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CREATE CHANGE

Pro Bono Centre

Criminal Defences and Sentencing Research

Intersection between criminal
defences and sentencing, and
cultural rights

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Summary of Findings

We researched how First Nations cultural rights have been engaged and interpreted by courts in international jurisdictions.

Whilst we were asked to consider domestic and family violence cases as part of our research, very few cases discussing domestic and family violence *and* cultural rights were identified. We were, however, able to find several criminal matters, sentencing decisions and some civil cases regarding cultural rights more broadly.

We focussed on international jurisdictions and courts with human rights instruments, especially Canada, New Zealand, and the European Court of Human Rights. Other foreign jurisdictions were explored to the extent this was considered informative, including the Inter-American Court of Human Rights, International Criminal Court, United States, Philippines, and India. We compiled case briefs highlighting where and how cultural rights have been invoked, and their significance.

Canada

The majority of the applicable case law in Canada involved interpretation of existing Aboriginal and treaty rights for civil matters regarding fishing, hunting and territory rights, under s 35 of the *Constitution Act*. We found that courts interpret Aboriginal and treaty rights generously and liberally; governments may only regulate existing Aboriginal rights for a compelling, substantial objective in accordance with the ‘Sparrow test’ (*R v Sparrow*) and ‘Van der Peet test’ (*R v Van der Peet*). Canadian courts continue to acknowledge the legal significance of Aboriginal rights, and they are widely understood and recognised by the courts to be paramount to the allocation of responsibility and appropriate sanctions.

The consideration of cultural rights has not been limited to civil matters. *R v Gladue* was an important case that considered the Aboriginal identity of the offender in a murder trial which raised issues of provocation and domestic relationships. This required interpretation of section 718.2(e) of the *Criminal Code*, which directs judges to consider the Indigenous offender’s unique systemic/background factors and impose appropriate sentencing aligning with the offender’s Aboriginal heritage. In *R v Gladue*, the Court recognised the value of restorative justice codified in this legislation, construing it to be remedial in nature with the aim of ameliorating the overrepresentation of Aboriginal people in prisons.

Therefore, criminal matters involving an Indigenous defendant will usually require additional case-specific information to be provided to the judge (the *Gladue* report), and a pre-sentence report that takes into account the systematic and background factors of the defendant’s Aboriginal community. However, it has simultaneously been emphasised that section 718.2 does not automatically require leniency in sentencing. Terms of imprisonment, regardless of the offender’s cultural background, will generally remain consistent for violent and serious crimes (as in *R v Gladue*, affirmed and followed in *R v Ipeelee*). Indigenous cultural rights, whilst considered during sentencing of criminal matters, do not override other aggravating and mitigating factors such as offence seriousness, previous criminal history, and the offender’s plea (Welsh & Ogloff, 2008).



New Zealand

New Zealand courts aim to reconcile Māori customary law and the New Zealand legal system which originates from England. Māori customary law comes from various sources such as the Treaty of Waitangi, and tikanga, the Māori ‘common law’ behavioural guidelines. In criminal settings, historically, sections 5 and 9 of the *Crimes Act 1961* impliedly overrule a Māori customary system for addressing wrongs (*R v Mason* (No 1)). Tikanga can explain the reasoning behind the crime, but it does not excuse the crime itself (*R v Mason* (No 2)). However, the recent landmark case *Ellis* allowed a criminal appeal to continue, despite the applicant’s death, on the basis of tikanga. *Ellis* put forward that tikanga is recognised in the development of common law and becomes a part of state law where relevant. This suggests strong potential for legal development into the future.

Sections 26 and 27 of the *NZ Sentencing Act 2002* allow information about the offender’s personal, family, whanau, community, and cultural background to be considered by the court, in the form of a report (*Berkland v R*). Intergenerational deprivation, if connected to individual circumstances, may lead to a discount in sentence, but this must be in balance with the severity of the crime. For example, commercial drug trafficking would need extreme criminogenic factors to warrant a discount. Cultural disconnectedness from Māori heritage is a plausible explanation for an individual’s involvement with criminal groups (*Carr v R*).

To support the interpretation of Māori customary law in criminal cases, we also studied its application in civil cases. We found that courts interpret Māori customary law consistently across different types of matters. Notable cases such as *Paki v Attorney General* and *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* emphasise that tikanga is “applicable law” in its own right, due to its significant influence on the “development of common law”. As such, it has been treated as holding a level of supremacy over contradictory legislation, when relevant.

International Human Rights Courts

We found that the rights to culture or to participate in cultural life have not been explicitly recognised by the European Court of Human Rights, or the Convention for the Protection of Human Rights and Fundamental Freedoms (though religious freedoms are preserved). However, there are some examples of cultural rights being protected under core civil rights contained in the Convention. The highlighted cases generally reflect a willingness of the court to take into account the applicant’s cultural history, traditions, and identity when determining whether there has been a violation of their rights under the Convention.

The Inter-American Court of Human Rights, in applying the American Convention on Human Rights, has established that cultural context may be relevant in determining the nature of reparations payments to families of victims, and the importance of referring to Indigenous customary law in cases where possible. Furthermore, the International Criminal Court has attributed some relevance to the defendant’s cultural and religious values when making a sentencing determination.

Other Foreign Jurisdictions

The Philippines has adopted a similar approach to Canada. The *Indigenous Peoples Rights Act 1997* recognises, protects and promotes Indigenous rights, but cannot be invoked to evade



prosecution and liability for crimes under the regular judicial system. Customary law is rarely applied to serious criminal matters (*Ha Datu Tawahig v Lapinid*). Where relevant, the courts will also take into account additional case-specific information.

Relevant cases studied in the US provide limited assistance for the application of human rights in criminal contexts, as they found cultural factors to be inapplicable to the specific circumstances. Factors to determine applicability involved a reasonable person test, as well as the credibility of cultural evidence.

Finally, there is Indian case law that emphasises Indigenous entitlement to land, discussing how extraction of resources from areas of land requires consent from Indigenous peoples. This ensures that Indigenous peoples have a say in how the land is maintained, in order to preserve their spiritual ties.



Background and context

The Queensland Government has asked the QLRC to review and make recommendations about particular defences in the *Criminal Code 1899* (Qld) (“**the Code**”).

UQPBC students were recruited to assist the QLRC in their research. This research report explores the scope of sections 27 and 28 of the *Human Rights Act 2019* (Qld) (“**HRA**”) and the intersection with the operation of criminal defences. Specifically, students were directed to:

- a) identify and provide a summary of the case law that has considered sections 27 and 28 of the HRA; and
- b) research how the cultural rights of Aboriginal and or Torres Strait Islander peoples have been engaged and interpreted in other Australian and international jurisdictions in the context of criminal matters (and sentencing) and/or decisions about domestic and family violence.
- c) consider the potential implications for the interpretation of sections 27 and 28 of the HRA;
- d) for international jurisdictions, focus on those jurisdictions with a human rights instrument such as an Act or Charter;
- e) where relevant, include contextual information on the development of jurisprudence in relation to particular rights (for example, the UNDRIP and the concept of FPIC).

Methodology

The students adopted a doctrinal research methodology. This report follows on from the work of semester 1, presenting findings associated with items **b)** and **d)** as identified above.

[Please note that, in the case summaries that follow, some material may be directly quoted from the judgement. Other material may be paraphrased.]



Engagement of Aboriginal and or Torres Strait Islander peoples' cultural rights in international jurisdictions with human rights instruments

Foreign National Jurisdictions

Canada

Case name	<i>R v Gladue</i> [1999] 1 SCR 688
URL	https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1695/index.do
Court	Supreme Court of Canada
Matter	Interpretation and application of s 718.2(e) of the Criminal Code, provocation, domestic relationships, Indigenous, murder
Facts	The accused was an Aboriginal woman, who, on the night of her 19th birthday, had been drinking with friends and family. Suspecting that her husband was having an affair with her sister, she became angry when they left the party together. She had been claiming that she would kill him if he continued this behaviour. When the victim returned home, they began to argue. The accused confronted the victim with his infidelity, and he responded with offensive and provocative language. The victim then fled, and the accused ran towards him with a knife, stabbing him to death. The accused pled guilty to manslaughter and was sentenced to three years' imprisonment. At the time of the stabbing, the appellant was pregnant, had a blood-alcohol content of 155-165 milligrams of alcohol in 100 millilitres of blood, and was diagnosed as suffering from a hyperthyroid condition, which led to exaggerated reactions to emotional situations. Evidence was also admitted which indicated that the victim had previously been physically abusive towards the accused.
Relevant Issue	The issue before the Court was how best to construe <u>s. 718.2(e)</u> of the <i>Criminal Code</i> , in order to determine whether the three-year sentence imposed on the accused was a result of its correct application.
Decision	Section 718.2(e) of the Criminal Code directs judges to undertake the sentencing of Aboriginal offenders individually and differently, considering the: - unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts, and; - types of sentencing procedures and sanctions which may be appropriate because of the offender's Aboriginal heritage or connection. It is remedial in nature and designed to ameliorate the serious problem of overrepresentation of Aboriginal people in prisons, and to encourage sentencing judges to take a restorative approach to sentencing. Additional case-specific information is provided by the counsel to the judge (<i>Gladue</i>



	report), and a pre-sentence report that takes into account the systematic/background factors may come from the relevant Aboriginal community. However, the section is not a means of automatically increasing leniency of the sentencing (e.g. reducing the prison sentence of Aboriginal offenders). Generally, the more serious and violent the crime, the more likely it is that the terms of imprisonment will be similar, independent of whether the offender is Aboriginal or non-Aboriginal. The appellant was sentenced to three years of imprisonment, in the interests of both the accused and society. Applied in <i>R. Ipeelee</i>: Both Aboriginal offenders were declared long-term offenders and had long-term supervision orders (LTSO) imposed. After release from prison, both offenders committed offences, breaching a condition of their LTSO. Applying the approach established in the <i>Gladue</i> case, the sentences imposed on the offenders were reduced.
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Case name	<i>R v Sparrow</i> [1990] 1 SCR 1075
URL	https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/609/index.do
Court	Supreme Court of Canada
Matter	Aboriginal fishing rights and consistency with s 35 of <i>Constitution Act, 1982</i> (first Supreme Court of Canada case to examine the matter)
Facts	The appellant (Sparrow), a Musqueam man and commercial fisherman, was charged under the <i>Fisheries Act</i> for using a fishing net that was longer than the length permitted by his food-fishing license. Sparrow defended the charge on the basis that he was exercising an existing Aboriginal right to fish that was protected by section 35(1) of the <i>Constitution Act, 1982</i> , which recognises and affirms existing Aboriginal and treaty rights in Canada.
Relevant Issue	Whether the Parliament's power to regulate fishing (specifically, the net length restriction contained in the Band's fishing licence) is limited by s 35(1) of the <i>Constitution Act, 1982</i> . Entailed interpretation of the meaning of section 35.
Decision	The Court ruled that historical policy on the part of the Crown, including the <i>Fisheries Act</i>, can neither extinguish the existing Aboriginal right to fish "without clear intention nor, in itself, delineate that right." The right may be regulated by government policy but in accordance with section 35(1). The case led to the establishment of the "Sparrow test", which outlines the criteria to determine whether and how an existing Indigenous right may be justifiably infringed upon by the government: To determine if a right has been infringed upon, consider: • Is the limitation on the right unreasonable? • Does the regulation impose undue hardship?



	- Does the regulation prevent the right-holder from exercising that right? An infringement may be justified if: - It serves a “valid legislative objective” (e.g. for the conservation of natural resources). - Fair compensation was provided. “There has been as little infringement as possible in order to effect the desired result”. - Aboriginal groups were consulted or at the least, informed. The Court further ruled that: - Aboriginal and treaty rights are capable of evolving over time and require generous and liberal interpretations. - Governments may regulate existing Aboriginal rights only for a compelling and substantial objective (e.g. conservation and management of resources). - After conservation goals are met, Aboriginal peoples must be given priority to fish for food over other user groups. <u>Application to other cases on Aboriginal fishing rights and section 35:</u> <i>R v Nikal</i> [1996] 1 SCR 1013 – application of Sparrow test to an appellant charged with fishing without a licence; appellant was exempted from requirement to obtain a fishing licence as the conditions of the licence infringed upon his Aboriginal fishing rights and the infringement was unjustified. <i>R v Gladstone</i> [1996] 2 SCR 723 – modification of the Sparrow test for the extinguishment of Aboriginal rights to give more government deference in protecting commercial fishing rights.
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Case name	<i>R v Horseman</i> [1990] 1 SCR 901
URL	https://www.canlii.org/en/ca/scc/doc/1990/1990canlii96/1990canlii96.html
Court	Supreme Court of Canada
Matter	Indian killed a bear in self-defence and later sold hide; whether Treaty 8 hunting rights are limited by the 1930 Natural Resources Transfer Agreement.
Facts	The appellant, a Treaty 8 Indian, killed a grizzly bear in self-defence while hunting moose for food. At the time, he did not have a licence to hunt grizzly bears or sell their hides. A year later, in need of money to support his family, he purchased a licence and sold the grizzly hide. The appellant was charged with unlawfully trafficking in wildlife, contrary to s. 42 of the <i>Wildlife Act</i> . He argued that he was within his Treaty 8 right “to pursue [his] usual vocations of hunting, trapping and fishing...subject to such regulations as [might] from time to time be made by the Government”.
Relevant Issue	Whether the appellant’s hunting and sale of bear hide was within Treaty 8 rights.



Decision	Aboriginal hunting rights under Treaty 8 have been limited to the right to hunt for food only, for sustenance of the individual Indian or Indian's family. This right was expanded by the Crown to widen the hunting territory and means by which Indians could hunt for food in exchange for reduction in the right to hunt for commercial purposes. The appellant's sale of the bear hide constituted a hunting activity that had ceased to be that of hunting "for food" but rather was an act of commerce, no longer protected by Treaty No. 8. The grizzly bear is also in a precarious position with numerous threats to its existence and as such, s 42. of the <i>Wildlife Act</i> is a valid legislation reflecting a <i>bona fide</i> concern for the preservation of the species.
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Case name	<i>R v Van der Peet</i> [1996] 2 SCR 507
URL	https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1407/index.do
Court	Supreme Court of Canada
Matter	<i>Constitution Act, 1982, s. 35(1); Fisheries Act, R.S.C. 1970, c. F-14, s. 61(1); British Columbia Fishery (General) Regulations, SOR/84-248, s. 27(5).</i>
Facts	The appellant, a First Nations person of Canada, was charged with selling salmon, which he caught under the authority of an Indian food fish licence, contrary to s 27(5) of the <i>British Columbia Fishery (General) Regulations</i> , which prohibited the sale of fish caught under this type of licence.
Relevant Issue	The question before the court was constitutional in nature, with the relevant issue being whether s. 27(5) of the <i>Regulations</i> had no effect in the circumstances due to the alleged existence of an Aboriginal right contained within s. 35 of the <i>Constitution</i> .
Decision	Section 35 of the <i>Constitution Act</i> does provide a framework for the protection of the distinctive cultures of Aboriginal peoples, with its result being that Aboriginal rights cannot be extinguished. However, they can be regulated or infringed if justified under the test in <i>R v Sparrow</i>. This case established the <i>Van der Peet</i> test, which defined and restricted Indigenous rights to those customs and traditions that are pre-contact and integral to Indigenous peoples' distinctive culture. Here, the appellant failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo culture which existed prior to contact. This decision has been applied in several cases including: • R v Adams [1996] 3 SCR 101 – appellant charged with fishing without a licence; ruled that claims to land are one manifestation of a broader-based conception of Aboriginal rights and fishing met the established <i>Van der Peet</i> test. • R v NTC Smokehouse Ltd [1996] 2 SCR 672 – appellant charged with selling and purchasing fish without a licence; ruled that the exchange of fish for money or other goods was not a sufficiently central, significant or defining feature such that it is recognised as an Aboriginal right under s. 35(1) of the <i>Constitution</i>. It did not meet the criteria established in the <i>Van der Peet</i> test.



Case name	<i>R v Sappier; R v Gray</i> [2006] 2 SCR 686, SCC 54
URL	https://www.canlii.org/en/ca/scc/doc/2006/2006scc54/2006scc54.html
Court	Supreme Court of Canada
Matter	s. 67(1)(c) and s. 67(2) of the Crown Lands and Forests Act
Facts	Two members of Maliseet and Mi'kmaq First Nations groups were charged under New Brunswick's <i>Crown Lands and Forests Act</i> with unlawful possession of or cutting of Crown timber from Crown lands which had been traditionally harvested by these groups. Both claimed that they possessed an Aboriginal and treaty right to harvest timber for personal use.
Relevant Issue	As per the <i>Van der Peet</i> test, for an Aboriginal right to exist, the activity in question must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.
Decision	'Culture' was described as being an inquiry into the pre-contact way of life of a particular Aboriginal community, and includes practices such as means of maintaining survival, socialisation, legal systems, and trade. This served to refine the <i>Van der Peet</i> test: the practice of harvesting wood for personal and survival purposes was found to fall within this definition. Therefore, the court held that there was a relevant Aboriginal right to harvest wood for domestic uses on Crown lands traditionally used for that purpose by the respective First Nations groups, and the provisions of the <i>Crown Lands and Forests Act</i> infringed upon this right.

Case name	<i>Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)</i> [2002] 2 SCR 146
URL	https://www.canlii.org/en/ca/scc/doc/2002/2002scc31/2002scc31.html
Court	Supreme Court of Canada
Matter	Constitution Act, 1867, ss. 91(24), 92(13); <i>Heritage Conservation Act</i> , R.S.B.C. 1996, c. 187, ss. 12(2)(a), 13(2)(c), (d).
Facts	The respondent, Interfor, held a forest licence over land in the central coast of British Columbia. It had notified the appellant, Kitkatla Band, of its development plans, as the appellants claimed Aboriginal rights in this area, and had been engaged in treaty negotiations with the province. Of concern was the possible presence of native heritage sites and objects, including culturally modified trees (CMTs) in the area to be harvested. The presence of a significant number of these trees was reported. Interfor applied to the respondent Minister for a site alteration permit under s. 12 of the provincial Heritage Conservation Act to authorise the cutting and processing of CMTs during logging operations. The Minister granted the permit without having considered any archaeological report. The Band then successfully challenged the legality of the permit, and the Minister revised the decision, issuing a new permit which provided that all fallen CMTs should be preserved together with 76 of 116 trees still standing. Sections 13(2)(c) and 13(2)(d) of the <i>Heritage Conservation Act</i> protect certain Aboriginal heritage objects from damage, alteration or removal, while



	s. 12(2)(a) provides the Minister responsible for the operation of the Act with the discretion to grant a permit authorising one of the actions prohibited under s. 13(2)(c) and (d).
Relevant Issue	The issue for the court was the constitutionality of ss. 12(2)(a) and 13(2)(c) and (d) of the <i>Heritage Conservation Act</i> .
Decision	The Band's appeal was dismissed. The Court held that ss. 12(2)(a) and 13(2)(c) and (d) of the Act are valid provincial law and that they do not single out Aboriginal peoples or impair their status or condition as Indians. The Act in question was tailored to not affect the established rights of Aboriginal peoples, and it had not been established that its provisions affected the essential and distinctive values of 'Indianness' which would engage the federal power over native affairs and First Nations in Canada. In the circumstances of this case, the overall effect of the provisions was to improve the protection of native cultural heritage.

Case name	<i>R v Sioui</i> [1990] 1 SCR 1025
URL	https://www.canlii.org/en/ca/scc/doc/1990/1990canlii103/1990canlii103.html
Court	Supreme Court of Canada
Matter	<i>Indian Act, R.S.C., 1985, c. I-5, s. 88; Parc de la Jacques-Cartier, (1981) 113 O.G. II 3518, ss. 9, 37.</i>
Facts	Some members of the Huron band on the Lorette Indian reserve were convicted by the Court of Sessions of the Peace for cutting down trees, camping and making fires in places not designated in Jacques-Cartier park contrary to ss. 9 and 37 of the Regulation respecting the Parc de la Jacques-Cartier, adopted pursuant to the <i>Quebec Parks Act</i> . They alleged that they were practicing the ancestral customs and religious rites that are the subject of a treaty between the Hurons and the British, which enlivened s. 88 of the <i>Indian Act</i> and exempted them from compliance with the regulations. The treaty is a document of 1760 signed by General Murray which guaranteed the Hurons, in exchange for their surrender, British protection and the free exercise of their religion, customs and trade with the English.
Relevant Issues	The questions before the court were (1) whether the 1760 document is a treaty; (2) whether it is still in effect; and (3) whether it makes ss. 9 and 37 of the Regulation respecting the Parc de la Jacques-Cartier unenforceable in respect of the respondents.
Decision	The 1760 document is a treaty within the meaning of s. 88 of the <i>Indian Act</i> , which was deemed to still be in force at the time the charges were brought, and it was found that the activities which the respondents were charged with did not seriously compromise the Crown's objectives in occupying the park. Therefore, under s. 88 of the <i>Indian Act</i> , the respondents could not be prosecuted as the activities in question were the subject of a treaty.



Case name	<i>Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)</i> [2005] 3 SCR 388
URL	https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/2251/index.do
Court	Supreme Court of Canada
Matter	Crown's duty to consult Indigenous groups, Treaty 8 reserve
Facts	In 2000, the federal government approved a winter road, which was to run through the Mikisew's reserve (located within Treaty 8), without consulting them. After the Mikisew protested, the road alignment was modified without consultation to track around the boundary of the reserve. The Mikisew's objection to the road went beyond the direct impact of closure to hunting and trapping of the area covered by the winter road, and included the detrimental effect it would have on their traditional lifestyle, which was central to their culture.
Relevant Issue	Whether the federal government was obligated to consult Mikisew Cree First Nation in constructing the winter road.
Decision	The court found that the government's approach, rather than advancing the process of reconciliation between the Crown and the Treaty 8 First nations, undermined it, as they breached the duty of consultation flowing from the honour of the Crown. It held that the Crown, while it has a treaty right to "take up" surrendered lands, was nevertheless under the obligation to communicate the impact the project would have on the exercise of their treaty hunting, fishing and trapping rights, especially considering the clear and demonstrably adverse impacts of the proposed road. Under Treaty 8, the First Nation treaty rights to hunt, fish and trap were therefore limited not only by geographical limits, but also by the Crown's right to take up lands under the treaty, subject to its duty to consult and accommodate the concerns of the First Nation affected, if appropriate.

Case name	<i>Mikisew Cree First Nation v Canada (Governor General in Council)</i> [2018] 2 SCR 765
URL	https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/17288/index.do
Court	Supreme Court of Canada
Matter	Crown's duty to consult Indigenous groups in passing legislation
Facts	In 2012, two pieces of legislation with significant effects on Canada's environmental protection regime were introduced into Parliament. The Mikisew Cree First Nation was not consulted on either bill at any stage in their development or prior to the granting of royal assent. The Mikisew brought an application for judicial review, arguing that the Crown had a duty to consult them on the development of the legislation, since it had the potential to adversely affect their treaty rights to hunt, trap and fish under Treaty No. 8.
Relevant Issue	Whether the federal government was required to consult prior to passing environmental legislation that could affect the exercise of treaty and/or Aboriginal rights.
Decision	The majority of the Court determined that the development, passage and enactment of legislation did not trigger the duty to consult Indigenous groups.



	However, it may be good government practice to do so, and declaratory relief may be appropriate. The minority supported a proactive approach to protecting Aboriginal treaty rights, concluding that Aboriginal rights do give rise to a duty to consult and legislation may be challenged directly for relief if it is enacted in breach of that duty. The court's split reasoning leaves open the possibility of further challenges in this area of the law.
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Case name	<i>R v Powley</i> , 2003 SCC 43 (CanLII), [2003] 2 SCR 207
URL	https://canlii.ca/t/51pd
Court	Supreme Court of Canada
Matter	<u>Constitution Act, 1982, s. 35</u> ; <u>Game and Fish Act, R.S.O. 1990, c. G.1, ss. 46, 47(1)</u> .
Facts	Two members of a Métis community near Sault Ste. Marie were charged with hunting contrary to provincial statute. In the first instance they were acquitted of unlawfully hunting a moose without a hunting licence and with knowingly possessing game hunted in contravention of <u>ss. 46 and 47(1)</u> of Ontario's <i>Game and Fish Act</i> . The trial judge found that the members of the Métis community in and around Sault Ste. Marie have, under <u>s. 35(1)</u> of the <i>Constitution Act 1982</i> ; an Aboriginal right to hunt for food that is infringed without justification by the Ontario hunting legislation.
Relevant Issue	The relevant issue for the court was whether <u>ss. 46 and 47(1)</u> of the <i>Game and Fish Act</i> , which prohibit hunting moose without a licence, unconstitutionally infringe the respondents' Aboriginal right to hunt for food, as recognised in <u>s. 35(1)</u> of the <i>Constitution Act, 1982</i> .
Decision	The Superior Court of Justice and the Court of Appeal upheld the acquittals. They found that the purpose of s. 35 was to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of Métis culture, including hunting for food.



New Zealand

Case name	<i>Peter Hugh McGregor Ellis v R</i> [2022] NZSC 114
URL	https://www.courtsofnz.govt.nz/assets/cases/2022/2022-NZSC-114.pdf
Court	Supreme Court of New Zealand
Matter	Criminal matter, sentencing, consideration of tikanga
Facts	Mr Ellis was convicted on seven counts of child sexual abuse 1993, with unsuccessful appeals in 1994 and 1999. In July 2019 he was granted leave to appeal once again, however he passed away in September 2019 before the appeal could be heard. In June 2020 a hearing concerning the relevance of tikanga Māori was held to determine whether the appeal should continue despite his death. Alongside consideration of a test of justice, the court allowed continuation of the appeal as tikanga is protected by law and continues to shape the lives of Māori peoples in modern society. Thus, the appeal was heard, and took into consideration the principle of tikanga when deciding upon the outcome.
Relevant Issue	How do cultural rights and background influence findings of guilt in criminal matters?
Decision	Despite Ellis not being of Māori descent, the appeal was allowed and his conviction was overturned. The court asserted that tikanga is recognised in the development of the common law where it is relevant, regardless of whether a person of interest is Māori, and that tikanga forms part of state law as a result of being incorporated into statutes and regulations.

Case name	<i>Berkland v R</i> [2022] NZSC 143
URL	https://www.courtsofnz.govt.nz/cases/william-allan-berkland-v-the-king-brownie-joseph-harding-v-the-king
Court	Supreme Court of New Zealand
Matter	Criminal; sentencing; criminogenic background factors leading to sentencing discount
Facts	Mr Berkland and Mr Harding appealed against sentences for several commercial drug charges. Mr Berkland's original sentence was 12 years and nine months' imprisonment. Mr Harding's original sentence was 28 and a half years imprisonment.
Relevant Issues	Does the lower average life expectancy of Māori men affect proportionality with sentencing terms? How does a person's Māori background, and associated historical intergenerational deprivation, influence the court's views on offending behaviour?
Decision	The applicant argued that Mr Harding's sentences could lead to a life sentence. Generalised life expectancy data was of no probative value as (a) it was not specific to Mr Harding's own life expectancy, and (b) early release is a matter for the Parole Board and/or compassionate release should the limits of Mr Harding's life expectancy eventually arise during the course of his sentence.



	The Court also considered the causative contribution of the Māori background to the offender's choice to offend. and the systemic poverty of the Māori people. Sections 26 and 27 of the <i>Sentencing Act</i>, which refer to the relevance of information about the offender's "personal, family, whanau, community, and cultural background", were considered. Section 27 interventions allow the court to hear persons to speak on the personal, family, whanau, community, and cultural background of the offender. Judges can request a s 27 intervention if they consider it would be helpful; the sentencing judge will ultimately decide what weight the information should be given. • The Court was satisfied that Mr Berkland's upbringing and its multiple criminogenic risk factors (poverty, trauma, chaotic home circumstances and poor educational outcomes) influenced his offending. • Mr Harding also submitted a report on his background of severe learning difficulties, unemployment, alcohol and gambling. However, the Court did not accept that these factors causatively contributed to the scale and extent of his offending. A s 27 report was submitted on behalf of Mr Harding, referring to general historical intergenerational deprivation as a driver of Māori offending. The writers made no real attempt to connect Mr Harding's own circumstances to those processes, and the Court was not satisfied that there was sufficient evidence to warrant a discrete discount. Although, it did acknowledge that if there is sufficient connection between intergenerational deprivation and the individual's circumstances, it may lead to a discount in sentencing. Mr Berkland received a 10 per cent discount for his deprived background and the role of addiction in his offending, and a 10 per cent discount for rehabilitation efforts. His final sentence was eight years and eight months imprisonment. Mr Harding received a 5 per cent discount for a late guilty plea. His final sentence was 21 years' imprisonment.
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Case name	<i>Carr v R</i> [2020] NZCA 357
URL	https://jade.io/article/1005263
Court	New Zealand Court of Appeal
Matter	Criminal; cultural disconnectedness and sentencing
Facts	Mr Anderson appealed against the sentences he received for various charges such as aggravated assault and robbery. The Court considered his background factors that contributed to his behaviour through the s 27 report.
Relevant Issues	Is cultural disconnectedness relevant to sentencing?
Decision	A s 27 report identified Mr Anderson's cultural disconnectedness from his Cook Islands Māori heritage and noted his connection to his family and whānau weakened as his connection to his peer group strengthened. The Court gave the applicant a 15 per cent discount for this background. Thus, Mr Anderson's sentence was reduced by a year.



Case name	<i>Takamore v Clarke</i> [2012] NZSC 116
URL	https://www.courtsofnz.govt.nz/assets/cases/2012/2012-NZSC-116.pdf
Court	Supreme Court of New Zealand
Matter	Burial and cremation; Māori customary law; Wills, probate and administration
Facts	Mr Takamore was buried according to tikanga by members of his Whakatohea and Tuhoe family. This was done without the permission of C, Mr Takamore's partner and executor. The Court of Appeals allowed C to rebury Mr Takamore. Mr Takamore's sister appealed to the judgement.
Relevant Issues	Is tikanga compatible with common law? Does tikanga apply to non-Māori? Competing claims based on different values (the wish of the spouse and children vs the obligation felt by the Kutarere family).
Decision	The Court affirmed that cultural preferences and practices are a relevant consideration, as s 20 of the New Zealand <i>Bill of Rights Act 1990</i> affirms. In Māori thinking, the dead are always present and acknowledged – this engages s 20 and makes the interest of this minority group a proper matter to be weighed, whatever the wishes of the deceased. The whanau (extended family) have standing in this case. The Court acknowledged that Māori tikanga is not forced on non-Māori who will not recognise it. This was not an issue of Māori customs overpowering C. C was ultimately granted the right to rebury her partner, on the basis of Mr Takamore's chosen way of life. Mr Takamore had made a life with her for more than 20 years, leaving behind his Kutarere. The Court noted that "had the family connections with Kutarere been maintained, even slightly, the claim based on whakapapa, identity, and hapu may well have prevailed."

Case name	<i>Paki and Others v Attorney-General of New Zealand</i> [2012] NZSC 50
URL	https://www.courtsofnz.govt.nz/assets/cases/2012/2012-NZSC-50.pdf
Court	Supreme Court of New Zealand
Matter	Application of the Treaty of Waitangi against s 261 of the <i>Coal Mines Act 1979</i> and s 354 of the <i>Resource Management Act 1991</i> .
Facts	This case concerned the ownership of a particular bed in the Waikato River which was acquired by the Crown in the 19th century. The case discussed a common law presumption that "ownership of the bed of the river to the middle of the stream was included in the land obtained by the Crown, in application of a conveyancing presumption of the English common law." However, "presumptions of Crown ownership under the common law could not arise in relation to land held by Maori under their customs and usages, which were guaranteed by the terms of the Treaty of Waitangi." Thus, it was argued that application of the English presumption in New Zealand could not move forward until Maori customary interests were excluded. That being said, it needed to be addressed whether the riverbed was under the ownership of the Crown due to specifications under s 14 of the <i>Coal-</i>



	<i>mines Act Amendment Act 1903</i> , s 261 of the <i>Coal Mines Act 1979</i> and s 354 of the <i>Resource Management Act 1991</i> .
Relevant Issues	Did the Maori customary law protected by the Treaty of Waitangi rebut the presumption of Crown ownership of land?
Decision	The English presumption was rebutted as Maori customary law prevails, and thus the riverbed was not vested in the Crown under s 261 of the <i>Coal Mines Act 1979</i> and s 354 of the <i>Resource Management Act 1991</i> . Thus, the case asserts the protection of Maori customary interests, and the rights of Maori peoples to enjoy the use of land under their traditional ownership.

Case name	<i>Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board</i> [2021] NZSC 127
URL	https://www.courtsofnz.govt.nz/assets/cases/2021/2021-NZSC-127.pdf
Court	Supreme Court of New Zealand
Matter	Consideration of the Treaty of Waitangi and tikanga when applying the Exclusive Economic Zone and <i>Continental Shelf (Environmental Effects) Act 2012</i> .
Facts	The appellant wished to be able to mine in an area of land within New Zealand's exclusive economic zone (EEZ). They held a permit under the Crown Minerals Act 1991, though before conducting the mining activities they must also obtain marine consents and marine discharge consents under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act). The respondents sought to oppose the grant of consents.
Relevant Issues	How the EEZ Act gives effect to the Treaty of Waitangi, and whether tikanga Māori is applicable law in the denying of the consents.
Decision	The court interpreted the EEZ Act as requiring the decision on granting or denying consents to uphold the Crown's obligations to give effect to the Treaty of Waitangi, and thus Maori customary law. Further, it was decided that tikanga "has been treated as norms influencing the development of the common law". Thus, tikanga should be considered as "other applicable law".



Case name	<i>R v Mason (No 1)</i> [2012] NZHC 1361
URL	https://jade.io/article/987290
Court	High Court of New Zealand
Matter	Consideration of tikanga in criminal trial.
Facts	The defendant was charged with one count of murder and one count of attempted murder. He applied for a ruling that his trial and sentencing should take into account tikanga Maori due to his Maori affiliations.
Relevant Issues	Is Maori customary law applicable in criminal contexts?
Decision	The trial process cannot accommodate tikanga Maori, for the trial process itself is “inherently inconsistent” with its nature. A Maori customary system for addressing wrongs had been impliedly overruled by ss 5 and 9 of the <i>Crimes Act</i> 1961. However, it was noted that there is more ability in the sentencing process to take into account tikanga Maori due to its inquisitorial nature.

Case name	<i>R v Mason (No 2)</i> [2012] NZHC 1849
URL	https://anzlaw.thomsonreuters.com/Document/le5761cf27fc811e8b22785ae5ff38a3b/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0&comp=wnlz
Court	High Court of New Zealand
Matter	Consideration of tikanga in criminal sentencing.
Facts	Sentencing considerations for <i>R v Mason</i> (No 1) [2012] NZHC 1361.
Relevant Issues	Consideration of cultural rights in sentencing.
Decision	“Tikanga Maori emphasises notions of reconciliation and reciprocity. Such matters are relevant to the sentencing process but they cannot drive it. The community, as a whole, also has an interest in seeing that the Courts respond appropriately and consistently to the offending of people who commit similar offences.” Based on this, the court decided that while tikanga is an important concept, it does not discredit a minimum sentence when one must be imposed, such as in the case of murder. This is because, despite its ability to explain the reasoning behind the crime, it does not excuse the fact that a murder was committed.



Philippines

Case name	<i>Diosdado Sama Y Hinupas and Bandy Masanglay Y Aceveda v People of the Philippines</i> [2021] (G.R. No. 224469. January 2021)
URL	https://elibrary.judiciary.gov.ph/assets/dtSearch/dtSearch_system_files/dtisa_pi6.dll?cmd=getdoc&stgd=yes&DocId=67496&request=%22Indigenous%22&index=%2a4aeb4dbdcceeda9b59b85ae3fb22cec0&searchFlags=1118208&autoStopLimit=0&fuzziness=3&SearchForm=C%3a%5celibrev2%5csearch%5csearch%5fform
Court	Supreme Court of the Philippines
Matter	Consideration of UNDRIP and Indigenous land rights in a criminal matter.
Facts	Applicants were convicted for illegal logging in private land. They argued that the tree planted was within the ancestral domain of the Iraya-Mangyan Indigenous Peoples, which thus granted them lawful authority.
Relevant Issue	Were the applicants the lawful owners of the land, and as such was the logging lawful?
Decision	Philippines is a signatory to the <i>UNDRIP</i>. The court considers Indigenous peoples rights and redemption of past colonialism to be of importance. Filipino constitution recognises IP rights (<i>Ha Data Tawahig v Lapinid</i>), which is reflected in the <i>Indigenous Peoples' Rights Act</i>. The land in question was private land, notwithstanding that according to the applicants' ancestral domain, they own it sui generis. As ownership itself is not a defence to a prosecution for illegal logging, the physical element of the crime was established. However, there was reasonable doubt about the intent element. Volition (intent to commit the act) was distinguished from criminal intent. The parties believed they had lawful authority to cut and collect the tree as Indigenous peoples for their Indigenous community's communal toilet. There was reasonable doubt as to the existence of the applicants' Indigenous peoples rights to log the tree. However, the court did not resolve whether there was, in fact, a lawful authority to cut the tree. The application was granted. The Court of Appeals decision was reversed and set aside, and the applicants were acquitted. However, the court could not categorically either affirm or negate the party's belief that IP rights gave a lawful basis to cut trees, and merely stated that "we have the ever growing respect, recognition, protection, and preservation accorded by the State to the IPs, including their rights to cultural heritage and ancestral domains and lands."



Case name	<i>Ha Datu Tawahig (Roderick D. Sumatra), Tribal Chieftain, Higaonon Tribe, Petitioner vs. The Honourable Cebu City Prosecutor I Lineth Lapinid, Cebu City Prosecure II Fernando Gubalance, Assistant City Prosecutor Ernesto Narido, Jr., Cebu City Prosecutor Nicolas Sellon and The Honourable Judge of Regional Trial Court Branch 12, Cebu City Estela Alma Singco, Respondents.</i>
URL	https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65145
Court	Supreme Court of Philippines
Matter	Criminal case of rape, customary law under Indigenous Peoples' Rights Act
Facts	This case involved a petition for mandamus filed by Roderick D. Sumatra (also known as Ha Datu Tawahig) to compel Judge Estela Alma Singco and public prosecutors to honour a resolution issued by the Dadantulan Tribal Court, which absolved him of liability for rape charges. Sumatra, a tribal leader of the Higaonon Tribe, sought to stop his criminal prosecution for rape, asserting that the <i>Indigenous Peoples' Rights Act</i> (IPRA) should apply and customary law should govern the matter. The case began when Lorraine Fe P. Igot filed a complaint against Sumatra for rape in 2006. Despite the tribal court's resolution clearing him in 2007, the Cebu City Prosecutor found probable cause and proceeded with filing a criminal case. Sumatra was eventually arrested in 2013 and filed motions to quash the case, citing IPRA provisions that, according to him, granted jurisdiction to tribal justice systems. Judge Singco denied Sumatra's motions, ruling that IPRA does not apply to criminal prosecutions unrelated to ancestral domain disputes or Indigenous rights. Sumatra then filed this mandamus petition to compel the court to recognize the tribal court's resolution and release him from detention.
Relevant Issue	Could the criminal prosecution for rape be stopped through application of customary law under the Indigenous Peoples' Rights Act?
Decision	"The Philippine legal system's framework for the protection of Indigenous peoples was never intended and will not operate to deprive courts of jurisdiction over criminal offenses. Individuals belonging to Indigenous cultural communities who are charged with criminal offenses cannot invoke Republic Act No. 8371, or the Indigenous Peoples' Rights Act of 1997, to evade prosecution and liability under courts of law." The Supreme Court denied the petition, ruling that IPRA does not exempt Indigenous persons from prosecution for crimes under the regular judicial system, and customary laws do not apply in this case of rape.



Case name	<i>Arnolfo A. Daco v Ruben E. Cabajar</i> [2021] (G.R. No. 222611. November 2021)
URL	https://elibrary.judiciary.gov.ph/assets/dtSearch/dtSearch_system_files/dtisa_pi6.dll?cmd=getdoc&DocId=67493&Index=%2a4aeb4dbdcceeda9b59b85ae3fb22cec0&HitCount=70&hits=28+2f+45+59+5d+b5+c4+e0+f1+104+112+13f+160+272+42f+661+67e+744+752+960+d8f+dc9+dd6+e45+e53+e5c+f06+1098+10ca+10df+1103+1132+1156+117d+127b+1288+12c2+12f2+1441+1450+1470+1478+14dc+14ea+14fd+1507+1522+154a+154e+1576+1647+1729+1735+1747+1806+1821+1834+1838+186b+19ce+1ae5+1af2+1b66+1b76+1c4f+1d1b+1d61+1dc6+1e4d+2029+&SearchForm=C%3a%5celibrev2%5csearch%5csearch%5fform
Court	Supreme Court of The Philippeans
Matter	Indigenous People Rights; Criminal
Facts	The petitioner claimed to own a parcel of land. However, the land had previously been established as the ancestral domain of the Tagbanua Indigenous community. The petitioner trespassed into the ancestral domain.
Relevant Issue	As the respondent's complaint was one of a criminal nature: should it have fallen within the jurisdiction of the Regional Trial Courts instead of the Regional Hearing Office of the National Commission on Indigenous Peoples?
Decision	The court found that the Commission was created for the protection and promotion of the rights of Indigenous people. Statute (IPRA) created an avenue where Indigenous peoples are given the opportunity to resolve issues within their customary laws. The Commission did have jurisdiction, and native title was upheld. The land has never been considered as a part of the public domain. It could not be privately owned by an individual. Petitioner was ordered to immediately vacate the ancestral domain and pay damages.



United States of America

Case name	<i>Siripongs v Calderon</i> 133 F.3d 732 (1998)
URL	https://caselaw.findlaw.com/court/us-9th-circuit/1200263.html
Court	United States Court of Appeals for the Ninth Circuit
Matter	Consideration of cultural values during criminal trial
Facts	The appellant was given the death penalty at the trial stage for his involvement in a murder. Although he asserted that he was not the one to commit the murder, he refused to name the perpetrator to his lawyer, due to his Thai cultural values, which would cause him shame and dishonour if he implicated another person. His lawyer failed to raise this at trial, and thus the appellant appealed the decision on the grounds that, had the lawyer discussed the involvement of another person, he may not have been sentenced to death.
Relevant Issue	Was the appellant's lawyer's failure to disclose an accomplice defence and relevant cultural evidence substantial enough to permit a retrial?
Decision	The appellant's argument was not believable due to his prior history of cooperation with law enforcement, meaning that at an earlier date, these cultural values had not seemed as important to him then. Furthermore, he was not actually a practicing Buddhist and was previously critical of the discussed values. Thus, the cultural evidence was not credible enough to present to a jury, and the court subsequently found that his lawyer had not caused an unfair trial.

Case name	<i>Trujillo-Garcia v Rowland</i> , 1993 U.S. App. LEXIS 30441
URL	https://advance.lexis.com/document/?pdmfid=1000516&crid=56501847-d1c5-4776-9c3a-a7d09acb8500&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-BHJ0-003B-P1R8-00000-00&pdcontentcomponentid=6393&pdshepid=urn%3AcontentItem%3A7XXR-8G81-2NSD-N175-00000-00&pdteaserkey=sr0&pditab=allpods&ecomp=hcgmk&earg=sr0&prid=d4fcc259-4d17-4cd1-943e-88b13207632c
Court	United States Court of Appeals for the Ninth Circuit
Matter	Criminal
Facts	The defendant lost \$140 to the victim during a game of poker. When he demanded his money back some four days later, the victim said an offensive phrase, and the defendant immediately pulled out a gun and shot him dead. During his trial, he raised the defence of provocation in an attempt to reduce the charge from murder to manslaughter, claiming that the phrase would have been particularly triggering for any reasonable Mexican man. However, the court did not accept the defence. The defendant appealed the decision, claiming that the trial judge violated his rights by failing to take into



	consideration his cultural background and how it may have influenced his reaction to the offensive phrase that was said.
Relevant Issue	Were the courts wrong in finding that his cultural background was irrelevant to the matter at hand?
Decision	The appeals were dismissed, as the higher courts found no error in the trial judge's rejection of a culturally-defined reasonable person test. It was said that, even if the courts were able to consider his cultural background, a reasonable Mexican male still would not have been provoked to murder a person simply because an offensive comment was made. As such, consideration of such a test would not have changed the outcome of the case.



India

Case name	<i>Orissa Mining Corporation v. Ministry of Environment & Forest & Others</i>
URL	https://main.sci.gov.in/pdf/SupremeCourtReport/2013_v6_piv.pdf
Court	Supreme Court of India
Matter	Spiritual relationship with land, Indigenous consent
Facts	Sterlite Industrial sought permission to construct a bauxite ore mine on Niyamgiri Hill (Orissa), inhabited by the Dongria Kondh tribe. The Ministry of Environment and Forests granted provisional environmental clearance, to be made final upon assessment of the construction's impacts on the Dongria Kondh people. The assessment concluded that the construction would interfere with the Dongria Kondh people's <i>Forest Rights Act</i> and the Ministry officially rejected Sterlite's application. The company asked the court to overturn the Ministry's rejection.
Relevant Issue	Whether rejecting environmental clearance for the construction of a mine due to its impacts of Indigenous tribes is lawful.
Decision	The Court held that the Dongria Kondh people have Indigenous entitlement to the land in question; the State holds the natural resources as a trustee of the people and as such, local populations must provide consent to any efforts to extract these resources. The Court noted that agriculture was the only source of livelihood for the tribes and that they had great emotional attachments to their lands. The United Nations Declaration on Rights of Indigenous Peoples provides that tribal forest dwellers have a right to maintain their distinctive spiritual relationship with the traditionally owned lands. The proposed construction would have devastated their habitat, permanently altering Dongria's way of life.



International Jurisdictions

Case name	<i>Khurshid Mustafa and Tarzibachi v. Sweden</i> no. 23883/06, 16 December 2008
URL	https://www.bailii.org/cgi-bin/markup.cgi?doc=eu/cases/ECHR/2008/1710.html&query=title(Khurshid%20Mustafa%20and%20Tarzibachi%20and%20.%20Sweden%20)
Court	European Court of Human Rights
Matter	Article 10 of the European Convention on Human Rights, access to culture, freedom of expression, freedom to receive information
Facts	The appellant tenants (two Swedish nationals) were evicted due to their refusal to remove a satellite dish, at the request of their landlord under special provisions of the tenancy agreement, which they used to receive television programmes in Arabic and Farsi from their country of origin (Iraq).
Relevant Issue	Whether this action by the landlord violated Articles 8 and 10 of the Convention.
Decision	The court held that the eviction did violate the tenants' freedom to receive information under Article 10. The installation of the satellite dish did not contravene the tenancy agreement or pose a risk to health and safety, and the court emphasised the importance of such freedom for an immigrant family with three children, who may wish to maintain contact with the culture and language of their country of origin. The court also noted that the freedom to receive information does not just include reports of events of public concern, but also cultural expressions and pure entertainment. Article 8 was not relevant to consider.

Case name	<i>Chapman v. The United Kingdom</i> [GC], no. 27238/95 [2001] ECHR 43
URL	https://www.bailii.org/cgi-bin/markup.cgi?doc=eu/cases/ECHR/2001/43.html&query=title(Chapman%20and%20.%20The%20United%20Kingdom%20)
Court	European Court of Human Rights
Matter	Article 8 European Convention on Human Rights, right to cultural identity
Facts	The applicant, a British citizen and member of the Romani community, along with her husband and children, travelled from place to place in caravans until she bought a piece of land in 1985. She alleges that a County Council official had told her in 1984 that if she bought the land, she would be allowed to live on it. The family moved onto the land and applied for planning permission (on multiple occasions). The District Council continued to refuse their applications and served them with various enforcement notices, as the land was not part of an officially designated "Gypsy site".
Relevant Issue	Whether the planning and enforcement measures taken against the applicant, regarding her occupation of land in her caravans, violated her right to respect for her home and her private and family life under Article 8 of the Convention, and if there was interference, whether it was justified.



Decision	The court determined that the right to respect for private and family life and home under Article 8 includes protection of the right to maintain a minority identity, and to have one's private and family life reflect that tradition, stating that "although the fact of belonging to a minority with a traditional lifestyle different from that of the majority does not confer an immunity from general laws intended to safeguard the assets of the community as a whole [...] it may have an incidence on the manner in which such laws are to be implemented". The court found that the applicant's occupation of her caravan was an integral part of her ethnic identity and reflected the long-held traditions of that minority group's lifestyle. However, it was held that there was no violation of Article 8, as it does not recognise the right to be provided with a home, and the court was unconvinced that there were no alternatives available to the applicant. There was also a legitimate aim pursued by the public authorities, and the dwelling had been established without the requisite planning permission. There arose a conflict between an individual's preferences and interests in relation to Article 8, and the community-held right to environmental protection, with the latter prevailing.
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Case name	<i>Kilic v Austria</i> no. 27700/15 [2023] ECHR (IV section)
URL	https://hudoc.echr.coe.int/?i=001-222139
Court	European Court of Human Rights
Matter	Article 9 of the European Convention on Human Rights; child custody
Facts	The Vienna Youth Welfare Office placed applicants' children in a childcare facility as an emergency measure after finding them in an extremely unhygienic, inhabitable apartment. The applicants complained that the Austrian Christian foster family deprived the children of their Turkish and Muslim identity, estranging them from their culture and religion.
Relevant Issue	Preserving the child's culture and religion
Decision	The court noted that it must take into account the concrete circumstances of each individual case, having regard to the child's culture and religion. However, the compulsory taking into care of a child inevitably entails limitations on the freedom of the biological parents to manifest their religious or other philosophical convictions in their own upbringing of the child. Taking children into care is only carried out in emergencies, where the child's well-being is severely endangered. It cannot be in the best interests of the child to wait until the child can be handed over to foster parents of similar origin. If foster parents with a different cultural background are selected, they will have been carefully prepared in the training courses to be able to take care of children from other cultural backgrounds. The court was satisfied that the domestic authorities took into account the applicants' cultural and religious background when choosing the foster parents. Turkish language courses are available to the applicants' children, free of charge, but neither the applicants nor their lawyer had not requested such offers. Regular visits by the applicants gave an opportunity (albeit a limited one) to maintain their cultural and linguistic ties with the children. Furthermore, the court found no indication of any indoctrination.



	Thus, the state authority does not violate Article 8 by placing children in foster families that do not correspond to their cultural, linguistic, and religious background, if it proves its due account for the children's cultural background.
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Case name	<i>S.A.S. v France</i> no. 43835/11 [2014] ECHR
URL	https://hudoc.echr.coe.int/?i=001-145466
Court	European Court of Human Rights
Matter	Exercise of religious rights; Articles 3, 8, 9, and 14
Facts	In October 2010, France issued a ban on all full-face coverings in public areas with the threat of criminal sanctions. The applicant argued that the ban on wearing clothing designed to conceal one's face in public places deprived her of the possibility of wearing the full-face veil in public.
Relevant Issue	The court concluded that the purpose of the ban was not to prohibit religious expression. The court found that the ban could be regarded as justified in its principle solely in so far as it seeks to guarantee the conditions of "living together". There was no consensus in Europe as to whether a blanket ban on full-face coverings was appropriate. Due to the breadth of the margin of appreciation, France's ban could be regarded as proportionate to the aim. The limitations were regarded as necessary in a democratic society. Other religious clothings and items were still allowed to be worn in public. Some Muslim coverings were full-face coverings, incidentally becoming a part of the ban. The Court also considered that the penalty for breach was very light (150 euros). Dissenting opinions criticised the vague idea of "living together", and claimed that France did not have a legitimate aim under the Convention. The judges viewed the blanket ban as a sign of selective pluralism and restricted tolerance, by prohibiting what is seen as a cause of tension.
Decision	Application dismissed by majority. The French government was not in breach of Articles 8 and 9 of the Convention.



Case name	<i>Abdullah Yalçın v Turkey</i> (No. 2) no. 34417/10 [2022] ECHR
URL	https://hudoc.echr.coe.int/?i=001-217716
Court	European Court of Human Rights
Matter	Article 9 of European Convention on Human Rights; exercise of religious rights
Facts	Turkish authorities refused to allocate a room for congregational Friday prayers (Jumuah) on the premises of a high-security prison. The applicant claimed this breaches Article 9 of the Convention.
Relevant Issue	The court observed that Article 9 does not protect every act motivated or inspired by a religion or belief. It protects acts that are intimately linked to the religion or beliefs in question. The court found the applicant's wishes to be genuine, reasonable and sufficiently connected to his right under Article 9 of the Convention. Although the applicant could have practised congregational Friday prayers in his own cell, he had three other cell mates at the time, who each may or may not have been also willing to offer congregational Friday prayers. The domestic authorities did not explore any other modalities, including those less restrictive of the applicant's rights.
Decision	The court unanimously held that the Turkish government violated Article 9 of the Convention. They failed to demonstrate that domestic authorities weighed the competing interests at stake in a manner compliant with their positive obligations under Article 9 of the Convention to guarantee the applicant's freedom to manifest his religion in community with others.

Case name	<i>Avenesyan v Armenia</i> no. 12999/15 [2021] ECHR
URL	https://hudoc.echr.coe.int/?i=001-211259
Court	European Court of Human Rights
Matter	Article 9 of European Convention on Human Rights
Facts	The applicant refused to perform military services for reasons of conscience, as he is a Jehovah's Witness. The Nagorno Karabakh Republic police subsequently convicted him for draft evasion, because NKR did not have alternative service options.
Relevant Issue	The court found that the applicant had genuine grounds to seek exemption from military service due to his religious convictions. The court noted the importance of reconciling the conflict between individual conscience and military obligation.
Decision	The court held that the application's conviction interfered with his religious freedom.



Case name	<i>Aloeboetoe v Suriname</i> (1993), IACtHR Series C 15
URL	https://www.corteidh.or.cr/docs/casos/articulos/seriec_15_ing.pdf
Court	Inter-American Court of Human Rights
Matter	American Convention on Human Rights, relevance of culture to reparations
Facts	In 1987, in a town in Suriname, 20 individuals of the Saramaka tribal group were attacked, abused and beaten by a group of soldiers. Many of the individuals were detained on suspicion of being part of the Jungle Commando, however they denied the allegation. Seven of the individuals were forcibly transported to a secondary location, where all but one - who was injured attempting to escape and later died - were massacred.
Relevant Issue	Initially it was relevant to determine whether the Government of Suriname violated the human rights of the victims as provided for by Articles 1, 2, 4(1), 5(1), 5(2), 7(1), 7(2), 7(3), 25(1), and 25(2) of the American Convention on Human Rights. However, the State of Suriname accepted responsibility for the deaths of the victims, and the violations of the relevant Articles of the Convention. Therefore, the relevant issue for the Court was to fix the reparations and costs to be paid to the families of the victims.
Decision	The Court determined that social context was relevant in determining the reparations due for Suriname's human rights violations, taking into account the cultural practices and family structure of the community to which the victims belonged (including the common practice of polygamy and the close tribal connections between the villagers) when assessing which aggrieved parties would be compensated. The Court did not view these practices as necessarily being a bar on recovery of reparations.

Case name	<i>Mayagna Awas Tingni v Nicaragua</i> (merits, 2001), IACtHR Series C 79
URL	https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf
Court	Inter-American Court of Human Rights
Matter	American Convention on Human Rights, Indigenous custom, land and property rights
Facts	The Inter-American Commission on Human Rights brought a lawsuit against Nicaragua, arguing that Nicaragua violated Articles 1, 2, 21, and 25 of the American Convention on Human Rights in failing to demarcate the communal lands of the Awas Tingni Community, not adopting effective measures to ensure the property rights of the Community to its ancestral lands and natural resources, granting a concession on community lands without the consent of the Community, and not effectively responding to the Community's concerns regarding its property rights.
Relevant Issue	The court was to interpret the relevant articles of the Convention in light of the arguments of the Commission, and with respect to whether the Awas Tingni Community had ownership over their communal lands.
Decision	The decision of the court protected the community and its right to communal property of its lands under Article 21 of the Convention. With respect to Article 21 of the Convention, the court also determined that the delimitation, demarcation and issuing of the title to the lands of the Mayagna Awas Tingni



	Community should be undertaken in conformity with its customary law, its uses, and its habits. Therefore, Indigenous possession of land is sufficient to obtain official recognition of that property.
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Case name	<i>The Prosecutor v. Ahmad Al Faqi Al Mahdi</i> (Judgment and Sentence)
URL	https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_07244.PDF
Court	International Criminal Court
Matter	Criminal trial and sentencing (cultural factors)
Facts	The defendant, an active member of Al-Qaeda, was consulted about the group's decision to destroy mausoleums in Timbuktu, Mali. He was initially opposed to this destruction as "all Islamic jurists agree on the prohibition of any construction over a tomb," and "recommended not destroying the mausoleums so as to maintain relations between the population and the occupying groups." Despite this, the group wanted to continue with the plan, and the defendant was ordered to attack a mausoleum that he had been previously monitoring; he then carried out the attack without hesitation. He was also a contributor to attacks at numerous other sites.
Relevant Issue	Was the defendant's reluctance to participate in the attacks, due to his cultural and religious values, a relevant consideration for the determination of the sentence?
Decision	The chamber noted that the defendant's reluctance was "of some relevance for the determination of the sentence and attaches weight to it." The court also considered his remorse and empathy for his actions in destroying significant cultural sites to be a mitigating factor. Taking these factors into account (alongside others which are not relevant to culture), the defendant was given a 9 year prison sentence.





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