Multiculturalism Policy Index: Indigenous Peoples

Second edition

Adrienne Davidson and Veldon Coburn

The Multiculturalism Policy Index Project, Queen's University. 2021.

Robert Sutherland Hall
138 Union Street
Kingston, ON, Canada
K7L 3N6
www.queensu.ca/sps/

Note to the Second Edition

This document has been prepared under our direction as part of the Multiculturalism Policy Index project. The original edition of the document, which was published in 2011, was completed by Veldon Coburn, who is now an assistant professor in the Institute of Indigenous Research and Studies at the University of Ottawa. He drew in part on research compiled by Lisa Vanhala in 2004 and by Janique Dubois in 2006. The 2011 edition has been archived and is available here.

This second edition of this document was produced in 2021 to reflect the status of multicultural policies for national minorities up to that year. It was completed by Adrienne Davidson, who is now an assistant professor in the Department of Political Science at McMaster University.

Keith Banting and Will Kymlicka, July 2021

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The Index

Multiculturalism Policy Index for Indigenous Peoples, by Country, 1980-2020

	Land Rights				Self-Government Rights				Treaties				Cultural Rights				Customary Law			
	1980	2000	2010	2020	1980	2000	2010	2020	1980	2000	2010	2020	1980	2000	2010	2020	1980	2000	2010	2020
Australia	0	1	1	1	0.5	0.5	0.5	0.5	0	0	0	0.5	0.5	0.5	1	1	0	0.5	0.5	0.5
Canada	1	1	1	1	0.5	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Denmark	1	1	1	1	1	1	1	1	0	0	0	0	1	1	1	1	1	1	1	1
Finland	0	0	0	0	0.5	0.5	0.5	0.5	0	0	0	0	0.5	0.5	0.5	0.5	0	0	0	0
Japan	0	0	0	0	0	0	0	0	0	0	0	0	0	0.5	0.5	0.5	0	0	0	0
New Zealand	0.5	1	1	1	0.5	0.5	0.5	0.5	1	1	1	1	1	1	1	1	1	1	1	1
Norway	0	0	0.5	0.5	0	0.5	0.5	0.5	0	0	0	0	0	1	1	1	0	0	0.5	0.5
Sweden	0	0	0	0.5	0	0.5	0.5	0.5	0	0	0	0	0.5	0.5	1	1	0	0	0	0.5
United States	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1

	Rep. in Central Government				Distinct Status				International Instr.				Affirmative Action				TOTAL SCORE			
	1980	2000	2010	2020	1980	2000	2010	2020	1980	2000	2010	2020	1980	2000	2010	2020	1980	2000	2010	2020
Australia	0	1	0.5	0.5	0	0	0.5	0.5	0	0	0.5	0.5	0	1	1	1	1	4.5	5.5	6
Canada	0	0	1	1	1	1	1	1	0	0	0.5	0.5	0	1	1	1	5.5	7	8.5	8.5
Denmark	1	1	1	1	1	1	1	1	0	1	1	1	0	0	0	0	6	7	7	7
Finland	1	1	1	1	1	1	1	1	0	0	0.5	0.5	0	0	0	0	3	3	3.5	3.5
Japan	0	0.5	0.5	0.5	0	0	0.5	1	0	0	0.5	0.5	0	0	0.5	0.5	0	1	2.5	3
New Zealand	1	1	1	1	1	1	1	1	0	0	0.5	0.5	0	0.5	0.5	0.5	6	7	7.5	7.5
Norway	0	0.5	1	1	0.5	1	1	1	0	1	1	1	0	0	0	0	0.5	4	5.5	5.5
Sweden	0	0.5	0.5	0.5	0.5	0.5	0.5	1	0	0	0.5	0.5	0	0	0	0	1	2	3	4.5
United States	0.5	0.5	1	1	1	1	1	1	0	0	0.5	0.5	1	1	1	1	7.5	7.5	8.5	8.5

Decision Rules for Ranking Multiculturalism Policies for National Minorities

In evaluating multiculturalism policies related to indigenous peoples, this document uses nine indicators. These are described briefly below. For each indicator, policy documents, program guidelines, legislation, and government news releases were examined to assess the extent to which a country has met or exceeded the standard outlined in the indicator. Where official government documents were not available, secondary sources and other academic research have been used.

For each indicator, a qualitative assessment is provided along with the relevant evidence. A response of "yes" indicates that the country has met or exceeded the standard outlined in the indicator, a response of "no" indicates that the country has not met this indicator, while a response of "partial" indicates that the country has made some progress in this area.

1. RECOGNITION OF LAND RIGHTS/TITLE

Yes: Country has recognized the indigenous peoples' rights and/or title to lands in statutory instruments (i.e., constitutions, legislation, proclamations, treaties, court decisions).

Partial: Country has policy related to indigenous land usage rights/privileges, but without legislative base; or, country has policy of, or legislated, usufructuary rights of indigenous peoples to land under the state's authority.

No: Country has not recognized land rights/title of indigenous peoples.

2. RECOGNITION OF SELF-GOVERNMENT RIGHTS

Yes: Self-government rights have been recognized in law e.

Partial: Indigenous peoples enjoy limited rights or privileges of governance over matters affecting them.

No: Country has not affirmed rights of self-government for indigenous peoples.

3. UPHOLDING HISTORIC TREATIES AND/OR SIGNING NEW TREATIES

Yes: The state has entered into at least one treaty, historic or modern/contemporary, with the indigenous peoples. The treaty(ies) must be duly recognized by state authorities as binding.

No: No treaties exist.

4. RECOGNITION OF CULTURAL RIGHTS (LANGUAGE, HUNTING/FISHING, RELIGION)

Yes: Country recognizes the cultural rights specific to the indigenous population in statutory instruments in two or more cultural domains.

Partial: Only cultural rights from one domain, such as language, have been recognized in law or policy; and/or country permits the indigenous population to enjoy or engage in an extensive range of cultural activities as a matter of policy, not law.

No: Country does not recognize the cultural rights of the indigenous population.

Note: In an earlier version of the Index, the presence (or absence) of Sunday-closing legislation was evaluated as part of this indictor. Although a number of countries were found have provisions that allow shops to open and close on days of their choosing, it was often not clear whether such policies were a response to multiculturalism, or other – often economic – considerations. As such, this measure has been excluded from this version of the index.

5. RECOGNITION OF CUSTOMARY LAW

Yes: The customary law of indigenous peoples has been recognized by the state in law or court rulings.

Partial: A limited scope of traditional legal customs still in practice within indigenous societies is permitted by the state.

No: Country does not recognize the customary legal traditions of the indigenous peoples.

6. GUARANTEES OF REPRESENTATION/CONSULTATION IN THE CENTRAL GOVERNMENT

Yes: Legislation guarantees representation of indigenous peoples in central government; and/or countries have statutory obligation to consult with indigenous peoples:

Partial: Indigenous peoples have representative bodies that are subordinate to the national government; and/or indigenous groups are consulted, as a matter of policy, on issues that affect them.

No: Indigenous peoples have no guarantee of representation/consultation in either law or policy. The existence of departments/ministries of the central government which are mandated to address indigenous peoples/issues do not qualify as representation/consultation. Historically, government ministries of indigenous affairs have often been a mechanism for non-indigenous political leaders to impose decisions on indigenous peoples, rather than a mechanism for indigenous peoples to affect the decisions of central governments. This indicator is concerned with the latter, and hence is intended to measure the extent to which indigenous peoples can speak for themselves and participate effectively in decision-making processes of the central government.

7. CONSTITUTIONAL OR LEGISLATIVE AFFIRMATION OF THE DISTINCT STATUS OF INDIGENOUS PEOPLES

Yes: The constitution or legislation recognizes and affirms a group as indigenous.

Partial: The distinct status of indigenous peoples is affirmed in other policy/legal instruments.

No: The constitution does not affirm the distinct status of indigenous peoples, and no domestic legislative

instruments or policies exist to this effect.

8. SUPPORT/RATIFICATION FOR INTERNATIONAL INSTRUMENTS ON INDIGENOUS RIGHTS

Yes: Country has signed and ratified ILO Convention 169 Indigenous and Tribal Peoples Convention, 1989.

Partial: Country has not supported or ratified ILO Convention 169 but has voted for, or later endorsed/supported the non-binding United Nations Declaration on the Rights of Indigenous Peoples.

No: Country has not supported or ratified any international instruments on indigenous rights.

9. AFFIRMATIVE ACTION

Yes: Country has an affirmative action policy that targets members of the indigenous population; this may be in the public or private sector, or both. Initiatives will extend beyond human rights policies and include targeted action aimed at removing barriers or more positive action measures such as quotas or preferential hiring.

Partial: Country does not have a statutory base for affirmative action; however, initiatives exist in policy, extending beyond human rights, which include targeted action at removing barriers or more positive action measures such as quotas or preferential hiring in either the public or private sector.

No: Country has no affirmative action policy for indigenous peoples.

[redacted]

Evidence

Australia

TOTAL SCORES				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**4.5**	**5.5**	**6**

1. RECOGNITION OF LAND RIGHTS/TITLE

Yes.

Land Rights/Title Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**1**	**1**	**1**

Evidence:

- In 1966, the South Australia government passed the Aboriginal Land Trust Act, which allowed for Indigenous ownership of land. The legislation, however, did not recognize any form of common law native title (Scholtz 2013).
- The Aboriginal Land Rights (Northern Territory) Act 1976 was the first attempt by an Australian government to legally recognize the Aboriginal system of land ownership and put into law the concept of inalienable freehold title. When the law was passed, previous Aboriginal reserves became Aboriginal land. The land was granted without the need for a land claim.
- In 1981, the Pitjantjatjara Land Rights Act was passed by the State Government of South Australia. Under section 18 of the act, "All Pitjantjatjaras have unrestricted rights of access to the lands" granted by the governor.
- In David Alan Gerhardy v. Robert John Brown (1985), the Australian High Court described the Pitjantjatjara Land Rights Act as "a special measure for the purpose of adjusting the law of the State to grant legal recognition and protection of the claims of the Anunga Pitjantjatjara to the traditional homelands on which they live."
- Since the 1980s, all states in Australia have enacted land and title legislation that deals with Aboriginal land rights.
- The Native Title Act 1993, a Commonwealth statute, came into operation in 1994 to address the High Court decision in Mabo v. Queensland (No 2) (1992). In Mabo, the court rejected the doctrine of terra nullius, and held that the common law of Australia recognizes continuing title held by indigenous peoples to their traditional lands in accordance with their traditional laws and customs.
- The main purpose of the Native Title Act 1993 is to recognize and protect native title. The act provides for the recognition of pre-existing rights to land and waters, and addresses the acts that impact native title and the resolution of claims for compensation.

- In 1998, however, the Native Title Act 1993 was amended under the Howard government through the Native Title Amendment Act 1998. This new legislation put many restrictions on potential claims by Aboriginal people.
- In 2016, the Kenbi Land Claim (first lodged in 1979) was settled. 80% of the lands claimed (~52,000 hectares) were granted as Aboriginal land under the *Aboriginal Land Rights Act*. The remaining 20% of the claimed lands will be transferred as freehold territory to be used by the Aboriginal claimants.
- A second land claim – the Wickham River Land Claim – was also finalized in 2016.
- 42 land claims remain outstanding and are still under negotiation.

2. RECOGNITION OF SELF-GOVERNMENT RIGHTS

Partial, but very limited.

Self Government Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0.5**	**0.5**	**0.5**	**0.5**

Evidence:

- Aboriginal peoples in Australia exercise limited, local self-governance through community-based governance councils. Aboriginal Land Councils are incorporated, statutory authorities that represent Aboriginal peoples and Aboriginal landowners across Australia. Aboriginal land councils manage a range of support services delivered at the local level to their communities. These services include housing, legal affairs, employment, training, and property acquisition and management.
- Aboriginal peoples are involved in the election of members to land councils. In each state and territory, land councils have been established to provide representation and organization of native title. For example, in the Northern Territory, the Aboriginal Land Rights (Northern Territory) Act 1976 established Aboriginal land councils to act as agents for traditional Aboriginal owners on land matters.
- In Western Australia, Aboriginal organizations may draft and enforce bylaws on Aboriginal reserves and other Aboriginal lands under the authority of the Aboriginal Communities Act 1979. Authority is limited to areas such as the regulation of admission of people and traffic; regulation for control of traffic; regulations governing noise, use or supply of alcohol and other substances, firearms and other weapons, litter and rubbish dumping.
- Some state-level policy is beginning to support Aboriginal self-government and/or self-governance. In South Australia, the Aboriginal Regional Authorities policy has created a framework for government recognition of Aboriginal political collectivities. In Victoria, the government has placed Aboriginal self-determination as a driver of Aboriginal affairs policy in the state (Vivian et al. 2017).

3. UPHOLDING HISTORIC TREATIES AND/OR SIGNING NEW TREATIES

Partial, limited to state government initiatives.

Upholding and/or Signing Treaties Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0**	**0**	**0.5**

Evidence:

- Neither the Commonwealth Government of Australia nor the British Crown has entered into a treaty with the indigenous peoples of Australia.
- There have been some attempts in recent decades to explore the idea of a treaty between Australia and the indigenous peoples. In 1979, until 1983, the Aboriginal Treaty Committee (ATC) was established as an independent body to pressure the Australian government to enter into a treaty, covenant or convention with Aboriginal people and Torres Strait Islanders. Despite the establishment of the ATC, throughout the 1980s - 2000s, movement towards Aboriginal treaties was limited.
- As with land rights, government progress towards a treaty relationship with Indigenous Australians appears to be happening at the state level first.
- In 2015, the Western Australia Government signed a $1.3 billion settlement with the Noongar people under the *Native Title Act.* The *Native Title Act* is primarily a mechanism for land claim., However, the final agreement addressed issues of governance, finance, and cultural heritage, among others, approximating modern treaties present in Canada and New Zealand.
- In 2018, the Victoria parliament passed legislation to create a framework for Indigenous treaty negotiations (Wahlquist 2018).
- Also in 2018, the Northern Territory Government pledged to undertake a treaty process, and signed the Barunda Agreement, which committed the government to develop a treaty process in negotiation with the Aboriginal groups in the Territory within three years (Allam 2018).
- Most recently, in 2019, the Queensland Government announced its interest in pursuing a pathway to a process for Indigenous treaties.

4. RECOGNITION OF CULTURAL RIGHTS (LANGUAGE, HUNTING/FISHING, RELIGION)

Yes, largely hunting and fishing, as well as religious, some language.

Recognition of Cultural Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0.5**	**0.5**	**1**	**1**

Evidence:

- Under the National Parks and Wildlife Conservation Act 1975, Aborigines are afforded the right to "the traditional use of any area of land or water for hunting, for food-gathering (otherwise than for purposes of sale) and for ceremonial and religious purposes" (section 70.1). In addition to this commonwealth statute, the states and territories have laws protecting Aboriginal hunting rights, as well as, in some instance, the care and control of flora and fauna on the land granted to them (see Aboriginal Land Claims Bill 1983 for Victoria, for instance).
- The Aboriginal Heritage Act 1988 was enacted in South Australia to protect Aboriginal culture and heritage. Specifically, the act protects all Aboriginal sites, objects and remains in South Australia that are of significance to Aboriginal tradition. Moreover, the South Australian State government has developed a "Cultural Inclusion Framework," designed to assist government agencies develop services that are culturally inclusive and thus more accessible to Aboriginal people.
- The Australian government supports indigenous languages through the Maintenance of Indigenous Languages and Records program. The program supports the sustainable development of an active network of community-based indigenous language centres and language organizations, language projects and policy initiatives such as the National Indigenous Language Survey.
- In 2009, the Australian government announced the establishment of the National Indigenous Languages Policy. This new policy seeks to create awareness, aid endangered languages, strengthen pride in identity and culture through language revival, and support indigenous language programs in schools.
- The Commonwealth Government passed the *Aboriginal and Torres Strait Islander Peoples Recognition Act* into law in 2013. The Act included specific recognition for Aboriginal and Torres Strait Islander languages; the Act had a 2-year sunset clause and is no longer in force.
- In 2017, New South Wales became the government in Australia to pass Aboriginal language protection legislation. The Aboriginal Languages Act recognizes importance of Aboriginal languages and the role that language loss was a product of government action and policy. The legislation also establishes the Aboriginal Languages Trust to support the maintenance and revitalization of Aboriginal languages in the state.
- In terms of fishing rights, numerous commonwealth, state and territorial laws accommodate Aboriginal traditional fishing practices. For example, the Torres Strait Treaty of 1978, an international treaty between Australia and Papua New Guinea that clarifies the boundaries between both countries, as well as jurisdiction over the seabed and fisheries in the Torres Strait, and the legislation to implement the treaty, provide for "traditional fishing."
- In the state of Western Australia, the Fisheries Act 1905 allows a person of Aboriginal descent to take, in any waters and by any means sufficient, fish for food for himself and his family, but not for sale; this right may be restricted by the power of the governor, however.
- Similarly, in Queensland, the Fisheries 1976 Act exempts from prosecution any Aboriginal or Torres Strait Islander who at the material time is resident on a reserve from the taking of fish or marine products for private purposes.

5. RECOGNITION OF CUSTOMARY LAW "

Partial, but very limited.

Recognition of Customary Law Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0.5**	**0.5**	**0.5**

Evidence:

- Generally, only a very limited breadth of acknowledgement of indigenous customary legal practices exists in Australian law, despite evidence which suggests that Aboriginal societies continue to practice their legal traditions (see the report of the 1986 Australian Law Reform Commission entitled The Recognition of Aboriginal Customary Laws).
- For nine years, beginning in 1977, the Australian Law Reform Commission (ALRC) studied whether it would be desirable to apply, either in whole or in part, Aboriginal customary law to Aborigines—generally or in particular areas or to those living in tribal communities only. The study culminated in the 1986 report, The Recognition of Aboriginal Customary Laws.
- The ALRC's 1986 report outlined that, with very limited exceptions, Aboriginal customary laws have never been recognized by general Australian law. It reported that customary laws were a significant influence in the lives of many Aborigines. More importantly, however, the report recognized that there was no one "authentic version" of customary law (ALRC 2010).
- Under current legislation, such as the Aboriginal Communities Act 1979 of Western Australia, the Council for Aboriginal Communities can make its own bylaws, which may be implicitly customary. Moreover, the Aboriginal Land Rights (Northern Territory) Act 1976 allows claims to be made by indigenous peoples to the Crown on the basis of traditional concepts of ownership.
- The 1992 decision in Mabo represented the recognition of indigenous customary law. In its decision, the High Court recognized the legal force of customary indigenous rights to land where those rights continue to exist.
- In 1995, the Office of Indigenous Affairs of the Department of Prime Minister and Cabinet published the report, Aboriginal Customary Laws: A Report on Commonwealth Implementation of the Recommendations of the Australian Law Reform Commission. In the report, the government indicated that there had been partial implementation of some of the recommendations (ibid.).
- Amendments were made in 2006 and 2007 to Commonwealth and Northern Territory legislation limiting consideration of cultural practice and customary law in bail and sentencing decisions. The bail and sentencing legislation of all other Australian jurisdictions allow for consideration of customary law and cultural practice in bail and sentencing decisions.
- The variety of legislation in effect by both the Commonwealth and state governments means that some aspects of Aboriginal customary laws and traditions are recognized. These include limited provisions recognizing traditional Aboriginal marriages, recent initiatives around Aboriginal child care practices, the distribution of property upon death in accordance with Aboriginal family and kin relationships, and the protection of sacred and significant sites of Aboriginal tradition and culture, among others.

6. GUARANTEES OF REPRESENTATION/CONSULATION IN THE CENTRAL GOVERMENT

Partial.

Guarantees of Representation Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**1**	**0.5**	**0.5**

Evidence:

- From 1990 until 2005, the Aboriginal and Torres Strait Islander Commission (ATSIC) was the national government body for indigenous policymaking and program/service delivery.
- When ATSIC was operational, Aboriginal and Torres Strait Islanders from across Australia elected 35 regional council members as well as a national Board of Commissioners. This organization also entailed an administration, which was headed by a chief executive officer. ATSIC was abolished under the Howard government through an act of parliament in 2005.
- Following the abolition of ATSIC, the Office of Indigenous Policy Coordination (OIPC) assumed the broad functions of the organization, absent the representative function. The OIPC is the Australian government's division within the broader Department of Families, Housing, Community Services and Indigenous Affairs. The office acts as the primary source of policy advice on indigenous issues to the minister and the coordination point for a whole-of-government approach to the delivery of programs and services for Australia's indigenous population.
- A new, national representative body, designed to replace the Aboriginal and Torres Strait Commission, was expected to be established and be fully operational by January 2011 (Anaya 2010, 9, para. 13). That body – the National Congress of Australia's First Peoples – faced several challenges to its operation and success. In 2013 the Commonwealth government indicated it would not continue to support it, and government financial contributions to the organization stopped in 2016. In 2019, the National Congress ceased operations.
- In 2017, the First Nations National Constitutional Convention supported the Uluru Statement from the Heart, which called for constitutional reforms to enable formal recognition and consultation of Aboriginal and Torres Strait Islander peoples on policy issues and legislation affecting their communities.
- The Statement recommended the creation of a Voice to advise the Australian Parliament on issues of structural disempowerment and systemic racism against Aboriginal peoples. The Statement did not define what such an institution would look like.
- Government and federal-level political support for the statement has been mixed. In June 2017, the Referendum Council recommended that a referendum be held with respect to amending the Australian Constitution to enable a representative body to give Aboriginal and Torres Strait Islanders a Voice to the Commonwealth Parliament (Referendum Council 2017); the recommendation for a referendum was rejected by the Australian government.
- The Government of Australia convened the Joint Select Committee on Constitutional Recognition in March 2018. The Committee supported the creation of an institutional Voice for Aboriginal and Torres Strait Islander peoples, calling for a 'co-design' process during the 46th Parliament.

- During the 2019 election, the political platforms of the Liberal-National Coalition, Australian Labor Party, and Australian Greens all supported the creation of an Aboriginal Voice to Parliament, and the establishment of a truth-telling process.

7. CONSTITUTIONAL OR LEGISLATIVE AFFIRMATION OF THE DISTINCT STATUS OF INDIGENOUS PEOPLES

Partial.

Affirmation of Distinct Status Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**0**	**0.5**	**0.5**

Evidence:

- In 1967, a national referendum amended the constitution to remove text that discriminated against Aboriginal and Torres Strait Islanders. Thus, indigenous people were included in the national census, and the Commonwealth Government gained the authority to legislate on matters related to indigenous people (Anaya 2010, 8, para. 9).
- The Motion of Apology to Australia's Indigenous Peoples (the "National Apology"), was introduced by Prime Minister Kevin Rudd and unanimously passed by the House of Representative on 13 February 2008. The Australian federal parliament apologized for "the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss" on Aboriginal and Torres Strait Islanders (quoted in Anaya 2010, 8, para. 11).
- In 2013, the Commonwealth Government passed the Aboriginal and Torres Strait Islander Peoples Recognition Act into law. In the Act, "The Parliament, on behalf of the people of Australia, recognises that the continent and the islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples." It furthermore "acknowledges the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters," and "acknowledges and respects the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples."
- The 2013 Act called for a review of support for a referendum to amend the Constitution to recognize Aboriginal and Torres Strait peoples. The Act had a two-year sunset clause, at which point the legislation was no longer in force.
- In 2017, the Uluru Statement from the Heart called for constitutional reforms to enable formal recognition of Aboriginal and Torres Strait Islander peoples; as discussed above, those reforms are as yet not implemented.
- The Government of Australia convened the Joint Select Committee on Constitutional Recognition in March 2018. The Committee's Final Report recommended that the government establish a co-design process with the Aboriginal and Torres Strait Islander peoples to establish a model for an Aboriginal Voice to Parliament, through legislative, executive, or constitutional mechanisms.
- During the 2019 election, the political platforms of the Liberal-National Coalition, Australian Labor Party, and Australian Greens all supported constitutional recognition.

8. SUPPORT/RATIFICATION FOR INTERNATIONAL INSTRUMENTS ON INDIGENOUS RIGHTS

Partial.

Support for International Instruments Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**0**	**0.5**	**0.5**

Evidence:

- Australia has not ratified ILO Convention 169 Indigenous and Tribal Peoples Convention, 1989.
- Australia was among the four countries that voted against the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP). In April 2009, Australia reversed its position and endorsed the UN DRIP. This declaration is non-binding and does not impose duties or obligations on the Australian government or Crown.

9. AFFIRMATIVE ACTION

Yes.

Affirmative Action Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**1**	**1**	**1**

Evidence:

- Under section 3 of the Equal Employment Opportunity (Commonwealth Authorities) Act 1987, "members of the Aboriginal race of Australia or persons who are descendants of indigenous inhabitants of the Torres Strait Islands" are distinguished as a "designated group." Under this law, programs and recruitment matters are to be designed to eliminate discrimination and promote equal opportunity for designated groups.
- Under the Commonwealth Racial Discrimination Act of 1975, special measures are permitted, as a form of affirmative action, to make distinctions based on race in hiring practices. The law permits that groups that have been traditionally denied human rights to receive special treatment to redress the situation.
- State legislation targets Aboriginal people for positions in the public service. For example, the Tasmanian State Service Act 1984 has identified that Aboriginal and Torres Strait Islanders are a designated "Equal Employment Opportunity" target group. Under this law, state agencies are required to recruit for "Aboriginal Identified Positions" where the position description will have an essential requirement of Aboriginality.
- The Australian Cabinet Office's 2015-2019 Corporate Plan outlines three purposes, the third of which is: Improving the Lives of Indigenous Australians. The plan outlines several measures directed towards affirmative action and improving Aboriginal economic development. These measures include the Indigenous Procurement Policy which sets targets for procurement contracts to be awarded to Indigenous businesses, commitments and targets for vocational training, and the Employment Parity Initiative that aims to provide an

additional 20,000 jobs for unemployed Aboriginal and Torres Strait Islander peoples, among others (Government of Australia, 2019).

Canada

TOTAL SCORES				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**5.5**	**7**	**8.5**	**8.5**

1. RECOGNITION OF LAND RIGHTS/TITLE

Yes.

Land Rights/Title Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- In Calder v. British Columbia (1973), the Supreme Court of Canada recognized the existence of Aboriginal title to lands that had not been surrendered to the Crown. Since this time, the Government of Canada has engaged in land claim negotiations with Aboriginal peoples in areas where Aboriginal rights and title have not been addressed by treaty or through other legal means.
- In 1997, the Supreme Court of Canada's decision in Delgamuukw v. British Columbia made it clear that Aboriginal land and territory title is a right recognized and affirmed by subsection 35 (1) of the Constitution Act, 1982.
- In Delgamuukw v. British Columbia, the court ruled that Aboriginal people enjoy the right of exclusive use and occupation of territory if they can demonstrate that they have occupied the land prior to the assertion of British sovereignty, and that there has been continuity in the possession between the present and pre-sovereignty occupation.
- Under the terms of the numerous historic treaties, Aboriginal peoples were granted land and territory. Where the Crown has failed to fulfill its obligations, Aboriginal peoples can appeal to Treaty Land Entitlement recourse to settle the land debt.
- Through the authority of the *Indian Act* (1876), tracts of land have been reserved for Indian bands. Although the title to the land is in the name of the Crown, His or Her Majesty, ownership of the land is conferred to bands. Reserve lands are owned communally and can only be alienated to the federal Crown.
- In 1999, the Government of Canada introduced the *First Nations Land Management Act*. The Act enables First Nations to opt-out of sections of the *Indian Act* relating to land management. First Nations can then develop their own laws about land use, the environment and natural resources and take advantage of cultural and economic development opportunities with their new land management authorities.

- Historically, the federal government did not recognize Métis as peoples with whom the federal government has a constitutional relationship. As such, the responsibility to deal with and recognize Metis fell primarily to the provinces. The *Métis Settlements Act* of Alberta (1990) provides for the protection of a collective land base for the Métis. As well, the *Manitoba Act* (1870) allocated a total of 1.4 million acres for the benefit of the Metis (Imai 1999, 86).
- The 2016, the Supreme Court of Canada ruled in favour of the Métis of Canada in *Daniels v. Canada.* The decision classified non-status Indians and Métis as "Indians" under section 91(24) of the Canadian Constitution, clarifying that both groups are a constitutional responsibility of the federal government, not provinces (Vowel 2016).
- In the north, the Inuit are beneficiaries of modern-day treaties and land claims through the James Bay and Northern Quebec Agreement, the Inuvialuit Final Agreement (The Western Arctic Claim Settlement), the Labrador Inuit Land Claims Agreement-In-Principle, and the Nunavut Land Claims Agreement Act.

2. RECOGNITION OF SELF-GOVERNMENT RIGHTS

Yes, but largely as a matter of policy rather than law..

Self Government Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0.5**	**1**	**1**	**1**

Evidence:

- The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the Constitution Act, 1982. The inherent right to self-government is a matter of policy and has not been codified in law, nor has it been recognized by the Supreme Court of Canada.
- In 1998, the Government of Canada released the Agenda for Action with First Nations which states that "Aboriginal people enjoyed their own forms of government for thousands of years before this country was founded and they continue to have the inherent right to self-government. The federal government is committed to working out government-to-government relationships at an agreed-upon pace acceptable to First Nations" (quoted in Imai 1999, 117).
- Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources (INAC 2010).
- Under the Indian Act, Indian bands are authorized to develop bylaws for their communities with the approval of the minister responsible for Indian Affairs.
- In 1995, the Government of Canada expanded its Official Policy of Negotiation to include self-government; as before, this expansion applies primarily to nations with whom historic treaties were not signed (mostly nations in western Canada and the far north).

- At present, there are 25 self-government agreements across Canada involving 43 Indigenous communities, including the Sechelt Indian Band Self-Government Act, Westbank First Nation Self-Government Agreement; and the The Tłı̨chǫ Land Claims and Self-Government Agreement.
- In one of the most recent modern-day treaties, the Nisga'a Final Agreement Act (1999) provides for an open, democratic and accountable Nisga'a government. Through the self-government provisions of the treaty, the Nisga'a have the legal authority to conduct their own affairs, including provisions for legal jurisdiction and the management of natural resources, in accordance with existing provincial legislation (UN 2005, 9).

3. UPHOLDING HISTORIC TREATIES AND/OR SIGNING NEW TREATIES

Yes.

Upholding and/or Signing Treaties Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- The British Crown first entered into solemn treaties with Aboriginal peoples in the early 18th century. The first of the historic treaties provides that Aboriginal peoples surrender their interests in lands in exchange for certain other benefits that could include reserves, annual payments, rights to medical care and education, and many others.
- The Supreme Court of Canada has ruled with respect to the ability of the federal government to override treaties. In R. v. Sparrow (1990), the Supreme Court stated that the federal government could limit or infringe upon a right of Aboriginal people only if there existed a good reason for the law, and only if the law interfered with the Aboriginal right in the least intrusive way possible (Imai 1999, 32). Failing to do so, the law would be deemed unconstitutional.
- In R. v. McPherson (1994), however, it was ruled that provincial laws of general application must be deemed inapplicable to Aboriginal persons when they conflict with Aboriginal treaty rights.
- The first of the modern-day treaties was the James Bay and Northern Quebec Agreement, signed in 1975. To date, the federal government has settled 25 additional self-government and comprehensive land claim areas (as well as two stand-alone self-government agreements) with Aboriginal people in Canada (CIRNAC 2020).
- Treaty rights already in existence in 1982, the year the Constitution Act was passed, and those that came afterwards, are recognized and affirmed by Canada's constitution.

4. RECOGNITION OF CULTURAL RIGHTS (LANGUAGE, HUNTING/FISHING, RELIGION)

Yes.

Recognition of Cultural Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- The Supreme Court of Canada ruled in R. v. Sparrow (1990) that Aboriginal rights recognized and affirmed by section 35 (1) of the Constitution Act, 1982 include those practices that form an "integral part" of an Aboriginal community's "distinctive culture."
- In 1996, the Supreme Court stated in R. v. Van der Peet that, "to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right at the time of contact" (quoted in Macklem 2007, 59).
- Cultural rights are often provided for in the treaties made between the Crown and Aboriginal peoples. Many treaties explicitly addressed hunting and fishing. In R v. Cheechoo (1981), the Ontario District Court maintained that, under Treaty No. 9, Indians were entitled to a right to trapping.
- Religious practices have been recognized as a treaty right. In R. v. Sioui (1990), the Supreme Court of Canada upheld an 1860 treaty guarantee to "the free exercise of their religion, customs and trade with the English." However, a British Columbia court ruled in Thomas v. Norris that there were limits to the treaty right. In this case, religious practices could not be used as defence against assault.

5. RECOGNITION OF CUSTOMARY LAW "

Yes.

Recognition of Customary Law Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- Canadian courts have recognized the existence of Aboriginal customary law in a number of circumstances. Customary marriage has been recognized in criminal cases when a wife refused to testify against her husband (Imai 1999, 36).
- Aboriginal customary marriage was recognized by an Alberta Court of Queen's Bench in the case of Manychief v. Poffenroth (1995). The conclusion of Justice McBain maintains that the case represents a strong affirmation of customary Aboriginal marriages as equivalent to marriage conducted under provincial law.

- In the case of Casimel v. Insurance Corp. of British Columbia (1994), a British Columbia Court of Appeal ordered an insurance company to pay benefits to the elderly parents of a deceased child who had been adopted according to the customs of the Stellaquo First Nation.
- In British Columbia, the Adoption Act of 1996 included a section [s.s. 46 (1) and 46 (2)] that addressed Aboriginal laws on customary adoptions. Similarly, the Northwest Territories passed the Aboriginal Custom Adoption Recognition Act in 1994.

6. GUARANTEES OF REPRESENTATION/CONSULATION IN THE CENTRAL GOVERMENT

Yes.

Guarantees of Representation Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0**	**1**	**1**

Evidence:

- Section 35.1 of Canada's Constitution Act, 1982 obliges the government of Canada to invite representatives of the aboriginal peoples to participate in discussions relating to proposed amendments to Aboriginal rights and freedom, as well as amendments to section 91.24 of the Constitution Act, 1867 that confers legislative responsibility for "Indians, and Lands reserved for Indians."
- Despite this constitutional provision, it was not until the early 2000s that the fundamental principles around the duty to consult were established. In 2004 and 2005, the Supreme Court of Canada released a trilogy of decisions that clarified the basis for the Crown's duty to consult: *Haida Nation v. British Columbia (Minister of Forests), Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*. The cases established procedural protection for Aboriginal and treaty rights and outlined a framework for implementation (Brideau, 2019).
- Of the three cases, landmark decision was unanimous 2004 judgment in Haida Nation v. British Columbia (Minister of Forests), the Supreme Court of Canada ruled that both the federal and provincial Crowns have a "duty to consult" Aboriginal peoples and to accommodate their concerns even before Aboriginal title or rights claims have been decided. The duty to consult stems from the Crown's unique relationship with Aboriginal peoples and must be discharged in a manner that upholds the honour of the Crown and promotes reconciliation of Aboriginal and non-Aboriginal interests (INAC 2008).
- All federal departments and agencies are required to comply with the legal duty to consult and possibly accommodate Aboriginal interests. Currently, the Government of Canada has developed an interim guideline entitled Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult (Government of Canada 2011).
- Neither the federal government nor any of the provincial governments ensures that Aboriginal peoples are represented in Parliament or in the legislatures. However, government studies and commissions have addressed the issue of guaranteed representation in Parliament or provincial/territorial legislatures (e.g., the Committee for Aboriginal Electoral Reform under the Royal Commission on Electoral Reform and Party Financing in 1991).

- In 2018, the Supreme Court revisited to the question of duty to consult in *Mikisew Cree First Nation v. Canada (Governor General in Council)*.n this decision, the Court made clear that at present, the duty to consult applies only to the Crown's conduct under enacted legislation, and not the process of developing legislation, though governments may seek the input of Indigenous groups as a matter of policy (Brideau, 2019).

7. CONSTITUTIONAL OR LEGISLATIVE AFFIRMATION OF THE DISTINCT STATUS OF INDIGENOUS PEOPLES

Yes.

Affirmation of Distinct Status Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**1**	**1**	**1**	**1**

Evidence:

- The Royal Proclamation of 1763 was the first affirmation of Canada's indigenous population. This proclamation recognized the "several Nations or Tribes of Indians" as distinct from European settlers (quoted in Imai 1999, 28).
- Canada's Aboriginal people are referenced twice in the constitution. In section 91.24 of the Constitution Act, 1867, the federal government is granted authority to make laws regarding "Indians, and Lands reserved for Indians." For the purposes of this section, the Supreme Court of Canada reference case [1939] SCR 104, Inuit are considered "Indians."
- Section 35 of the Constitution Act, 1982, recognizes Aboriginal people and their rights. Aboriginal people are described as including "Indians, Inuit and Metis." Moreover, section 35 "recognized and affirmed" that the rights of Aboriginal people pre-exist the constitution and are not created by the constitution.

8. SUPPORT/RATIFICATION FOR INTERNATIONAL INSTRUMENTS ON INDIGENOUS RIGHTS

Partial.

Support for International Instruments Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**0**	**0.5**	**0.5**

Evidence:

- Canada has not ratified ILO Convention 169 Indigenous and Tribal Peoples Convention, 1989.
- Canada was among the four countries that voted against the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP). In November 2010, Canada reversed its position and endorsed the UN DRIP.

This declaration is non-binding and does not impose duties or obligations on the Canadian government or Crown

- In 2016, the Government of Canada again endorsed the UN DRIP and committed to its full implementation.
- In 2016, NDP Member of Parliament Romeo Saganash introduced a private member's bill (C-262) to ensure that Canadian laws are consistent with the UN DRIP; however the bill would not have codified the UN declaration into Canadian law. Despite passage in the House of Commons, the bill died on the order paper in the Senate in 2019 when it rose for summer recess (Gunn 2019).
- In December 2020, the Government of Canada introduced its own legislation to implement the UN DRIP.
- In 2019, the provincial government in British Columbia passed its own legislation, *Declaration on the Rights of Indigenous Peoples Act,* to implement the UN DRIP and ensure provincial laws align with the declaration

9. AFFIRMATIVE ACTION

Yes, but primarily limited to employers under federal jurisdiction.

Affirmative Action Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**1**	**1**	**1**

Evidence:

- Aboriginal people were identified as one of four groups designated as beneficiaries for employment equity as a result of the 1984 Abella Commission on Equality in Employment.
- Based on the recommendations of the Abella Report, the Government of Canada enacted the Employment Equity Act in 1985 (subsequently amended in 1995). Section 5 of this act stipulates that every employer shall implement employment equity by "instituting such positive policies and practices and making such reasonable accommodations as will ensure that [Aboriginal persons] achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in the Canadian workforce."
- The Employment Equity Act is federal legislation and applies only to federally regulated workforce activity, such as the federal public service. In no other jurisdiction in Canada (provincial or territorial) does there exist similar legislative prescriptions for affirmative action. Provincial and territorial employment equity falls under human rights codes, effectively barring employers from discriminating in their employment activities, such as hiring and wage negotiation, on the basis of race or nationality (i.e., indigenous status).
- Though no legislative prescriptions exist, the three Northern territories (Yukon, Northwest Territories, and Nunavut) have all introduced affirmative action policies within the territorial public services.
    - The Nunavut Land Claim Agreement commits federal and territorial governments to the recruitment and training of Inuit for positions throughout government (Gallagher-Mackay, 2019).
    - In 2006, the Government of the Northwest Territories introduced an Affirmative Action program, of which Aboriginal peoples of Inuit, Metis, or Dene descent are named as a target group (GNWT 2006)

    - In 2020, the Yukon government introduced a new aboriginal hiring preference program under "Breaking Trail Together," the government's plan to increase the number of Aboriginal employees in government (CBC News 2020b).

- Through the federal Department of Human Resources and Skills Development Canada, the Government of Canada has developed the Aboriginal Skills and Employment Partnership as well as the Aboriginal Skills and Employment Training Strategy. These initiatives are designed to provide funding for employment programs and services that help Aboriginal people and private sector employers prepare for, obtain and maintain employment for Aboriginal people.

Denmark

TOTAL SCORES				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**6**	**7**	**7**	**7**

1. RECOGNITION OF LAND RIGHTS/TITLE

Yes.

Land Rights/Title Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- The Act on Greenland Self-Government (2009) provides for access to independence and sovereignty for Greenland. In this legislation that was implemented in June 2009, the people of Greenland can, through a referendum, be granted independence from the Kingdom of Denmark. As chapter 8, section 21 (4) reads: "Independence for Greenland shall imply that Greenland assumes sovereignty over the Greenland territory."
- Prior to the 2009 self-government legislation, the Greenland Home Rule Act (1978) stated that, "The resident population of Greenland has fundamental rights to the natural resources of Greenland" (section 8.1). Despite the ambiguity of this provision, many legal opinions generally recognized that Greenland could claim full ownership of all surface and subsurface resources (Dahl 2005, 160).
- Under the Act on Mineral Resources in Greenland, the exploitation of subsurface resources is administered jointly between Danish and Greenland authorities. The act affords Greenland a veto on all matters relating to prospecting and exploitation of subsurface resources, including hydro-electricity. Since 1998, the administration of all mineral resource activities has been in the hands of Home Rule authorities (Dahl 2005, 169).
- In 2009, Danish legislation was passed declaring that revenue from mineral resource activities in Greenland shall accrue to the Greenland Self-Government authorities (see chapter 3, section 7 of the Act on Greenland Self-Government).

2. RECOGNITION OF SELF-GOVERNMENT RIGHTS

Yes.

Self Government Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0.5**	**0.5**	**0.5**	**0.5**

Evidence:

- In 2009, the Danish Parliament passed, assented and ratified the Act on Greenland Self-Government. Chapter 1, section 1 of the act reads: 'The Greenland Self-Government authorities shall exercise legislative and executive power in the fields of responsibility taken over. Courts of law that are established by the Self-Government authorities shall exercise judicial powers in Greenland in all fields of responsibility. Accordingly, the legislative power shall lie with the Greenland Parliament, the executive power with the Greenland Government, and the judicial power with the courts of law."
- Under the authority of the Greenland Home Rule Act (1978), Greenland has assumed powers of self-government over several areas of domestic affairs, such as education, the economy (including fishing and trade), taxation, health, and infrastructure. However, the Home Rule authorities rely on the Danish government (in the form of block grants and other transfers) for about 50 percent of public expenditures (Dahl 2005, 152).
- The Greenland Home Rule Act created a quasi-parliamentary system, consisting of an elected assembly, called the Landsting, and an administration headed by an executive, called the Landsstyre. Members of the Landsting elect the executive and the cabinet, which is headed by the premier (the chair of the Landsstyre).
- The Greenland Parliament is elected by a common vote and does not restrict the right to vote for candidates to ethnic Greenlandic people. Any individual who has lived in Greenland for more than six months prior to the election and is 18 years of age or older, is entitled to participate in elections.
- Under the Authorization Act of 2005, Greenland has been granted the power to enter into international consultations and agreements with foreign states. These agreements address only matters where legislative and administrative powers have been transferred to Greenland, and exclude issues of national defence and security policy, or matters that apply to Denmark as a member of an international organization.
- Through the Act on Greenland Self-Government (2009), the Self-Government authorities of Greenland may take over all fields of responsibility that have not already been assumed by the Home Rule Government, with the exemption of the following: the constitution, foreign affairs, defence and security policy, the Supreme Court, nationality, and exchange rates and monetary policy.

3. UPHOLDING HISTORIC TREATIES AND/OR SIGNING NEW TREATIES

No.

Upholding and/or Signing Treaties Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0**	**0**	**0**

Evidence:

- The Danish Instructions of 1782, also called the "Instrux," contained some form of recognition and has been described by some as a Bill of Rights for Greenland's indigenous population. This document, however, was concerned largely with trade and wage regulations (Loukacheva 2007, 19).
- The Instrux is not a treaty recognized in international law.

4. RECOGNITION OF CULTURAL RIGHTS (LANGUAGE, HUNTING/FISHING, RELIGION)

Yes.

Recognition of Cultural Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- Under Home Rule, Greenland has assumed authority over cultural affairs. Under the Ministry of Culture, Education, Research and the Church, the Government of Greenland has responsibility for these broad matters, but also language policy, media, leisure activities, and cultural matters. " Section 9 of the Home Rule Act stipulated that Greenlandic is the principal language in Greenland, that Danish must be thoroughly taught, and that either language may be used for official purposes. In schools, the primary language of instruction is Greenlandic, however a great deal of public administration is conducted predominantly in Danish (Dahl 2005, 174).
- With the passage of the Act on Greenland Self-Government (2009), Greenlandic has been declared the official language in Greenland (see Ch. 7, section 20). In accord with the Home Rule Act, the Self-Government Commission has noted that the existing legislation on public administration, which established that both Greenlandic and Danish languages can be used with respect to public matters, should continue as a matter of principle (Denmark 2009, 12).
- In May 2010, Parliament of Greenland passed an act on language policy and integration aimed at strengthening the role and use of Greenlandic. The Act establishes that Greenlandic consists of three main Inuit dialects (Avanersuaq, Tunu, and Kitaa). The Act requires private companies, public authorities and institutions adopt language policies that promote the use and integration of Greenlandic. The Act aims to ensure that the right of the Inuit children to retain their identity and use their own language is maintained (United Nations General Assembly, 2016).
- Fishing and hunting is an area of jurisdiction conferred to the Greenland government. A separate government department, the Ministry of Fisheries, Hunting and Agriculture is responsible for legislation on national and international fisheries and hunting. Administration of legislation relating to fishing, hunting and agriculture is the responsibility of the Fisheries, Hunting and Agriculture Agency.
- "In the political discourse within Greenland, many rights are claimed for the Inuit. However, for several reasons, every demand for rights put in ethnic terms has been transformed and interpreted into rights for the

territorially defined population of the island. Consequently, de jure rights are not conferred on anyone for being an indigenous person" (Loukacheva 2007, 35)

5. RECOGNITION OF CUSTOMARY LAW "

Yes.

Recognition of Customary Law Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- Greenlandic customary law forms part of a "hybrid" system of law unified in Danish statutes. The justice and law reforms of the 1950s did away with the distinction between Greenlandic and Danish law, however features of Greenlandic customary law are enshrined in legislation and legal practices (Loukacheva 2007).
- The Greenland Administration of Justice Act (1951) and the Greenland Criminal Code (1954) still form the basis for the modern justice system in Greenland today. These acts allow for the more traditional and customary practices to enter Greenland's legal environment by preserving the lay judge institution. Lay judges and lay assessors are used in Greenlandic justice, and are preferred over Danish jurists, given their close connection to the Greenlandic community and knowledge of Greenlandic customary law.
- With the enactment of the Act on Greenland Self-Government in 2009, several fields of law will be assumed under the jurisdiction of Greenland; these are to be transferred to Greenland's Self-Government authorities at points of time fixed through negotiations with the central authorities of the Danish state. These aspects of law include: the administration of justice, including the establishment of courts of law; criminal law; law of capacity; family law; succession law; law practice (see List II of the Schedule to the legislation).
- In 2010, Greenland took over mineral and oil rights from Denmark, which included the right to legislate, as well as overall administrative and financial responsibilities associated (Kleist 2010). No other significant authorities have yet been transferred (Kuokkanen 2018). In 2020, Erik Jensen was elected as the new premier of Greenland, through a leadership challenge, running on a platform to pursue more extensive Greenlandic independence. He has highlighted veterinary control, immigration, shipping, and foreign policy as priority areas for transfer (Breum 2020).

6. GUARANTEES OF REPRESENTATION/CONSULATION IN THE CENTRAL GOVERMENT

Yes.

Guarantees of Representation Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- The Constitutional Act of Denmark of 1953 (Part IV, section 28) describes the quota system in Denmark's Parliament, affording both the Greenlandic people, as well as those of the Faroe Island population, two seats in the national Parliament.
- Greenland's public administration bodies are represented in the Danish central state by the Rigsombudsmand (the High Commissioner) in Greenland. The High Commissioner is the chief of the Danish administration in Greenland. The position's functions include control over legislation and matters concerning family law, reporting to the Danish Prime Minister's Office, and planning and organizing meetings between home rule and Danish authorities, amongst others (Loukacheva 2007, 68).
- The Danish state is obliged under section 13 of the Home Rule Act to consult with the Greenland home rule government before concluding international treaties that specifically affect Greenland's interests.
- Under section 16 of the Home Rule Act, Greenlandic authorities may request representation on Danish diplomatic missions to attend to subject matters where legislative and administrative powers have been entirely transferred to the authorities of Greenland.
- Chapter 5, sections 17 and 18 of the Act on Greenland Self-Government (2009) stipulate that both government Bills and draft administrative orders from the Danish Parliament which may be enacted for Greenland must, before presented to Parliament or issued, be submitted to the Greenland Self-Government authorities for comments.

7. CONSTITUTIONAL OR LEGISLATIVE AFFIRMATION OF THE DISTINCT STATUS OF INDIGENOUS PEOPLES

Yes.

Affirmation of Distinct Status Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**1**	**1**	**1**	**1**

Evidence:

- The Greenland Home Rule Act of 1978 proclaims that "Greenland is a distinct community within the Kingdom of Denmark" (see Chapter 1, section 1 (1) of the act).
- The preamble of the 2009 Act on Greenland Self-Government reads: "Recognizing that the people of Greenland is a people pursuant to international law with the right of self-determination, the Act is based on a wish to foster equality and mutual respect in the partnership between Denmark and Greenland."
- Danish representatives to the United Nations have remarked in the past that "there was only one indigenous people in the Kingdom of Denmark: the Inuit of Greenland." (United Nations, 2002).

8. SUPPORT/RATIFICATION FOR INTERNATIONAL INSTRUMENTS ON INDIGENOUS RIGHTS

Yes.

Support for International Instruments Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**1**	**1**	**1**

Evidence:

- Denmark ratified ILO Convention 169 Indigenous and Tribal Peoples Convention, 1989, in February 1996.
- Denmark voted in favour of adopting the United Nations Declaration on the Rights of Indigenous Peoples. This declaration is non-binding and does not impose duties or obligations on the Danish state.
- In November 2017, Denmark delivered the Nordic-Baltic Statement on the Rights of Indigenous Peoples on behalf of the membership of the Nordic-Baltic countries, reaffirming strong support for the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), including rights to self-government and participation (Norwegian Ministry of Foreign Affairs, 2017).

9. AFFIRMATIVE ACTION

No.

Affirmative Action Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**0**	**0**	**0**

Evidence:

- In 2003, Denmark passed an Act of Ethnic and Equal Treatment, which bars discrimination on the basis of race or ethnicity.
- In January 2013, the Greenland Human Rights Council was established (Inatsisartut Act No. 23). The Council has a mandate to promote, protect, and contribute to the maintenance of human rights in Greenland, in cooperation with the Danish Institute for Human Rights (United Nations General Assembly, 2016).
- Affirmative action has not been introduced as a legal measure in Greenland (Loukacheva 2007, 71)

Finland

TOTAL SCORES				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**3**	**3**	**3.5**	**3.5**

1. RECOGNITION OF LAND RIGHTS/TITLE

No.

Land Rights/Title Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0**	**0**	**0**

Evidence:

- In the late 19th century, Nordic countries, including Finland, confiscated Sami territory under the Taxed Lapp Land system. Under this system, the Sami people lost their legal right to their traditional lands.
- Finland has regularly denied that they have ever acknowledged that the Sami people had ownership rights to their traditional territories (Arhen 2004, 78).
- The Nordic countries, including Finland, maintain to this day that it is "beyond doubt that the Saami people's nomadic land use has not given rise to legal rights to land and that the Saami traditional lands, water, and natural resources belong to the [Finnish] state" (Arhen 2004, 93).
- Section 4 of the Constitution of Finland states that "The territory of Finland is indivisible. The national borders can not be altered without the consent of the Parliament."
- In a report to the UN, the Finnish government stated that: "Finland has, for a long time, tried to settle the rights of the Sami people to the lands traditionally used by them in a manner acceptable to all parties, but without success" (UN 2009, 3).
- Sami land rights were further eroded in 2013 following a decision by the Supreme Administration Court which decided that under the Mining Act, reindeer herders, reindeer herder cooperatives, and the Sami Parliament have no right to appeal mining reservations in the Sami Homeland (Nilsen 2020).

2. RECOGNITION OF SELF-GOVERNMENT RIGHTS

Partial; limited to matters of language and culture; and subordinate in an advisory capacity to the Finnish government.

Self Government Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0.5**	**0.5**	**0.5**	**0.5**

Evidence:

- The Sami of Finland have an elected representative body, the Sami Parliament, which elects 20 representatives every four years.
- The substantive power of the Sami Parliament, as set out by the enabling legislation, "is to look after the Sami language and culture, as well as to take care of matters relating to their status as an indigenous people."
- The Sami Parliament is the supreme decision-making body of the Finnish Sami. It falls within the authority of the Ministry of Justice but is not part of the State administration. The Parliament represents the Sami in national and international contexts and attends to matters related to the language and culture of the Sami and their position as an indigenous people. The Parliament may submit initiatives and proposals and prepare statements for authorities (UN 2007a, 15).
- According to section 6 of the Sami Parliament Act (1973), the Sami Parliament shall represent the Sami in national and international connections in matters pertaining to its tasks. The legislation does not afford the Sami Parliament a power of veto over the national Finnish Parliament. However, given the inadequate authority for executive governance, the Sami Parliament is more an advisory body to the Finnish government than a body for the administration of Sami affairs.
- Two recent court cases have additionally threatened Sami self-government, as it relates to the ability of the Sami Parliament to certify electors. In 2011, the Finnish Supreme Administrative Court overturned a decision of the Sami Parliament to not add four individuals to the electoral register; in 2015 it did so again, adding 93 electors deemed ineligible by the Sami Parliament (Saami Council 2017). These decisions were highly criticized by the Sami, and were recently found to violate Sami rights by the UN Human Rights Council (OHCHR 2019).

3. UPHOLDING HISTORIC TREATIES AND/OR SIGNING NEW TREATIES

No.

Upholding and/or Signing Treaties Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0**	**0**	**0.5**

Evidence:

- There is no evidence that Finland has ever signed a treaty with the Sami people.

- The Lapp Kodicill, an annex to a 1751 border agreement between Norway and Sweden, details rights and duties of the Sami people. The Sami have maintained that the Lapp Kodicill has status as a binding treaty under international law, and as such confirms the signatories' duty to respect the Sami nation.
- In 2001, the governments of Norway, Finland and Sweden, and the Sami Parliament in the three countries, appointed an Expert Group to draft a Nordic Sami Convention. In November 2005, the Expert Group presented the draft text to the three governments and the three Sami Parliaments.
- All three Sami parliaments have endorsed the proposed Sami Convention. The actual process of negotiation did not begin until 2011, and a revised Nordic Sami Convention was presented in 2016. The revised proposal has been criticized by the Sami as being a weakened version of the 2005 draft, and as falling short of fulfilling international norms (Mörkenstam 2019).
- When signed, the Sami Convention will be a legally binding treaty between Finland, Norway and Sweden on the rights of the Sami people, and can thus be viewed as a renewal of the Lapp Kodicill (Ahren 2004, 75; Ahren 2007, 12). However, ratification appears to still be several years away.

4. RECOGNITION OF CULTURAL RIGHTS (LANGUAGE, HUNTING/FISHING, RELIGION)

Yes, limited largely to matters of language.

Recognition of Cultural Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0.5**	**0.5**	**0.5**	**0.5**

Evidence:

- The Sami have a constitutionally protected right "to maintain and develop their own language and culture" as per section 17 of the Constitution Act of Finland.
- Despite the lack of formal rights to land, in 1995 the Finnish Parliament granted the Sami the right to cultural autonomy within the demarcated areas of the Sami Homeland. This right to cultural autonomy was afforded constitutional protection by an amendment in 1995.
- As the Finnish constitution states, provisions on the right of the Sami to use the Sami language before the authorities are laid down by an act. Indeed, the Sami Language Act [2003] contains provisions on the right of the Sami to use their own language before the courts and other public authorities, as well as on the duty of the authorities to enforce and promote the linguistic rights of the Sami.
- The provision of Sami language education, however, is largely limited to the Sami Homeland and is not otherwise protected or secured in Finnish education acts (Saami Council 2017).
- The Sami in Finland have no special rights to land or water use in the pursuit of traditional hunting and fishing activities. The Fishing Act of 1982 excludes mention of the northern region of Finland, the Sami Homeland area. The law regulating fishing in Sami Homeland is the 1902 legislation that denies Sami rights to land and water use.

- In 2017, the governments of Norway and Finland finalized the Deatnu/Tana Agreement, regulating fishing in the Deatnu Watercourse. The agreement strongly limited Sami traditional fishing methods, including net-fishing; the Sami Parliaments in both Finland and Norway were strongly opposed to the agreement (Saami Council 2019). A 2019 District Court decision affirmed the constitutional right of the Sami to fish in their home rivers, however, the decision may be appealed (Sapmi 2019).
- Under the 1990 Finnish Reindeer Herding Act, the right to reindeer husbandry in Finland requires mere residence in the Sami Homeland area, and thus non-Sami can pursue reindeer herding in this area as well.
- Reindeer-herding, fishing and hunting constitute the right of any citizen of not only Finland, but any member state of the European Union, having his or her permanent residence in the reindeer-herding area of northern Finland (Hannikainen 1996, 45).

5. RECOGNITION OF CUSTOMARY LAW "

No.

Recognition of Customary Law Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0**	**0**	**0**

Evidence:

- Finland revoked the recognition of Sami customary law in the 19th century. While there has been some minor acknowledgement of customary law by the courts, customary law is not widely recognized (Ahren 2004).

6. GUARANTEES OF REPRESENTATION/CONSULATION IN THE CENTRAL GOVERMENT

Yes.

Guarantees of Representation Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- There are no specific provisions for the representation of Sami, or other persons belonging to ethnic, national or linguistic minorities, in the Finnish Parliament or the Municipal Councils, which are bodies nominated by general elections and regulated by the Elections Act.
- The Finnish Rules of Procedure of the Parliament (article 37) stipulate that the Sami can be heard in Parliament in the context of the preparation of a matter by a committee to influence the subject matter of a proposal.

- In accordance with the Sami Parliament Act, the Finnish Department of Culture, Sports and Youth Policy within the Ministry of Education aims to negotiate with the Sami Parliament in the preparation of strategies, policy programs, and legislation that may affect the Sami people as an indigenous people.
- The Advisory Board on Sami Affairs, consisting of 12 members, works in connection with the Ministry of Justice for the coordination and consistent preparation of issues concerning the Sami population. The Advisory Board's tasks include monitoring the development of Sami people's legal, economic, social and cultural conditions and employment conditions. It also monitors the realization of regional policy objectives in the Sami Homeland. On the basis of its observations, it submits proposals and initiatives on these issues to the relevant ministries. The Sami Parliament nominates six members, and the other members represent the government (UN 2007a, 14).

7. CONSTITUTIONAL OR LEGISLATIVE AFFIRMATION OF THE DISTINCT STATUS OF INDIGENOUS PEOPLES

Yes.

Affirmation of Distinct Status Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**1**	**1**	**1**	**1**

Evidence:

- Section 17 of the Constitution Act of Finland (2000) explicitly state that the Sami are an indigenous people as does numerous sections of the Sami Parliament Act.
- The draft Nordic Sami Convention will recognize the status of the Sami people as the only indigenous people of Finland, as well as Norway and Sweden (Scheinin 2007, 41).

8. SUPPORT/RATIFICATION FOR INTERNATIONAL INSTRUMENTS ON INDIGENOUS RIGHTS

Partial.

Support for International Instruments Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**0**	**0.5**	**0.5**

Evidence:

- Finland voted in favour of adopting the United Nations Declaration on the Rights of Indigenous Peoples. This declaration is non-binding and does not impose duties or obligations on the Finnish state.

- Finland has not ratified ILO Convention 169 Indigenous and Tribal Peoples Convention, 1989. Discussions between the Sami and Finnish parliaments over Finland's ratification of this instrument have been ongoing since the 1990s (Koskenniemie and Takamaa 1998).
- In 2000, the Finnish Ministry of Justice set up a committee to evaluate obstacles to meeting the minimum criteria that are required for the ratification of ILO Convention 169 (UN 2006b, para. 63).
- Finland, along with Norway and Sweden, has been in discussion since 2005 with the three Sami parliaments on the adoption of the draft Nordic Sami Convention. The Expert Group that was commissioned to draft the convention makes clear that it is a rights convention, "with very few general or merely aspirational provisions" (Ahren 2007, 13).
- In 2014, the Finnish Government submitted a proposal to Parliament to accept ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. The proposal aimed to enhance the rights of the Sámi to participate in the planning of and decisions on the use of State-owned lands and waters in the Sámi Homeland, and their right to use these areas for practicing, maintaining and promoting Sámi culture (UN General Assembly 2017).
- In January 2019, the Finnish government withdrew the bill intended to ratify the ILO Convention on the Rights of Indigenous Peoples, over issues related to Sami land rights (YLE News 2019). As of December 2020, Finland still has not ratified.

9. AFFIRMATIVE ACTION

No.

Affirmative Action Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**0**	**0**	**0**

Evidence:

- There is no evidence that affirmative action for the Sami people exists in either law or policy.

Japan

TOTAL SCORES				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**1**	**2.5**	**3**

1. RECOGNITION OF LAND RIGHTS/TITLE

No.

Land Rights/Title Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0**	**0**	**0**

Evidence:

- The Ainu are among the few indigenous peoples in the world who have no land recognized as their indigenous land (UN 2006c).
- After the Meiji Restoration of 1868, Ainu land was appropriated as terra nullius, under the Land Regulation Ordinance, 1872.
- Under the Hokkaido Former Aborigines Protection Act of 1899, individual Ainu were granted parcels of land with the stipulation that it be used solely for farming, but the governor of Hokkaido maintained administrative authority over this property (Larson, Johnson and Murphy 2008, 57).
- After the adoption of the UN Declaration on the Rights of Indigenous Peoples (UN DRIP), Japan stated that it viewed indigenous rights to land and resources as restricted within due reason in light of harmonization with third party rights and other public interests (UN 2007b). This is in spite of Article 26 of the UN DRIP that affirms the right of indigenous peoples to the lands and territories which they have traditionally owned or occupied.
- The 1997 legislation on Ainu cultural promotion [Ainu Shinpo (Culture Promotion Law)] does not explicitly detail Ainu land rights or title. At the time of drafting this legislation, the Japanese government stated that the Ainu are only indigenous to Japan's "inalienable land" (Siddle 2002, 408). However, a supplementary provision (Art. 3.1) stipulates that the Governor of Hokkaido "shall control the communal properties of the indigenous people of Hokkaido " until the Communal Properties are restored to its owners."
- Since 1997, some communal property has been returned to the Ainu (Stevens 2008).

2. RECOGNITION OF SELF-GOVERNMENT RIGHTS

No.

Self-Government Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0**	**0**	**0**

Evidence:

- The Japanese government has been consistently dismissive of any talk regarding Ainu self-government. In the preliminary discussions on the Ainu Culture Promotion Law, the Japanese government refused to entertain the Ainu's calls for provisions in the new legislation that would entail self-government (Porter 2008).
- Speaking after the adoption of the text of the UN Declaration on the Rights of Indigenous Peoples, the Japanese representative clarified that the right of self-determination did not give indigenous peoples the right to be separate and independent from their countries of residence, and that this right should not be invoked for the purpose of impairing sovereignty of a state, its national and political unity, or territorial integrity (UN 2007b).

3. UPHOLDING HISTORIC TREATIES AND/OR SIGNING NEW TREATIES

No.

Upholding and/or Signing Treaties Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0**	**0**	**0**

Evidence:

- The Ainu have never entered into a consensual juridical relationship with either Japan or any other state (Holland 2009, 87; see also Stevens 2008).

4. RECOGNITION OF CULTURAL RIGHTS (LANGUAGE, HUNTING/FISHING, RELIGION)

Yes.

Recognition of Cultural Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0.5**	**0.5**	**0.5**

Evidence:

- The Culture Promotion Law makes no mention of fishing and hunting rights and other activities that may be part of the Ainu culture despite the Ainu Association's own Proposed Legislation (Stevens 2001, 130).
- The Culture Promotion Law does not, in fact, stipulate cultural rights. Rather, the act concerns itself with the need to promote Ainu culture defined as "Ainu language and cultural properties such as music, dance, crafts, and other cultural properties which have been inherited by the Ainu people, and other cultural properties developed from these."
- According to the UN, the Ainu are still greatly restricted in their freedom to fish salmon, their ancestral traditional food. Ainu fishing is limited and under the authorization of the Japanese government (UN 2006c). As well, the Hokkaido governor regulates the Ainu traditional hunting (Stevens 2008, 139).
- The Ainu Policy Promotion Act of 2019 sets aside funds for cultural revival. The government was scheduled to open Upopoy, also known as the "Symbolic Space for Ethnic Harmony," in May 2020 (*the opening appears to have been delayed due to the global pandemic). Upopoy will be the national center for the revival and development of the Ainu culture, and houses the National Ainu Museum and the National Ainu Park.
- The 2019 Policy also includes special provisions to protect and promote Ainu culture, moving to provide for the establishment of measures concerning harvesting of forest products from state-owned forests and freshwater salmon fishing (Articles 16 and 17). However details of implementation are as yet limited (Tsunemoto 2019).

5. RECOGNITION OF CUSTOMARY LAW "

No.

Recognition of Customary Law Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0**	**0**	**0**

Evidence:

- The situation of the Ainu practice of customary law has been severely eroded. Years of intense assimilationist policies have forced the Ainu to give up their distinct legal system (Roy 2005, 11).
- The Ainu Policy Promotion Act of 2019 does not include any specific language regarding the recognition of Ainu customary laws.

6. GUARANTEES OF REPRESENTATION/CONSULATION IN THE CENTRAL GOVERMENT

Partial, but very limited.

Guarantees of Representation Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0.5**	**0.5**	**0.5**

Evidence:

- There is no domestic legislative or policy base that stipulates any requirement on the part of the Japanese government to consult the Ainu.
- Despite the 1997 decision in Kayano et al v. Hokkaido Expropriation Committee, where the Sapporo Court recognized the need for government bodies to involve minority groups in decision-making processes where the outcome has a considerable impact on their cultural practices, there is no obligation to even consider Ainu culture where Hokkaido development projects may have an impact (Stevens 2001, 125, 129).
- The Council for Ainu Policy Promotion, established in 2009, has a mandate to promote Ainu policy and cultural promotion. As a policy group engaged on issues related to the Ainu people, it has procedures in place to consult with and engage the Ainu in developing recommendations. The Council itself is comprised of 14 members, of which five are Ainu representatives (other members include academics working on Ainu culture and human rights, as well as leaders of local and national government).

7. CONSTITUTIONAL OR LEGISLATIVE AFFIRMATION OF THE DISTINCT STATUS OF INDIGENOUS PEOPLES

Yes.

Affirmation of Distinct Status Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**0**	**0.5**	**1**

Evidence:

- The first acknowledgement of the Ainu as a distinct and indigenous people occurred in 1997 with a decision by the Sapporo District Court. In Kayano et al v. Hokkaido Expropriation Committee (the Nibutani Dam case), the court ruled that the Japanese government had illegally taken Ainu land to build a dam and failed to consider "the unique culture of the indigenous Ainu minority."
- After the Nibutani Dam ruling, the Japanese government repealed the Hokkaido Former Aborigines Protection Act of 1899, a statute that renounced the indigenous status of the Ainu and implemented measures for the assimilation of the Ainu; this legislation was replaced by the Ainu Shinpo (Culture Promotion Law) on 1 July 1997.

- On June 6, 2008, the upper and lower houses of the Japanese Diet unanimously passed a resolution urging the government to recognize the Ainu as an indigenous people to Japan. The resolution states that the Ainu have a distinct language, religion and culture.
- The 2008 resolution imposed no statutory obligations on the Japanese government and has been described as primarily symbolic. Dr. Richard Siddle, author of Race, Resistance and the Ainu of Japan, has stated that, "Very little will change for the Ainu because of this. It's a step forward, but not an epoch-making step as some people are portraying" (BBC 2008).
- Following the submission of the resolution, in July 2008, the government established the Advisory Council for Future Ainu Policy.
- In 2019, the Japanese parliament passed the Ainu Policy Promotion Act which recognizes the Ainu as indigenous, and enshrines that recognition in legislation (Article 1).

8. SUPPORT/RATIFICATION FOR INTERNATIONAL INSTRUMENTS ON INDIGENOUS RIGHTS

Partial, but limited.

Support for International Instruments Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**0**	**0.5**	**0.5**

Evidence:

- Japan has not ratified ILO Convention 169 Indigenous and Tribal Peoples Convention, 1989.
- Japan voted in favour of adopting the UNDRIP. This declaration is non-binding and does not impose duties or obligations on the Japanese state.

9. AFFIRMATIVE ACTION

Yes, based on a combination of existing policies and legislation.

Affirmative Action Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**0.5**	**0.5**	**0.5**

Evidence:

- The Utari Welfare Measures, first implemented in 1971 and still in force today, were created to improve the social welfare of the Ainu through education and public works projects. The measures make available scholarships for Ainu students for high school and higher education (Okano 2013).

- There is no statute or legislation devoted explicitly to Ainu affirmative action. Rather, the Ainu fall under the purview of employment equity legislation, the Equal Employment Opportunity Act of 1985, that guards against discrimination of any kind (i.e., on the grounds of race, creed, sex, social status or family origin, etc.).
- The Ministry of Social Welfare, Health and Employment has a program of professional orientation for Ainu, a recruitment service, and lends money to allow Ainu to find employment. The ministry also briefs managers on the discrimination of the Ainu and promotes their recruitment (UN 2006c, 9).
- The Hokkaido government has promoted fundamental measures, aimed at stable employment for the Ainu, under a program called A Promotion Policy for the Improvement of Ainu Life, 2002-2008 (Hokkaido Bureau 2010).
- The Ainu Policy Promotion Act of 2019 bans discrimination against Ainu on the basis of ethnicity

New Zealand

TOTAL SCORES				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**6**	**7**	**7.5**	**7.5**

1. RECOGNITION OF LAND RIGHTS/TITLE

Yes.

Land Rights/Title Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0.5**	**1**	**1**	**1**

Evidence:

- Under the 1840 Treaty of Waitangi (Article 2), the Maori are guaranteed "the full exclusive and undisturbed possession of their lands and estates, forests, fisheries, and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession."
- Maori land can only be alienated to the British Crown. The treaty affords the Crown with "the exclusive right of pre-emption over such lands as the proprietors thereof may be disposed to alienate."
- Legislation in 1993 created what are called Maori reservations. Under the Te Ture Whenua Maori Act 1993 (also called the Maori Land Act 1993), any Maori freehold land or any general land may be set aside as a Maori reservation. As well, Crown land with historical, spiritual, or emotional significance to the Maori can also be set aside with this designation.
- Under the Te Ture Whenua Maori Act 1993, a reservation can be established for any of the following purposes: a village site; sports grounds; a catchment area or other source of water supply; a place of cultural, historical, or scenic interest; a timber reserve, among others.
- Maori reservations are distinct from Maori reserves which are administered by the New Zealand government under the Maori Reserved Land Act 1955. Under this legislation, the Maori were granted land freeholds to tracts of land set aside by the Crown and leased to the owner (which need not be Maori) in perpetuity.
- With the enactment of the Treaty of Waitangi Act 1975, a Maori Land Court was established, though this body had been in existence since 1862 as the Native Land Court under the jurisdiction of the Native Land Act.
- The Native Land Court was established largely to confiscate Maori lands (Gilling 1993). However the newer Maori Land Court, with powers limited to those of a tribunal, conducts hearings concerning Maori land claims, as well as successions, title improvement, and Maori land sales.

- In 2011, the government repealed the 2004 Foreshore and Seabed Act. The replacement act – the Marine Coastal Area (Takutai Moana) Act 2011 – removed Crown ownership of the foreshore and seabed and introduced a "no ownership" principle. This change subsequently restored the rights of the Maori to seek title and customary rights through the courts or through negotiation with the government.

2. RECOGNITION OF SELF-GOVERNMENT RIGHTS

Partial, but limited to community bylaws.

Self Government Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0.5**	**0.5**	**0.5**	**0.5**

Evidence:

- The Maori Social and Economic Advancement Act passed in 1945 conferred a limited measure of self-government upon organized Maori communities. This act was consolidated and amended with the enactment of the Maori Community Development Act 1962.
- The Maori Community Development Act 1962 recognizes established Maori District Committees and District Maori Councils. The 1962 legislation groups local community committees into districts and then combines these districts so as to allow for the creation of a New Zealand Maori Council at the national level.
- Under this legislation, Maori District Committees are given authority to exercise Maori customary law by way of bylaws in Maori communities.
- The act, however, is administered by the New Zealand Minister of Maori Affairs under his or her general direction and control.
- The Treaty of Waitangi Act of 1975 established the Waitangi Tribunal, which is charged with making recommendations on claims relating to the practical application of the principles of the Treaty of Waitangi. Moreover, the Tribunal is a permanent commission of inquiry charged with making recommendations on claims brought by Maori relating to actions or omissions of the Crown that breach the promises made in the Treaty of Waitangi. The recommendations of the Tribunal are not, however, binding upon the Crown.
- Maori interpretations of the Treaty of Waitangi maintain that Maori autonomy is a requirement of the Crown in its obligation to treaty duties. Although the English version of the text grants the Crown sovereignty, the Maori text limits the Crown's rights of government short of sovereignty (Wiessner 1999).
- In 2015, the Waitangi Tribunal, found in favour of Maori arguments, agreeing that original Treaty of Waitangi signed in 1840, did not include a cession of Maori sovereignty as has been claimed by the Crown. The government has not publicly accepted this finding; nonetheless, it supports and affirms the Maori position on self-determination (O'Sullivan 2017).

3. UPHOLDING HISTORIC TREATIES AND/OR SIGNING NEW TREATIES

Yes.

Upholding and/or Signing Treaties Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- Signed on 6 February 1840, the Treaty of Waitangi is a founding document of government in New Zealand, and established the country as a nation. According to the English text, the Maori ceded the sovereignty of New Zealand to Britain and gave the Crown an exclusive right to buy lands they wished to sell. In return, the Maori were guaranteed full rights of ownership of their lands, forests, fisheries and other possessions, and were given the rights and privileges of British subjects (New Zealand 2010).
- In a submission to the United Nations, the Government of New Zealand made it clear that, "The Treaty of Waitangi continues to be the founding document for the ongoing and evolving relationship between Maori and the Crown" (UN 2006a, 13).
- The Treaty of Waitangi has never been ratified, however it is commonly held to be the founding document of New Zealand and the source of political legitimacy for current state institutions. The principles of the treaty have been given statutory force in legislation, and it is argued that the treaty is part of the "unwritten" constitution of New Zealand (Pryor 2008, 86).
- The Office of Treaty Settlements, under the Ministry of Justice, was established and continues in operation to negotiate the settlement of historical Treaty of Waitangi claims and build positive relationships between the Crown and Maori. The Government of New Zealand has stated an objective of having all claims settled by 2020 (UN 2006a, 15).
- 46 treaty settlements were finalized and passed into legislation between 2010 and 2019; upwards of thirty treaty negotiations and settlement processes remain ongoing (where deed of settlement have not yet been signed) (Government of New Zealand 2020).

4. RECOGNITION OF CULTURAL RIGHTS (LANGUAGE, HUNTING/FISHING, RELIGION)

Yes.

Recognition of Cultural Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- The Maori language was confirmed and guaranteed by the Crown in the Treaty of Waitangi. The Maori Language Act of 1987 declared the Maori language to be an official language of New Zealand. The act confers

upon the Maori the right to speak Maori in legal proceedings, however the right does not entitle any person to insist on being addressed or answered in Maori.

- With the enactment of the Maori Language Act 1987, the government of New Zealand established the Maori Language Commission. The main function of the commission is to "promote the Maori language, and, in particular, its use as a living language and as an ordinary means of communication."
- In 2003, the commission initiated the Maori Language Strategy. The strategy aimed to move the Maori language to the next stage of revitalization over the next twenty-five years. The strategy has received confirmation and direction from the New Zealand Cabinet.
- In 2016, the Māori Language Act 2016 was enacted. The Act gives the Māori language (Te Reo Maori) official status. This means that Te Reo Maori can now be used in signs and official notices, in legal proceedings, and to conduct business. The Act further created a new organization, Te Mātāwai, to develop and lead language revitalization activities.
- Maori are entitled to both commercial and non-commercial fishing rights in New Zealand in both legislation and under the common law doctrine of Aboriginal rights. Moreover, the orthodox position is that the Treaty of Waitangi guarantees, under Article 2, protection of Maori fisheries where Aboriginal title has not been clearly extinguished (Maihi 2003, 18).
- The doctrine of Aboriginal rights entitle the Maori to a range of hunting, fishing and other types of food gathering (classed as being similar in nature to rights to take and rights of access and passage). In Te Weehi v. Regional Fisheries Officer [1986], Maori fishing rights were affirmed and deemed protected under the doctrine of Aboriginal rights.
- Among the first statutes to explicitly confer Maori fishing rights was the Fisheries Act 1983. This legislation stated that, "nothing in this Act shall affect any Maori fishing right." This legislation has since been repealed, yet the obligations it contained form part of the new statutory base through which Maori fisheries rights are now conferred. Customary fishing rights are guaranteed by theTreaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the 1992 Deed of Settlement. Under the Deed of Settlement, the New Zealand government has specific obligations to Māori to provide for both customary fisheries management practices and the traditional gathering of fish. Further legislation and regulations include the Fisheries Act 1996; Maori Fisheries Act 2004; and the Maori Commercial Aquaculture Claims Settlement Act 2004; the Waikato-Tainui (Waikato River Fisheries) Regulations 2011 (New Zealand 2009; New Zealand 2019).
- The Government of New Zealand, acting on behalf of the Crown, has developed the Fisheries Treaty Strategy. In partnership with the Maori, the treaty strategy is designed to ensure the Crown meets its obligation to Maori under treaty principles, legislative obligations in the area of fisheries and aquaculture.

5. RECOGNITION OF CUSTOMARY LAW "

Yes.

Recognition of Customary Law Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- Maori customary law refers to the established governance arrangements, social structures, and system of norms and customs that existed prior to European settlement. Together, these customs and laws are generally referred to as *tikanga Māori*.
- In New Zealand, Maori custom law is a source of treaty law, with the Treaty of Waitangi promising the protection of Maori custom and cultural values. Maori customary law is relevant in several areas such as sentencing, family protection claims, in the protection and utilization of natural resource, as well as the administration of land.
- New Zealand subscribes to the common law "doctrine of aboriginal rights" which is based on the presumption of continuity, namely that customs, particularly long-standing and universally observed customs of a particular community or in relation to a particular piece of land, are granted the force of law under English domestic law and may be enforced in accordance with the remedies available at law and in equity (NZLC 2001, 11).
- The New Zealand Law Commission points out that, in recent times, judges are increasingly being required to develop an understanding of Maori cultural values and practices and how they apply to particular situations (NZLC 2001, 49).
- The Māori Land Court created in 1993 is guided by *tikanga Māori. The Land Court* has the authority to hear cases relating to the ownership, administration, and transfer of ownership of Māori Land. Most cases that come before the Court relate to freehold land (with multiple owners), however, the court may determine and declare "land that is held by Māori in accordance with tikanga Māori" to be "Māori customary land."
- Customary law and Māori customary rights relating to the foreshore and seabed were a major site of debate and protest in the early 2000s. As mentioned elsewhere, the Marine and Coastal Area (Takutai Moana) Act 2011, removed Crown "ownership" from the foreshore and seabed, enabling Māori to seek recognition of rights and title of these areas in the courts. The legislation further enshrined the right of the Māori to participate in conservation processes in marine and coastal areas (Buchanan 2013).

6. GUARANTEES OF REPRESENTATION/CONSULATION IN THE CENTRAL GOVERMENT

Yes, both representation and consultation

Guarantees of Representation Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- According to the New Zealand Ministry of Justice, the Treaty of Waitangi provides a set of reasons to consult with Maori, namely the principle that the Treaty stipulates a constructive and mutually respectful relationship between the Crown and Maori. "The Treaty of Waitangi, as the founding document of New Zealand, was the first step in bringing together two parties with distinct backgrounds and cultures. Consultation is a way of ensuring that Maori are given the opportunity to provide their views during the development of justice policy" (New Zealand 1997).

- Moreover, the courts and various jurisprudence have developed guidelines that entail: the relationship should be built on mutual cooperation and trust, there are basic principles of reasonableness and good faith, and the Crown has to make informed decisions (ibid.).
- The Government of New Zealand has moved toward direct reference of the Treaty of Waitangi in legislation, moving away from general references to a clear articulation of the responsibilities of government or local government to provide for consultation with Maori or Maori participation in decision-making in relation to specific activities (UN 2006a, 13).
- The Government of New Zealand established a department devoted solely to Maori, the Ministry for Maori Development, with an act of parliament in 1992. The department monitors policy and legislation, providing the government with advice on Maori relations. The department has developed the "Maori Potential Approach," a policy framework designed with the ultimate aim to better position Maori to build and leverage their collective resources, knowledge, skills and leadership capability (New Zealand 2008).
- New Zealand's electoral system includes what are known as Maori electorates that guarantee Maori representation in the New Zealand Parliament. Separate electoral seats in Parliament are reserved to represent those New Zealand electors choosing to register on a separate Maori election roll.
- Despite being reserved for Maori representation, the Maori seats do not guarantee that the representative will be of Maori descent. Since 1967, the stipulation that the representative be a non-European ended. However, there has yet to be a non-Maori elected in a Maori electorate seat, although non-Maori candidates have contested these seats since 1967 (Wilson 2003, 19).
- Under the new electoral rules that accompanied the introduction of Mixed-Member Proportional representation in 1993, the number of Maori electorates is allowed to fluctuate. Though previously fixed, the number of Maori seats must represent an average electoral population of 68,150 Maori. As of 2020, based on the 2018 census, there are seven dedicated seats in Parliament for the Maori electorates.
- In 2019, the Electoral (Entrenchment of Maori Seats) Amendment Bill was introduced into the New Zealand Parliament. The bill would have made it harder to remove Maori seats from Parliament by requiring 75 per cent of MPs to vote to get rid of them in the future. The bill failed to pass its second reading in the House (Jancic 2019).

7. CONSTITUTIONAL OR LEGISLATIVE AFFIRMATION OF THE DISTINCT STATUS OF INDIGENOUS PEOPLES

Yes.

Affirmation of Distinct Status Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**1**	**1**	**1**	**1**

Evidence:

- The privileged status of the Treaty of Waitangi is an affirmation of the distinct status of Maori.

- The 1980s was characterized by the formal recognition of indigenous rights, accompanying a re-interpretation of Maori rights as constituting a treaty-based partnership between the Crown and the Maori people (Ivison, Patton and Sanders 2000, 141).
- With the passage of the Treaty of Waitangi Act 1975, Maori tribal groups were effectively recognized as indigenous peoples, having existed prior to the 1840 signing of the Treaty of Waitangi (ibid.).

8. SUPPORT/RATIFICATION FOR INTERNATIONAL INSTRUMENTS ON INDIGENOUS RIGHTS

Partial.

Support for International Instruments Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**0**	**0.5**	**0.5**

Evidence:

- New Zealand has not ratified ILO Convention 169 Indigenous and Tribal Peoples Convention, 1989.
- New Zealand was among the four countries that voted against the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP). In April 2010, New Zealand reversed its position and endorsed the UN DRIP. This declaration is non-binding and does not impose duties or obligations on the New Zealand government or Crown.
- In 2019, the New Zealand government announced it will begin to develop a plan to implement UNDRIP in relation to the Māori. As part of the development, the Māori Development Minister noted that a delegation from the UN's Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) was invited to New Zealand to participate in consultations and provide advice (Bennett 2019).

9. AFFIRMATIVE ACTION

Partial, but limited.

Affirmative Action Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**0.5**	**0.5**	**0.5**

Evidence:

- There is a statutory basis that sanctions practices of affirmative action in the Bill of Rights Act 1990 and the Human Rights Act 1993. The Bill of Rights Act holds that "everyone has a right to freedom from discrimination" while the Human Rights Act 1993 includes "race" as a prohibited ground of discrimination. Moreover, the Human Rights Act articulates that policies and measures taken for the purposes of assisting or

advancing disadvantaged groups does not constitute discrimination (thus laying the foundation for affirmative action programs) (Sadler 2005).

- However, despite the statutory framework, affirmative action policies are relatively limited.
- In 1980, the Government of New Zealand introduced the Maori and Pacific Islander Recruitment Scheme to increase the participation of Maori in the public sector. Later, in 1987, the New Zealand Race Relations Conciliator proposed that the government implement a comprehensive system of affirmative action. The government responded with the State Sectors Act in 1988 (Lashley 2006, 138).
- In the State Sectors Act of 1988, the New Zealand public service legislation, the chief of a Department should strive to be a "good employer." As per section 56.1 (c), this entails recognition of: (i) the aims and aspirations of the Maori people; and (ii) the employment requirements of the Maori people; and (iii) the need for greater involvement of the Maori people in the Public Service.
- Affirmative action for Maori is a matter of policy regarding medical and law studies admissions. For medical and law schools, Maori (as well as Pacific Islanders) can enter through targeted "Special Entry Quotas." Universities are empowered by the Education Act 1989, which affords them the authority to sanction discriminatory decisions relating to affirmative action programs.

Norway

TOTAL SCORES				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0.5**	**4**	**5.5**	**5.5**

1. RECOGNITION OF LAND RIGHTS/TITLE

Partial, but very limited.

Land Rights/Title Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0**	**0.5**	**0.5**

Evidence:

- The Finnmark Act of 2005 provides that the Sami people, through prolonged use of land and water, have acquired rights to land in Finnmark (sec. 5). However, the "Finnmark Act is ethnically neutral in the sense that individual legal status is not dependent on whether one is a Sami, Norwegian or Kven or belongs to another population group" (Norway n.d., 3; italics original).
- There is no clearly defined Sami homeland, as in Finland, but the Finnmark Act transferred approximately 95 percent of the land in Finnmark county under state ownership to the Finnmark Estate (Henriksen 2008a, 32-33).
- The Finnmark Act establishes the Finnmark Estate, an independent legal entity which administers the land and natural resources in Finnmark country. The Finnmark Estate is governed by a board of six persons, of which the Sami Parliament elects three members.
- The act does not, however, involve changes in the rights of use and ownership to the land in Finnmark county (Norway n.d., 5). The act established the Finnmark Commission that will study the right of ownership and right to land in Finnmark county; a 2018 report from the Saami Council to the Committee on the Elimination of Racial Discrimination noted that no significant progress had been made on recommended amendments to the Finnmark Act, the Mineral Act, or the Reindeer Husbandry Act (Saami Council 2018).

2. RECOGNITION OF SELF-GOVERNMENT RIGHTS

Partial, but limited to matters of culture.

Self Government Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0**	**0.5**	**0.5**

Evidence:

- The Sami Parliament, established in 1987, is an indigenous electoral body elected among and for the Sami people in Norway. The Sami Parliament represents the Sami people in all matters concerning the Sami. The Sami Parliament has its separate electoral system with elections every fourth year.
- The Sami Parliament is only an advisory body to the Norwegian legislature and does not constitute an order of government with jurisdiction over Sami traditional territories. The Norwegian government has the overall responsibility for Sami policy (UN 2004, para. 468).
- Recent court cases have reinforced a more limited interpretation of Sami rights, including self-governance rights. While Sami do have *usage* rights (e.g. reindeer grazing rights), a 2018 Supreme Court decision held that Sami villages do not have the right to regulate traditional activities – such as fishing, trapping and hunting – in the Finnmark region (Hofverberg 2019).

3. UPHOLDING HISTORIC TREATIES AND/OR SIGNING NEW TREATIES

No.

Upholding and/or Signing Treaties Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0**	**0**	**0**

Evidence:

- There is no evidence that Norway has ever signed a treaty with the Sami people.
- The Lapp Kodicill, an annex to a 1751 border agreement between Norway and Sweden, details rights and duties of the Sami people. The Sami have maintained that the Lapp Kodicill has status as a binding treaty under international law, and as such confirms the signatories' duty to respect the Sami nation.
- In 2001, the governments of Norway, Finland and Sweden, and the Sami Parliament in the three countries, appointed an Expert Group to draft a Nordic Sami Convention. In November 2005, the Expert Group presented the draft text to the three governments and the three Sami parliaments. Negotiations have since stalled the process.
- All three Sami parliaments have endorsed the proposed Sami Convention. The actual process of negotiation did not begin until 2011, and a revised Nordic Sami Convention was presented in 2016. The revised proposal

has been criticized by the Sami as being a weakened version of the 2005 draft, and as falling short of fulfilling international norms (Mörkenstam 2019).

- When signed, the Sami Convention will be a legally binding treaty between Finland, Norway and Sweden on the rights of the Sami people, and can thus be viewed as a renewal of the Lapp Kodicill (Ahren 2004, 75; Ahren 2007, 12). However, ratification appears to still be several years away.

4. RECOGNITION OF CULTURAL RIGHTS (LANGUAGE, HUNTING/FISHING, RELIGION)

Yes; recognition of specific Sami rights is primarily limited to language, with some recent acknowledgements regarding fishing/reindeer husbandry.

Recognition of Cultural Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**1**	**1**	**1**

Evidence:

- In 1992, Norway passed the Sami Language Act, making Sami and Norwegian both official languages in certain parts of Norway that have large Sami populations. Under this legislation, the Sami people have the right to use their mother tongue in communication with local and regional authorities (Fouberg and Hogan 2003, 58).
- The Sami Act of 1987, most recently amended in 2003, states in section 1.5 that "Sami and Norwegian are languages of equal worth." Pursuant to section 3.12 of the same act, a Sami Language Council has been established.
- According to the 1999 Education Act, all students in primary and lower secondary schools in areas defined in the act as Sami districts are entitled to study and be taught in the Sami language. Outside Sami districts, any group of ten or more students who so demand, have the right to study and be taught in the Sami language.
- Section 1.1 of the Sami Act states: "The purpose of the Act is to enable the Sami people in Norway to safeguard and develop their language, culture and way of life."
- The purpose of the 2005 Finnmark Act is to facilitate the management of land and natural resources in the country of Finnmark for the benefit of the residents of the county and particularly as a basis for Sami culture, reindeer husbandry and social life (section 1).
- The act confers the rights to all residents, including the Sami, of Finnmark county to fish, fell certain trees, remove timber for home crafts, hunt and trap big and small game, pick cloudberries, and to reindeer husbandry. The act, however, does not contain provisions on sea fishing (UN 2007c, para. 37). Moreover, the act is ethnically neutral and the rights are not special to the Sami; all individuals must be issued a permit for such activities.
- The Marine Resources Act includes a provision noting the importance of emphasizing Sami culture considerations in regulations pertaining to fishing and in the management of fishing. Additionally, a local fjord fishing advisory board was established which consists of three members of the Sami Parliament, and three members from each of the three northern counties.

- In 2017, the governments of Norway and Finland finalized the Deatnu/Tana Agreement, regulating fishing in the Deatnu Watercourse. The agreement strongly limited Sami traditional fishing methods, including net-fishing; the Sami Parliaments in both Finland and Norway were strongly opposed to the agreement (Saami Council 2019).
- Additionally, Sami reindeer management was recognized through a General Agreement for the Reindeer Industry (1976) and the Reindeer Management Act (1978) (Riseth 2007, 179).

5. RECOGNITION OF CUSTOMARY LAW "

Partial, some attempts to institutionalize and safeguard Sami customary law within the Norwegian judicial system.

Recognition of Customary Law Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0**	**0.5**	**0.5**

Evidence:

- Under the assimilation policies of the 19th century, Norway revoked the recognition of Sami customary law (Ahren 2004, 88).
- During the debate over Sami rights, the government of Norway largely ignored Sami customary conceptions of land and water rights (Eide 2001, 135).
- Sami customary law and pastoral land tenure are largely undocumented, remaining a shared practical knowledge among Sami herders (Brantenberg 1995).
- The Sami Act has influenced the practice of law in Norway with respect to the Sami. In 2004, Norway established the Sis-Finnmárkku Diggigoddi / Inner Finnmark District Court, a district court for the Central Sami areas with judges who speak the Sami language and who are skilled in Sami culture and with a special responsibility to safeguard Sami customary law (Ravna 2013)

6. GUARANTEES OF REPRESENTATION/CONSULATION IN THE CENTRAL GOVERMENT

Yes.

Guarantees of Representation Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0.5**	**1**	**1**

Evidence:

- As an indigenous people recognized by the Norwegian state, the Sami are entitled to be consulted on matters that concern them. This right is enshrined in the ILO Convention no. 169, to which Norway is a signatory (Government of Norway 2018a).
- The demand for direct representation in the Parliament of Norway has never been a central issue for the Sami. The demand put forward by the Sami with a view to strengthening their democratic rights was a demand for their own elected body (Josefson 2003, 22).
- The Norwegian Government and the Sami Parliament have signed an agreement specifying how consultations are to take place.
- The Finnmark Act of 2005 requires the consultation of the Sami in the management of land and natural resources in the area of the Finnmark Estate.
- In negotiating the details of the Finnmark Act, the Saami Parliament and Norwegian authorities also set out a joint agreement relating to consultation procedures. By Royal Decree on 1 July 2005, the agreed-upon procedures were extended to apply to the whole central government administration, including legislative or administrative measures that may directly affect Sami interests. Under the agreed-upon terms, consultations are not to be concluded until the Sami Parliament and the Norwegian State agree that it will be possible to reach agreement (Samediggi Sametinget n.d.).
- In 2018, the Sami Parliament, The Norwegian Reindeer Association (Norske reindriftssamers landsforbund in Norwegian) and the government reached an updated agreement on consultation rules; the consultation framework was brought before the Norwegian Parliament in 2018 (Johnsen and Søreng 2018; Government of Norway 2018b).
- The proposed changes (Prop. 116L) to the Sami Act would introduce a separate chapter on consultations, legislating the main principles of the duty to consult and regulating consultations between public authorities and the Sami Parliament (Government of Norway 2018c). The Parliament sent the bill back to government; as of 2020 it has yet to be considered by Parliament (Ravna 2020).

7. CONSTITUTIONAL OR LEGISLATIVE AFFIRMATION OF THE DISTINCT STATUS OF INDIGENOUS PEOPLES

Yes.

Affirmation of Distinct Status Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0.5**	**1**	**1**	**1**

Evidence:

- The Sami received constitutional recognition on 21 April 1988 when the National Parliament of Norway amended the Norwegian Constitution through the adoption of Article 110 (a).
- Article 110 (a) of the Constitution of the Kingdom of Norway recognizes the Sami, stating that: "It is the responsibility of the authorities of the State to create conditions enabling the Sami to preserve and develop its

language, culture and way of life." The Saami Council contests the degree to which this language acts as a full recognition of the Sami as a distinct people or as an indigenous people (Saami Council 2018).

- Speaking after the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP), Johan L. Lovald, the Norwegian representative stated that "Norway would work with the Sami people, recognized as indigenous by the Government [of Norway]" (UN 2007b).
- The draft Nordic Sami Convention will recognize the status of the Sami people as the only indigenous people of Norway, as well as Finland and Sweden (Scheinin 2007, 41). However, as noted in Section 3, ratification appears to still be several years away.

8. SUPPORT/RATIFICATION FOR INTERNATIONAL INSTRUMENTS ON INDIGENOUS RIGHTS

Yes.

Support for International Instruments Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**1**	**1**	**1**

Evidence:

- On 19 June 1990, Norway was the first country to ratify ILO Convention 169 Indigenous and Tribal Peoples Convention, 1989.
- In 2007, Norway voted in favour of adopting the UN DRIP. This declaration is non-binding and does not impose duties or obligations on the Norwegian state.
- Norway, along with Finland and Sweden, has been in discussion since 2005 with the three Sami parliaments on the adoption of the draft Nordic Sami Convention. The Expert Group that was commissioned to draft the convention makes clear that it is a rights convention, "with very few general or merely aspirational provisions" (Ahren 2007, 13).

9. AFFIRMATIVE ACTION

No, but employers are obligated by law to “make and active effort” to promote equality.

Affirmative Action Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**0**	**0**	**0**

Evidence:

- According to Henriksen, there are "no affirmative action programmes to overcome discrimination in employment against Samis as such situations are no longer an issue" (1997, 71).

- Employment equity falls under several statutes. Most pertinent for the Sami people is The Anti-Discrimination Act [2006]. The purpose of the act is to promote equality, ensure equal opportunities and rights and prevent discrimination based on ethnicity, national origin, descent, skin colour, language, religion or belief.
- This act does not stipulate affirmative action with the goal of improving the labour market outcomes of the Sami. Section 8 of the act, however, allows for positive action introduced by employers.
- Sector-specific action, such as the reservation of spots for Sami within medical schools, has seen some success (Gaski et al. 2008; George 2001).
- In January 2009, a new "duty to make an active effort and report" was introduced in The Anti-Discrimination Act (section 3.a). The duty to make an active effort and report makes it mandatory for public authorities, public and private employers and employer/employee organizations to work actively, systematically, and in a targeted manner to promote the purpose of the act.
- Furthermore, the new activity obligation comprises pay and working conditions, promotion, development opportunities and protections against harassment. Private companies regularly employing less than 50 employees are exempted from this duty (Norway 2009, 53).

Sweden

TOTAL SCORES				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**2**	**3**	**4.5**

1. RECOGNITION OF LAND RIGHTS/TITLE

Partial, but limited.

Land Rights/Title Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0**	**0**	**0.5**

Evidence:

- In the late 19th century, Nordic countries, including Sweden, confiscated Sami territory under the Taxed Lapp Land system. The Swedish Reindeer Grazing Act of 1886 abolished any previously recognized Sami land rights and declared the Sami people's traditional land the property of the Swedish Crown. To this day, the Swedish government maintains that it alone owns all the lands of Sweden.
- The Sami of northern Sweden have challenged the Government of Sweden's claim to their traditional territory. In the 1981 landmark judgment by the Swedish Supreme Court in the Skattefjall case, what is also known as the "Taxed Mountains case," the court confirmed Sami usufructuary rights to land for reindeer husbandry.
- In the Taxed Mountains case, the court ruled that the Sami could conceivably acquire title to land by using it for traditional Sami economic activities. However, in this case, the Sami party did not have a proper evidential basis for their claim to ownership (UN 1997).
- In 1998, the Government of Sweden issued a formal apology to the Sami for the discrimination and injustice that they were met with by the Swedish state, including forced dislocation from their traditional lands.
- Despite the Skattefjall ruling and the formal apology, no substantive or formal rights to land have been afforded to the Sami by the Swedish government. The United Nations Association of Sweden reports that the Sami right to land is ignored and systematically violated in Sweden (UNA Sweden 2010, 6).
- The Nordic countries, including Sweden, maintain to this day that it is "beyond doubt that the Saami people's nomadic land use has not given rise to legal rights to land and that the Saami traditional lands, water, and natural resources belong to the [Swedish] state" (Ahren 2004, 93).
- In a 2011 decision (the Nordmaling case) regarding a dispute between landowner logging rights and the grazing rights of Sami reindeer herders, the Supreme Court found in favour of the Sami, conferring common

law rights to an area of land. The ruling provided important guidelines regarding Sami land rights more broadly (Sasvari and Beach 2011).

- In January 2020, Sweden's Supreme Court found in favour of the Sami, overturning a policy that restricted Sami hunting and fishing rights. In addition to affirming the cultural and traditional practices of hunting and fishing, the decision set a new precedent regarding Sami land use rights. The court ruling, however, only applies to the Sami people in Girjas sameby (for discussion of the "sameby" see self-government rights) (Hofverberg 2020).

2. RECOGNITION OF SELF-GOVERNMENT RIGHTS

Partial; limited to matters of language and culture, some local administration.

Self Government Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0.5**	**0.5**	**0.5**

Evidence:

- The Sami Parliament of Sweden was established in 1993 under the Sami Parliament Act of 1992. The act states that the Sami Parliament's primary purpose is "to monitor issues that relate to Sami culture in Sweden."
- Although the Sami Parliament is an elected body, by the Sami, it is regarded under Swedish law as a government agency to the central government. The Sami Parliament Act outlines the tasks of the Sami Parliament, placing them under the authority of the Swedish government.
- As a state agency, the Sami Parliament must carry out the policies and decisions made by the Swedish Parliament. The Government of Sweden maintains the right to stipulate directives for the operations of Sami governance.
- The Sami Parliament is controlled by the Swedish Parliament and the government through laws, ordinances and appropriation decisions. As a state authority, the Sami Parliament must follow the guidelines in the official appropriations documents that the Government of Sweden adopts each year.
- Since 2007, the Sami Parliament has assumed responsibility for the reindeer industry from the Government of Sweden.
- Swedish law has some mechanisms for Sami local self-governance. The Reindeer Husbandry Act (1971) created the "sameby" or "Sami village." The sameby is an economic and administrative union within a geographic area. The members of a sameby have the right to participate in reindeer husbandry, and in some areas also have hunting and fishing rights.
- The sameby administrative units have been important to advancing Sami hunting and land rights through the courts.

3. UPHOLDING HISTORIC TREATIES AND/OR SIGNING NEW TREATIES

No.

Upholding and/or Signing Treaties Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0**	**0**	**0**

Evidence:

- There is no evidence that Sweden has ever signed a treaty with the Sami people.
- The Lapp Kodicill, an annex to a 1751 border agreement between Norway and Sweden, details rights and duties of the Sami people. The Sami have maintained that the Lapp Kodicill has status as a binding treaty under international law, and as such confirms the signatories' duty to respect the Sami nation.
- In 2001, the governments of Norway, Finland and Sweden, and the Sami parliaments in each of the three countries, appointed an Expert Group to draft a Nordic Sami Convention. In November 2005, the Expert Group presented the draft text to the three governments and the three Sami parliaments.
- All three Sami parliaments have endorsed the proposed Sami Convention. The actual process of negotiation did not begin until 2011, and a revised Nordic Sami Convention was presented in 2016. The revised proposal has been criticized by the Sami as being a weakened version of the 2005 draft, and as falling short of fulfilling international norms (Mörkenstam 2019).
- The Sami will not be a formal party to the convention; doing so would deprive the convention of its status as a legally binding instrument under international law. However, the provisions of the convention stipulate that ratification and any amendments by the states shall not take place without approval by all three Sami parliaments (Henriksen 2008b, 75).
- When signed, the Sami Convention will be a legally binding treaty between Finland, Norway and Sweden on the rights of the Sami people, and can thus be viewed as a renewal of the Lapp Kodicill (Ahren 2004, 75; Ahren 2007, 12). However, ratification appears to still be several years away.

4. RECOGNITION OF CULTURAL RIGHTS (LANGUAGE, HUNTING/FISHING, RELIGION)

Yes, with some limitations.

Recognition of Cultural Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0.5**	**0.5**	**1**	**1**

Evidence:

- Funding has been provided for many years from the cultural budget to the Sami Parliament for grants to non-governmental Sami organizations at the local and national levels devoted to education, research and projects pertaining to Sami culture (UN 2006b, 86).
- The Sami Parliament Act of 1992 invests the responsibility in the Sami Parliament over the direction of Sami linguistic work and preservation efforts.
- The Sami language received formal status as an official minority language in Sweden with the enactment of the 1999 legislation, Act Concerning the Right to Use the Sami Language in Dealings with Public Authorities and Courts. This law stipulated the right to use Sami, both spoken and written, in proceedings with administrative authorities and courts. This law limited Sami language rights to the northernmost municipalities in Sweden.
- The 1999 language legislation was replaced in 2009 with the Act on National Minorities and National Minority Languages. This new law protects the Sami language and expands the geographical areas where the right to use Sami in proceedings with authorities is accommodated.
- In the same year, however, Swedish was proclaimed in a separate statute, the Language Act of 2009, to be the main language in Sweden, putting an emphasis on the minority status of Sami.
- The Reindeer Husbandry Law, enacted in 1971 and last revised in 1993, regulates the rights of Sami in reindeer breeding. Only those Sami who are permitted to carry out reindeer herding enjoy special land and water rights. The land and water rights of Sami fishermen or other Sami have never been covered by the present legislation.
- In 1992 the Swedish Parliament adopted legislative measures affecting traditional Sami hunting and fishing rights. The Swedish Parliament decided that all traditional Sami hunting grounds shall be accessible and open for all Swedish citizens. Since 2007, however, the Sami Parliament assumed responsibility for the management of the reindeer industry, taking over from the Swedish government's central administration.
- The 2020 Supreme Court decision reaffirmed Sami hunting and fishing rights. The decision confirmed the authority of the Sami village (Girjas sameby) to confer hunting and fishing rights on others without the Swedish state's permission. Moreover, the decision found that the state does not have the authority to confer these rights within the sameby.

5. RECOGNITION OF CUSTOMARY LAW "

Partial, limited legal recognition.

Recognition of Customary Law Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0**	**0**	**0.5**

Evidence:

- With the abolition of the Taxed Lapp Land system in the late 19th century through the enactment of the 1886 Reindeer Grazing Act, the Swedish government revoked Sami legal traditions and customary law (Ahren 2004).

- The 2011 Nordmaling decision by the Swedish Supreme Court found in favour of Sami reindeer-herder grazing rights, based on the principle of customary rights.
- In Nordmaling, "the court confirmed that customary rights form the strongest legal principle for herding rights… and defined herding rights as collective rights that apply to the whole Saami reindeer herding population, and cannot expire" (Sasvari and Beach 2011).

6. GUARANTEES OF REPRESENTATION/CONSULATION IN THE CENTRAL GOVERMENT

Partial, but very limited.

Guarantees of Representation Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0**	**0.5**	**0.5**	**0.5**

Evidence:

- The Sami Parliament is a consultative mechanism, and serves largely an advisory function. Unlike Finland and Norway, there is no legislated obligation on the part of the Swedish state to consult with the Sami Parliament. No mandatory action follows the hearing of the Sami Parliament in Sweden.
- The Swedish Ombudsman against Ethnic Discrimination points out that the "Sami Parliament lacks real political influence as shaped through participation in decision making, the right of co-determination in legislative matters, the right of veto in administrative decisions or, the status of compulsory referral body in matters that concern the Sami interests" (Ombudsman against Ethnic Discrimination (DO) 2008, 23).
- According to the Sami Parliament website, "the Sami have no representation in the Swedish Parliament" (Sametinget 2009). A 2003 research document notes that no Sami has ever been elected to the Swedish Parliament (Josefson 2003, 17)
- Article 16 of the Nordic Sami Convention commits Sweden to negotiating with the Sami Parliament on matters of major importance to the Sami. The Article stipulates that "these negotiations must take place sufficiently early to enable the Sami parliaments to have a real influence over the proceedings and result." The Nordic Convention has not yet been ratified by Sweden (Nordic Saami Convention 2016).

7. CONSTITUTIONAL OR LEGISLATIVE AFFIRMATION OF THE DISTINCT STATUS OF INDIGENOUS PEOPLES

Yes.

Affirmation of Distinct Status Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0.5**	**0.5**	**0.5**	**1**

Evidence:

- The Government of Sweden states that the Sami are recognized as an indigenous people and constitute a recognized minority in Sweden (UN 2006b, 5). The Sami were first recognized as an indigenous people by the Swedish Parliament in 1977. Currently, the Sami are recognized as one of five national minorities under the National Minorities in Sweden Government Act of 1998.
- A new Swedish Constitution was drafted in 2010. The draft recognizes the Sami as a full-fledged people and not a minority. In a previous draft of the new constitution, the Sami were called an "ethnic minority." This description drew strong reaction from the Sami community, prompting the change by a parliamentary committee (Varsi 2010).
- In 2011, the Constitution of Sweden was amended, recognizing the Sami as a people (Zeldin 2011; Sami Parliament, n.d.).
- The Nordic Sami Convention recognizes the status of the Sami people as the only indigenous people of Sweden, as well as Norway and Finland (Scheinin 2007, 41). The Convention has yet to be ratified by Sweden.
- In 2019, the Swedish government announced it would fund the creation of a Sami Truth Commission, that will shed light on the systemic injustices carried out by the Swedish state on the Indigenous group (CBC News 2020a).

8. SUPPORT/RATIFICATION FOR INTERNATIONAL INSTRUMENTS ON INDIGENOUS RIGHTS

Partial.

Support for International Instruments Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**0**	**0.5**	**0.5**

Evidence:

- Sweden adheres to the principle of duality, which stipulates that international treaties do not automatically become part of Swedish law. To become applicable, international treaties must either be converted into Swedish legislation or be incorporated through a special act.
- Sweden voted in favour of adopting the United Nations Declaration on the Rights of Indigenous Peoples. This declaration is non-binding and does not impose duties or obligations on the Swedish state.
- Sweden has not ratified ILO Convention C169 Indigenous and Tribal Peoples Convention, 1989. Although the Swedish government has made attempts to ratify this convention, progress has slowed in recent years (UN 2008, 6).
- Sweden, along with Norway and Finland, has been in discussion since 2005 with the three Sami parliaments on the adoption of the draft Nordic Sami Convention. The Expert Group that was commissioned to draft the convention makes clear that it is a rights convention, "with very few general or merely aspirational provisions" (Ahren 2007, 13). A revised Convention was agreed upon in 2016; as yet, the convention has not yet been ratified.

- It is the view of the Government of Sweden that indigenous peoples have the right to self-determination insofar as they constitute peoples within the meaning of common Article 1 of the 1966 ICCPR and 1966 ICESCR.
- However, Sweden has clarified for the UN that the right to self-determination shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of Sweden.

9. AFFIRMATIVE ACTION

No, but legislation requires "active measures" for equity in working life.

Affirmative Action Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**0**	**0**	**0**

Evidence:

- There is no evidence that affirmative action for the Sami people exists in either law or policy.
- In 2009, the new Discrimination Act was enacted, replacing several previous statutes, combining features of each into one comprehensive anti-discrimination law. The legislation entails provisions on "active measures" in working life in the areas of equal pay.
- Although the law works to promote equal rights and opportunities, particularly in working life, it does not explicitly address the Sami people. Under this law, the Sami would be protected against discrimination on the grounds of ethnic origin.
- Article 7 of the Nordic Convention addresses non-discrimination and special measures. The Convention (once ratified) will ensure the protection of Sami against discrimination, and establishes that Sweden (and Finland and Norway) "shall, when necessary for the implementation of Saami rights pursuant to this Convention, adopt special positive measures with respect to such rights" (Nordic Sami Convention, 2016).

United States

TOTAL SCORES				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**7.5**	**7.5**	**8.5**	**8.5**

1. RECOGNITION OF LAND RIGHTS/TITLE

Yes.

Land Rights/Title Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- Until 1871, when the United States ceased entering into treaties with Indian tribes, almost 400 treaties had been signed. Most treaties concerned land title and usufructuary rights to land. Treaties were designed as an exchange, ceding territory to the United States in return for a set of guarantees, which largely entailed rights to specific territories for the tribe. These reserves were to be protected from non-Indian encroachment.
- In the landmark Worcester v. Georgia (1832), the court explained that "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States."
- However, under federal US law, not all Indian land rights are afforded "property rights" status. Property rights status is considered as recognized title and cannot be unilaterally confiscated by Congress. Lands without this protection (i.e., unrecognized lands held by aboriginal title, by virtue of historical possession and use) can be taken without compensation.
- In 1934, the Indian Reorganization Act (also called the Wheeler-Howard Act) was passed by Congress "to conserve and develop Indian lands and resources."
- Section 3 of the Indian Reorganization Act stipulates that Indian lands will be held in trust and said lands can only be alienated to the United States.
- In 1946, the US Congress established the Indian Claims Commission. Land was predominantly the issue addressed by the commission. However, the commission did not have the authority to restore land rights. Instead, where a claim was successful, monetary compensation was provided in lieu of land title. The Indian Claims Commission was disbanded in the late 1970s and the remaining cases were transferred to the US Court of Claims system.

- Under the Winters Doctrine, stemming from Winters v. United States (1908), tribes are entitled to reserved water rights. Indian reservations created by Congress or executive order are conferred the right to waterways within their territory, as well as the protection of streams, rivers and other water sources that are used by tribes. Indian water rights are not created by use and cannot be lost by non-use.
- Under the Clean Water Act (1972), Indian tribes can regulate their water resources in the same manner as states and can enforce its standards against upstream users (if the standards have been approved by the Environmental Protection Agency).
- The Bureau of Indian Affairs is responsible for the administration and management of 55 million surface acres and 57 million acres of subsurface minerals estates held in trust by the United States for American Indians, Indian tribes, and Alaska Natives.

2. RECOGNITION OF SELF-GOVERNMENT RIGHTS

Yes.

Self Government Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- The United States has recognized that its relationship with Indian tribes constitutes a government-to-government relationship.
- Indian tribes are independent sovereign governments, separate from the states and from the federal government. In the case of Cherokee Nation v. Georgia (1831), the Supreme Court Chief Justice John Marshall famously declared that Indian tribes were "domestic dependent nations...Their relationship to the United States resembles that of a ward to his guardian" (quoted in Anaya 2004, 24).
- The Indian Reorganization Act of 1934 was an attempt to afford Indian tribes greater sovereignty and self-government over their territories. Section 16 states that "any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws."
- Tribal sovereignty over tribal territory, including tribal members and non-members, was recognized in the case of United States v. Mazurie (1975). The court stated that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. … Indian tribes within 'Indian Country' are a good deal more than 'private, voluntary organizations."
- Tribal sovereignty is said to be inherent and it exists unless and until the United States Congress extinguishes it. In United States v. Wheeler (1978), the court explained that "The powers of Indian tribes, are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.'"
- In 1975, the Indian Self-Determination and Education Assistance Act was passed to encourage tribal participation in, and management of, programs that had been administered on their behalf by various federal departments.

- Under the Tribal Self-Governance program, signed into law in 1994, greater responsibility for policy and program administration was transferred from the federal Bureau of Indian Affairs to tribal governments.

3. UPHOLDING HISTORIC TREATIES AND/OR SIGNING NEW TREATIES

Yes.

Upholding and/or Signing Treaties Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- There are nearly 400 treaties signed between the United States and Indian tribes: the first treaty dates back to 1778 between the United States and the Delawares (Prucha 1994, 3). In 1871, the United States ceased entering into treaties with Indian tribes.
- In most cases, treaties were designed to take land away from a tribe. In exchange for land, the United States promised to respect a tribe's sovereignty, and to provide for the well being of tribal members (ILRC 2006, 3).
- The United States Supreme Court ruled in 1903 in Lone Wolf v. Hitchcock that Congress maintains unrestricted power to unilaterally abrogate treaties. However, in United States v. Dion (1986), the court recognized that "Indian treaties are too fundamental to be easily cast aside." (quoted in Prucha 1994, 386).
- Recent court rulings have affirmed the treaty rights of tribal governments. In *Washington State Department of Licensing v. Cougar Den* (2019), the court held that that the treaty rights of the Confederated Tribes and Bands of the Yakama Nation should protect its tribal member from having to pay fuel tax to the state of Washington. In *Herrera v. Wyoming* (2019), the court overturned a previous decision to affirm the treaty rights of the Crow Tribe to hunt on off-reserve lands (Braun, 2020).
- In upholding historic treaties, in 2020, the Supreme Court ruled that approximately half of the land in the state of Oklahoma is within a Native American reservation. Writing for the majority opinion, Justice Neil Gorsuch wrote that "…we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word" (Healy and Liptak, 2020).

4. RECOGNITION OF CULTURAL RIGHTS (LANGUAGE, HUNTING/FISHING, RELIGION)

Yes.

Recognition of Cultural Rights Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- Fishing and hunting on Indian reservations is subject to the jurisdiction of Indian tribal governments. The state governments may not regulate Indian tribes or their members within the boundaries of a reservation; however, federal conservation laws may apply.
- American Indians may hunt, fish and trap on forest lands in the public domain. In some instances, specific treaties, statutes or other federal laws and regulations, as well as intergovernmental agreements, provide Indians with hunting and fishing rights. For example, the Navajo Treaty with the United States allows tribal members to hunt on unoccupied ground in San Juan County contiguous to the reservation. Treaty hunting rights do not extend to private, developed, or cultivated lands.
- The courts have ruled that, even in the absences of a treaty right, tribes may hunt on lands aboriginally held by them, so long as their aboriginal right has never been extinguished by Congress or expressly given up by the tribes (Ziontz 1996, 200).
- Ordinarily the taking of bald eagles, eagle parts, hawk feathers or parts, is in violation of federal law. However, an exception is made for eagles and eagle parts used for American Indian religious and cultural purposes. As well, Indians who are members of federally enrolled Indian tribes are exempt from prosecution under the Migrant Bird Treaty Act, and thus can legally possess hawk feathers.
- The Native American Language Act of 1990 was passed by Congress in order to promote and protect traditional Native American languages. Section 102 (1) reads: "The Congress finds that the status of the cultures and languages of Native Americans is unique and the United States has the responsibility to act together with Native Americans to ensure the survival of these unique cultures and languages."
- The Indian Civil Rights Act of 1968 affords the free exercise of religion and prohibits Indian tribes from denying this right to an individual. The act goes further in its guarantee of religious freedom, and does not prohibit a tribe from establishing a religion.
- Under the National Historic Preservation Act of 1966, the religious and cultural sites of Indian tribes are granted federal protection.
- In a joint resolution by the Senate and House of Representatives in 1978, the US Congress expressed the general policy of the US government toward traditional Native American religions. The resolution reads: "henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites" (quoted in Utter 2001, 157).

5. RECOGNITION OF CUSTOMARY LAW "

Yes.

Recognition of Customary Law Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**1**	**1**	**1**	**1**

Evidence:

- In 1993, the US government passed the Indian Tribal Justice Act 1993. Section 2 (7) of the Indian Tribal Justice Act of 1993 reads: "traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes and to the goals of this Act." This legislation affirms the principle that tribal courts are the appropriate venue for specific forms of justice unique to particular Indian tribes.
- In 1978, in the case of United States v. Wheeler, which dealt with the issues of tribal criminal jurisdiction over tribal members, the court explained that tribes had been self-governing political communities prior to the arrival of the Europeans and had not given up full sovereignty, including the power over legal traditions within tribal territory.
- In Williams v. Lee (1959), the court maintained that the States do not have jurisdiction over civil matters that occur on Indian reservations and brought by a non-Indian against an Indian. The matter would be dealt with through tribal courts and this authority could only be limited by Congress.

6. GUARANTEES OF REPRESENTATION/CONSULATION IN THE CENTRAL GOVERMENT

Yes.

Guarantees of Representation Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Scores:	**0.5**	**0.5**	**1**	**1**

Evidence:

- The federal obligation to consult Indian tribes was enshrined by President Clinton under Executive Order 13175--Consultation and Coordination with Indian Tribal Governments on 6 November 2000.
- The Executive Order establishes "regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes."
- The *National Historic Preservation Act* (2004), which governs the historic preservation activities of the US federal government, requires consultation with Indian Tribes under Section 106 of the Act.
- The Tribal Law and Order Act, which was signed in July 2010, requires the Bureau of Indian Affairs and the Office of Justice Services to establish certain policies, procedures and guidelines for consultation with tribes.

7. CONSTITUTIONAL OR LEGISLATIVE AFFIRMATION OF THE DISTINCT STATUS OF INDIGENOUS PEOPLES

Yes.

Affirmation of Distinct Status Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**1**	**1**	**1**	**1**

Evidence:

- Sections 2 and 8 of Article I of the Constitution of the United States explicitly mentions "Indians," and "Indian Tribes." Moreover, section 2 of the fourteenth amendment also refers to "Indians."
- The constitutionality of Indians and Indian tribes was addressed in the Supreme Court decision for United States v. Antelope (1977), wherein the court stated that, "classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians."

8. SUPPORT/RATIFICATION FOR INTERNATIONAL INSTRUMENTS ON INDIGENOUS RIGHTS

Partial, but limited.

Support for International Instruments Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**0**	**0**	**0.5**	**0.5**

Evidence:

- The United States has not ratified ILO Convention C 169 Indigenous and Tribal Peoples Convention, 1989.
- The United States was one of four countries that voted against the UN Declaration on the Rights of Indigenous Peoples.
- In April of 2010, the United States announced at the UN Permanent Forum on Indigenous Issues that it has decided to review the US position on the Declaration. The US Department of State, and other federal agencies will be hosting consultations with federally recognized tribes, NGOs, and other stakeholders on this issue.
- In December 2010, the United States government removed its opposition to UNDRIP. President Obama announced that the United States would lend its support to UNDRIP; however, the statement released by the US State Department made clear that it did not regard the Declaration as binding on US law (US Department of State, 2011).

9. AFFIRMATIVE ACTION

Yes.

Affirmative Action Scores				
Year:	**1980**	**2000**	**2010**	**2020**
Score:	**1**	**1**	**1**	**1**

Evidence:

- Affirmative action has been American policy since an executive order by President Kennedy in 1961. This executive order mandated that federally financed projects take affirmative action to ensure that human resources practices are free from racial discrimination.
- An executive order issued by President Johnson in 1965 amended the previous affirmative action order acknowledging the policy's goal of correcting the effects of past and present discrimination because of race and skin colour, amongst others.
- As per the operation of the Executive Order Program, "Each contracting agency in the Executive Branch of government must include the equal opportunity clause in each of its non-exempt government contracts. The equal opportunity clause requires that the contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. American Indian or Alaskan Native, Asian or Pacific Islander, Black, and Hispanic are considered minorities for purposes of the Executive Order. This clause makes equal employment opportunity and affirmative action integral elements of a contractor's agreement with the government" (US DOL 2002).

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