

INFORMATION SHEET: CONSTITUTIONAL PROVISIONS

POLICY AREA / POLICY ISSUE

Constitutional provisions

ISSUES TO CONSIDER

Not all States have a written constitution, but most do. A constitution is generally at the top of the legal hierarchy in a State.¹ It is an important starting point for understanding the place of culture and ICH within any State, their system of governance and law, and the relationship between the State and various different communities.

The approach taken to ICH and related issues in a constitution provides the framework within which ICH-related policymaking and safeguarding can happen within a State. Most national constitutions do not mention ICH specifically. In a few constitutions, broad indications are given about why ICH safeguarding is considered important, how it is defined, how the State plans to ensure its safeguarding, and the roles of various stakeholders in doing so. Using the Constitute database as a guide,² we find specific mention of ICH (or 'immaterial' cultural heritage), for example, in the constitutions of Bolivia (2009), Brazil (1988, revised 2014), the Dominican Republic (2010), and Venezuela (1999, revised 2009). The Constitution of the Philippines also 'acknowledges the importance of protecting traditional culture for the promotion of national identity, especially indigenous traditional culture, traditions, and institutions'.³ Irrespective of whether it mentions ICH and its value to society or specific communities, or not, a constitution may make statements about development, human rights or language that will likely affect the nature and scope of policymaking relating to ICH, especially where the constitution is supreme law. Constitutions may also identify areas in which the State plans to make new policies and laws, such as in the area of ICH.

A constitution tends to focus on general principles of governance and is therefore relatively abstract, high level and difficult to amend. It may not be optimal (or possible) to include detailed provisions for ICH safeguarding in a constitution, unless there is a federal or otherwise devolved system of governance requiring the constitution to set out responsibilities for culture at different levels of government, or other compelling reasons. Where States are already going through a process of constitutional revision, it may be worth asking country counterparts whether there have been any discussions about acknowledging ICH as a part of the cultural heritage in the territory. This may make it easier, if required, to subsequently ensure the modification of culture policies and legislation, or other areas of policy, to include ICH.

If ICH is mentioned in a constitution, it may be worth considering the fact that the Convention focuses on the role of ICH in sustaining cultural diversity rather than as a component of 'national' identity. The Convention and its subordinate texts avoid the idea that some ICH is more important than others.

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1. Most constitutions are supreme law, which means that they can override any contradictory provisions in other laws or regulations. Even so, any contradictory provisions in subsidiary legislation may need to go through a process of constitutional review before they are repealed or amended. If a constitution is not supreme law, legislation that contradicts the constitution can still be enforced.
 2. <https://www.constituteproject.org/>
 3. Lixinski, Lucas *Intangible Cultural Heritage in International Law* (Oxford University Press 2013), p.138.

WHAT THE CONVENTION AND ITS TEXTS SAY

The Convention

In the Preamble, ICH is represented as ‘a mainspring of cultural diversity and a guarantee of sustainable development’ and playing an ‘invaluable role ... in bringing human beings closer together and ensuring exchange and understanding among them’. The ‘threats of deterioration, disappearance and destruction’ facing ICH can be linked to ‘globalization and social transformation’ and ‘intolerance’, as well as to ‘a lack of resources for safeguarding such heritage’.

Operational Directives

VI.4.1 Social cohesion and equity

194. States Parties should endeavour to recognize and promote the contribution of the safeguarding of intangible cultural heritage to social cohesion, overcoming all forms of discrimination and strengthening the social fabric of communities and groups in an inclusive way.

Ethical Principles

Ethical Principle 11: ‘Cultural diversity and the identities of communities, groups and individuals should be fully respected. In the respect of values recognized by communities, groups and individuals and sensitivity to cultural norms, specific attention to gender equality, youth involvement and respect for ethnic identities should be included in the design and implementation of safeguarding measures’.

EXAMPLES

Bolivia: The ICH is described as ‘manifestations of art and popular industries’ and ‘intangible aspects of places and activities’ in the Bolivian Constitution of 2009, article 101. This constitution gives communities (the broadly defined ‘nations and rural native indigenous peoples’) the right ‘to have their ICH ‘valued, respected and promoted’, and ‘collective ownership of the intellectual property’ in their ICH (Article 30).⁴

Venezuela: The Venezuelan Constitution says that:

Cultural values are the unrenounceable property of the Venezuelan people and a fundamental right to be encouraged and guaranteed by the State, efforts being made to provide the necessary conditions, legal instruments, means and funding. The autonomy of the public administration of culture is recognized, on such terms as may be established by law. The State guarantees the protection and preservation, enrichment, conservation and restoration of the cultural tangible and intangible heritage and the historic memories of the nation (Article 99).⁵

Brazil: The Constitution of Brazil (Article 216)⁶ is unusual in that it gives a fairly detailed definition of ICH and tangible cultural heritage, and some suggestions for its safeguarding, ‘with the collaboration of the community’:

Brazilian cultural heritage includes material and immaterial goods, taken either individually or as a whole, that refer to the identity, action and memory of the various groups that form Brazilian society, including:

4. https://www.constituteproject.org/constitution/Bolivia_2009.pdf?lang=en
5. https://www.constituteproject.org/constitution/Venezuela_2009.pdf?lang=en
6. https://www.constituteproject.org/constitution/Brazil_2014#s4132

- I. forms of expression;
- II. modes of creating, making and living;
- III. scientific, artistic and technological creations;
- IV. works, objects, documents, buildings and other spaces intended for artistic-cultural manifestations;
- V. urban complexes and sites with historical, landscape, artistic, archeological, paleontological, ecological and scientific value.

RELEVANT CASE STUDIES IN THE CAPACITY-BUILDING MATERIALS

Case study 53: Colombia: a far-reaching policy with intersectoral implications
CS53-v1.0: [English](#)|[French](#)|[Spanish](#)

FURTHER INFORMATION

The Constitute database contains constitutions from many States worldwide
<https://www.constituteproject.org/>

Constitution Finder provides the option to look at historical constitutions
<http://confinder.richmond.edu/index.html>

Bayeh, Endalcachew. "The Place of Customary and Religious Laws and Practices in Ethiopia: A Critical Review of the Four Modern Constitutions." *Social Sciences* 4.4 (2015): 90-93. (paper on academia.edu)

Choudhry, Sujit. "Group Rights in Comparative Constitutional Law: culture, economics, or political power?" in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (OUP, 2012).

Lixinski, Lucas. "Constitutionalism and the Other: Multiculturalism and Indigeneity in selected Latin American Countries." *Anuario iberoamericano de justicia constitucional* 14 (2010): 235-266.

Rahier, Jean Muteba, and Mamyrah Dougé Prosper. "Afrodescendants, the Multicultural Turn and the "New" Latin American Constitutions and Other Special Legislations: Particularities of the Andean Region." In *Blackness in the Andes: Ethnographic Vignettes of Cultural Politics in the Time of Multiculturalism* ed. J. Rahier. (Palgrave Macmillan US, 2014), pp.89-103.

The Cultural Rights and Kenya's New Constitution project <https://katibaculturalrights.com/>

QUESTIONS TO CONSIDER

- Are there provisions in the constitution for the recognition of human (and specifically cultural) rights and for the promotion and/or restriction of some cultural activities?
- What does the constitution say about the system of law and governance (especially in the domain of culture), including provisions for devolution of powers and/or the recognition of customary and religious systems of law and the role of traditional leaders, if any?
- What approaches are adopted in the constitution in relation to culture, heritage and linguistic, religious and cultural diversity? What is the purpose or role of culture (and/or ICH) in society, according to the constitution?
- What provisions, if any, are made in the constitution for the recognition of indigenous and minority groups, and/or communities defined in other ways?

- Are any provisions made in the constitution for ICH safeguarding?
- What approaches are adopted in the constitution in relation to health, education, IP and other areas of government activity that could impact on ICH safeguarding?