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# Examining the contemporary ethno-national policy: a comprehensive analysis of the political rights and legal status of indigenous peoples

VITALIY KOVALCHUK\*

YURIY KOVNYI\*\*

MYKHAILO PROKHORENKO\*\*\*

KATERYNA MANUILOVA\*\*\*\*

SVITLANA POLIARUSH-SAFRONENKO\*\*\*\*\*

## ABSTRACT

The article delves into the contemporary legal and political status of indigenous communities within contemporary frameworks. It traces the evolutionary trajectory of pertinent regulations, analyzes contemporary legal terminologies, and sheds light on the political rights of indigenous populations. A primary focus is directed towards acknowledging and honoring their autonomy and self-determination within the legal framework of the state. Employing a comparative legal methodology, the analysis scrutinizes the regulatory landscape concerning the status of indigenous peoples across various countries, including the USA, Canada, New Zealand, Indonesia, Sweden, Norway, and Ukraine. To support the author's assertions, a survey methodology was adopted to gather data from different regions of Ukraine and gauge perceptions of the status of indigenous peoples and their socio-political situation. The article concludes that despite discernible advancements, numerous indigenous communities worldwide

continue to encounter challenges in exercising their political rights to their fullest extent.

**KEYWORDS:** international legal subjects, rights of indigenous peoples, state legal policies, the right to self-determination of indigenous peoples, the paradigm of free, prior informed consent.

\* Department of Theory and Philosophy of Law, Constitutional and International Law Institute of Jurisprudence, Psychology and Innovative Education, Lviv Polytechnic National University. Lviv, Ukraine. E-mail: kovalchuk8100@edu.knu.com. [Google Scholar](#). ORCID: 0000-0002-7523-2098.

\*\* Department of Special Pedagogy, Ivan Franko National University of Lviv. Lviv, Ukraine. E-mail: yurii\_kovnyi@pltech-sci.com. [Google Scholar](#). ORCID: 0000-0002-1230-5050.

\*\*\* Department of Jurisprudence, Psychology and Innovative Education. National Defence University of Ukraine named after Ivan Cherniakhovskiy. Kyiv, Ukraine. E-mail: prokhorenko8067@edu.cn.ua. [Google Scholar](#). ORCID: 0000-0003-4723-0893.

\*\*\*\* Department of International and European Law. National University "Odesa Law Academy". Odesa Obl., Ukraine. E-mail: manuilova8067@sci-univ.com. [Google Scholar](#). ORCID: 0000-0002-1471-9134.

\*\*\*\*\* Department of Constitutional Law and Theoretical and Legal Disciplines. Bila Tserkva National Agrarian University. Bila Tserkva, Ukraine. E-mail: safronenko8100@edu.cn.ua. [Google Scholar](#). ORCID: 0000-0002-4007-8844.



## **Examinando la política etno-nacional contemporánea: un análisis exhaustivo de los derechos políticos y el estatuto jurídico de los pueblos indígenas**

### **RESUMEN**

El artículo parece centrarse en el estatus legal y los derechos políticos de los pueblos indígenas en el contexto de marcos legales y políticos modernos. Explora la evolución de las regulaciones legales relacionadas con los pueblos indígenas y examina la terminología y los conceptos relacionados con este grupo en la ley contemporánea. Además, el artículo presta atención específica a los derechos políticos de los pueblos indígenas, enfatizando la importancia de reconocer y respetar su autonomía y autodeterminación dentro del marco más amplio de un estado legal. La metodología de este artículo se basa en un sistema de tres niveles de métodos y enfoques: filosófico, científico general y científico especializado. Se utilizó el método legal comparativo para analizar la regulación legal del estatus de los pueblos indígenas en diversos países, incluidos Estados Unidos, Canadá, Nueva Zelanda, Indonesia, Suecia, Noruega y Ucrania. Para respaldar las afirmaciones del autor, se utilizó el método de encuesta para recopilar datos de diferentes regiones de Ucrania sobre la comprensión del estatus de los pueblos indígenas y su situación socio-política, lo que contribuye a la representatividad de los argumentos del autor. La conclusión del artículo es que, aunque se ha logrado cierto progreso, muchos pueblos indígenas en todo el mundo aún enfrentan desafíos para ejercer plenamente sus derechos políticos. Para crear políticas efectivas de estado etno-nacional para los pueblos indígenas, se requieren medidas especiales debido a su mayor vulnerabilidad, su historia de marginación y discriminación, y el impacto desproporcionado de las violaciones persistentes de los derechos humanos en ellos. Ejemplos de tales medidas incluyen cuotas especiales de representación, garantizar el derecho a la autodeterminación y aplicar el concepto de consentimiento libre, previo e informado.

**PALABRAS CLAVE:** sujetos de derecho internacional, derechos de los pueblos indígenas, política jurídica del Estado, derecho a la libre determinación de los pueblos indígenas, concepto de consentimiento libre, previo e informado.

## I. Introduction

The impact of globalization has created a nuanced scenario where the push for the standardization of socio-legal facets coexists with the pronounced emphasis on ethno-national identity and the uniqueness of national origin. This juxtaposition has notably amplified the urgency surrounding the status, protection and security of indigenous peoples, particularly smaller groups that have not evolved into titular nations.

The need for additional legal attention arises from the vulnerability indigenous communities face amid a myriad of other societal groups, underpinning their susceptibility to assimilation and the loss of their national identity. This issue is highly relevant and controversial within the legal policies of numerous countries worldwide. Given the heightened vulnerability of smaller indigenous populations, establishing specialized legal protections becomes pivotal, enabling them to preserve their cultural, linguistic, and ethnic heritage for succeeding generations. Facilitating the nurturing and perpetuation of a sense of national identity and cultural legacy is imperative. Hence, the humanist underpinning of law necessitates confronting this concern, endeavoring to construct a legal framework that supports the rights of indigenous peoples. Globally recognized as among the most disadvantaged, vulnerable, and marginalized populations, indigenous peoples number approximately 476 million worldwide. Despite constituting 6 percent of the global population, they account for around 19 percent of extreme poverty in the world. Alarming, the life expectancy of indigenous peoples lags behind that of non-indigenous individuals by an average of 20 worldwide (International Labor Organization - ILO, 2020).

While the development of socio-economic relations aligns with modernity, a substantial populace still identifies as indigenous peoples. In the United States, this demographic encompasses primarily American Indians, Alaska Natives (as per the 2010 census, amounting to 5.2 million individuals, comprising 1.7% of the total US population) Native Hawaiians, and smaller Pacific Island groups such as the Chamorro of Guam and the Taino indigenous people of Puerto Rico. Australia recognizes Aboriginal and Torres Strait Islander peoples as indigenous peoples, while New Zealand's indigenous population comprises the Maori. Canada identifies Indigenous peoples as encompassing First Nations, Métis (of mixed Aboriginal and non-Aboriginal ancestry) and Inuit with the National Household Survey identified reporting 1.4 million Aboriginal individuals, constituting 4.3% of

the total Canadian population. The 2021 Australian census approximates 984,000 Aboriginal individuals, representing almost 4% of the nation's populace (Census-based estimated resident population of Aboriginal and Torres Strait Islander and non-Indigenous Australians, 2021).

Considered by scholars as Europe's sole indigenous population, the Sami, identified as such due to their traditional settlement territory called Sápmi (Land of the Sami) in the Northern Sami language, confronts numerous challenges. Estimated at 50,000–70,000 in Norway, over 10,000 in Finland, 20,000–35,000 in Sweden, and 2,000 in Russia, approximately half of the Sami speak Sami as their mother tongue, all of which are categorized as endangered (Jaakkola et al., 2018). Social vulnerability, small population size, dispersed settlements, and urbanization compound the challenges faced by the Sami, accentuating the imperative for comprehensive research delving into the current status of indigenous peoples within the context of contemporary statehood development.

## 2. Literature review

Scholars approach the analysis of the status of indigenous peoples through several common perspectives. One cohort concentrates on the correlation between indigenous peoples and their land, their socio-economic situation, and environmental concerns. A prevalent observation is the disregard for indigenous peoples' biological knowledge, values and beliefs in governance, planning, and decision-making across various levels. This oversight holds significant consequences, potentially depriving indigenous groups of their ancestral land rights and contributing to a spectrum of socio-economic challenges. Recent research underscores the underrepresentation of indigenous peoples in decision-making processes (Jessen et al., 2022; McDowell et al., 2020; Turner et al., 2022; Yellowknives Dene First Nation Wellness Division et al., 2019).

Another group of researchers focuses on the health challenges that indigenous peoples face, particularly emphasizing their right to health amid the backdrop of the COVID-19 pandemic (Carroll et al., 2021; Harfield et al., 2018; Hermawanto et al., 2022; Smith et al., 2022). It has been noted that indigenous communities often encounter barriers to access medical services, basic amenities, sanitation facilities, and preventive measures such as clean water, soap, and disinfectants. These deficiencies exacerbate their vulnerability to both infectious and non-infectious diseases, including COVID-19 (Calí Tzay, 2021).

However, in recent years, comprehensive studies analyzing the political rights of indigenous peoples, encompassing self-determination, participation in public decision-making, and the implementation of specialized measures to regulate their political rights, have been lacking.

Consequently, this article aims to examine the legal status of indigenous peoples within the context of contemporary ethno-national policies, concentrating specifically on their political rights. To fulfill this objective, the author has identified several tasks, including an analysis of the historical evolution of legal frameworks regulating the status of indigenous peoples, an examination of contemporary legal terminology pertinent to these communities, and an exploration of their political rights.

### **3. Methodology**

The methodology used in this article operates on a three-level system of methods and approaches. At the first level employs philosophical methods, including the dialectical method, were utilized to identify established and innovative strategies of safeguarding indigenous peoples. The synergistic technique was applied to assess the potential impacts of globalization crises on the status of indigenous communities, while the metaphysical method was employed to pinpoint external factors that influence coordination within the ethno-national process. The second level of methodology comprises general scientific methods such as analysis and synthesis, analogy, and abstraction. At the third, special scientific methods were employed, notably the compilation method, which facilitated a comparative assessment of the legal regulation concerning indigenous peoples across diverse countries worldwide. Additionally, the legal modeling approach was used, which indicates the possibility of devising a single matrix outlining the rights of indigenous peoples within contemporary ethno-national politics. The comparative legal method was used to analyze the legal framework governing the status of indigenous peoples in the USA, Canada, New Zealand, Indonesia, Sweden, Norway and Ukraine.

Enhancing the article's robustness, a survey method was employed, encompassing various regions of Ukraine (Lviv, Zakarpattia, Kyiv, and Zaporizhzhya prior to the outbreak of the conflict on February 24, 2022). From 2020-2022 author questionnaires were administered to two distinct groups: 356 Ukrainian citizens self-identifying as Ukrainians and representatives and 62 representatives primarily from indigenous minorities, predominantly Crimean Tatars.

### **4. Results**

#### **4.1. Formation and Evolution of Legal Regulation Pertaining to Indigenous Peoples**

The historical trajectory of legal regulation concerning indigenous peoples has been intricate, with the national law initially defining the characteristics and essential nature of these groups at the domestic level. However, over time, international norms began to establish primary benchmarks within this domain. An analysis of

the developmental aspects highlights certain characteristic features of the evolution of the status of indigenous peoples at the international level.

Firstly, the development of law was significantly driven by the socio-economic sphere and labor relations. The International Labor Organization played a pioneering role in addressing indigenous and tribal issues, signaling the necessity for international cooperation and attention. Initially, norms established by the 1957 convention focused on the integration of individuals living a tribal lifestyle—a convention currently closed for ratification. Subsequently, norms were established to determine the status of indigenous peoples within sovereign states (United Nations, 1989). The labor-related norms adopt a 'pragmatic approach,' with the main subjective criterion being the self-determination of people as indigenous for official recognition.

Secondly, the creation of international legal norms was not primarily instigated by states, but rather by representatives of civil society. The conclusion of the last century witnessed the emergence of numerous of public organizations advocating for indigenous rights. These advocacy groups significantly influenced national governments and international institutions.

Thirdly, a pivotal milestone was the comprehensive international act—the 2007 United Nations Declaration on the Rights of Indigenous Peoples. This declaration encompasses a broad array of provisions safeguarding their status. States have committed to vital responsibilities to protect this ethno-national group and expand the entire system of promoting their rights and legitimate interests, particularly in political, economic, social, cultural and environmental spheres. The legal policy underscores respect for ideological, mental and traditional values, emphasizing the prevention of forced assimilation—a principal task of globalized society in accordance with declared international standards.

Fourthly, the assurance of the rights of indigenous peoples extends beyond mere legal prescriptions. Reclaiming national identity and overcoming historical oppression and discrimination of this group can be facilitated through institutional bodies, expert committees, special commissions, special commissioners, judicial processes, and pre-trial mediation procedures (Martínez Cobo, 1981; United Nations High Commissioner for Human Rights, 2023).

However, even with such international regulation, its adequacy remains far from comprehensive. The challenge lies in the myriad of obstacles indigenous peoples encounter at the administrative and organizational levels when seeking to exercise their granted rights. These hurdles include:

- Heightened gap between the general population and representatives due to globalization crises and informational threats, particularly affecting those who maintain ancestral traditions and lifestyles.

- Insufficient participation of these groups in the administrative, legal, and organizational activities of the state.
- Economic marginalization, resulting in a lack of adequate social protection among indigenous peoples.
- Perpetuation of discrimination based on ethnic and national identity in various regions globally.

Consequently, the effective implementation of all rights, notably political rights, presents a formidable challenge within a globalized society, entailing complex legal and state-authority issues.

#### **4.2. Ambiguity in the Conceptual Framework and Categorical Apparatus Regarding Indigenous Peoples in Contemporary Law**

Despite heightened attention from international institutions and scholars on indigenous issues, it is important to recognize that the term ‘indigenous peoples’ encompasses a diverse range of communities sharing common traits like common ancestry, distinct cultural identities, shared territories, and natural resources. The UN Declaration on the Rights of Indigenous Peoples defines indigenous population as contributing to diversity and richness of civilization, culture and being part of the shared heritage of humanity. However, this definition lacks explicit articulation in any regulatory act and requires logical and systematic interpretation for its comprehension.

Notably, indigenous groups themselves oppose the adoption of an official international definition, emphasizing the importance of flexibility and respecting the right of each indigenous group to self-identify. Overly broad or narrow definitions can pose challenges in practically implementing the Declaration on the Rights of Indigenous Peoples. A narrow definition may leave many groups vulnerable, especially in regions with enduring colonial legacies and underdeveloped effective legal systems, impeding their access to international assistance. Conversely, an excessively broad definition could trigger an influx of claims from large national minorities, with more resources and political influence than indigenous populations, straining the monitoring mechanism for indigenous rights.

Studies by Martínez Cobo (1981) present a widely acknowledged “working definition” of indigenous peoples. This delineation describes indigenous communities, peoples, and nations as possessing historical continuity tracing back to pre-invasion and pre-colonial societies that flourished on their territories. They perceive themselves as distinct from prevailing sectors in these areas and constitute non-dominant societal layers. Indigenous peoples aim to safeguard, develop, and transmit their ancestral territories and ethnic identity to future generations, forming

the basis for their continued existence as communities, in line with their cultural norms, social institutions, and legal systems.

Examining Indonesia, a country hosting a diverse array of indigenous groups, the governmental recognition, respect, and assumption of responsibility for indigenous peoples are enshrined at the constitutional level. The Indonesian Ministry of Social Affairs utilizes the term “remote indigenous population” as delineated in Presidential Decree No. 111/1999. This term refers to isolated communities characterized socio-cultural localization, dispersion, and minimal engagement with social, economic, and political networks and services (Masyarakat Adat di Indonesia, 2013: Indigenous People in Indonesia: Towards Inclusive Social Protection, 2013).

In contrast, Finnish legislation lacks a specific definition for national minorities. However, criteria are set for identifying individuals as Sami under the Sami District Act. A person is recognized as Sami if they self-identify themselves as such and have learned the Sami language as their mother tongue. Alternatively, if one of their parents or grandparents fulfills these criteria or if one of their parents is eligible to vote in the Sami delegation or assembly elections. Additionally, Finnish Laplanders whose ancestors paid Lapland taxes and were hunters, foresters, or fishermen are also considered Sami.

It is evident that safeguarding indigenous peoples requires prioritizing their distinct characteristics. The numerical size of the group should not be the sole determinant. Instead, the level of integration within the political and legal structures and the extent of assimilation into these structures in their legal, political, domestic, and social lives should also be considered. This recognition underscores the significant variation in the legitimate interests of different indigenous groups.

Defining the characteristics of indigenous peoples remains intricate. According to Syarifah (2010), characteristics encompass organized societies with a distinctive place in the social structure, institutional existence with shared wealth, community composition based on heritage kinship or regional environment, and cohabitation and cooperation (Lytvyn et al., 2022; Syarifah, 2010). Other scholars, like Alting (2010), argue for the necessity of additional defining traits, including religious beliefs rooted in a sense of the sacred, communal nature (*commuun*), emphasizing direct participation (*kontane handling*) in collective endeavors.

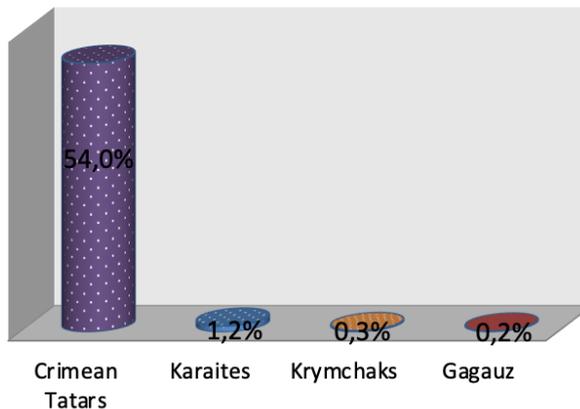
Collective living represents a common trait among indigenous peoples, embodying values of collective responsibility, reverence for elders, ancestors, spirits, and community, guiding their daily conduct. Over time, they have developed unique structures and institutions, often centered around the family unit, expanding to encompass larger communities and social institutions governed by local laws and sacred teachings. Indigenous peoples historically practiced self-governance, autonomous decision-making, and institutional self-sufficiency. While the specifics

may differ, indigenous communities across the globe have traditionally exercised what is now recognized as the right to self-determination rooted in their political, economic, and social structures, cultural, spiritual, historical, and philosophical traditions (Ortynskyi et al., 2022).

In a doctrinal and normative context several characteristics typify indigenous peoples as subjects of ethno-national policy. These include cohesion, shared historical heritage, territorial connection, distinct socio-cultural systems, shared customs, religious norms, collective existence, and sovereignty over their land and natural resources.

Highlighting the significance of legal regulation within this domain is crucial. However, in certain states like Ukraine, the inadequacy of emphasis on the specificities and rights of indigenous peoples in legal frameworks and public scientific discourse presents a significant challenge. Our survey findings underscore this issue, Only 54% of respondents were aware of the Crimean Tatar people being recognized as an indigenous nation. Alarmingly, a staggering 98% of the surveyed individuals lacked awareness regarding other indigenous groups such as Karaites, Krymchaks, and Gagauzes (Figure 1).

**Figure 1.** Which indigenous people of Ukraine do you know?



Source: compiled by the authors

## 5. Discussion

### 5.1. Political Rights of Indigenous Peoples

The contemporary state is fundamentally grounded in the principles of democratization and openness of state power, underscoring the significant demand for political rights among individuals. These rights afford legitimate opportunities to influence public institutions, form representative bodies that safeguard individual

interests, ensure participation in social and political life, and engage in the exercise of state power. They encompass electoral freedoms, freedom of speech, assembly and protest rights, facilitating participation in state and public affairs.

The political rights of indigenous peoples can be delineated into two levels. The first level comprises political rights granted to all citizens within a particular state based on the general constitutional principles recognized by that state. The second level encompasses additional opportunities, positive restrictions, or guarantees specifically applicable to members of the indigenous community. These rights, per national policy, may involve positive measures and, regrettably, discriminatory practices. Despite some positive changes, the majority of indigenous peoples globally encounter challenges in fully realizing their individual and collective human rights. Lines and Jardine (2019) emphasize the criticality of “relationship, interconnectedness, and community” as essential component for indigenous peoples. Addressing historical marginalization, discrimination, and persistent human rights violations necessitates special measures for these communities.

Recognition of collective land rights by certain states serves as a common example of such measures. The Endorois case adjudicated by the African Commission on Human and Peoples’ Rights mandated such measures to counter discrimination against the Endorois people within a property system that disregarded their community’s property rights (2010). Similarly, in the Saramaka case saw the Inter-American Court the need for special measures ensuring indigenous populations’ ability to maintain their traditional lifestyle and uphold their distinct cultural identity, social structure, economic system, customs, beliefs and traditions, safeguarding them from state intervention (Inter-American Court of Human Rights, 2007). The contemporary ideological paradigm must factor in the rights of indigenous peoples, recognizing that globalization does not inherently undermine this specific ethnic group. Understanding the requests and needs of indigenous peoples necessitates acknowledging the detrimental impacts of global colonization on their lives (Curtice and Choo, 2020):

- Recognition is an important factor for indigenous peoples who aspire to be acknowledged as distinct ethnic groups, preserving their unique cultures and identities (Daigle, 2019).
- Indigenous peoples’ ontological nature presents challenges in perpetuating their legacy in the contemporary globalized society, necessitating the right to pass on their history, language, traditions, forms of internal governance, and spiritual practices to future generations.
- Asserting the right to inhabit and utilize their ancestral lands is a natural but significantly challenged desire among indigenous peoples (many scholars have discussed this (Ford et al., 2020; Greenwood and Lindsay, 2019)).

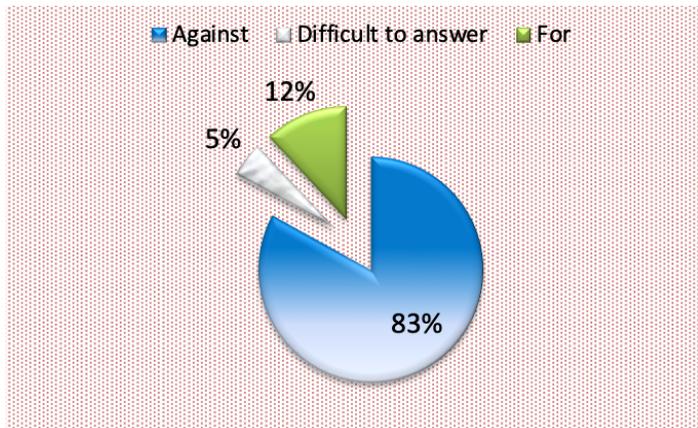
- These groups demand a legal policy from their residing countries that acknowledges their ability to autonomously determine their fate.
- Self-determination, a unique aspect for this ethnic minority, ensures their well-being, granting substantial autonomy in shaping their political future, social norms, and cultural environment.
- The aim is to combat rights violations and discriminatory circumstances, preventing social isolation, undue mental or physical pressure, assimilation, and striving for equal treatment in all spheres (Callaghan et al., 2020).
- Access to education, health care (Hefler et al., 2019; Jacklin and Walker, 2020), employment, and basic needs satisfaction. Due to their unique differences, they seek involvement in decision-making processes regarding their education, healthcare, economic development, and other services.

Crucially, despite their indigenous status, these peoples are citizens of their respective states. They understand the interdependence between them and their country, aspiring to participate fully in the political and economic facets of their nations.

Certainly, Article 46(3) of the Declaration on Indigenous Peoples underscores the collective right to self-determination for all members indigenous communities or nations, emphasizing its exercise in accordance with principles of justice, democracy, human rights, equality, non-discrimination, good governance, and integrity. This Declaration acknowledges the right of indigenous peoples to self-governance concerning their internal and local affairs (Article 4). Moreover, indigenous communities are entitled to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions while actively participating in the political, economic, social, and cultural realms of the state (Article 5). According to the Declaration, indigenous communities have the right to promote, develop, and preserve their institutional structures, unique customs, spirituality, traditions, procedures, practices, and judicial systems or customs, where present, while adhering to international human rights standards, as outlined in Article 34 (United Nations and Department of Economic and Social Affairs Indigenous Peoples, 2000).

Upon completion of our research, it has become apparent that there exists a prevalent misunderstanding among the general public regarding the right to self-determination of indigenous peoples. This misunderstanding often conflates this right with the desire to establish an independent state. Graph 2 demonstrates that a majority of Ukrainian citizens do not support the right of indigenous peoples to self-determination (Figure 2). Specifically, 83% of the interviewed representatives from non-indigenous communities expressed opposition to this right.

**Figure 2.** How do you feel about granting indigenous peoples the right to self-determination?



Source: compiled by the authors

Several states have collaborated with indigenous peoples, employing diverse approaches to strengthen their legislative and administrative authority. These approaches encompass guaranteed legislative representation, constitutionally protected self-government agreements, and implementation of statutory consultations with indigenous communities prior to making administrative and legislative decisions that could affect their interests.

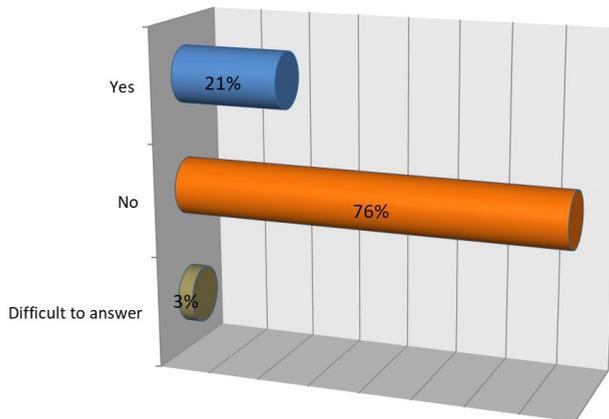
In the United States of America, many American Indian communities retain varying degrees of sovereignty over their territories, often smaller than their historical lands. Within the framework of United States constitutional law, American Indians are typically possess the authority to enact laws based on their governance structures and operate under their legal systems. However, the constitutional doctrine of plenary power vested in Congress allows it to pass laws superseding American Indian regulations. Canada has facilitated the establishment a self-governing body for the Nunatsiavut tribal peoples, granting extensive powers to address social issues like education and healthcare (Department of Labrador and Aboriginal Affairs, 2005).

Finland has encountered criticism from the UN for its failure to safeguard the Sami's right to self-determination. Last June, a UN committee found Finland in violation of international human rights conventions on racial discrimination regarding the political rights of the Sami people. The core issue revolves around the 1996 Sámi Parliament Act, permitting ethnic Finns with ancestral ties to the Sami, involved in hunting, fishing, reindeer herding and payment of Lapland taxes, to participate in voting and candidacy for the Sámi Parliament in Finland. Consequently, this diluted the powers of the representative body of the indigenous Sami people. Despite criticism, the current legal regulation persist (Nezirevic, 2022).

In specific regions of Bangladesh (Chittagong Division), distinct national-level legal precedents prevail, differing from legal systems elsewhere in the country. Indigenous communities operate informal justice systems, resolving civil and minor criminal disputes. Traditional justice institutions like district chiefs, district (mouza) and village (kabaris) heads, complement state justice structures, governing customary family law and rights concerning land and natural resources (Devasish et al., 2007). Nevertheless, scholars have highlighted emerging challenges that indigenous peoples must confront, necessitating novel forms of political, normative, and strategic thinking (Martínez de Bringas, 2020).

In Ukraine, the issue of indigenous rights holds significance. The Crimean Tatars, recognized as the indigenous people, express a need for distinct political methodologies to assert their national identity. A majority of interviewed Crimean Tatars contend that the state fails to ensure their political rights as an indigenous people (Figure 3).

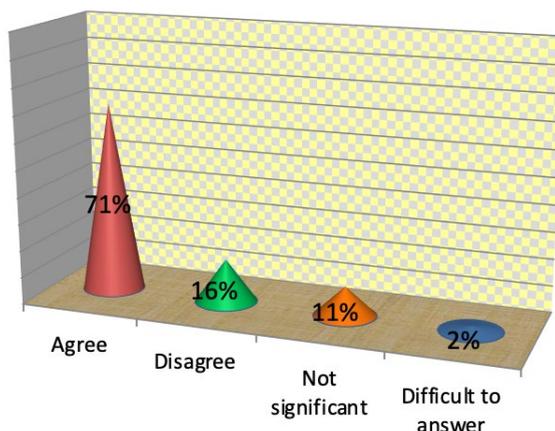
**Figure 3.** Do you consider your political rights protected as representatives of indigenous peoples?



Source: compiled by the authors

Furthermore, respondents voiced their support for the allocation of dedicated seats in the Verkhovna Rada of Ukraine, the country's legislative body, for indigenous peoples. A substantial 81% of those surveyed expressed their favor towards this proposal (Figure 4).

**Figure 4.** Do you think it is appropriate to propose the allocation of separate seats in the Verkhovna Rada of Ukraine for representatives of indigenous peoples?



Source: compiled by the authors

## 5.2. Indigenous Rights and Consultation Practices: Navigating Challenges and Progress

The principle of free, prior and informed consent stands as a crucial mechanism that safeguards the informational rights of indigenous peoples. Consultation rules are designed to foster dialogue, a practice that has exhibited effectiveness over time, exemplified by Spain's *política de pactismo*, entailing negotiations and agreements between the government and indigenous communities (Kania, 2022). Despite international attention to the issue, there is not a one-size-fits-all consultation formula applicable universally across all circumstances and jurisdictions. As a result, consultation practices tend to be specific to each country. Within a bipolar or multicultural society, consultation with indigenous groups of the state is viewed as a vital element to ensure successful integration. However, it is essential to note that the FPIC mechanism underscores that consultations should not imply “veto power”; rather, they serve as a procedural means without conferring an effective veto. The primary aim is to discern the most effective practice for the participation of indigenous peoples in decision-making.

During its 4th session in Geneva from 11-15 July 2011, the Human Rights Council Expert Mechanism on the Rights of Indigenous Peoples highlighted in paragraph 13 that the pivotal factor in determining best practices is the extent of participation and agreement of indigenous peoples in its formulation. Other determining factors encompass the practice's capacity to enable and promote indigenous peoples' participation in decision-making, empowering them to influence decisions that affect their interests, affirm their right to self-determination, and establish robust

consultation procedures and processes to attain their free, prior and informed consent where appropriate.

The United Nations (UN) and the Committee on Economic, Social and Cultural Rights (CESCR) articulated in General Comment No. 21 a comprehensive interpretation of prior and informed consent. Concerning cultural rights, the Committee stresses that indigenous peoples have the right to partake in cultural life, including the right to the return or restitution of lands, territories and resources traditionally used by them, if taken without their prior and informed consent. The Committee also urges States Parties to “respect the principle of free, prior and informed consent of indigenous peoples in all matters concerning their special rights,” seeking their consent when safeguarding cultural resources tied to their way of life and cultural expression that are at risk (2009).

Establishing clear guidelines at the state level through bylaws adhering to FPIC is normatively appropriate. For instance, Norway’s by-law activities, specifically the Instructions to the Basic Consultation Agreement, issued by the Ministry of Labor and Social Affairs in 2006, serve as guidance in interpreting and enforcing the state’s consultation obligation. Article 2 of the Instruction broadly covers the consultation scope, encompassing various aspects of the Sami language, culture such as cultural heritage, property rights, land management, nature, traditional knowledge, music, education, healthcare and social values (Soldberg and Nystø , 2005).

Early jurisprudence on the state’s duty of consultation was established in accordance with the principle of the honor of the Crown, signifying the duty to fairly address matters related to the assertion of sovereignty. This principle holds significance, particularly in Crown agreements concerning land, natural resources, and their potential impact on the rights of Aboriginal communities. The Haida Nation case marked the first Supreme Court of Canada (2004) case involving consultation, focusing on logging on islands claimed by the tribe for over a century. The court found the province negligent in its duty to consult, indicating that this duty also necessitated consideration of the tribe’s interests.

Several cases since 2010 have clarified the content and extent of the duty to consult. The Clyde River case (July 2017), for instance, examined whether the federal independent agency, the National Energy Board (NEB), had fulfilled the Crown’s duty to consult. The NEB had approved offshore seismic testing for oil and gas exploration in Nunavut, potentially affecting the treaty rights of the Clyde River Inuit. Despite some consultations between the company and the Inuit group, the consultation and accommodation were deemed inadequate and ineffective, particularly due to insufficient research on the rights’ impact on the rights rather than solely on the environment. Consequently, the Supreme Court of Canada (2017) overturned the NEB’s authorization. Nowadays, there exists a detailed government policy on the duty to consult at both provincial and federal levels, and

some Aboriginal communities have devised their own policy. Various provinces have incorporated consultation requirements into natural resource legislation, such as mining laws.

To ensure effective consultation, it is crucial that the institution responsible is tailored specifically to the rights of indigenous peoples, rather than peripheral issues. Our analysis of Swedish legislation supports this conclusion. The consultation process with the Sámi, in the Swedish legal framework, is solely related to corporate consultation with affected reindeer herding communities. It is essential to highlight that this type of consultation is not equivalent to the duty to consult with indigenous peoples, as it does not concern the state or stem from the Sámi as an indigenous community. The Canadian legal system has established effective protection for the right to information and consultation through case law, a precedent that merits acknowledgement. In Sweden, this form of consultation is termed “samråd” and is prevalent in natural resource regulations involving considerations and balances among rights holders or other interested parties. In these cases, the state does not enforce FPIC on the Sami as an indigenous people.

In today's globalizing society, this issue holds significant weight. There is a concerning trend of governments leveraging emergency situations and pandemic response measures to undermine and suspend environmental protections, circumvent and nullify legal guarantees, dilute foreign investment regulations, and introduce legal reforms aimed at eroding environmental safeguards and the rights of indigenous peoples (Carling, 2021; Urzedo and Robinson, 2023).

The COVID-19 pandemic has profoundly impacted the rights of indigenous peoples, with some governments exploiting the crisis to weaken their rights and approve projects and policies that might detrimentally affect them. While the pandemic has affected the entire global population, indigenous peoples, numbering 370 million worldwide, have borne a disproportionate burden (Power et al., 2020). Scientists have highlighted the severe consequences of COVID-19 on the indigenous population and migrants in Brazil, exacerbating their vulnerability. Despite the Brazilian government's disregard for inter-American and international human rights standards, this situation has resulted in socio-economic losses and hundreds of deaths, as reported by Brazilian researchers (Leidens and Noschang, 2021; United Nations, 2021).

A thorough analysis of the Report of the Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Calí Tzay, reveals several problematic aspects. Point 9 of the report raises an alarming trend where states exploit pandemic-induced emergency situations and response measures to weaken or suspend environmental protection initiatives, sidestep legal guarantees, dilute foreign investment regulations, and enact legal reforms undermining both environmental protection and the rights of indigenous peoples.

These pandemic emergency measures not only erode legal protections but also curtail the ability of indigenous peoples and other human rights defenders to challenge damaging legislation and safeguard their rights. Consequently, the environment suffers, violent conflicts escalate, and workers might become susceptible to the virus (United Nations, 2021). To fulfill the duty to consult, some states allowed virtual consultations instead of in-person meetings. However, these online formats often conflict with traditional decision-making processes entrenched in indigenous cultures. Furthermore, the limited communication opportunities and internet access in most indigenous territories hinder effective participation in virtual consultation processes.

The analysis of the reports from the Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Calí Tzay, highlight several new challenges facing indigenous communities in contemporary times. Point 3 of his 2021 Report underscores the significant presence of indigenous peoples in urban environments, necessitating attention to issues such as poverty, racism, racial discrimination, marginalization, and increased support for these communities. The migration of indigenous peoples to urban areas is often spurred by the pursuit of employment, educational opportunities, forced evictions, land alienation, militarization, environmental degradation, and climate change-induced natural disasters. Studies confirm that indigenous populations worldwide are among those most severely affected by the impacts of climate change (Jones, 2019; Middleton et al., 2020).

While indigenous communities continue to reside in their original rural territories, globalization has accelerated their migration to urban centers. In several countries, a significant proportion of indigenous peoples now reside in cities. Although precise statistics are unavailable, the International Labour Organization (ILO) (2020) estimates that approximately 69 percent of the indigenous peoples of North America, 17.9 percent of the indigenous populations of Africa, 27.2 percent of the indigenous groups of Asia and the Pacific, 33.6 percent of the indigenous communities of Europe and Central Asia, and 52.2 percent of the indigenous peoples of Latin America and the Caribbean reside in urban areas. Globally, it is estimated that over a quarter of the world's indigenous population now live in urban areas.

## **Conclusions**

In general, indigenous peoples grapple with the enduring legacy of colonization and intergenerational trauma, facing specific challenges that affect their cultural heritage, sense of identity, and ties to land and resources. The international community has established various legal and institutional safeguards for indigenous rights, notably through specific mechanisms within the United Nations system (such as the UN Permanent Forum on Indigenous Issues, Expert Mechanism on the Rights of Indigenous Peoples, Special Rapporteur on the rights of indigenous peoples). However, the primary regulatory powers remain vested in states. While there exists

an extensive system of normative legal instruments aimed at protecting indigenous rights, many of these remain declarative or discretionary. Consequently, indigenous peoples often find themselves at a disadvantage when confronting the formidable state machinery, especially in nations lacking stable democracies or with smaller indigenous populations.

The lack of a coherent theoretical and legal framework for understanding indigenous peoples remains a pressing issue. To establish them as ethno-national policy subjects, the authors have suggested specific characteristics defining indigenous peoples. These encompass community identity, shared historical heritage, a distinct geographical territory of historical importance, a unique socio-cultural system, common customs and religious practices, collective modes of existence, and the right to sovereignty over their land and natural resources. Despite some progress, the majority of indigenous peoples worldwide continue to grapple with challenges in fully exercising their political rights. Given their heightened vulnerability due to historical marginalization and discrimination, special measures are necessary to effectively implement ethno-national policies for indigenous communities. Such measures might include setting up special representation quotas, safeguarding their right to self-determination, and incorporating the principle of free, prior and informed consent.

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