted assimilationist policies to eliminate Indigenous cultures and languages. It suffices to think that in North America, during the 19th and 20th centuries, Native children were forcibly removed from their families and taken to boarding schools to be "re-educated".[350]

The Declaration also puts attention on extending linguistic rights to the sphere of external exposure of indigenous languages through the media. The Indigenous peoples have a right to establish their own media in their own languages and to access all other non-indigenous media without discrimination.[351] All in all, the States shall adopt efficient measures to ensure that the public media reflects indigenous cultural diversity.[352]

At this point, as done in previous Chapters, it is worth mentioning what the ILO Conventions affirmed on indigenous languages. ILO Convention No. 107 was the first attempt to protect indigenous languages at the international level. However, also for these rights, the Convention adopted an integrationist and assimilationist approach. The Convention promotes the use of indigenous languages as a sort of temporary measure prior to the adoption by indigenous peoples of

[350] UN-DESA (2023). Why Indigenous languages matter: The International Decade on Indigenous Languages 2022–2032, Policy Brief No. 151, https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/PB151.pdf
[351]UN(2007). United Nations Declaration on the Rights of Indigenous Peoples, Article 16.1, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf
[352]UN (2007). United Nations Declaration on the Rights of Indigenous Peoples, Article 16.2

"modern" languages and the cultures of dominant populations. Remarkably, Article 23 establishes that children should be taught to read and write in their mother tongue but that States should take efforts for a progressive transition from the mother tongue language to the national language or to one of the official languages of the country. Article 26 recognizes the need of using written translations and the use of mass media in the languages of these populations.

Convention 169 dedicates from Articles 27 to 31 to languages, education and culture. Article 27 stipulates that educational policies must reflect the special needs and incorporate the histories, knowledge, value systems and further social, economic and cultural aspirations of indigenous peoples. Moreover, Article 27.3 provides that governments shall recognise the right of these people to establish their own educational institutions and facilities and provide appropriate resources for this purpose. Perhaps the most revealing provision is Article 28, which provides that children belonging to indigenous peoples concerned shall be taught to read and write in their own indigenous language and measures should be taken to preserve and promote the development and practice of the indigenous languages. From this Article can be seen a significant advancement with respect to Article 23 of ILO Convention 107.

Article 28 provisions include the right to have the opportunity to attain fluency in the national or one of the official county languages.

In addition, Article 30, in a similar fashion to Article 26 of Convention No. 107, stipulates that governments shall adopt appropriate measures to make indigenous peoples know their rights and duties and this shall be done using written translations and mass communications in the languages of these peoples. Also, according to Article 12, the state has to take measures to ensure that indigenous peoples can understand and be understood in legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means. Finally, it requires states to consult with indigenous peoples before taking measures that affect them, including measures related to education and language.

Significantly, as it has been remarked for the Indigenous right to land, also for education and language, to be consulted and to participate remain pivotal requests of indigenous communities.

In the view of Fernandez (2011), notwithstanding the existence of the ILO Convention and the UNDRIP, there is no international instrument that specifically deals with the linguistic rights of indigenous peoples in Latin America.[353] The author affirms it on the basis of the theoretical and

[353] Fernandez, J. (2011). Linguistic Rights of Indigenous Peoples in the States of Latin America. *Intercultural Human Rights Law Review, 6,* 379-426.

practical difficulty to elaborate international standards of linguistic rights, bearing in mind the situation of language diversity, linguistic communities, and values of different states.

Another benchmark in the field of language rights, even if it does not specifically address indigenous, is Article 27 of the International Covenant on Civil and Political Rights. It articulates the rights of persons belonging to cultural groups, as opposed to specifying rights held by the groups themselves. It is apparent, however, that in its practical application, Article 27 protects group as well as individual interests in cultural integrity. It recognizes the right to language and cultural rights, including for minorities and indigenous groups. It affirms the importance of respecting the cultural and linguistic diversity of minorities and indigenous groups and recognizes their right to use and preserve their own languages. This understanding is implicit in Article 27 itself, which upholds the rights of persons to enjoy their culture "*in community with other members of their group*." It imposes a negative duty on the nation-states to protect the languages and cultures of minority groups.

Article 14 of the same covenant recognises that all persons are equal before the courts and tribunals and that any person charged with an offence shall have the right during the proceedings to be informed in detail, of the nature and cause of the charge against him/her and in a language which he or she understands.

In a different way from articles of other conventions, it also prohibits discrimination based on language or other aspects of cultural identity. Also, this Covenant emphasizes the pivotal role of education in promoting the understanding and respect for human rights and cultural diversity and requires states to ensure that education is accessible to all on the basis of equality. This includes ensuring that education is provided in the language of the child or in the language of the community where possible.

Focused on the right to not be discriminated against on grounds of language is also the ICCPR. Specifically, Article 14 of the Covenant grants access before the courts to the charges in a language that the accused understands. From it part, Article 27 guarantees members of minority language communities the use of their languages.

The American Convention on Human Rights in Article 8 (a) establishes the right to be assisted by an interpreter or translator when the accused does not know the language of the court or tribunal. In the same document, there are express references to the prohibition of discrimination on grounds of language.[354]

[354]OAS (1969). American Convention on Human Rights. Articles 1 and 27. https://www.oas.org/dil/access_to_information_American_Convention_on_Human_Rights.pdf

Interesting articles on the protection of linguistic rights are contained in the UN Declaration on Minorities. In the Preamble, it affirms that the promotion and protection of the rights of persons belonging to national or ethnic, religious, and linguistic minorities contribute to the political and social stability of the States in which they live. This provision contradicts the popular but mistaken belief that the existence of minorities is divisive for nation-states.

Article 2 affirms the right of minorities to use their own language, in private and in public, freely and without interference or any form of discrimination and prompts the states to actively promote the enjoyment of these rights. In particular, according to Article 4.3, States have to offer minorities adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.

Nevertheless, these articles use the formulation "shall" and have few let-out modifications or alternatives which permit a reluctant state to provide minimalist protection. For example, in the above-mentioned Article 4.3, it is stated that states have to adopt measures "*whenever possible*". In addition, it does not specify what are "*appropriate measures*" or "*adequate opportunities*" and who is in charge of deciding what is "possible". Lack of clarity exists also on the definition of "*instruction in the mother tongue*". It is not clear whether it means through the medium of the mother tongue or only instruction in the mother tongue as a subject.

The provisions of this declaration are strengthened by the Durban Declaration which affirms that States have to prevent forced assimilation and the loss of cultures, religions and languages and encourages the creation of conditions for the promotion of national, ethnical, cultural, religious and linguistic identities of such minorities and for diversity and plural identities to be protected and respected.

5.3 Comparative Analysis of Compliance with Indigenous Language Rights in Brazil and Mexico

Concerning the analysis in a comparative perspective of the respect of indigenous language rights in the two countries, a few points should be raised.

According to Terborg et al. (2006), even though the Mexican government has recognized 68 Indigenous languages as official at the regional level and ten at the national level, Spanish is the *de facto* official language of the government. [355] Indeed, as proved by a successive study carried out by

[355]Terborg, R., Garcia Landa, L., & Moore, P. (2006). The Language Situation in Mexico. Current Issues in Language Planning, 7(4), 1-22.

Terborg et. al (2008), a Spanish speaker whose first language is Otomí, that is, someone who speaks Spanish with an indigenous accent, is regarded as less qualified and has thus fewer chances to obtain a well-paid job than someone who speaks the standard Spanish of the region. [356] Furthermore, the study claims that Otomí speakers are treated as second-class citizens, they are discriminated against and verbally attacked both outside and inside their communities. Proof of that is that in a secondary school in an Otomí community, the principal of the school prohibited the use of indigenous languages.

In addition to the consequences that language barriers have on access to jobs, they have an impact on access to the right to health. Indeed, in Mexico 42 out of every 100 indigenous language speakers are not entitled to health services at the national level. The number is even higher in the states of Oaxaca and Chiapas which register the highest percentages of indigenous population without access to these services, ranging from 18 to 21 per cent.

The commitment of the government to promote and support indigenous peoples' languages can be seen in the creation of the National Institute of Indigenous Languages (INALI) which, together with the National Commission for the Development of Indigenous Peoples (CDI), provides support for the preservation and promotion of Indigenous languages. This was required by the General Law of Indigenous Peoples' Linguistic Rights to guarantee its implementation. This is part of the federal public administration and has different tasks. It has to defend the linguistic rights of indigenous peoples, promote the use of indigenous languages in both the private and public spheres, increase the presence of speakers of indigenous languages in the media, raise awareness about the legal framework of the linguistic rights of the Mexican State, promote research and recognition of the linguistic diversity of the country and promote intercultural policies.

To do it, the institute carries out ethnographic, ethnological, anthropological, and linguistic research on indigenous groups of Mexico, by employing accredited interpreters and translators in indigenous languages in the courts, supporting the establishment of institutes of the same type in the federated states and distributing education and training material with content that takes into account cultural and linguistic pluralities and indigenous languages. During the Covid-19 pandemic, it also took care of the spread of indigenous languages through comics, books, and other resources in virtual form.

[356] Terborg, R. & Velázquez, V. (2008). La muerte de lenguas y la desventaja de ser nativo hablante del otomí en México. UniverSOS, Revista de Lenguas Indígenas y Universos Culturales, No. 5: 129-143

Another initiative adopted by the Mexican government to promote the maintenance, development and consolidation of indigenous languages and cultures by forming professionals committed to working in indigenous communities is Intercultural Universities.[357]

On the other side, despite these initiatives, it seems sometimes almost impossible to guarantee bilingual education. Indeed, even if the law establishes a national system of bilingual intercultural education, there is still a shortage of qualified bilingual teachers and resources in indigenous languages. Consequently, many indigenous children do not receive education in their native language, which can lead to a loss of language and culture. Data reveal that in 72,773 schools with students speaking indigenous languages, there is not even one teacher who also speaks indigenous languages, and in only 59.7 per cent of the cases the teachers' language coincides with that of the students. [358]

Remarkably, practices such as “Castilianization”, which aim to convert speakers of an indigenous language to Spanish, continue to exist in the state of Chiapas and exacerbate this problem.[359]

[357]Secretaria de Educación Pública (2009). Universidades Interculturales. http://www.ses.sep.gob.mx/wb/ses/universidades_interculturales

[358] Barragán D. (2016). En México, 4 millones de niños indígenas van a escuelas sin baños y con maestros no bilingües, Sinembargo.mx, https://www.sinembargo.mx/15-08-2016/3079716

[359] Rich T. (2022). A new survey shines light on the fight to save Mexico’s native languages. Mexico News Daily. https://mexiconewsdaily.com/opinion/the-fight-to-save-mexicos-native-languages/

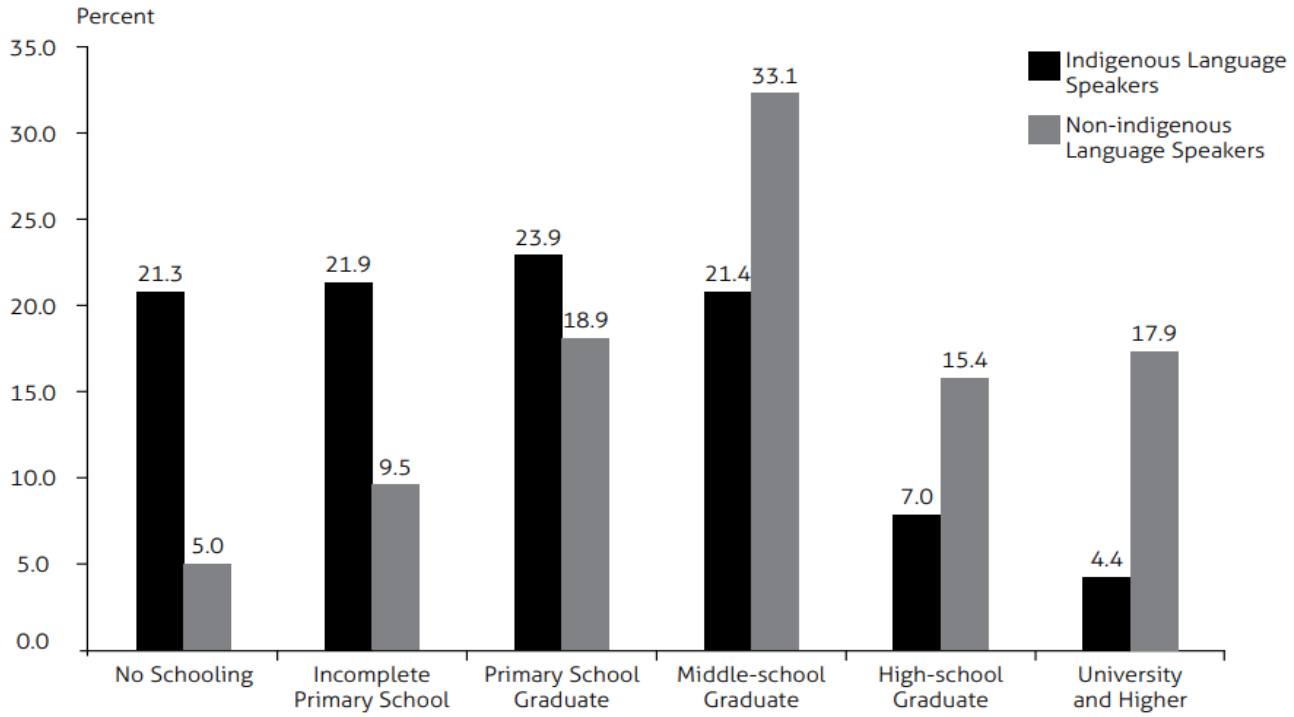


Figure 9: Percent of the Population 15 and Older by Level of Schooling and Language Spoken. (Bugeda Bernal, 2015)[360]

This graph is revelatory of the levels of schooling of indigenous people in Mexico. In particular, it shows that if compared to mono-lingual Spanish speakers, their formal educational levels are much lower. This difference is striking for people that have no schooling. Indeed, the analphabets represent 21.3 per cent among indigenous language speakers compared to 5 per cent among non-indigenous language speakers.

Another problem that was found arising from the violation of the linguistic rights of indigenous people concerns the impact that it has on the right to health. Indeed, notwithstanding the provisions of the General Law of Indigenous Peoples' Linguistic Rights, particularly of Article 131, situations of violation of linguistic rights continue to occur in the communities, where health personnel are unaware of the language of the patients and the number of staff needed to support the interpretation of situations that may arise, both to make a clear statement of the disease or condition and to specify the treatment needed to recover health.[361]

Furthermore, there seems to be no compliance with the provisions of the Constitution on full access to state jurisdiction. Indeed, there have been a number of cases or situations in which the native

[360]Bugeda Bernal D. I. (2015). Mexico's Indigenous Languages An Overview. http://www.revistascisan.unam.mx/Voices/pdfs/10912.pdf
The graph is based on estimates made by Conapo during Intercensal Survey of 2015, https://www.gob.mx/cms/uploads/attachment/file/121653/Infografia_INDI_FINAL_08082016.pdf
[361] CNDH México (2016). Derechos lingüísticos de los pueblos indígenas.

language of the indigenous people is not recognized, and it is easier to omit attention to this right than to seek mechanisms that enable full access to the interpreters necessary for the fulfilment of the rights of indigenous people.[362]

Connected with speaking an indigenous language are also high levels of poverty. Indeed, almost seven out of every 100 Mexicans are speakers of an indigenous language and of these, eight out of ten are poor, half of whom live in extreme poverty.[363]

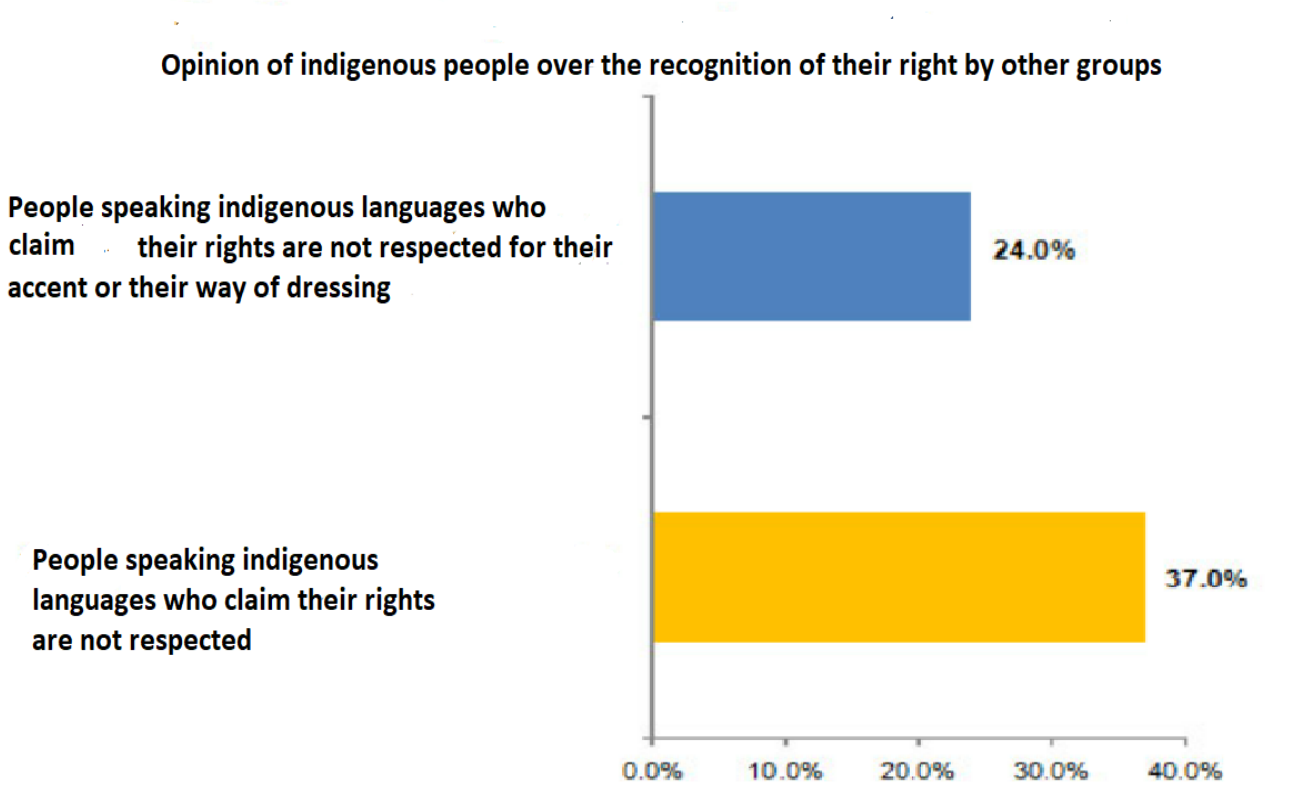


Figure 10: Indigenous People's Views on the Recognition of Their Rights in the Eyes of Others. (CONAPRED, 2010)[364]

This graph was elaborated on the basis of the National Survey on Discrimination in Mexico carried out in 2010 and it shows the perception indigenous have on the respect of their rights. It indicates that 37 per cent of the indigenous-speaking population believes say that their rights are not respected and that 24 per cent of this same group say that this is caused by their accent when speaking and the way they dress. This data is particularly relevant since it shows that in many cases indigenous perceive to be discriminated against on the basis of their culture, and of their language in particular.

[362] *Ibidem*
[363] Singer Sochet, M. (2014). ¿Exclusión o inclusión indígena?. *Estudios políticos (México)*, (31), 87-106. http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S0185-16162014000100005&lng=es&tlng=es
[364] CONAPRED (2010). Discriminación en contra de la población indígena en México. http://www.conapred.org.mx/userfiles/files/Enadis-2010-RG-Accss-001.pdf

In conclusion, what can be drawn from these data is that in practice Spanish seems to be the dominant language in many areas of the country and Indigenous languages are often marginalized and at risk of disappearing due to factors such as language shift, urbanization, and discrimination.

At this point, it is time to consider what is the situation regarding indigenous languages in Brazil. Significantly, Brazil recognizes only Portuguese as the official language, even if there are more than 200 Indigenous languages spoken across the country. This feature is symptomatic of the limited efforts put in by the Brazilian government for the protection and use of indigenous languages. On the other side, it must be considered that years of assimilationist policies carried out in the past combined with the impact of national education, media and language campaigns have led 76.9% of the Indigenous population of Brazil to speak Portuguese.[365]

To compensate for the gap left by the government, as it has been indicated in Chapter 4 for political rights, specific NGOs have been instituted. An example is the Institute for Research and Development in Language Policy (IPOL), a non-profit organization founded in 1999 which advocates for the linguistic and cultural rights of Brazil's linguistic communities in line with the Universal Declaration of Linguistic Rights. IPOL's stated mission is to develop projects that support communities of minority language speakers in Brazil, assisting the government in the maintenance and promotion of Brazilian linguistic diversity.

Interesting data shows how well-designed and implemented policies can have a tangential impact on the rights of indigenous people regards the adoption of Law 12.990/201. Indeed, after then the share of black, brown, and indigenous students at federal universities has passed from 42% to 51%.

Nonetheless, it must be also remarked that in Brazil there is a shortage of teachers and indigenous languages, and cultures are not sufficiently being included in the curriculum. In addition, as affirmed for Mexico, many indigenous children only complete primary school and do not continue schooling after that.

Some relevant data have been collected by the Brazilian Indigenous Peoples' Mission (CIMI) which reported 256 cases of linguistic and cultural discrimination against indigenous peoples in Brazil in 2020. These cases include instances where Indigenous people were denied access to public services

[365] IBGEeduca. (2021). Conheça o Brasil - População – Indígenas. https://educa.ibge.gov.br/jovens/conheca-o-brasil/populacao/20506- indigenas.html

or employment opportunities or were subject to verbal abuse or harassment based on their language.[366]

Two interesting studies regarding the situation of language rights in Brazil deserve mention. One by Casadei (2022) who investigated problems of communication and access to rights of the indigenous population that does not speak Portuguese. [367] The scholar found that the Executive, Legislative and Judiciary branches can be considered non-accessible from a linguistic point of view. The analysis highlighted that the Executive has not implemented any specific policy on the issue, the Legislative has not proposed and approved laws or normative acts regarding accessibility and the judiciary, even if existing legislation provides for the monitoring of translators and interpreters in criminal proceedings, does not give indigenous people the right to communicate and have access to proceedings in their traditional language.

The other study has been carried out by da Silva (2019)[368]. It focuses on indigenous access to justice and highlights that, since this is a constitutional commandment, criminal procedural law must respect the right of indigenous peoples to use their languages but that existing Code of Criminal Procedure makes no mention of the indigenous peoples. In the view of the author, the absence of criteria for dealing with the ethnic and linguistic specificities of indigenous peoples in the criminal sector represents a real obstacle to their access to justice.

Interesting are some initiatives that have been adopted at the international level to revitalize indigenous languages. Some have been adopted by the UNPFII which has on many occasions called on States to introduce indigenous languages in public administration in indigenous territories, to disseminate their activities in publications in indigenous languages, to support the creation of indigenous language and cultural studies centres in universities and encouraged the UNESCO to support such initiatives.

In response to a 2016 recommendation from the UNPFII has been instituted 2019 as the International Year of Indigenous Languages.[369] It was meant to draw attention to the critical loss of indigenous languages and the urgent need to preserve, revitalize and promote them at both national

[366]CIMI (2020). Relatório. Violência Contra os Povos Indígenas no Brasil. https://cimi.org.br/wp-content/uploads/2021/11/relatorio-violencia-povos-indigenas-2020-cimi.pdf

[367] Casadei, MT. (2022). Linguistic (in)accessibility of Indigenous Peoples in State Powers and social (ex)inclusion. https://www.teses.usp.br/teses/disponiveis/8/8161/tde-19082022-174429/publico/2022_MariaTeresaDeMendonca_VCorr.pdf

[368] Da Silva J.I. (2019). Direitos Linguísticos Dos Povos Indígenas No Acesso À Justiça: A Disputa Pelo Direito Ao Uso Das Línguas Indígenas Em Juízo A Partir Da Análise De Três Processos Judiciais. https://repositorio.ufsc.br/bitstream/handle/123456789/215161/PLLG0772-T.pdf?sequence=-1&isAllowed=y

[369] UNESCO Bangkok (2019). Hack the future: Preserving indigenous languages through free and open source software. https://bangkok.unesco.org/content/hack-future-preserving-indigenous-languages-through-free-and-open-source-software

and international levels and to take further urgent steps at the national and international levels. Nevertheless, since these objectives require prolonged and sustained efforts to be realized, the UN General Assembly proclaimed the International Decade of Indigenous Languages from 2022 to 2032. UNESCO was designated as the lead agency for the International Decade in collaboration with the DESA and other relevant agencies.

UNESCO and its partners developed a Global Action Plan for the International Decade and remarkably Brazil and Mexico are among the member states that have adopted national action plans for its implementation.

Another initiative that indirectly relates to it is Target 4.5 of Sustainable Development Goals. Indeed, this aims to ensure equal access to all levels of education and vocational training for indigenous peoples and the use of indigenous languages in education and training has been strongly put forth as an approach to meet this target. In the view of the IWGIA, this can be done by guaranteeing to indigenous people specific curricula, timetables that respect indigenous traditions, differentiated teaching methodologies, educational materials published in Indigenous languages and teacher training for Indigenous individuals so that they can teach in our communities.[370]

5.4 Conclusions

This Chapter has aimed to highlight the legislative framework and the actual situation and policies adopted in Mexico and Brazil on indigenous language rights. The previous paragraph has attempted to point out that government actions and public policies are not absent but, as it emerges from the data, the graphs and the studies, are not enough to fully guarantee these rights. For this reason, States should guarantee the presence of teachers that speak indigenous languages in school, interpreters and defenders who know indigenous languages, documents and information available in indigenous languages to guarantee this right.

Clearly, as can be seen from provisions such as that of ILO Convention 107, and as it has been highlighted in Chapter 1, it has also to be considered that only recently more attention has been put on indigenous languages.

[370]IWGIA (2022). Indigenous Peoples, public policies and elections in Brazil. https://www.iwgia.org/en/brazil/4990-indigenous-peoples,-public-policies-and-elections-in-brazil.html

The present Chapter has also tried to prove that education is key to guaranteeing this right. Indeed, education has the potential of saving and reviving indigenous languages that are on the brink of extinction. Bilingual education combined with mass media and telecommunication systems has the potential to strengthen and revive indigenous languages.

Final Remarks

This research thesis has sought to address the question of whether the legal and institutional systems of Brazil and Mexico adequately protect the rights of indigenous communities, both at normative and practical levels.

Throughout the chapters, this work has gathered evidence indicating that these two systems do not effectively safeguard the rights of indigenous peoples. Several reasons contribute to this conclusion.

Firstly, the normative system falls short of protecting indigenous rights. Internationally, there are limited legally binding instruments dedicated to indigenous protection. Notably, the UNDRIP is a non-binding document, rendering state participation voluntary and allowing states to avoid accountability when they disregard it. In addition, both the UNDRIP and ILO Conventions promote a notion of participation that fails to consider the practical consequences in cases of dissent among indigenous populations.

Secondly, even when courts such as the IACtHR rule in favour of indigenous communities, governments often fail to respect these rulings in practice. In this regard, it deserves to be pointed out that the Court enforces the American Convention on Human Rights and the American Declaration on Human Rights which are instruments not specifically tailored to indigenous people. Therefore, the Court has had to interpret and adapt the articles of these instruments to the demands of indigenous people.

Thirdly, the formulation of many conventions and declarations often lacks clarity, leaving their interpretation and practical implementation to the discretion of the interpreter. Ambiguous phrases like "whenever possible," "appropriate measures," and "adequate opportunities" in Article 4.3 of the UN Declaration on Minorities negatively impact indigenous rights, leaving them in a state of uncertainty.

Fourthly, in the Constitutions of both Brazil and Mexico, the rights granted to indigenous peoples are not absolute and can be infringed upon by the state in the name of public interest. It is the case for the right to FPIC that in Brazil, according to Directive 303/2012 by the Attorney General of the Union, can be superseded in case of exceptional situations.

Fifthly, some laws and conventions on indigenous people still in force have an assimilationist and integrationist approach towards indigenous people and contrast with more advanced instruments of protection of indigenous rights. It is the case for the Indian Statute, a 1973 Brazilian law which contains many provisions on indigenous populations that contrast those contained in the Constitution.

A significant example is Article 1 of the Statute which declares that the indigenous population should be integrated harmoniously and progressively into Brazilian society while the Constitution in Article 231 recognizes the cultural autonomy of indigenous peoples. Similarly, ILO Convention 107 which contains an assimilationist and integrationist approach towards indigenous is still in force and, on many grounds, it conflicts with the ILO Convention 169. Furthermore, even if laws, conventions or constitutions do not directly infringe upon indigenous rights, they hinder them by not considering the specific situation of indigenous people. As a way of example, Article 91 of the Brazilian Electoral Code stipulates that Brazilian citizens, and consequently also indigenous people, must vote if they are over 18 years old and literate in Portuguese, thus excluding indigenous individuals who do not speak Portuguese.

Sixthly, many instruments that are used to protect indigenous rights are not specifically tailored to their situation. As Thornberry (2002) points out, indigenous individuals may and do benefit from charters that protect human rights in general or those of minorities, but the problem with focussing on these "*undifferentiated*" instruments is that the specific indigenous voice "*may be lost*".[371]

Lastly, the existence of legally binding instruments, as is the case for ILO 169, does not guarantee compliance. Indeed, both Brazil and Mexico have violated it on many grounds but the lack of significant consequences in the case of non-compliance with a convention or a treaty deters from implementing it.

Even when it appears that these documents are protecting indigenous rights, attention must be paid to the formulation of the provisions. For example, the Brazilian Constitution acknowledges the existence of indigenous languages, but it does not grant them the status of official languages as it does for Portuguese in Article 13.

Furthermore, both national constitutions and international instruments often do not consider the cosmovision of indigenous people and, for this reason, are less effective in the protection of their rights. A simple example is that compensation for lands, territories, and resources subtracted to indigenous people is often considered an optimal solution, almost like restitution of them, while it is neglected the spiritual and cultural values that they have for indigenous communities. In addition, as noted by Melo (2006), this does not consider the undesirable impacts this type of measure might have

[371] Thornberry, P. (2002). Indigenous Peoples and Human Rights, Manchester University Press, p. 87

on the life of communities with little contact with the market economy. [372] In the same way, many documents refer to indigenous people as a macro-category having one language and one culture without considering their specificities and that indigenous communities differ greatly from each other.

Finally, the existing instruments of protection of indigenous rights such as demarcation, are often lengthy and complicated and require years to be effectively put in place and to grant the connected rights to indigenous people.

From these observations, it is clear that the existing instruments do not adequately protect indigenous people at a normative level. This deficiency also has tangible consequences at the practical level. Numerous pieces of evidence support this hypothesis.

In several cases, projects are carried out on indigenous lands without their consent (the Independence Aqueduct and the Mayan Train in Mexico are only a few of the numerous examples) and Indigenous groups that attempt to protect their lands face threats and violence and sometimes they are even killed by miners, criminal organizations or other private actors that want to subtract lands and resources to indigenous people.

Further violations of indigenous rights are apparent in the realms of political and language rights. In Mexico, indigenous people are not guaranteed proper bilingual education, as teachers often do not speak indigenous languages and instead impose the use of Spanish. In addition, the speakers of indigenous languages are and feel discriminated against for this.

Additionally, governments frequently fail to implement effective affirmative action policies, and when they do, these policies often fall short for various reasons. For example, despite the indigenous quotas established by the Federal Code of Electoral Institutions and Procedures in Mexico, only seven indigenous candidates were elected in 2018.

Constitutional provisions that defend indigenous rights are often not implemented. A remarkable case is Article 67 of the Temporary Provisions of Brazilian Constitutions which required the demarcation of all 532 recognized indigenous areas by 1993 but, at the moment, demarcation is still pending for 241 Indigenous territories [373].

The aforementioned examples serve as indicative elements of the prevailing approach toward indigenous rights in Brazil, Mexico, and the international community. The findings presented in the

[372] Melo, M. (2006). Recent advances in the justiciability of indigenous rights in the Inter-American System of Human Rights. SUR, 4, https://sur.conectas.org/en/recent-advances-justiciability-indigenous-rights-inter-american-system-human-rights/

[373]Human Rights Watch (2022). Brazil: Indigenous Rights Under Serious Threat, https://www.hrw.org/news/2022/08/09/brazil-indigenous-rights-under-serious-threat

preceding chapters and summarized in this conclusion demonstrate that, for different reasons and in different ways, neither Brazil nor Mexico possesses legal and institutional systems that protect indigenous rights "on paper" or in practice.

It is important to note that the limited existing literature on indigenous rights, particularly in the context of Mexico and Brazil, and the challenges in accessing data on indigenous populations not only in English but also in Spanish and Portuguese, further underscore the insufficient attention dedicated to indigenous peoples. This deficiency complicates the possibility of addressing targeted policies for indigenous people to improve the respect of their rights.

Clearly, there are differences between the two countries which are due to the different histories of indigenous groups living there. Indeed, in Mexico, there are more indigenous people who are concentrated in some areas. These make it "easier" for them to come together and bring forward their instances. It has been the case for the *Ejército Zapatista de Liberación Nacional* (EZLN) which since the 1980s has fought for the land, political and cultural rights of the indigenous populations in Mexico. This has led, for example, to relatively greater implementation of land rights in the form of *ejidos* in Mexico, which has not happened in Brazil where the process of demarcation is blocked. It has also to be remarked that thanks to this movement has been amended Article 2 of the Mexican Constitution and have been stipulated the San Andrés Accords which recognize self-determination, autonomy, and participation in decision-making processes and the right to the collective use of common lands by indigenous people.

The different numbers and distribution of indigenous populations have also had important reflections on the models and policies of integration adopted towards indigenous issues. Indeed, Mexico opted for a multicultural approach, acknowledging the distinct identities and rights of indigenous peoples, including their languages, customs, and territories. On the other hand, Brazil has historically followed a melting pot approach, seeking to integrate indigenous populations into mainstream society. Consequently, indigenous people, as also Afro-American and other minorities, have been forced to assimilate into the culture of the colonizers.

Even if neither the Mexican nor the Brazilian legal and institutional framework existing on indigenous rights adequately protects indigenous rights both at the normative and practical level, it can be affirmed that the Mexican one is more protective of indigenous rights in both dimensions. The reason has to be traced probably in the different colonization history, numbers and distributions of indigenous people on the territories which has influenced the policies adopted towards indigenous people.

This thesis seeks to make a contribution to the literature on indigenous rights by providing a comprehensive overview of the legislation and institutions related to indigenous rights at the international and state levels in Brazil and Mexico. By doing so, it aims to shed light on the areas that are adequately addressed and those that still require attention, as well as the effectiveness of the existing legal and institutional framework.

Moreover, the research indicates the presence of deficiencies at both the normative and practical levels. However, there are some recommendations that states could follow to address some of these shortcomings.

In the first place, the instruments existing at the international level on indigenous rights should be binding and should be instituted courts that can impose penalties on the states that do not respect them. These conventions and treaties should be designed specifically for indigenous people.

In the second place, constitutions should contain specific provisions on demarcation and on the right to free, prior and informed consent and, in the case in which they are not enforced, bring governments or private actors to national courts that impose penalties on them.

In third place, states should adopt effective affirmative action policies after deeply studying how they can improve the political rights of indigenous people.

In fourth place, laws and constitutions should promote indigenous languages to avoid their disappearance and guarantee that education, justice, information and all the services are available in indigenous languages.

Finally, the governments should follow through on the various declarations of the international community, the Venice Commission, the United Nations High Commissioner for Human Rights, international human rights organizations and other bodies concerning the situation of their indigenous peoples.

Considering these above-mentioned elements and these “recommendations”, this thesis is written with the hope that greater attention and protection both on the normative and practical side will be afforded to these populations in the near future.

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