

# The Case of Indigenous Peoples in Latin America: Substantive Justice and the Right to Self-Determination

*El Caso de los Pueblos Indígenas en América Latina: Justicia Sustantiva y Derecho a la Autodeterminación*

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## ABSTRACT

This paper explores the dimension of substantive justice within the context of indigenous peoples' right to self-determination in Latin America. It contends that substantive justice requires not only formal recognition of collective and individual indigenous rights, but also their actualisation in conditions of equality, meaningful participation, and cultural respect. Drawing on case studies across several Latin American countries, the study examines how public policies, legal frameworks, and governance practices have responded—and at times failed—to these demands. Findings indicate that despite legislative advances, implementation remains uneven, with barriers such as inadequate prior consultation, economic exclusion, and development models imposed

without cultural recognition. The study concludes by proposing a substantive justice approach that incorporates participatory mechanisms, indigenous control over resources, and genuine transformation of legal and social relations.

**Keywords** *indigenous peoples, self determination, substantive justice, Latin America, collective rights*

## RESUMEN

Este estudio aborda la dimensión de la justicia sustantiva en el marco del derecho a la autodeterminación de los pueblos indígenas en América Latina. Se argumenta que la justicia sustantiva exige que no solo se reconozcan formalmente los derechos colectivos e individuales de los pueblos indígenas, sino que también se materialicen en condiciones de igualdad, participación efectiva y respeto cultural. A partir de casos en varios países latinoamericanos, se analiza cómo las políticas públicas, los marcos legales y las prácticas de gobernanza han respondido —o no— a estas exigencias. Los hallazgos muestran que, pese a avances legislativos, la implementación sigue siendo desigual, con obstáculos tales como la falta de consulta previa, la exclusión económica y la imposición de modelos de desarrollo sin reconocimiento cultural. El estudio concluye proponiendo un enfoque de justicia sustantiva que incorpore mecanismos de participación, control indígena sobre recursos y real transformación de las relaciones jurídicas y sociales.

**Palabras clave** *pueblos indígenas, autodeterminación, justicia sustantiva, América Latina, derechos colectivos*

## A. Introduction

Indigenous peoples in Latin America embody one of the most enduring paradoxes of modern constitutional democracies.<sup>1</sup> Although they comprise a significant proportion of the population—an estimated 50 million people across the continent—they continue to experience social, political, and economic marginalization rooted in centuries of colonial domination.<sup>2</sup> From the sixteenth century onward, European

<sup>1</sup> Yashar, Deborah J. "Democracy, indigenous movements, and postliberal challenge in Latin America." *World Politics* 52, no. 1 (1999): 76-104; Van Cott, Donna Lee. "Building inclusive democracies: Indigenous peoples and ethnic minorities in Latin America." *Democratization* 12, no. 5 (2005): 820-837.

<sup>2</sup> Stavenhagen, Rodolfo. "Indigenous peoples and the state in Latin America: An ongoing debate." *Multiculturalism in Latin America: Indigenous rights, diversity and democracy*. London: Palgrave Macmillan UK, 2002, pp. 24-44; Polanco, Héctor Díaz. *Indigenous peoples in Latin America: The quest for self-determination*. London:

conquest disrupted Indigenous civilizations, dispossessing them of land, resources, and sovereignty. The colonial legacy of racial hierarchy, cultural assimilation, and territorial expropriation has profoundly shaped the post-independence states that emerged in the nineteenth century. Even as these republics proclaimed equality and citizenship, they did so on the basis of assimilationist models that denied the collective identities and governance systems of Indigenous nations.<sup>3</sup>

This historical exclusion has persisted into the twenty-first century. Across Latin America, Indigenous peoples remain disproportionately affected by poverty, land insecurity, and political underrepresentation. Development policies, extractive industries, and large-scale infrastructure projects frequently encroach on their territories, often without free, prior, and informed consent. These realities expose the contradictions between formal constitutional guarantees of equality and the persistence of colonial structures of domination. Yet the last three decades have also witnessed a remarkable political and legal resurgence of Indigenous movements that has redefined the discourse of rights and citizenship in the region.<sup>4</sup>

The 1990s marked the emergence of what scholars have termed the *Indigenous renaissance* or *Indigenous constitutional moment*.<sup>5</sup> In Bolivia, Ecuador, Mexico, and Chile, among others, Indigenous movements mobilized to demand recognition of their collective identities, languages, and ancestral territories.<sup>6</sup> In Bolivia, sustained mobilization led to the reconstitution of the state as *Plurinational* under the 2009 Constitution, which recognizes 36 Indigenous nations and their right to self-governance.<sup>7</sup> Ecuador's 2008 Constitution enshrined the concept of *Sumak Kawsay* (*Buen Vivir*), linking Indigenous cosmologies to the state's development model and granting

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Routledge, 2018; Quijano, Aníbal. "The challenge of the "indigenous movement" in Latin America." *Socialism and Democracy* 19, no. 3 (2005): 55-78.

<sup>3</sup> Gabbert, Wolfgang. "The second conquest: Continental and internal colonialism in nineteenth-century Latin America." *Shifting Forms of Continental Colonialism: Unfinished Struggles and Tensions*. Singapore: Springer Nature Singapore, 2019, pp. 333-362.

<sup>4</sup> Piscopo, Jennifer M., and Kristin N. Wylie. "Gender, Race, and Political Representation in Latin America." *Oxford Research Encyclopedia of Politics*. 2020; Cruz-Saco, Maria Amparo. "Indigenous communities and social inclusion in Latin America." *United Nations Expert Group Meeting on Families and Inclusive Societies New York Headquarters*. 2018.

<sup>5</sup> Esteban, Aitor. "A comparative discussion of indigenous rights under constitutional law." *Estudios de Deusto: Revista de Derecho Público* 51, no. 1 (2003): 169-189.

<sup>6</sup> Albó, Xavier. "Indigenous movements in Bolivia, Ecuador and Peru." *Development and semi-periphery-post-neoliberal trajectories in South America and central Eastern Europe* (2012): 105-122.

<sup>7</sup> See Postero, Nancy. *The indigenous state: Race, politics, and performance in plurinational Bolivia*. University of California Press, 2017.

legal rights to nature itself.<sup>8</sup> In Mexico, the 1994 Zapatista uprising in Chiapas articulated a radical vision of autonomy and participatory democracy that transcended conventional legal frameworks.<sup>9</sup> In Chile, Indigenous mobilization has influenced constitutional debates and human rights advocacy, culminating in the recent—though ultimately unsuccessful—attempt to draft a new constitution that incorporated Indigenous self-determination as a foundational principle.<sup>10</sup>

These national transformations parallel developments in international law, where the rights of Indigenous peoples have gained unprecedented recognition. Two instruments are especially significant. The International Labour Organization's Convention No. 169 (1989) establishes binding obligations for states to recognize Indigenous peoples' rights to land, consultation, and self-governance.<sup>11</sup> The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) affirms the right of Indigenous peoples to self-determination, autonomy, and cultural integrity.<sup>12</sup> The Inter-American human rights system has reinforced these norms through landmark decisions, such as *Awas Tingni v. Nicaragua* (2001)<sup>13</sup>, *Saramaka People v. Suriname* (2007)<sup>14</sup>, and *Sarayaku v. Ecuador* (2012)<sup>15</sup>, recognizing that territorial and cultural rights are essential to Indigenous survival. Together, these

<sup>8</sup> Benalcázar-Ibujes, Jetsael Sebastian, et al. "Buen Vivir (Sumak Kawsay) en la constitución del Ecuador [Good Living (Sumak Kawsay) in the Constitution of Ecuador]." *Verdad y Derecho. Revista Arbitrada de Ciencias Jurídicas y Sociales* 3, no. especial 3 UNIANDES (2024): 498-505.

<sup>9</sup> Mora, Mariana. *Decolonizing politics: Zapatista indigenous autonomy in an era of neoliberal governance and low intensity warfare*. The University of Texas at Austin, 2008.

<sup>10</sup> Rodríguez, Patricia, and David Carruthers. "Testing democracy's promise: Indigenous mobilization and the Chilean state." *Revista Europea de Estudios Latinoamericanos y del Caribe/European Review of Latin American and Caribbean Studies* (2008): 3-21.

<sup>11</sup> Yupsanis, Athanasios. "ILO Convention No. 169 concerning Indigenous and tribal peoples in independent countries 1989-2009: An overview." *Nordic Journal of International Law* 79, no. 3 (2010): 433-456; Yupsanis, Athanasios. "The International Labour Organization and Its Contribution to the Protection of the Rights of Indigenous Peoples." *Canadian Yearbook of International Law/Annuaire canadien de droit international* 49 (2012): 117-176.

<sup>12</sup> Odello, Marco. "The United Nations Declaration on the Rights of Indigenous Peoples." *Handbook of Indigenous Peoples' Rights*. London: Routledge, 2016, pp. 51-68.

<sup>13</sup> See Alvarado, Leonardo J. "Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of *Awas Tingni v. Nicaragua*." *Arizona Journal of International & Comparative Law* 24, no. 3 (2007): 610.

<sup>14</sup> See Orellana, Marcos A. "Saramaka People V. Suriname. Judgment (Preliminary Objections, Merits, Reparations, and Costs)." *American Journal of International Law* 102, no. 4 (2008): 841-847.

<sup>15</sup> See Verbeek, Carol Y. "Free, Prior, Informed Consent: The Key to Self-Determination: An Analysis of 'The Kichwa People of Sarayaku v. Ecuador'." *American Indian Law Review* 37, no. 1 (2012): 263-282.

instruments constitute an emerging regional and global framework for Indigenous justice.

Nevertheless, the translation of these norms into practice remains inconsistent. Despite the proliferation of legal guarantees, Indigenous communities continue to face systemic barriers to exercising real autonomy. The persistence of extractivist economic models, centralized state authority, and institutional racism reveals the limits of a justice system still embedded in colonial hierarchies. The question, therefore, is not only whether Indigenous rights are recognized but whether they are realized in ways that achieve substantive justice—justice that goes beyond formal equality to address historical wrongs, redistribute power, and ensure genuine self-determination.<sup>16</sup>

The central paradox facing Indigenous peoples in Latin America lies in the disjunction between formal recognition and substantive realization. Many states now acknowledge Indigenous rights within their constitutions and statutes, yet structural exclusion and dependency persist.<sup>17</sup> Legal equality, while symbolically important, often conceals deep inequalities in access to resources, participation in decision-making, and control over ancestral lands.<sup>18</sup> The persistence of forced displacement, environmental degradation, and criminalization of Indigenous activists<sup>19</sup> indicates that these rights remain largely theoretical.

This gap reflects the difference between formal equality—the equal application of legal rules—and substantive justice, which demands equitable outcomes that reflect context, history, and power relations. Formal equality treats Indigenous peoples as identical to other citizens,

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<sup>16</sup> Hendry, Jennifer, and Melissa L. Tatum. "Human Rights, Indigenous Peoples, and the Pursuit of Justice." *Yale Law & Policy Review* 34, no. 2 (2016): 351-386; Young, Stephen. *Indigenous peoples, consent and rights: troubling subjects*. London: Routledge, 2019.

<sup>17</sup> Quijano, Aníbal. "The challenge of the "indigenous movement" in Latin America." *Socialism and Democracy* 19, no. 3 (2005): 55-78. See also Cusicanqui, Silvia Rivera. "The notion of "rights" and the paradoxes of postcolonial modernity: Indigenous peoples and women in Bolivia." *Qui Parle: Critical Humanities and Social Sciences* 18, no. 2 (2010): 29-54.

<sup>18</sup> See Bello, Álvaro, and Marta Rangel. "Equity and exclusion in Latin America and the Caribbean: the case of Indigenous and Afro-descendant peoples." *Cepal Review* 2002, no. 76 (2002): 39-53.

<sup>19</sup> See also Lema, Daqui, and Augusta Vasquez. "Forced Displacement of Indigenous Peoples in the Amazon Caused by Environmental Hardship: A Case for Human Security." *Peace Human Rights Governance* 6, no. 2 (2022): 159-180; Rodríguez, Iokiñe, and Mirna Liz Inturias. "Conflict transformation in indigenous peoples' territories: doing environmental justice with a 'decolonial turn'." *Development Studies Research* 5, no. 1 (2018): 90-105; Hanna, Philippe, Esther Jean Langdon, and Frank Vanclay. "Indigenous rights, performativity and protest." *Land Use Policy* 50 (2016): 490-506.

overlooking the collective dimensions of their existence and the historical injustices they have endured. Substantive justice, by contrast, requires differentiated measures to redress these inequities and to empower Indigenous nations as self-determining political communities. The challenge, then, is to understand how the principle of substantive justice can guide the transformation of legal and political systems that continue to reproduce inequality under the guise of neutrality.

This study explores how the principle of substantive justice applies to the right of Indigenous peoples in Latin America to self-determination. It seeks to clarify the extent to which contemporary state frameworks—constitutional, judicial, and administrative—realize or restrict this right, and what reforms are necessary to achieve justice in both legal and moral terms. Three guiding research questions structure the analysis:

- 1) How can substantive justice be conceptualized and operationalized in relation to Indigenous peoples' collective right to self-determination?
- 2) To what extent do current state frameworks in Latin America promote or constrain this right in practice?
- 3) What legal, institutional, and normative reforms are required to achieve substantive justice for Indigenous nations?

The objective is to bridge normative theory and empirical reality, examining how substantive justice functions as both a moral principle and a policy framework. The study moves beyond a descriptive account of rights recognition to a critical evaluation of how justice can be realized within plural, postcolonial societies.

This research contributes to ongoing debates at the intersection of human rights law, Indigenous studies, and political philosophy. By articulating the right to self-determination through the lens of substantive justice, the paper advances a theoretical and comparative framework for evaluating the depth of democratic inclusion in multicultural states. It argues that justice for Indigenous peoples requires not merely recognition within existing legal systems, but the transformation of those systems to reflect multiple epistemologies, governance traditions, and conceptions of well-being.<sup>20</sup>

The significance of this study is both academic and practical. Conceptually, it extends theories of justice—traditionally focused on individual rights—toward collective dimensions of identity, territory, and autonomy. Empirically, it examines how constitutional and policy

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<sup>20</sup> Przybylinski, Stephen, and Johanna Ohlsson. "Indigenous Approaches to Justice", in *Theorising Justice: A Premier for Social Scientist*. Bristol: Bristol University Press, 2023, pp. 107-123.

reforms in Bolivia, Ecuador, and Chile illustrate both progress and regression in implementing Indigenous self-determination. These cases reveal the complexities of reconciling state sovereignty with Indigenous nationhood and highlight how legal pluralism can function as a vehicle for substantive, rather than merely symbolic, justice.

## B. Literature Review and Theoretical Framework

### 1. The Concept of Substantive Justice

Substantive justice is a multidimensional concept central to legal and political philosophy, human rights discourse, and normative debates concerning marginalized or historically oppressed communities.<sup>21</sup> Unlike formal or procedural justice, which focuses on the uniform application of laws and equality before legal rules, substantive justice emphasizes outcomes that correct structural inequalities, empower disadvantaged groups, and address historical wrongs. Within the context of Indigenous peoples, substantive justice extends beyond mere legal recognition to ensure meaningful autonomy, material security, and political participation, thereby transforming formal equality into practical, lived equality.

The theoretical foundations of substantive justice have been explored extensively by philosophers and legal theorists. John Rawls's theory of justice as fairness provides a normative framework for considering how institutional arrangements can compensate for historical and structural disadvantage. In *A Theory of Justice* (1971), Rawls advances the difference principle, which permits inequalities only if they benefit the least advantaged. Applying this to Indigenous contexts, one can argue that redistributive measures—such as land reform, political representation, and resource control—are morally justified to redress historical expropriation and marginalization.<sup>22</sup> Rawls' framework underscores that justice is not merely procedural but requires attention to outcomes, particularly for communities historically excluded from social, political, and economic spheres.<sup>23</sup>

Amartya Sen offers a complementary lens through his capabilities approach, which shifts the focus from rights or resources to real freedoms and opportunities.<sup>24</sup> According to Sen, justice must be

<sup>21</sup> Ehrenreich, Nancy. "Foreword: Conceptualizing Substantive Justice." *The Journal of Gender, Race, and Justice* 13, no. 3 (2010): 533.

<sup>22</sup> Rawls, John. "A Theory of Justice." *Applied Ethics*. London: Routledge, 2017, pp. 21-29. See also Chapman, John W. "Rawls's theory of justice." *American Political Science Review* 69, no. 2 (1975): 588-593.

<sup>23</sup> Amartya, Sen. "What do we want from a theory of justice?." *Theories of Justice*. London: Routledge, 2017, pp. 27-50.

<sup>24</sup> Sen, Amartya. "The Idea of Justice." *Journal of Human Development* 9, no. 3 (2008): 331-342.



assessed by whether individuals and communities possess the substantive capacities to live lives they value.<sup>25</sup> For Indigenous peoples, this entails access to land, governance over communal resources, preservation of language and culture, and participation in decision-making processes. Sen's framework emphasizes that justice is measured not only by formal entitlements but by the extent to which social, political, and economic structures allow people to exercise their capabilities.

In legal theory, Ronald Dworkin emphasizes that law carries a moral dimension, requiring legal systems to respect human dignity and interpret rights in ways that recognize individuals and groups as moral equals.<sup>26</sup> Dworkin's perspective aligns closely with Indigenous struggles, highlighting that legal recognition of collective rights—such as territorial autonomy or self-governance—is necessary to honor the inherent dignity and agency of Indigenous nations. Without these moral considerations, formal rights risk becoming symbolic gestures that fail to address systemic oppression.

Nancy Fraser contributes a multidimensional model of justice that integrates three interrelated dimensions: redistribution, recognition, and representation. Redistribution addresses economic inequalities and structural disadvantage; recognition affirms cultural identity, respect, and dignity; and representation ensures meaningful participation in political and institutional processes.<sup>27</sup> For Indigenous communities, Fraser's framework is particularly relevant, as struggles often involve intertwined economic marginalization, cultural misrecognition, and political exclusion. Applying Fraser's lens allows scholars and policymakers to assess whether legal and policy reforms genuinely empower Indigenous peoples or merely offer formal acknowledgment without substantive change.

Substantive justice thus emerges as a normative ideal and a practical benchmark. For Indigenous peoples in Latin America, it implies more than constitutional guarantees or symbolic inclusion; it demands institutional reforms, material redistribution, and legal mechanisms that enable self-determination. Justice, in this view, is measured by lived outcomes: the capacity of Indigenous communities

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<sup>25</sup> See also Sen, Amartya. "Gender Inequality and Theories of Justice." *Women, Culture and Development: A Study of Human Capabilities* (1995): 259–273.

<sup>26</sup> Dworkin, Ronald M. "The Elusive Morality of Law." *Villanova Law Review* 10, no. 4 (1965): 631.

<sup>27</sup> Fraser, Nancy. "Re-framing justice in a globalizing world." (Mis) *recognition, social inequality and social justice*. London: Routledge, 2007, pp. 29–47; Fraser, Nancy. *Scales of justice: Reimagining political space in a globalizing world*. Vol. 31. Columbia University Press, 2009.



to exercise agency, maintain cultural integrity, and govern their own affairs in a manner consistent with their traditions and values.

## 2. The Right to Self-Determination in International Law

The right to self-determination is a central pillar of Indigenous justice within international legal frameworks. Its historical development reflects a tension between state sovereignty and the collective rights of Indigenous nations.<sup>28</sup> The principle was first codified in Article 1 of the United Nations Charter (1945), which affirms the right of peoples to freely determine their political status and pursue economic, social, and cultural development.<sup>29</sup> This foundational norm has been elaborated in subsequent human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR, 1966)<sup>30</sup> and the International Covenant on Economic, Social, and Cultural Rights (ICESCR, 1966)<sup>31</sup>, both of which reinforce the right to self-determination while binding states to promote the welfare of distinct communities.

The evolution of Indigenous-specific norms, particularly during the late twentieth and early twenty-first centuries, further clarifies the legal scope of self-determination. The International Labour Organization's Convention No. 169 (1989) mandates state recognition of Indigenous peoples' collective rights over land, resources, and governance.<sup>32</sup> The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) affirms Indigenous peoples' rights to autonomy, self-governance, and participation in decision-making, while emphasizing free, prior, and informed consent regarding activities that affect their territories.<sup>33</sup> Collectively, these instruments

<sup>28</sup> Emerson, Rupert. "Self-determination." *American Journal of International Law* 65, no. 3 (1971): 459-475.

<sup>29</sup> Kilian, Petr. "Self-Determination of Peoples in the Charter of the United Nations." *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD)* 11, no. 3 (2019): 341-353.

<sup>30</sup> Scheinin, Martin. "Indigenous peoples' rights under the International Covenant on Civil and Political Rights." *International Law and Indigenous Peoples*. Leiden: Brill Nijhoff, 2005, pp. 3-15.

<sup>31</sup> See Saul, Ben, David Kinley, and Jaqueline Mowbray. *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials*. Oxford: Oxford University Press, 2014.

<sup>32</sup> Tomaselli, Alexandra. "Political participation, the international labour organization, and Indigenous peoples: Convention 169 'participatory' rights." *The International Journal of Human Rights* 24, no. 2-3 (2020): 127-143.

<sup>33</sup> Coulter, Robert T. "The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples." *UCLA Journal of International Law and Foreign Affairs* (2010): 1-27.

establish a normative framework that prioritizes the practical exercise of Indigenous sovereignty rather than mere formal acknowledgment.

Despite these advances, the exercise of self-determination often conflicts with state sovereignty, creating legal and political tension. While international law recognizes Indigenous collective rights, it simultaneously affirms the territorial integrity of existing states. This duality can result in a paradox: states may constitutionally recognize Indigenous autonomy, yet limit its practical implementation through restrictive legislation, centralized governance, or bureaucratic inertia. In Latin America, these contradictions manifest in conflicts over resource extraction, environmental protection, and political representation, highlighting the challenge of translating international norms into domestic practice.

Regional human rights jurisprudence provides key insights into these tensions. The Inter-American Court of Human Rights (IACtHR) has issued landmark decisions reinforcing Indigenous self-determination and territorial rights.<sup>34</sup> In *Awas Tingni v. Nicaragua* (2001), the Court recognized communal land tenure as fundamental to Indigenous survival, establishing that governments must respect customary land rights.<sup>35</sup> In *Saramaka People v. Suriname* (2007), the Court affirmed that Indigenous peoples must participate in decisions

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<sup>34</sup> See Navarro, Gabriela CB. *The Effectiveness of the Inter-American Court of Human Rights: The Case of Indigenous Territorial Rights*. Bloomsbury Publishing, 2025; Feriat-Tinta, Monica. "Inter-American Court of Human Rights." *The Environment Through the Lens of International Courts and Tribunals*. The Hague: TMC Asser Press, 2022, pp. 249-287.

<sup>35</sup> *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Inter-American Court of Human Rights, 2001) was a landmark case establishing the international legal precedent for collective Indigenous land rights. The Awas Tingni, an Indigenous community in Nicaragua's Atlantic region, challenged the government's decision to grant logging concessions on their ancestral lands without consultation or legal recognition of ownership. The Court ruled that Nicaragua violated Article 21 (right to property) of the American Convention on Human Rights, affirming that Indigenous peoples possess collective rights to their traditional lands, even in the absence of formal state titles. The decision required Nicaragua to demarcate and title the community's territory and to adopt legal and administrative measures to protect Indigenous land tenure. This case was the first in which an international tribunal recognized collective land rights as a human right, setting a binding precedent for substantive justice, cultural survival, and self-determination across the Americas. See also Anaya, S. James, and Claudio Grossman. "The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples." *Arizona Journal of International and Comparative Law* 19, no. 1 (2002): 1-15; Grossman, Claudio. "Awas Tingni v. Nicaragua: A Landmark Case for the Inter-American System." *Human Rights Brief* 8, no. 3 (2001): 1; Anaya, S. James, and S. Todd Crider. "Indigenous peoples, the environment, and commercial forestry in developing countries: The case of Awas Tingni, Nicaragua." *Human Rights Quarterly* 18, no. 2 (1996): 345-367.

affecting natural resource exploitation.<sup>36</sup> *Sarayaku v. Ecuador* (2012) extended these principles, ruling that consultation is not sufficient unless it is meaningful and conducted in good faith.<sup>37</sup> These cases collectively illustrate that substantive justice requires both legal recognition and enforceable protections for Indigenous autonomy.

### 3. Indigenous Justice in Latin America

Latin America has become a laboratory for experimenting with legal and constitutional frameworks designed to operationalize Indigenous self-determination. These efforts reveal both the possibilities and limitations of substantive justice in practice.

Bolivia exemplifies a comprehensive approach through its 2009 Constitution, which established the country as a Plurinational State. This model recognizes multiple nations within the territory of Bolivia,

<sup>36</sup> The *Saramaka People v. Suriname* (Inter-American Court of Human Rights, 2007) is a landmark case affirming collective land and resource rights of Indigenous and tribal peoples under international law. The Saramaka, a Maroon community in Suriname, argued that state-approved logging and hydroelectric projects on their ancestral lands violated their rights to property, culture, and survival. The Court ruled in their favor, holding that Suriname breached Article 21 of the American Convention on Human Rights by failing to recognize and protect collective ownership. Importantly, the Court established that states must (1) legally recognize collective land tenure, (2) ensure Free, Prior, and Informed Consent (FPIC) for large-scale projects, and (3) guarantee benefit-sharing from resource exploitation. This decision expanded the scope of Indigenous and tribal peoples' rights in the Americas, emphasizing substantive justice, cultural survival, and participatory governance as essential components of human rights protection. See also Orellana, Marcos A. "Saramaka People v. Suriname. Judgment (Preliminary Objections, Merits, Reparations, and Costs)." *American Journal of International Law* 102, no. 4 (2008): 841-847; Brunner, Lisl. "The Rise of Peoples' Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights." *Chinese Journal of International Law* 7, no. 3 (2008): 699-711.

<sup>37</sup> The *Sarayaku v. Ecuador* case (Inter-American Court of Human Rights, 2012) is a pivotal decision affirming Indigenous peoples' rights to territory, consultation, and cultural integrity. The *Kichwa People of Sarayaku*, living in Ecuador's Amazon region, brought the case after the government authorized an oil company to explore their ancestral lands without consultation, resulting in environmental damage and threats to community life. The Court found Ecuador in violation of Articles 21 (right to property) and 23 (political participation) of the American Convention on Human Rights, as well as the duty to ensure Free, Prior, and Informed Consent (FPIC) under ILO Convention No. 169. The judgment required Ecuador to remove explosives left by the company, recognize Sarayaku's territorial rights, and reform consultation procedures. This case strengthened the regional standard that Indigenous consultation must be prior, informed, culturally appropriate, and aimed at obtaining consent, reinforcing substantive justice and self-determination principles. See also López Andrade, Adrián Raúl. "Tiempos encontrados: frente de colonización y la sentencia del caso del pueblo indígena kichwa de Sarayaku contra Ecuador, 2012." *Estado & Comunes, Revista de Políticas y Problemas Públicos* 2, no. 9 (2019): 333-357.

granting Indigenous communities formal authority over their lands, resources, and local governance structures. It also incorporates mechanisms for political representation, participatory democracy, and redistribution of resources.<sup>38</sup> However, the implementation of these reforms has faced challenges, particularly in balancing central state authority with local autonomy and managing resource extraction in Indigenous territories. The Bolivian case highlights that constitutional recognition alone does not guarantee substantive justice; enforcement, institutional capacity, and political will are critical.

Ecuador similarly integrated Indigenous principles into its 2008 Constitution through *Sumak Kawsay* (*Buen Vivir*), a concept derived from Indigenous Andean cosmology. *Sumak Kawsay* reconceptualizes development as the harmonious coexistence of humans, communities, and nature, rather than merely economic growth.<sup>39</sup> The Ecuadorian Constitution recognizes collective rights, environmental stewardship, and culturally grounded governance, reflecting a holistic approach to substantive justice. Nonetheless, conflicts persist, especially regarding resource extraction and industrial development in Indigenous territories, demonstrating the tension between legal ideals and political-economic realities.

Mexico provides a distinctive model through the Zapatista autonomous municipalities in Chiapas, which emerged from the 1994 uprising. These communities operate self-governing institutions grounded in Indigenous law, collective land management, and participatory decision-making. The Zapatista case illustrates that grassroots governance and *de facto* autonomy can achieve aspects of substantive justice that formal legal recognition alone cannot. It also demonstrates the importance of linking recognition, redistribution, and representation at the community level, emphasizing the need for political, social, and economic empowerment.<sup>40</sup>

Chile represents a more contested context. While constitutional reforms and Indigenous consultations have advanced the discourse on self-determination, ongoing debates over land rights, political representation, and resource governance reveal the limits of formal recognition. Indigenous communities continue to confront systemic barriers, including legal ambiguities, administrative inertia, and societal

<sup>38</sup> See Barrantes-Reynolds, María-Paula. "Legal Pluralism in the Constitution of Bolivia of 2009: Between Multiculturalism and Plurinationalism". *PhD Thesis*, University of Leicester, 2016.

<sup>39</sup> Calderon, Noela. "The Benefits of Indigenous Knowledge Systems in Law and Decision Making-A Case Study on Sumak Kawsay, Buen Vivir and Rights of Nature in the Ecuadorian Constitution." *PhD Thesis*, University of Lund, 2023.

<sup>40</sup> Stahler-Sholk, Richard. "Globalization and social movement resistance: the Zapatista rebellion in Chiapas, Mexico." *New Political Science* 23, no. 4 (2001): 493-516.

prejudice. Chile illustrates the challenges of translating multicultural legal frameworks into effective mechanisms for substantive justice, particularly in societies with deeply entrenched inequalities.<sup>41</sup>

Academic debates on Indigenous justice in Latin America frequently contrast liberal multiculturalism with decolonial approaches. Multicultural perspectives emphasize the recognition of cultural differences within the framework of existing state institutions, often prioritizing symbolic inclusion and procedural rights. Decolonial approaches argue for transformative justice, advocating the restructuring of political, legal, and economic systems to dismantle colonial hierarchies and restore Indigenous sovereignty. Substantive justice offers a bridge between these perspectives, insisting that recognition must be accompanied by material redistribution and institutional reform to achieve genuine equality and empowerment.

#### 4. Analytical Gap

Despite extensive scholarship on Indigenous rights in Latin America, a significant analytical gap persists regarding the translation of formal legal recognition into substantive outcomes. Much existing research emphasizes constitutional reforms, procedural inclusion, or symbolic recognition—such as the acknowledgment of Indigenous languages, cultural practices, or limited political representation—without sufficiently interrogating whether these reforms produce real empowerment, control over resources, and meaningful self-governance. While these studies provide valuable descriptive accounts of legal frameworks and policy innovations, they often overlook the practical and multidimensional realization of Indigenous self-determination.

Socially, Indigenous communities continue to experience marginalization despite formal recognition. Studies by Yashar<sup>42</sup> and Van Cott<sup>43</sup> demonstrate that constitutional recognition and political inclusion in Bolivia, Ecuador, and Colombia have not fully dismantled entrenched inequalities in education, health, and economic

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<sup>41</sup> Ugarte Urzua, Magdalena. "Normative Worlds Clashing: State Planning, Indigenous Self-Determination, and the Possibilities of Legal Pluralism in Chile". *PhD Thesis*, University of British Columbia, 2019.

<sup>42</sup> Yashar, Deborah J. *Contesting citizenship in Latin America: The rise of indigenous movements and the postliberal challenge*. Cambridge University Press, 2005.

<sup>43</sup> Van Cott, Donna Lee. *From movements to parties in Latin America: The evolution of ethnic politics*. Cambridge University Press, 2007; Van Cott, Donna Lee. "Indigenous peoples' politics in Latin America." *Annual Review of Political Science* 13, no. 1 (2010): 385-405.

opportunity. Bebbington<sup>44</sup> highlights persistent poverty and social exclusion among Indigenous populations in resource-rich areas, revealing that recognition of rights does not automatically translate into improved living standards or social mobility. Moreover, Tockman<sup>45</sup> and Molina<sup>46</sup> note that social prejudices and structural discrimination continue to impede Indigenous participation in national decision-making, limiting their capacity to exercise meaningful self-determination. These studies reveal a clear social gap: even with legal recognition, Indigenous communities often remain excluded from the benefits and protections that legal reforms ostensibly guarantee.

From a policy and legal perspective, there remains a substantial gap between normative recognition and enforceable rights. While constitutions in Bolivia (2009) and Ecuador (2008) establish plurinational frameworks and incorporate concepts like *Sumak Kawsay* or *Buen Vivir*, enforcement mechanisms are often weak or inconsistent. For example, Van Cott<sup>47</sup> and Gudynas<sup>48</sup> point out that government policies in both countries continue to prioritize extractive economic development over Indigenous land rights, even when these rights are constitutionally guaranteed. Similarly, in Chile, Dana<sup>49</sup> documents that consultations under legal frameworks often remain perfunctory, lacking the meaningful participation required under international law, such as UNDRIP's free, prior, and informed consent (FPIC) standards. In Mexico, while the Zapatista autonomous municipalities demonstrate localized self-governance, these initiatives often exist in parallel to state authority and face persistent legal ambiguity, as noted by Stahler-Sholk.<sup>50</sup>

These cases underscore a policy and legal gap: formal recognition and constitutional provisions are insufficient when political will,

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<sup>44</sup> Bebbington, Anthony. "Social movements and the politicization of chronic poverty." *Development and Change* 38, no. 5 (2007): 793-818.

<sup>45</sup> Tockman, Jason. "The hegemony of representation: democracy and Indigenous self-government in Bolivia." *Journal of politics in Latin America* 9, no. 2 (2017): 121-138.

<sup>46</sup> Molina, George Gray. "The crisis in Bolivia: Challenges of democracy, conflict and human security." In *Democracy, Conflict and Human Security*. Stockholm: International Institute for Democracy and Electoral Assistance, 2006, pp. 25-35.

<sup>47</sup> Van Cott, Donna Lee. *From movements to parties in Latin America: The evolution of ethnic politics*. Cambridge University Press, 2007.

<sup>48</sup> Gudynas, Eduardo. "Buen vivir: Germinando alternativas al desarrollo." *América Latina en movimiento* 462, no. 2 (2011): 1-20.

<sup>49</sup> Dana, Leo-Paul. "Indigenous peoples in Chile." *International Journal of Entrepreneurship and Small Business* 3, no. 6 (2006): 779-786.

<sup>50</sup> Stahler-Sholk, Richard. "Autonomy, collective identity, and the Zapatista social movement." *Rethinking Latin American social movements: Radical action from below* (2014): 185-206.



institutional capacity, and enforcement mechanisms are weak, leading to outcomes that fall short of substantive justice.

Furthermore, academically, there is a research gap in assessing Indigenous justice using a substantive lens. Most studies focus on normative or legal analyses, such as constitutional provisions, treaty obligations, or human rights frameworks, without empirically evaluating whether these reforms produce tangible empowerment, resource control, or effective self-governance. For example, studies by Yashar and Van Cott offer detailed accounts of political inclusion and institutional reforms, but they provide limited analysis of whether these reforms reduce historical inequalities or enhance cultural autonomy.<sup>51</sup> Similarly, while Bebbington and Molina examine social and economic outcomes, these studies are often sector-specific and do not systematically integrate legal, political, and cultural dimensions of justice.<sup>52</sup>

Furthermore, most scholarship treats Indigenous communities as homogeneous, overlooking intersectional inequalities within and among communities—such as gender, generational differences, or geographic disparities—that significantly affect the realization of substantive justice. This gap suggests that current research provides a fragmented view, missing the interplay between legal recognition, social empowerment, and political autonomy.

Addressing these gaps requires a substantive justice framework that bridges social, policy, and research dimensions. Substantive justice emphasizes outcomes over mere recognition, integrating three critical elements:

- 1) Redistribution – ensuring equitable access to land, resources, and economic opportunities to rectify historical dispossession and structural inequalities.
- 2) Recognition – affirming Indigenous cultural identity, autonomy, and self-determined governance systems, moving beyond symbolic acknowledgment.
- 3) Representation – securing meaningful participation in political and institutional decision-making processes to translate rights into practice.

By applying this framework, scholars can evaluate the effectiveness of constitutional reforms and policy measures across Bolivia, Ecuador, Mexico, and Chile, considering whether Indigenous

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<sup>51</sup> See Yashar, "Democracy, indigenous movements, and postliberal challenge in Latin America"; Van Cott, "Building inclusive democracies: Indigenous peoples and ethnic minorities in Latin America."

<sup>52</sup> See Benbington, "Social movements and the politicization of chronic poverty"; Molina, "The crisis in Bolivia: Challenges of democracy, conflict and human security."



communities genuinely experience empowerment, maintain cultural integrity, and exercise autonomous governance. Such an approach integrates philosophical theory (Rawls, Sen, Dworkin, Fraser), international law (UNDRIP, ILO Convention 169), and empirical case studies, providing a holistic lens to assess Indigenous self-determination.

This analytical focus not only addresses social and policy gaps but also identifies where further research is needed—particularly studies that combine legal, sociopolitical, and economic indicators, account for intersectional inequalities, and critically assess the conditions under which recognition translates into real empowerment. In doing so, the substantive justice framework provides a comprehensive methodology to assess and improve the effectiveness of Indigenous rights policies, bridging the disconnect between formal legal recognition and lived realities.

**TABLE 1.** Social Gaps, Policy/Legal Gaps, and Research Gaps for Indigenous self-determination in Bolivia, Ecuador, Mexico, and Chile

| Country | Social Gaps  | Policy / Legal Gaps   | Research Gaps   |
|---------|--|---|---|
| Bolivia | Persistent poverty and inequality in Indigenous-majority areas; social exclusion from health, education, and economic opportunities    | Weak enforcement of land rights and autonomy despite plurinational constitutional recognition. Central government priorities often conflict with Indigenous control over resources.     | Limited empirical studies evaluating the translation of constitutional recognition into tangible empowerment, political authority, and local self-governance. |
| Ecuador | Marginalization of Indigenous communities despite cultural recognition; ongoing socioeconomic disparities in rural and Amazon regions. | Implementation of Sumak Kawsay principles often inconsistent; resource extraction projects proceed without genuine FPIC; tensions between national development and Indigenous autonomy. | Scarce research integrating legal recognition with economic and political outcomes; limited longitudinal analysis of autonomy effectiveness.                  |
| Mexico  | Continued social inequality and exclusion in Indigenous areas; gender and generational disparities within communities.                 | Zapatista autonomous zones recognized locally but legally ambiguous at federal level; limited enforcement of  | Few studies evaluate the effectiveness of grassroots autonomy on broader Indigenous   |

| Country | Social Gaps   | Policy / Legal Gaps   | Research Gaps  |
|---------|---|---|--|
|         |   | Indigenous governance rights.   | empowerment and resource control.  |
| Chile   | Indigenous populations face socioeconomic marginalization and limited access to quality services. | Legal recognition (Indigenous consultation laws) often symbolic; FPIC standards poorly implemented; institutional support weak. | Limited research on the gap between formal consultation rights and actual policy influence; insufficient analysis of long-term empowerment outcomes. |

The comparative table (Table 1) highlights the multidimensional gaps that Indigenous communities face across Bolivia, Ecuador, Mexico, and Chile. Socially, despite formal recognition of their rights, Indigenous populations continue to experience persistent poverty, limited access to education and healthcare, and structural exclusion from economic and political opportunities. These social gaps demonstrate that constitutional reforms or legal recognition alone are insufficient to address historical inequalities or ensure meaningful empowerment. Moreover, disparities within Indigenous communities—based on gender, age, or geographic location—further complicate the realization of substantive justice, illustrating that recognition without redistribution and participation cannot achieve true equity.

From a policy and legal perspective, the table reveals a consistent disconnect between formal rights and enforcement mechanisms. Constitutional reforms and legal frameworks often exist symbolically, with weak institutional support, insufficient political will, and ongoing conflicts with state development priorities undermining Indigenous autonomy. Research gaps are similarly evident: most studies focus on legal recognition or political inclusion but fail to empirically assess whether Indigenous communities gain actual control over land, resources, and governance, or whether reforms improve lived conditions. By systematically comparing these gaps across countries, the table underscores the need for a substantive justice framework that integrates redistribution, recognition, and representation, enabling scholars and policymakers to evaluate whether reforms translate into meaningful empowerment and self-determination for Indigenous populations.

## C. Methodology

### 1. Research Design

This study employs a qualitative, comparative, and socio-legal research design, which is particularly suited to examining the complex intersection of law, politics, and Indigenous social realities. A qualitative approach allows for a nuanced understanding of Indigenous self-determination beyond mere formal legal recognition, emphasizing lived experiences, governance practices, and structural inequalities. Comparative analysis enables the identification of patterns, divergences, and contextual factors across different national settings, while a socio-legal perspective facilitates the exploration of how legal norms are enacted, interpreted, and operationalized in practice.

The study adopts a case study approach, focusing primarily on Bolivia, Ecuador, and Chile. These countries provide compelling examples of varying approaches to Indigenous rights within Latin America. Bolivia and Ecuador have instituted plurinational constitutional frameworks that formally recognize Indigenous peoples' rights, including autonomy and collective land ownership, while Chile represents a more constrained model of recognition with ongoing debates around constitutional reform and consultation processes. By examining these cases comparatively, the study seeks to uncover both the potential and limitations of legal recognition in achieving substantive justice for Indigenous communities.

### 2. Data Sources

The research draws on a combination of primary and secondary sources to construct a comprehensive and multi-dimensional analysis. Primary legal sources include national constitutions, Indigenous rights legislation, and key judgments from the Inter-American Court of Human Rights. These sources provide insight into the formal legal frameworks, the scope of Indigenous rights recognition, and the mechanisms for enforcement or judicial interpretation.

Secondary sources include reports from international organizations such as the United Nations (UN) and the Organization of American States (OAS), publications by non-governmental organizations (NGOs) advocating for Indigenous rights, academic literature examining legal reforms and social outcomes, and Indigenous declarations articulating self-determination claims. Where feasible, the study incorporates qualitative insights from interviews with Indigenous leaders or analyses of public statements, speeches, and policy submissions by Indigenous organizations. These sources provide critical perspectives on the lived experiences of Indigenous

communities, which often remain underrepresented in conventional legal or policy analyses.

### 3. Analytical Framework

The study employs a substantive justice framework as the central analytical lens. This framework evaluates the extent to which legal and political reforms translate into tangible empowerment for Indigenous communities, rather than simply formal recognition of rights. To operationalize substantive justice, the study examines three key indicators:

- 1) **Recognition of Identity and Autonomy:** The degree to which Indigenous peoples are acknowledged as distinct cultural, political, and legal actors, including recognition of their governance structures, customary laws, and self-determination claims.
- 2) **Distribution of Resources:** The allocation and control of land, natural resources, and economic benefits. This indicator examines whether Indigenous communities exercise effective ownership and decision-making over resources essential to cultural and material survival.
- 3) **Participation and Decision-Making Power:** The extent to which Indigenous peoples are able to influence policy, engage in consultation processes, and participate in institutional decision-making on matters affecting their lives and territories.

The framework integrates substantive justice theory (Rawls, Fraser, Dworkin) with decolonial and intercultural approaches, emphasizing the need to recognize Indigenous epistemologies, governance models, and cultural norms. By combining normative theory with empirical evidence, this approach enables a critical assessment of whether Indigenous rights reforms achieve genuine empowerment and equitable outcomes, rather than symbolic compliance with international or constitutional standards.

## D. Case Analysis of Substantive Justice and the Right to Self-Determination in Latin America

### 1. Bolivia: Plurinationalism and the Paradox of the State

Bolivia's 2009 Constitution represents one of the most ambitious attempts in Latin America to institutionalize Indigenous rights and autonomy. By establishing the Plurinational State of Bolivia, the Constitution recognizes Indigenous nations as legal subjects with distinct languages, cultures, and governance structures. Articles 2, 30, and 171 explicitly guarantee Indigenous peoples' rights to self-determination, customary law, and territorial autonomy, reflecting the state's commitment to multiculturalism and legal pluralism. Scholars

such as Van Cott and Yashar highlight Bolivia as a paradigmatic case of constitutional recognition, noting that the inclusion of Indigenous representatives in national and subnational institutions marks a significant step toward political inclusion and social recognition.<sup>53</sup>

In practice, these reforms have led to notable successes. Indigenous communities now participate directly in state institutions, exercise jurisdiction in their territories through Indigenous legal systems, and have formal mechanisms for consultation on development projects. The TCO (*Territorio Comunitario de Origen*) system, for example, legally recognizes collective land ownership, encompassing approximately 13% of Bolivia's national territory.<sup>54</sup> This legal recognition allows Indigenous nations to exercise governance over land allocation, natural resource use, and local justice systems, aligning with Fraser's framework of recognition as a critical component of justice, enabling historically marginalized groups to assert cultural and political identity.<sup>55</sup>

However, the Bolivian case also illustrates the paradox of the state. While the 2009 Constitution enshrines Indigenous autonomy, Bolivia's extractivist economic model—heavily reliant on hydrocarbons and mineral exports—has repeatedly undermined Indigenous land and environmental rights. Large-scale projects such as the TIPNIS highway, intended to connect Amazonian regions with national markets, led to widespread protests from Indigenous communities and demonstrated the tension between constitutional recognition and national economic priorities.<sup>56</sup> Despite formal consultation requirements, many projects proceeded with limited Indigenous participation, highlighting the gap between procedural recognition and substantive empowerment.

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<sup>53</sup> See Yashar, "Democracy, indigenous movements, and postliberal challenge in Latin America"; Van Cott, "Building inclusive democracies: Indigenous peoples and ethnic minorities in Latin America."

<sup>54</sup> Laing, Anna F. "Re-producing territory: Between resource nationalism and indigenous self-determination in Bolivia." *Geoforum* 108 (2020): 28–38. See also Ceolin, Sara. "The Right to Land of Indigenous Peoples in Latin America: collectivity, culture and territory." Thesis. Venezia: Università Ca' Foscari Venezia, 2021.

<sup>55</sup> Fraser, "Re-framing justice in a globalizing world." (*Mis*) recognition, social inequality and social justice.

<sup>56</sup> See Reyes-García, Victoria, et al. "Variety of indigenous peoples' opinions of large infrastructure projects: The TIPNIS road in the Bolivian Amazon." *World Development* 127 (2020): 104751; Springerová, Pavlína, and Barbora Vališková. "Territoriality in the development policy of Evo Morales' government and its impacts on the rights of indigenous people: The case of TIPNIS." *Canadian Journal of Latin American and Caribbean Studies/Revue canadienne des études latino-américaines et caraïbes* 41, no. 2 (2016): 147–172; Walton, Leah. "Indigenous Rights at the Crossroads of Development and Environmental Protection in the Tipnis, Bolivia". Thesis. The University of North Carolina at Charlotte, 2019.

Scholars such as Gudynas<sup>57</sup> argue that plurinationalism risks being symbolic unless coupled with genuine redistribution of economic power and enforceable protections for Indigenous territories.

Empirical data further illustrate persistent social and economic disparities. According to Bolivia's National Institute of, Indigenous households remain disproportionately affected by poverty: 40% of rural Indigenous households live below the poverty line, compared to 18% of non-Indigenous households.<sup>58</sup> These inequalities reflect structural barriers that formal recognition alone cannot overcome, including limited access to quality education, healthcare, and economic opportunities. The Bolivian experience thus exemplifies the critical tension highlighted by Sen<sup>59</sup> and Dworkin<sup>60</sup> between formal rights and capabilities: legal recognition does not automatically translate into the capacity for meaningful participation and self-determination.

## 2. Ecuador: Buen Vivir and Environmental Justice

Ecuador's 2008 Constitution introduces the concept of *Sumak Kawsay* (*Buen Vivir*), reflecting Indigenous philosophies that link human well-being to harmony with nature. Articles 71–74 recognize the rights of nature and affirm Indigenous peoples' collective rights to territories, self-governance, and cultural preservation. This framework represents an innovative approach that combines substantive justice theory with environmental ethics, extending Fraser's<sup>61</sup> argument on redistribution to include ecological stewardship and the interdependence of social and environmental justice.

Despite formal recognition, Ecuadorian Indigenous communities face persistent challenges in asserting territorial and governance rights. Large-scale resource extraction, particularly in the Amazon, creates conflicts between the state's economic priorities and Indigenous autonomy. The Sarayaku case (Inter-American Court of Human Rights, 2012) exemplifies these tensions. The Court ruled in favor of the Sarayaku people, affirming their right to prior consultation and cultural integrity, after the Ecuadorian government had authorized oil exploration without free, prior, and informed consent (FPIC). This landmark decision highlights the potential of international law to

<sup>57</sup> Gudynas, "Buen vivir: Germinando alternativas al desarrollo." *América Latina en movimiento*

<sup>58</sup> See Gigler, Björn-Sören. "Poverty, inequality and human development of indigenous peoples in Bolivia", *Working Paper Series No. 17*, Center for Latin American Studies, Georgetown University.

<sup>59</sup> See Sen, "The Idea of Justice".

<sup>60</sup> See Dworkin, "The Elusive Morality of Law".

<sup>61</sup> Fraser, "Re-framing justice in a globalizing world." (Mis) *recognition, social inequality and social justice*.

enforce substantive justice while simultaneously revealing the limitations of domestic enforcement and political will.

Indigenous experiences provide a more granular perspective. The Sarayaku community, for instance, has developed participatory governance structures to manage their lands and natural resources, including community oversight of oil exploration and environmental monitoring programs. Despite these initiatives, Ecuadorian Indigenous peoples remain economically marginalized: the World Bank on 2020 reports that over 45% of Indigenous households in the Amazon live in multidimensional poverty, with limited access to health and education services. These outcomes suggest that constitutional recognition and international legal protections, while necessary, are insufficient for realizing substantive justice in practice. Scholars such as Bebbington<sup>62</sup> emphasize that Buen Vivir requires alignment between normative recognition, economic redistribution, and enforceable governance rights to achieve empowerment and social justice.

### 3. Chile: Constitutional Reform and Indigenous Rights

Chile presents a contrasting case, where legal recognition of Indigenous peoples remains limited despite multicultural rhetoric. The 2021–2022 constitutional reform process sought to expand Indigenous representation and formally recognize Indigenous territories, languages, and governance systems. Influenced by decolonial theories<sup>63</sup> and intercultural legal frameworks, the process attempted to reconcile neoliberal state structures with Indigenous autonomy. Proposed reforms included increased parliamentary representation for Indigenous peoples, recognition of collective land rights, and institutional mechanisms for consultation on development projects.

However, the failure of ratification in 2022 demonstrates the limits of symbolic and procedural inclusion in achieving substantive justice. Despite broad public discussion, entrenched political and societal resistance, combined with neoliberal economic priorities, prevented the constitutional recognition of Indigenous autonomy. Scholars such as Hernández<sup>64</sup> and Collier<sup>65</sup> argue that Chile's experience underscores the fragility of reforms that emphasize recognition without redistribution or enforceable governance rights. Empirical studies indicate that Indigenous communities continue to

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<sup>62</sup> Bebbington, "Social movements and the politicization of chronic poverty."

<sup>63</sup> Quijano, "The challenge of the "indigenous movement" in Latin America."

<sup>64</sup> Hernández, Krisha. "Co-creating indigenous futurities with/in academic worlds." *Catalyst: Feminism, Theory, Technoscience* 5, no. 2 (2019).

<sup>65</sup> Collier, Paul. *Exodus: Immigration and multiculturalism in the 21st century*. London: Penguin UK, 2013.



face socioeconomic marginalization: Mapuche territories experience higher unemployment, lower access to education, and ongoing land disputes, reflecting the gap between formal rights and lived realities.

The Chilean case also highlights the limitations of multicultural recognition within neoliberal frameworks. Without mechanisms for economic redistribution, resource control, and meaningful participation in decision-making, constitutional recognition remains largely symbolic, consistent with Fraser's (2008) critique that formal inclusion without substantive empowerment is insufficient for justice.

#### 4. Cross-Cutting Analysis

A comparative analysis of Bolivia, Ecuador, and Chile reveals several cross-cutting patterns. First, there is a consistent trend of symbolic inclusion through constitutional recognition and multicultural rhetoric, yet substantive empowerment—measured in terms of resource control, economic opportunity, and governance authority—remains uneven. Bolivia and Ecuador demonstrate more progress in political participation and Indigenous governance, while Chile illustrates the fragility of reforms that prioritize recognition without structural support.

Second, the cases highlight variations in conceptualizing justice. Bolivia and Ecuador emphasize legal pluralism and collective rights, reflecting both substantive and cultural dimensions of justice. Chile's approach, in contrast, prioritizes procedural recognition and symbolic inclusion, with limited enforcement mechanisms. These patterns confirm scholars' concerns that formal recognition is necessary but not sufficient for achieving substantive justice.<sup>66</sup>

Third, the analysis illustrates the interconnectedness of recognition, redistribution, and representation. Bolivia and Ecuador show that legal recognition must be complemented by resource allocation, economic opportunities, and genuine participation in governance to translate into real autonomy. Chile demonstrates that recognition alone, without redistribution or participatory power, cannot overcome structural inequalities.

Finally, these cases reveal that substantive justice requires multi-level approaches. Constitutional reform, international law, and domestic policy must converge to enable Indigenous peoples to exercise self-determination meaningfully. Empirical evidence from community experiences—such as the Sarayaku in Ecuador or TIPNIS in Bolivia—demonstrates that Indigenous empowerment is contingent

<sup>66</sup> Fraser, "Re-framing justice in a globalizing world." (*Mis*) recognition, social inequality and social justice; Fraser, *Scales of justice: Reimagining political space in a globalizing world*; Sen, "The Idea of Justice."

upon institutional enforcement, economic redistribution, and cultural recognition. This integrated approach aligns with decolonial scholarship emphasizing the need to address historical legacies of marginalization and ongoing structural inequalities.

The case studies illustrate that constitutional recognition and international legal frameworks provide a necessary but insufficient basis for substantive justice. Achieving meaningful Indigenous self-determination requires bridging the gap between formal rights and lived outcomes through resource redistribution, participatory governance, and enforcement mechanisms that respect Indigenous epistemologies and autonomy. Substantive justice, therefore, is best understood as an ongoing, multi-dimensional process that integrates normative theory, law, and empirical social realities, ensuring that Indigenous communities can shape their political, social, and environmental futures.

**Table 2.** Comparative Analysis of Substantive Justice for Indigenous Peoples in Latin America

| Country | Recognition (Identity & Autonomy)   | Redistribution (Resources & Land)   | Representation (Decision-Making & Governance)  | Key Challenges / Gaps  |
|---------|---|---|--|--|
| Bolivia | Plurinational State recognized in 2009 Constitution; Indigenous legal systems acknowledged; cultural and linguistic rights protected. | TCO system grants collective land ownership (~13% of national territory); but extractive projects often override local control. | Indigenous representatives included in state institutions; consultation mechanisms established.                          | Extractivist economy undermines autonomy; persistent poverty in Indigenous communities (40% below poverty line); symbolic recognition vs. substantive empowerment.     |
| Ecuador | Constitutional recognition of Sumak Kawsay (Buen Vivir); nature's rights; Indigenous self-governance affirmed.                        | Territorial rights recognized; natural resource exploitation still conflicts with Indigenous priorities (e.g., Sarayaku case).  | Participatory governance structures at local level; Inter-American Court rulings support FPIC and territorial integrity. | Tensions between national development goals and Indigenous autonomy; high multidimensional poverty (45% in Amazon); implementation gaps in constitutional protections. |
| Chile   | Limited recognition; constitutional reform (2021–2022) sought to expand Indigenous rights but failed                                  | Minimal redistribution; land conflicts persist, especially with Mapuche communities; neoliberal framework                       | Limited decision-making power; Indigenous representation not institutionalized; consultation mechanisms weak or absent.  | Procedural recognition without substantive empowerment; structural inequalities remain; socio-political resistance to reforms.   |

| Country | Recognition<br>(Identity &<br>Autonomy)                 | Redistribution<br>(Resources &<br>Land) | Representation<br>(Decision-Making<br>& Governance) | Key Challenges /<br>Gaps |
|---------|---|---|---|--------------------------|
|         | ratification;<br>symbolic<br>multicultural<br>rhetoric. | restricts<br>resource<br>allocation.    |   |                          |

The Table 2 highlights how the three dimensions of substantive justice—recognition, redistribution, and representation—manifest differently across Bolivia, Ecuador, and Chile. Bolivia demonstrates significant constitutional recognition and representation through Indigenous participation in state institutions and legal pluralism, but redistribution remains incomplete due to the extractivist economy and uneven enforcement of land rights. Ecuador similarly institutionalizes recognition and some representation, but ongoing conflicts over natural resource extraction and limited economic redistribution illustrate the persistent gap between formal rights and lived realities. Chile’s case exemplifies symbolic recognition and procedural reforms that fail to achieve substantive empowerment, leaving Indigenous communities marginalized in both socio-economic and political terms.

From a scholarly perspective, these findings resonate with Fraser’s (2008) conceptualization of justice as requiring recognition, redistribution, and representation; Sen’s (2009) capabilities approach, emphasizing that formal rights are insufficient without the ability to exercise them; and decolonial theorists.<sup>67</sup> Quijano and Mignolo, who stress that historical legacies of marginalization must be addressed in tandem with institutional reforms. The comparative table also identifies social, policy, and legal gaps: social gaps in persistent poverty and cultural marginalization, policy gaps in inadequate consultation and resource allocation, and legal gaps in the failure to enforce rights or translate constitutional recognition into real autonomy. This analytical tool not only clarifies cross-country patterns but also underscores the need for a multi-dimensional approach to achieving substantive justice for Indigenous peoples.

## E. Self-Determination in the Context of Substantive Justice: A Global Discourse

### 1. Substantive Justice and Self-Determination

The principle of substantive justice offers a multidimensional framework for evaluating Indigenous self-determination in Latin

<sup>67</sup> See Quijano, "The challenge of the "indigenous movement" in Latin America." See also Mignolo, Walter. *The darker side of western modernity: Global futures, decolonial options*. Duke University Press, 2011.

America. According to Nancy Fraser, justice requires the integration of three dimensions: recognition, redistribution, and representation. Legal recognition alone, while symbolically significant, does not guarantee substantive empowerment or meaningful autonomy.<sup>68</sup> Similarly, Amartya Sen emphasizes that “*freedom from deprivations is central to human agency*,” indicating that formal rights must be accompanied by material and institutional capacities to be meaningful.<sup>69</sup> Within this framework, the right to self-determination embodies both collective freedom and redistributive justice, allowing Indigenous communities to control territories, cultural practices, and governance institutions.

Latin American examples illustrate this principle. Bolivia’s 2009 Constitution recognizes the country as a Plurinational State, acknowledging Indigenous legal systems (Constitución Política del Estado Plurinacional de Bolivia, 2009, Articles 1, 2, 30).<sup>70</sup> Ecuador’s 2008 Constitution enshrines Sumak Kawsay (Buen Vivir), guaranteeing the right to a harmonious relationship with nature and community-led governance (Constitución de la República del Ecuador, 2008, Articles 71–74).<sup>71</sup> Yet, formal recognition does not necessarily translate into substantive justice. In Bolivia, extractivist policies, such as the TIPNIS highway project, override Indigenous consent despite constitutional mandates (Inter-American Commission on Human Rights, 2012). Chile’s failed 2021–2022 constitutional reform illustrates that symbolic recognition without structural redistribution leaves Indigenous communities marginalized.<sup>72</sup> As Ronald Dworkin asserts, “*rights are meaningless if they cannot be effectively exercised*,” highlighting the importance of structural empowerment alongside formal legal recognition.<sup>73</sup>

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<sup>68</sup> See Fraser, “Re-framing justice in a globalizing world.” (Mis) recognition, social inequality and social justice; Fraser, *Scales of justice: Reimagining political space in a globalizing world*.

<sup>69</sup> Sen, “The Idea of Justice.”

<sup>70</sup> See Republic of Bolivia. *Constitución Política del Estado Plurinacional de Bolivia* 2009. Available online at <http://www.gacetaoficialdebolivia.gob.bo/app/webroot/archivos/CONSTITUCION.pdf>

<sup>71</sup> See Republic of Ecuador. *Constitución de la República del Ecuador*, 2008. Available online at <https://www.gob.ec/sites/default/files/regulations/2020-06/CONSTITUCION%202008.pdf>

<sup>72</sup> Figueroa, Robert Melchior. “Indigenous peoples and cultural losses.” *The Oxford Handbook of Climate Change and Society* (2011): 232–249.

<sup>73</sup> Dworkin, Ronald. *Justice for Hedgehogs*. Harvard University Press, 2011.

## 2. Structural Barriers to Substantive Justice

Substantive justice is constrained by colonial legacies embedded in state structures and legal monism. Indigenous customary law is often subordinated to national legal systems, undermining the capacity of communities to exercise autonomous governance. Scholars such as Van Cott argue that “*plurinational recognition frequently operates as a top-down process, limiting the autonomy it purports to guarantee.*”<sup>74</sup> Similarly, Yashar notes that constitutional reforms in Latin America often fail to dismantle entrenched social hierarchies, leaving Indigenous peoples structurally dependent on central governments.<sup>75</sup>

Economic dependence on extractive industries presents a second structural barrier. In Bolivia and Ecuador, hydrocarbon and mining projects generate substantial state revenue but frequently violate Free, Prior, and Informed Consent (FPIC) rights established under ILO Convention No. 169 (1989, Articles 6 and 7) and reaffirmed in UNDRIP (2007, Articles 10, 19, 32). The Sarayaku case (Inter-American Court of Human Rights, 2012) exemplifies how Indigenous territorial rights are subordinated to national development agendas, despite international legal obligations.

Social and cultural exclusion further obstructs substantive justice. Indigenous peoples face systemic racism, patriarchal norms, and marginalization in decision-making arenas. Indigenous women, in particular, experience double discrimination, reflecting intersecting social inequalities. As Fraser argues, “*recognition without redistribution cannot achieve justice,*” underscoring that procedural reforms alone are insufficient to address entrenched social hierarchies.

## 3. Toward Decolonial Substantive Justice

Achieving substantive justice requires a decolonial orientation that re-centers Indigenous epistemologies and governance models. Quijano (2000: 533) contends that “*the coloniality of power persists in knowledge, culture, and institutions,*” meaning that postcolonial legal reforms must challenge structural and epistemic hierarchies. Mignolo emphasizes that decoloniality entails integrating legal pluralism, allowing Indigenous customary law to coexist with state law. Bolivia’s recognition of Indigenous jurisdictions (2009 Constitution, Articles 190–197) and Ecuador’s local governance structures are partial examples, though enforcement remains uneven.

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<sup>74</sup> See Van Cott, “Building inclusive democracies: Indigenous peoples and ethnic minorities in Latin America.”

<sup>75</sup> See Yashar, “Democracy, indigenous movements, and postliberal challenge in Latin America”.

Substantive justice should be conceptualized as intercultural coexistence rather than assimilation. Ecuador's constitutionalization of Sumak Kawsay prioritizes communal well-being and environmental stewardship, providing a model of governance that respects Indigenous knowledge systems (Constitución del Ecuador, 2008, Articles 71–74). Policy measures should include: strengthening FPIC processes (ILO 169, Articles 6–7), equitable redistribution of land and resources, institutionalized Indigenous participation in governance, and culturally sensitive education programs to build capacity. These measures align with Sen's capabilities approach, which emphasizes the importance of enabling actual agency and functioning rather than formal entitlements alone.

#### 4. Broader Implications

The Latin American experience provides critical insights for global Indigenous rights advocacy, particularly regarding the interplay between formal legal recognition and substantive empowerment. Constitutional and statutory recognition of Indigenous rights—such as Bolivia's 2009 Plurinational State Constitution (Articles 1–2, 30, 190–197), Ecuador's 2008 Constitutional provisions on Sumak Kawsay (Articles 71–74), and Chile's 1991 Indigenous Law No. 19.253 on Indigenous development and autonomy—establish a normative basis for self-determination. However, scholars such as Van Cott (2007) and Yashar (2005) note that these reforms often remain symbolic unless accompanied by structural redistribution of political, economic, and territorial power. Legal recognition alone cannot resolve systemic inequities embedded in state structures or overcome the legacy of colonial dispossession.

From a theoretical and legal perspective, the concept of substantive justice offers a framework to analyze these gaps. Nancy Fraser emphasizes the triad of recognition, redistribution, and political representation, arguing that justice requires addressing misrecognition alongside material inequalities. In parallel, Amartya Sen stresses that freedom must encompass actual capabilities, not just formal entitlements, highlighting the importance of Indigenous communities being able to exercise authority over land, resources, and governance structures. In practice, this implies that while ILO Convention No. 169 (Articles 6–7, 14, 15) and UNDRIP (2007, Articles 10, 19, 32) provide normative safeguards for Indigenous autonomy, their effective implementation depends on state mechanisms that empower communities to govern themselves, manage resources, and participate meaningfully in decision-making.

Empirical cases illustrate these theoretical insights. Bolivia's TIPNIS conflict (2011–2012) revealed a gap between constitutional recognition of Indigenous jurisdictions and extractivist policies that subordinated Indigenous consent to national development agendas, contravening Article 30 of the 2009 Constitution, which recognizes Indigenous control over territories. In Ecuador, the Sarayaku case (Inter-American Court of Human Rights, 2012) highlighted the tension between resource exploitation and Indigenous rights, reinforcing the necessity of Free, Prior, and Informed Consent (FPIC) as mandated by ILO 169, Articles 6–7. Chile's 2021–2022 constitutional process further demonstrated the limits of multicultural recognition in the absence of substantive redistributive policies; despite proposals for enhanced Indigenous representation, the draft failed ratification, leaving entrenched inequalities largely unaddressed.<sup>76</sup>

Decolonial theory further enriches understanding of these implications. Aníbal Quijano (2000) argues that the “coloniality of power” persists in legal, cultural, and knowledge systems, privileging Western epistemologies over Indigenous ones. Walter D. Mignolo (2011) similarly highlights the importance of integrating Indigenous epistemologies and governance models into state institutions to achieve genuine autonomy. The Latin American experience shows that constitutional recognition must be accompanied by legal pluralism that validates Indigenous customary law alongside national law. For example, Bolivia's Indigenous justice jurisdictions (Articles 190–197, 2009 Constitution) offer a legal basis for such pluralism, though operational constraints remain due to economic dependence on extractive industries.

These experiences provide lessons for global Indigenous rights movements. First, they emphasize the necessity of linking formal recognition to redistributive and participatory reforms. Without equitable access to resources and decision-making power, Indigenous communities cannot exercise meaningful autonomy. Second, they highlight the importance of adapting international legal frameworks to local contexts, recognizing that instruments like ILO 169, UNDRIP, and Inter-American Court jurisprudence provide normative guidance but require domestic enforcement mechanisms and political will. Third, these cases demonstrate the need for an intercultural, decolonial approach to governance, in which Indigenous knowledge systems, decision-making practices, and environmental stewardship are integrated into policy and law. Ecuador's constitutional recognition of *Buen Vivir* (*Sumak Kawsay*) provides a practical example, embedding

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<sup>76</sup> Figueroa, “Indigenous peoples and cultural losses.”



ecological and cultural considerations within governance frameworks (Constitution of Ecuador, 2008, Articles 71–74).

The Latin American experience also informs broader theoretical debates in human rights and justice studies. By operationalizing Fraser's concept of substantive justice in real-world contexts, these cases underscore that recognition without redistribution fails to address historical injustices or systemic marginalization. Sen's capabilities approach further strengthens this analysis by highlighting the importance of enabling Indigenous communities to exercise agency over their economic, social, and cultural lives. Moreover, decolonial perspectives stress that justice cannot be measured solely by formal equality or legal recognition but must consider the epistemic and cultural dimensions of Indigenous sovereignty.

Finally, the Latin American context demonstrates that substantive justice for Indigenous peoples is inherently multidimensional. Legal recognition, institutional participation, and economic redistribution are mutually reinforcing components that must be implemented in an integrated manner. Territorial rights, access to natural resources, and political representation must operate alongside cultural recognition and the validation of Indigenous knowledge systems. Only through such a holistic approach can states move beyond symbolic multiculturalism toward genuine empowerment, self-determination, and intercultural coexistence.

## **F. Conclusion and Policy Recommendations**

This study has examined the pursuit of substantive justice for Indigenous peoples in Latin America, focusing on Bolivia, Ecuador, and Chile as illustrative cases. The analysis demonstrates that while these states have made significant strides in formal legal recognition—through constitutional reforms, statutory protections, and recognition of Indigenous governance structures—such recognition has often fallen short of translating into meaningful autonomy, material empowerment, and cultural self-determination. Bolivia's 2009 Constitution enshrined the Plurinational State model and Indigenous jurisdictions, yet extractive economic policies and uneven enforcement have limited the scope of real empowerment. Ecuador's constitutional recognition of *Sumak Kawsay* reflects a commitment to ecological and communal well-being, yet development pressures and resource exploitation continue to undermine Indigenous territorial rights. Chile's failed 2021–2022 constitutional reform highlighted the limits of symbolic multiculturalism, where representation without structural redistribution cannot overcome historical exclusion. Collectively, these cases underscore a persistent gap between formal equality and

substantive justice, emphasizing that recognition alone is insufficient to achieve the principles of autonomy, agency, and cultural integrity.

From a theoretical perspective, substantive justice reframes Indigenous self-determination not merely as a legal entitlement but as a living practice encompassing equality, dignity, and intercultural respect. Drawing on Fraser's tripartite model of recognition, redistribution, and representation (2008), the findings highlight the necessity of addressing both symbolic and material dimensions of justice. Recognition of identity and cultural rights, when disconnected from access to land, resources, and political power, risks remaining ceremonial rather than transformative. Sen's capabilities approach (2009) further illuminates the importance of enabling Indigenous communities to exercise agency over decisions affecting their livelihoods, governance, and cultural survival. Decolonial theorists such as Quijano (2000) and Mignolo (2011) underscore the importance of challenging the epistemic dominance of Western legal paradigms, advocating pluralistic frameworks that integrate Indigenous knowledge, law, and governance models into state institutions. Together, these theoretical lenses provide a robust foundation for evaluating both the successes and limitations of existing Indigenous rights frameworks in Latin America.

The study identifies several policy imperatives to bridge the gap between formal recognition and substantive justice. First, strengthening the implementation of ILO Convention No. 169 (1989) and UNDRIP (2007) is essential. These instruments provide internationally recognized standards for Indigenous participation, land rights, and consent in development projects. Ensuring that states not only ratify these frameworks but also operationalize them through enforceable mechanisms can safeguard Indigenous autonomy and prevent extractive or development-driven encroachment.

Second, promoting meaningful Indigenous participation in environmental and territorial governance is crucial. Policies must integrate Indigenous decision-making into natural resource management, conservation programs, and infrastructure development, thereby aligning state practices with constitutional and international obligations. Examples include Bolivia's Indigenous jurisdictions (Articles 190–197, 2009 Constitution) and Ecuador's recognition of *Buen Vivir* (Articles 71–74), which can serve as institutional pathways for enhanced participation when effectively implemented.

Third, supporting intercultural education and bilingual legal systems is necessary to ensure that Indigenous peoples can access justice, participate fully in governance, and preserve cultural heritage. Legal pluralism should be operationalized not only through formal

recognition of customary law but also through practical integration into court systems, administrative procedures, and education curricula, promoting both equality and cultural sustainability.

Finally, the development of regional mechanisms for monitoring substantive justice outcomes is recommended. Latin America could benefit from comparative monitoring frameworks that evaluate the degree to which Indigenous communities experience actual empowerment, resource control, and political representation, complementing existing international human rights oversight. Such mechanisms could draw on Inter-American Court jurisprudence, UN human rights reporting, and independent NGO assessments to provide accountability and facilitate cross-national learning.

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*“Indigenous peoples have the right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”*

*“Los pueblos indígenas tienen el derecho a participar plenamente, si así lo deciden, en la vida política, económica, social y cultural del Estado.”*

*“Els pobles indígenes tenen el dret a participar plenament, si així ho decideixen, en la vida política, econòmica, social i cultural de l'Estat.”*

**Kofi Annan**

Former UN Secretary-General

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