

Judicial Dialogue and Transformative Constitutionalism in Latin America: The Case of Indigenous Peoples and Afro-descendants***

Diálogo judicial y constitucionalismo transformador en América Latina: el caso de los pueblos indígenas y afrodescendientes

ABSTRACT

This research presents an example of transformative case law from the Inter-American Court of Human Rights and the Constitutional Court of Colombia. Due to the fact that these Courts had seriously contemplated the right to free, prior and informed consultation of indigenous peoples and afro-descendants, this study explains the standards and statistics produced for 25 years on the topic. It focuses on the principal outcomes of the interamerican case *Saramaka v. Suriname* (2007) and the Colombian Decision T-129 of 2011, which nowadays encompass the most plausible and balanced standard of protection on the matter. However, the progressive outcomes are at risk of being regressively changed. For that reason, this study analyses the relevance of “binding consent” as an alternative to the problematic category or wrongly so-called “veto power”.

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KEYWORDS

Transformative Constitutionalism, Right to Free, Prior and Informed Consent (FPIC), Indigenous Peoples, Afro-Descendants, Constitutional Court of Colombia, Inter-American Court of Human Rights, Judicial Dialogue.

RESUMEN

En esta investigación se expone un ejemplo de diálogo judicial y transformador entre la Corte Interamericana de Derechos Humanos y la Corte Constitucional de Colombia. En la medida en que estos dos tribunales se han tomado en serio los derechos a la consulta previa, libre e informada de los pueblos indígenas y afrodescendientes, se presentan detalladas tablas con los casos y las estadísticas producidas durante 25 años sobre el tema. La investigación se centra en el histórico precedente de la Corte Interamericana *Saramaka v. Suriname* (2007) y la sentencia T-129 de 2011 de la Corte Constitucional de Colombia por medio de la cual se profundizó el diálogo judicial y de donde quizá ha surgido el estándar de protección más plausible y equilibrado en la materia, aunque en riesgo de ser modificado regresivamente. De ahí que se puntualice la relevancia del “consentimiento vinculante” como alternativa al mal denominado “poder de veto”.

PALABRAS CLAVE

Constitucionalismo transformador, derecho a la consulta previa, libre e informada, pueblos indígenas, afrodescendientes, Corte Constitucional de Colombia, Corte Interamericana de Derechos Humanos, diálogo judicial.

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INTRODUCTION

Free, prior and informed consent (FPIC) of indigenous peoples and afro-descendants on matters that have the potential to affect their interests and territories has become one of the most powerful tools that positive and jurisprudential law has created in recent decades to protect the collective rights of these populations.¹ In the construction of transformative constitutionalism in the region;² the Inter-American Court of Human Rights and the Constitutional Court of Colombia have become a kind of *beacons* irradiating principles and supranational values. In other words, these two courts have set up a supranational dialogue beyond hierarchical or vertical preconceptions.

Regarding the indigenous question in the constitutional Latin American context, R. Gargarella asks: “how should we solve, then, the questions posed by the emerging tensions between the rights and interests of indigenous groups and rights and interest of the rest of the population?”³

This study articulates an answer to that question contextualizing the issue in the region (section 1) and presenting the most relevant and current standards of case law according to the mentioned Courts (sections 2 and 3). In general terms, this research complements and critically annotates the case law and legal grounds of the right to FPIC focusing on the issue of binding consent. For this reason, this article will not provide an empirical review of how the right to prior consultation itself is implemented. Further, it develops a series of arguments to highlight the main aspects of this exemplary judicial dialogue and the outcomes.

For instance, it will explain why the precedents are transformative and why are the outcomes at risk. Furthermore, it will provide strong reasons to not understand prior consultation in terms of who vetoes who (section 4). In (section 5) the study explains the reasons to consider this case law as an emblematic example of dialogue and elucidates some problems that dialogue and the constitutionalization of international law in the region face, particularly, under the framework of a broader *ius commune*. Finally, this analysis points to regional integration as a fundamental “piece” to articulate a long-term dialogic, transformative and common constitutionalism for the region.

1 About the origin and meaning of the category “FPIC”, see HANNA, P. and VANCLAY, F. *Human Rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent*. In *Impact Assessment and Project Appraisal*. Vol. 31, No. 2, 2013, 146-157.

2 See BOGDANDY, A. V. et al. *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune*. Oxford: Oxford University Press, 2017. About the origins, KLARE, L. *Legal Culture and Transformative Constitutionalism*. In *South African Journal of Human Rights*. Vol. 14, No. 1, 146-188, 146.

3 GARGARELLA, R. *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution*. Oxford: Oxford University Press, 2013, 180-181.

1. WHY THE INDIGENOUS QUESTION MATTERS?

Latin America, with more than 21 million square kilometres of surface area and approximately 600 million of supposedly non “well-ordered”⁴ inhabitants, has had the fortune of preserving massive amounts of natural resources which includes much more than forests, rivers and exotic animals. For centuries, many groups of indigenous and afro-descendants have made their livelihood and survived in a kind of balance or at least in a way that maintains a non-self-destructive relationship with the environment or a way that is incongruent with the mainstream development model.

More than 400 years after the *Valladolid Debate* took place, in a kind of cyclical history this issue seems to remain a core part of the controversy with different characters.⁵ Yesterday, it was western European empires; today, it is the belated arrival of industrialization to the region and its forced immersion into a globalized market economy with national and international actors who have pushed several areas and groups to reprise their historical roles of “backyard” with their human and natural resources.⁶ This is especially so for those communities who in most cases are surviving in desolate regions, or as so denominated by hegemonic powers: “developing countries,” i.e. Latin America, Africa and several parts of Asia, or to use an imperfect term, what has been called “global south”.⁷ This notwithstanding, there is a logical difficulty derived from that binary classification between global north and a global south. Located in the south, are Australia, New Zealand or Singapore part of the global south? Located in the north, are Romania, Ukraine or Moldavia part of the global north?

Due to this fact, more than the geographical location, the nuclear aspect links with the conception of *developing*. For instance, the World Bank changed its terminology in its 2016 edition of World Development Indicators (WDI), no longer distinguishing between “developing” and “developed” countries. According to the organization, this terminology is becoming “less relevant,” and as of now it recommends using the term “developing world.” Nevertheless,

4 RAWLS, J. *The Law of Peoples*. In *Critical Inquiry*. Vol. 20, No. 36, 1993, 44-45.

5 The Valladolid debate (1550-1551) is considered the first western controversy about moral concerns regarding indigenous rights in the so called “new world”. See, FERNÁNDEZ, F. *La controversia entre Ginés de Sepúlveda y Bartolomé de las Casas. Una revisión*. In *Boletín Americanista*. Vol. 42, No. 301, 1992. For an overview on the issue of indigenous rights until today, see DUVE, T. *Indigenous Rights in Latin America: A Legal Historical Perspective*. In *Max Planck Institute for European Legal History Research Paper Series*. No. 2, 2017.

6 JONES, M. *America’s Backyard*. In *Diplomacy and Statecraft Journal*. Vol. 11, No. 1, 2000, 291-298, 291.

7 From a counter-hegemonic approach, “the words Global South and Global North [are offered] as less pejorative synonyms”. BONILLA, D. *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*. New York: Cambridge University Press, 2013, 4.

the word choice continues to be pejorative and problematic. Is “developing” the principal category to divide the world?

In 1990, Joseph Nye, in a seminal article published in the journal *Foreign Policy*, pointed out that “multinational corporations are sometimes more relevant to achieving a country’s goals than are other states.”⁸ Twenty-six years later, the same publication signalled the rise of the titans, the so-called “metanationals,” and named the current top 25 companies that are more powerful than many countries. To cite some examples ExxonMobil “today boasts a 75,300-strong workforce that explores for oil and natural gas on six continents,” Glencore plc is “notorious for its business interests in Africa [and] has the power to make or break economies there or Nestlé, the “largest food maker, peddling products in 196 nations.”⁹

In Latin America, megaprojects (public and/or private) and (north-north/north-south) associations, incomparable in scale with the ones experienced in the past, are forcing communities and the environment to undergo several challenges.¹⁰ Extractive industries and infrastructure interventions in their territories are some of the major dangers.¹¹ To date, nearly all Latin American countries have ratified the ILO Convention 169/89 (Indigenous and Tribal Peoples Convention) or its predecessor ILO Convention 107/57, with the latter is now interpreted by the ILO Supervisory bodies in line with ILO Convention 169. Since the last decades, indigenous peoples are playing a relevant role in the international arena as “new citizens of the world” with a clear leadership from Latin America.¹²

For instance, as part of the “developing world” just have ratified the aforementioned conventions: African Central Republic, Angola, Egypt, Fiji, Ghana, Guinea–Bissau, India, Iraq, Malawi, Nepal, Pakistan, Syria and Tunisia. Been worse in the “developed world,” with its history of exploitation of the global south, only: Belgium, Denmark, Holland, Portugal, Norway and Spain seem committed internationally to the Convention and have ratified it.¹³

Seen Graph 1, should Latin American countries require ratification of ILO 169, environmental protocols or trade agreements to allow interventions

8 NYE, J. S., Jr. *Soft Power*. In *Foreign Policy*, No. 80, 1990, 153-171, 157.

9 KHANNA, P. and FRANCIS, D. *Rise of the Titans*. In *Foreign Policy*, No. 2017, 2016, 50.

10 KANOSUE, Y. *When Land Is Taken Away: States Obligations under International Human Rights Law Concerning Large-scale Projects Impacting Local Communities*. In *Human Rights Law Review*. Vol. 15, No. 4, 2015, 643-667, 643.

11 GONZÁLEZ, D. *Peasants’ Right to Land: Addressing the Existing Implementation and Normative Gaps in International Human Rights Law*. In *Human Rights Law Review*. Vol. 14, No. 4, 2014, 589-609, 589.

12 See STAVENHAGEN, R. *Indigenous Peoples as New Citizens of the World*. In *Latin American and Caribbean Ethnic Studies*. Vol. 4, No. 1, 2009, 1-15.

13 For a decolonial approach of the indigenous question, see SIERRA-CAMARGO, J. *The Importance of Decolonizing International Human Rights Law: The Prior Consultation in Colombia Case*. In *Revista Derecho del Estado*. Vol. 39, 2017, 137-186, 137.

in their territories? Given this reality, an era of transnational investments demands international commitments. However, the interest in exploring and exploiting resources seems to be greater than discerning a way to prevent self-destruction and both, the respect and understanding of the *otherness*.¹⁴ This is due to several reasons, but our understanding of these cultures and their environment is not yet clear. To give an example, ethnobotanists such as Richard Evans Schultes and those who have followed his legacy, have demonstrated that the elders of some communities are virtually living encyclopaedias.¹⁵

GRAPH 1
RATIFICATIONS OF C169-1989 AND C107-1957 INDIGENOUS
AND TRIBAL PEOPLES CONVENTION



Source: Author's elaboration from the database NORMLEX available at: www.ilo.org (Created with mapchart.net).

Therefore, in most of the cases, the protection of indigenous is not only a defence of those groups, but it also concerns holistic preservation of customs, animals and all that a delicate balance with the environment entails.¹⁶ In this context, the transformative potential of law plays a key role to go beyond the

14 Mainstream models can be balanced with a counter-hegemonic conception of multiculturalism. See RODRÍGUEZ-GARAVITO, C. *Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields*. In *Indiana Journal of Global Legal Studies*. Vol. 18, No. 1, 2011, 263-305, 304.

15 One proof of this point could be the explicit message in DAVIS, W. *One River: Explorations and Discoveries in the Amazon Rain Forest*. London: Vintage Books, 2014; and the movie that influenced it: *Embrace of the Serpent* (directed by Ciro Guerra, 2015), which was nominated and/or awarded prizes in several film festivals.

16 "In the Amazon, nature teaches classes about diversity. The natives recognize ten distinct types of soils, eighty varieties of plants, forty-three species of ant and three hundred species of

traditional understanding of international law or even anthropocentric and ethnocentric constitutionalism.

2. TRANSFORMATIVE CASE LAW OF THE INTERAMERICAN COURT OF HUMANS RIGHTS (IACtHR)

The jurisprudence of the IACtHR has played a vital role in protecting the rights of communities by establishing a relevant standard of protection under the perspective of transformative constitutionalism.¹⁷ The case law of the Court calls for this prominent level of protection and the imperative to recognize FPIC. The spectrum of protection must consider the particularities of each indigenous and afro-descendant group and different methods of relating to the territory as well as their own objectives and conception of multiple variables. IACtHR case law deals with legal issues and fundamental rights violations associated with interventions by private or public parties in protected territories, including for instance extractive activities, “development projects” and governmental decisions.

TABLE 1
CASE LAW OF THE IACtHR REGARDING PRIOR CONSULTATION
OF INDIGENOUS PEOPLES AND AFRO-DESCENDANTS
AND THE PROTECTION OF THEIR TERRITORIES

	CASE	YEAR	CORE ISSUE	DECISION
1	<i>Mayagna (Sumo) Awas Tingni v. Nicaragua</i>	2001	Roads and deforestation	Granted
2	<i>Yakye Axa v. Paraguay</i>	2005	Ancestral lands and displacement	Granted
3	<i>Moiwana v. Suriname</i>	2005	Displacement and dignity	Granted
4	<i>Sawhoyamaya v. Paraguay</i>	2006	Farming and traditional lands	Granted
5	<i>Saramaka v. Suriname*</i> (Leading case)	2007	Dam, deforestation and gold mining	Granted
6	<i>Xámok Kásek v. Paraguay</i>	2010	Ancestral lands and natural reserve	Granted
7	<i>Kichwa de Sarayaku v. Ecuador*</i>	2012	Petroleum extraction	Granted
8	<i>Kuna and Emberá v. Panamá</i>	2014	Dam and irregular occupation	Granted

birds in just one kilometre.” GALEANO, E. *El cazador de historias*. Madrid: Siglo XXI, 2016, 33. (Own translation).

17 “Transformative constitutionalism seeks to remake a country’s (supposedly deficient) political and social institutions by moving them closer to the sets of principles, values, and practices found in the constitutional text.” LANDAU, D. *A Dynamic Theory of Judicial Role*. In *Boston College Law Review*. Vol. 55, No. 5, 2014, 1535.

	CASE	YEAR	CORE ISSUE	DECISION
9	<i>Garífuna Punta Piedra Community and its Members v. Honduras*</i>	2015	Illegal occupation of territories and lack of protection	Granted
10	<i>Garífuna Triunfo de la Cruz Community and its Members v. Honduras*</i>	2015	Delimitation and protection of territories	Granted
11	<i>Kaliña and Lokono Peoples v. Suriname*</i>	2015	Ancestral lands and extractive industries	Granted

Source: Author's compilation from the database available at: www.corteidh.or.cr/ (January, 2018).

The IACTHR has ruled on prior consultation directly in the cases marked with the asterisk (*) in Table 1. However, the table also contains the judgments in which the court studied issues regarding the protection of territories of indigenous peoples and afro-descendants due to the rich consideration and connection with the territorial interest of the protected groups. Due to the structure of the Inter-American system, contrary to that in Europe, the Commission decides which cases should be studied by the IACTHR. This “filter” and the severity of the violations may explain why in all the cases studied, the Inter-american judges have declared the international responsibility of the states and granted the protection.

Regarding the substance of the protection, the Court of the American continent applies Article 25 of the Convention related to the right to an effective remedy. On the other hand, applied Article 22 concerning free movement. While in Articles 4-5 connected the often-violated rights to both life and physical integrity. Taking into consideration the infringement of those rights, especially of acquired rights of communities over land that has been inhabited since ancient times, the IACTHR has ordered that states should change legislation and administrative statutes to protect the collective rights. Furthermore, the Court has stressed that in recognizing the violation of the right to prior consultation, it allows for reparations—both material and symbolic—to the affected populations.¹⁸

Within the case law lines of the IACTHR,¹⁹ one decision stands out as a leading case: the *Saramaka v. Suriname* ruling of 2007.²⁰ Here, the Court studied its own precedent and proceeded to solve the problem of the indig-

18 CORNEJO CHÁVEZ, L. *New Remedial Responses in the Practice of Regional Human Rights Courts: Purposes beyond Compensation*. In *International Journal of Constitutional Law*. Vol. 15, No. 2, 2017, 372-392.

19 An excellent study of the case law before the *Saramaka* case, see PASQUALUCCI, J. M. *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*. In *Human Rights Law Review*. Vol. 6, No. 2, 2006, 281-322, 281.

20 IACTHR. *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of November 28, 2007, Series C, No. 172.

enous community of this South American State, which authorized several interventions in their territories, such as a dam, deforestation and mining. Representatives of the community claimed that Suriname ignored the consent of the *Saramaka* peoples in making high impact changes in their territories, such as: (a) the number of people displaced in the area; (b) the lack of compensation to be awarded to those who were displaced; (c) the lack of access to electricity; (d) the painful effects of the dam; (e) the reduction of natural resources; (f) the destruction of sacred sites; (g) the lack of respect for the remains of deceased ancestors; among others.

The decision relates to the standards that underscore a variety of areas, not only to the relevance of simple prior consultation. More than that, the IACTHR declares that states should: (i) protect effective participation of the indigenous community in accordance with their customs and traditions, regarding the development process, investment, exploration or extraction in their territory; (ii) guarantee that indigenous communities receive benefits from interventions in their territories; and (iii) ensure that no concessions will be made in the territories of protected communities unless a previous environmental and social plan is in place. However, the most important part of the decision (iv) determined that these conditions would be applied in all cases involving large-scale investment, which have the greatest impact within the territory of protected populations. For that reason, according to customs and specific traditions, it is the duty of the state not only to consult the communities but also to obtain their *free, prior and informed consent*.²¹

In conclusion, on some occasions, indigenous peoples and afro-descendants of Latin America must address interventions with profound social and economic challenges. Loss of their traditional lands, eviction, migration, depletion of resources and destruction and pollution of the traditional environment, are just a few examples. The *Saramaka* case built a comprehensive path for protection that has been confirmed in subsequent cases.²² In the case of *Xámok Kásek v. Paraguay* (2010), the IACTHR referred to the *Saramaka* precedent on 14 occasions; in *Sarayaku v. Ecuador* (2012) and *Garífuna Punta Piedra Community and its Members v. Honduras* (2015), each case quoted the *Saramaka* decision around 20 times. However, in more recent litigation, the *Kaliña and Lokono Peoples v. Suriname* (2015) case made more than 70 direct references to the *Saramaka* case and profoundly has shaped the relevance of consent to effectively protect the rights involved.

Saramaka, stands as a landmark case which strives for systematic protection of indigenous autonomy and self-governance under a multicultural

21 *Ibid.* at paras. 133-137.

22 See SCHÖNSTEINER, J.; BELTRÁN Y PUGA, A. and LOVERA, D. A. *Reflections on the Human Rights Challenges of Consolidating Democracies: Recent Developments in the Inter-American System of Human Rights*. In *Human Rights Law Review*. Vol. 11, No. 2, 2011, 362-389, 382-383.

perspective.²³ Since that precedent was first set, decisions of communities should not just be “considered” or “socialized”. Additionally, there is a “right to consultation, and where applicable, a duty to obtain consent”.²⁴ The effects of this jurisprudence are even beyond the Latin American region and are possible to see an emergence of a Dialogue between Regional Systems and with International Human Right Regime.

For instance, a mutual reinforcement has been pointed out between the interamerican system and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the direction of the UN Special Rapporteur who is also interpreting the FPIC requirement in the mentioned declaration. Indeed, it is arguably the adoption of the UNDRIP that has propelled the transition towards greater recognition of FPIC within International, Regional and National mechanisms and courts.²⁵ On the other hand, the African system (both the Commission and the Court) has relied on some interamerican precedents to start building their own precedents in the region.²⁶

3. TRANSFORMATIVE CASE LAW OF THE CONSTITUTIONAL COURT OF COLOMBIA

3.1. Contextualization

Constitutional scholars have shown increased interest in the *proactivism* of the Constitutional Court of Colombia²⁷ and the transformative role of the justices.²⁸ As a matter of fact, prior consultation and indigenous rights are

23 What roles has the concept of multiculturalism played in human rights discourse? A powerful answer can be found in MCGOLDRICK, D. *Multiculturalism and its Discontents*. In *Human Rights Law Review*. Vol. 5, No. 1, 2005, 27-56, 27.

24 For a detailed analysis of the judgment, see OLIVARES, E. *Indigenous Peoples' Rights and the Extractive Industry: Jurisprudence from the Inter-American System of Human Rights*. In *Gottingen Journal of International Law*. Vol. 5, No. 1, 2013, 187-204, 187.

25 See RODRÍGUEZ-PINERO, L. *The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement*. In ALLEN, S. and XANTHAKI, A. (Eds.). *Reflections on the UN Declaration on the Rights of Indigenous Peoples*. London: Hart Publishing, 2011, 457-484; BARELLI, M. *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead*. In *The International Journal of Human Rights*. Vol. 16, No. 1, 2012, 1-24.

26 See among others SAUL, B. *Indigenous Peoples and Human Rights: International and Regional Jurisprudence*. London: Bloomsbury, 2016, 163, or the recent wasted opportunity in the case of *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, Judgment 26, May, 2017.

27 LANDAU, D. *The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modeling Judicial behavior in Latin America*. In *George Washington International Law Review*. Vol. 37, No. 3, 2005, 687-744, 736.

28 UPRIMNY, R. *The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates*. In GARGARELLA, R. and ROUX, T. (Eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* Aldershot: Ashgate, 2006, 127.

one of the examples where it is possible to find a good example of vigorous commitment to transformative constitutionalism.²⁹

In Colombia, before the Constitution of 1991 populations such as (i) indigenous, (ii) Afro-Colombians, (iii) Raizales islanders, (iv) Palenqueras and (v) Roma were constitutionally dismissed as independent or special groups or just “People outside the Constitution”.³⁰ After the independence(s), these historical peoples were voluntarily and/or involuntarily compelled to reside in peripheral areas such as the Amazon region in the south, the Pacific coast in the west and the Caribbean in the north. In addition, the “developing” process enforced and commanded from major cities, such as Bogotá with more than eight million in the centre of the country, Medellín with 3.7 million in the north-west, Cali with 2.9 million in the south or Barranquilla with 1.8 million in the north represents a direct threat for the protected populations.³¹

Moreover, the past 50 years have seen increasingly rapid advances and developments in those centres of industrial production both in the national and international sphere. Overpopulation and other factors linked to development had created a two-pronged problem. On the one hand, national and transnational actors are exploring or exploiting natural resources in areas where these types of communities had been living for centuries. In addition, the cyclical violence of the country in some cases and the *western* influence in others are pushing some groups or families to move from small rural communities to urban areas.³² These dramatic changes often result in a very inadequate quality of life and in most of the cases a quick push over the edge to homelessness for people who are just barely surviving.³³

29 CEPEDA, M. J. and LANDAU, D. *Colombian Constitutional Law: Leading Cases*. New York: Oxford University Press, 2017, 241.

30 GARGARELLA, R. “We the People” outside of the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances. In *Current Legal Problems*. Vol. 67, No. 1, 2014, 1-47.

31 The total population of Colombia by 2005 was 42,888,592; the 2017 projection is around 49,000,000. Indigenous communities are approximately 3.43% of the total population; 10.62%, Afro-Colombians; 0.01%, Roma; and 85.94%, classified as non-ethnic. Departamento Administrativo Nacional de Estadística (DANE). *Colombia, una nación multicultural, su diversidad étnica*. Bogotá: DANE, 2007.

32 Around 50% of Latin American indigenous peoples have moved to urban centres. See, World Bank. *Indigenous Latin America in the Twenty-first Century: The First Decade*. Washington: World Bank Group, 2015, 17-27.

33 For instance, the case of the Nukak Maku community. More than 50% of the population has been displaced from their traditional nomadic territories due to the armed conflict or to the action of settlers. The population is estimated at about 450-550 survivors. STAVENHAGEN, R. *Peasants, Culture and Indigenous Peoples: Critical Issues*. Heidelberg: Springer-Colegio de México, 2013, 151-152.

3.2. *Constitutional and legal protection*³⁴

The Constitution of Colombia of 1991 has provisions which directly protect indigenous peoples and creates the perfect platform for the participation rights of these types of groups who have historically been subjected to discrimination. The most relevant are: Article 7 (ethnic and cultural diversity), Article 10 (language), Article 40 (rights of citizen participation), Article 171 (senators elected in a special national constituency for indigenous communities) and Articles 246, 286, 287, 329 and 330 (Indigenous territories as administrative entities; faculties within local authorities, management, judicial jurisdiction and development of policies). The constitutional ranking of these particularities was tantamount to a small revolution and strategically developed relevant aspects of the ILO Convention 169/1989.

Article 330 provides the main source of connection between prior consultation and the rights of the indigenous peoples. According to the Constitution, councils formed by and regulated according to their traditions shall govern native territories. As a result, councils should exercise the following functions of this decalogue:

TABLE 2
PRIOR CONSULTATION AND THE RIGHTS OF THE INDIGENOUS PEOPLES
IN ARTICLE 330 OF THE CONSTITUTION OF COLOMBIA

(i)	Implement regulations of land uses and settlement of their territories
(ii)	Design the policies, plans and programmes of economic and social development within their territory, in accordance with the National Development Plan
(iii)	Promote public investments in their territories and ensure their proper implementation
(iv)	Collect and distribute their resources
(v)	Ensure the preservation of natural resources
(vi)	Coordinate the programmes and projects promoted by the different communities in their territory
(vii)	Collaborate with the maintenance of public order within their territory in accordance with the instructions and provisions of the national government
(viii)	Represent the territories before the national government and other entities to which they are members

34 All the references to the Colombian Constitution and case law in general are translated by the author. References to the case law of the Constitutional Court of Colombia, hereinafter [ccc], will be identified under the style used for the tribunal, e.g. [ccc] T-129/11 easily found at: www.corteconstitucional.gov.co (The decisions are hyperlinked in the Tables 3 and 4 in the Appendix of this paper).

(ix)	Attend to matters stipulated by the Constitution and the law
(x)	Exploit natural resources without harm to the cultural, social and economic integrity of indigenous communities

Source: Author's compilation.

Article 330 is at the heart of jurisprudential and constitutional understanding of the right to consultation. According to the mandate of the constituent power, “exploitation of natural resources in indigenous territories shall be done without harming the cultural, social and economic integrity of indigenous communities. The decisions taken with respect to such types of exploitation in their territories must be encouraged by the government and coordinated with the representatives of the respective communities”.³⁵

The constitutionalization of the extensive guarantees described, introduced an important protection instrument and legitimization mechanism for indigenous peoples and afro-descendants, somehow vindicating centuries of systematic violations of their rights and lands. In sum, for the very first time, Colombia recognized its own national and regional reality as well as the fact of being a multicultural State.³⁶

Regarding legal reforms, the most relevant debate about prior consultation is the regulation of the right as fundamental and the determination of whether a so-called veto power exists. Thus, from that perspective, the *Ley Estatutaria* or Statutory Act merits obligatory discussion. This act constitutes a special law that demands an absolute majority to pass legislation in Congress and a legislative period of one year. Subsequently, legislation passed is subject to mandatory review before the Constitutional Court.

The Colombian government, the private sector, several civil and leadership organizations are trying to discuss a draft, which is paradoxically stalled due to the lack of prior consultation. However, the solution is not *per se* the regulation.³⁷ In the following sections, this research will show the basic elements or standard that should be considered in future legislation in Colombia and why not in other countries or systems. Following the *ius commune*

35 See the paragraph in Article 330, Colombian Constitution, 1991.

36 “These ideas challenge previously dominate western conceptions of the cultural homogeneous and legally monolithic state.” ANAYA, J. S. *International Human Rights and Indigenous Peoples: The Move toward the Multicultural State*. In *Arizona Journal of International and Comparative Law*. Vol. 21, No. 1, 2004, 61.

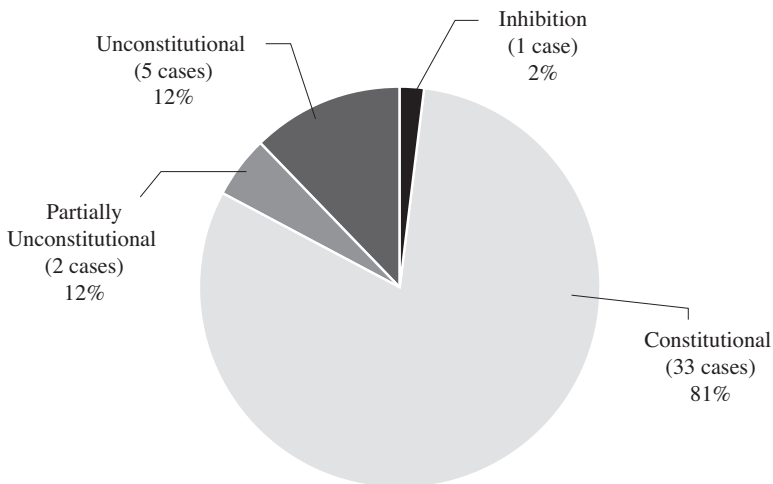
37 At least the conclusions that have come from Peru are not the optimal: “We have found that the actual influence exerted by the groups consulted on the content of the law and the decree was very limited.” SCHILLING-VACAFLOR, A. and FLEMMER, R. *Conflict Transformation through Prior Consultation? Lessons from Peru*. In *Journal of Latin American Studies*. Vol. 47, No. 4, 2015, 811-839, 835. Regarding context, see WRIGHT, C. *Indigenous Mobilisation and the Law of Consultation in Peru: A Boomerang Pattern?* In *The International Indigenous Policy Journal*. Vol. 5, No. 4, 2014.

proposal,³⁸ it will reconstruct the principal outcomes from the case law of the Colombian and the Inter-American Court, demonstrating how and why this judicial dialogue has developed –the most balanced standard of protection regarding prior consultation–.

3.3. Review of legislation (abstract control)

Abstract control is complex due to the difficulties in explaining and determining what exactly should be consulted with the communities regarding regulations. A complete list of cases which review legislation can be found in Table 3 located in the appendix of this study. The Graph 2 shows only two cases of 41 (5%), where the Constitutional Court set aside parts of the legislation which directly affects the right to prior consultation and merely five cases (12%) in which the whole regulation was reviewed. Consequently, it declared unconstitutional or dismissed prior consultation during the process of discussion and debate of the law-making process.

GRAPH 2. CASE LAW OF THE CONSTITUTIONAL COURT OF COLOMBIA RELATED TO PRIOR CONSULTATION OF INDIGENOUS PEOPLES AND AFRO-DESCENDANTS (25 YEARS). ABSTRACT CONTROL OR REVIEW OF LEGISLATION



Source: Author's elaboration from the database available at: www.corteconstitucional.gov.co
See details in the appendix (table 3).

38 ICCAL "belief in the transformative potential of law, if properly embedded in broader social processes. Moreover, it builds on and reconstructs the wealth of judicial activity with a transformative agenda." VON BOGDANDY et al. *Transformative Constitutionalism in Latin America*, cit., 19.

Contrary to the variety of critics who consider prior consultation a problematic issue for mainstream development model and the “general interest”³⁹, in more than 80% of the cases reviewed (33 cases), the Court has found the regulation made by the Parliament to be constitutional (see Graph 2). On just one occasion, “inhibition or dismissal” was the mechanism to reject the study of legal action due to the mediocre quality of the litigation (2%). Decision C-030/08 stands out as clearly the most important and comprehensive precedent related to the abstract control of legislation and the fundamental right to prior consultation.⁴⁰ In the words of the Court itself in a 2013 decision:

Judgment C-030 of 2008 re-conceptualizes the jurisprudential line and makes progress in establishing the requirements and characteristics of prior consultation. That is, it stands on the main precedent in this area, as it consolidates the standard in the implementation of prior consultation in the legislative process, to guarantee the realization of the right of such communities to participate in decisions that directly affect them.⁴¹

To interpret the content and scope of the legislative measures in specific cases, the leading case C-030/2008 distinguished between the direct impact on indigenous peoples and afro-descendants and impact on the Colombian society as a whole. For instance, mining regulation affects all Colombian citizens. However, if there is a chapter or article that mentions or exclusively affects indigenous peoples and afro-descendants, the CCC reviews whether during the legislative process the protected communities were consulted or not.

Consequently, it has applied several hermeneutical methods: (i) textual interpretation of the regulatory body; (ii) systematic interpretation; (iii) historical interpretation; (iv) contextual interpretation including the precedents and the controversies around the ruling process; and (v) teleological interpretation. In short, the key element here is the direct impact of the regulation on the interests of the community. In those cases, where it is possible to prove or find lack of prior consultation, the jurisprudence has declared some articles or the whole law to be unconstitutional; once again, only in 17% of the cases studied in 25 years. In the other more than 80%, it has declared the regulation to be constitutional.

In the cases marked in Table 3 with an asterisk (* see appendix), the Court declares the constitutionality laying out additional specifications to be considered in the implementation or given the framework of the interpretation

39 *La satanización de la consulta previa* [The demonization of prior consultation]. [En línea]. In *El Espectador*. 25 February 2016. Available at: <http://www.elespectador.com/opinion/editorial/satanizacion-de-consulta-previa-articulo-618787>

40 Some specific cases are explained in Section 4.4.3 of CCC C-196/12. For a summary in English, see CEPEDA and LANDAU. *Colombian Constitutional Law*, cit., 2017, 264-270.

41 CCC. C-253/13.

under *tutela* case law principles. Decision C-389/16, the last one of the case law period studied, is an excellent example of how it is possible to solidify binding consent. This decision recapitulates the leading case of abstract control and links constitutionality with the considerations of the leading case of concrete control, T-129/11 and the other decisions related to direct interventions in the territories of the communities. The Grand Chamber of the Court establishes in the holding of decision C-389/16 the following important remark regarding measures to be considered during direct interventions on the protected territories:

The Grand Chamber will therefore declare Articles 122, 124 and 133 of the Mining Code to be enforceable, on the understanding that it is constitutionally admissible only if it is considered that ethnic communities shall be consulted in relation to mining projects likely to affect them directly (C-371/14, T-129/11, T-769/09, among many others). And if, in accordance with that which has been explained in the preceding paragraphs, decisions that directly and intensely affect their rights can be only implemented if they obtain the prior, free and informed consent of the communities.

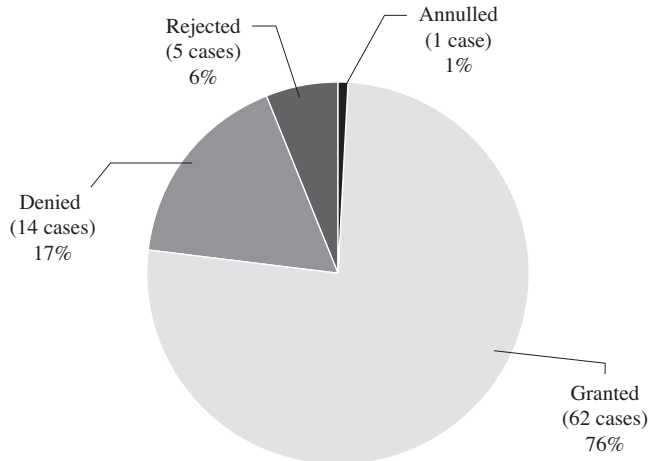
To summarize, the Grand Chamber upholds the commitment to judicial dialogue with the IACTHR and international instruments, especially with the balanced standard established in decisions T-769/09 and T-129/11 and the many others that reinforce and solidify the case law of the CCC or what D. Bonilla has properly coined the “pluralistic multicultural model”.⁴²

3.4. *The tutela decisions (concrete control)*

In situations regarding enforcement of constitutional rights, or *acciones de tutela*, on several occasions, the Constitutional Court has studied problems where indigenous peoples and afro-descendants had to address violation of their territories or the exploitation of natural resources, both by private and/or public actors. Table 4 in the appendix shows the case law of the CCC in detail regarding direct interventions (concrete control) in territories protected by prior consultation or summarised in Graph 3.

42 “This model appeals to a pluralistic structure of the state as well as to intercultural equality, corrective justice, self-government rights, and cultural integrity in order to justify and give content to the right to prior consultation.” BONILLA. *Constitutionalism of the Global South*, cit., 2013, 35.

GRAPH 3. CASE LAW OF THE CONSTITUTIONAL COURT OF COLOMBIA RELATED TO PRIOR CONSULTATION OF INDIGENOUS PEOPLES AND AFRO-DESCENDANTS (25 YEARS). CONCRETE CONTROL OR “TUTELAS”

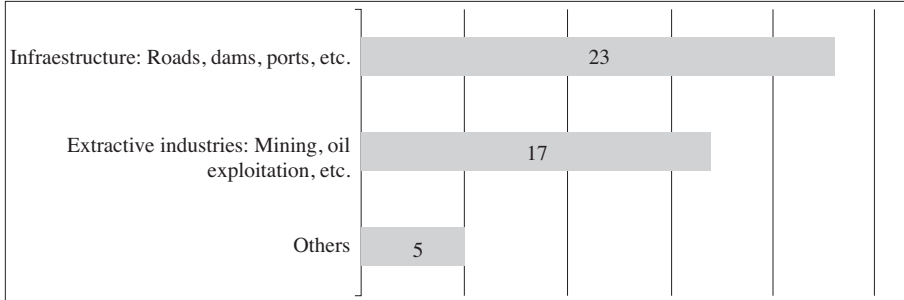


Source: Author's compilation from the database available at: corteconstitucional.gov.co/
See details in the appendix (Table 4).

In the five rejected cases (6%), the jurisprudence pointed out that *tutela* was not the proper mechanism for the specific case. Finally, in just one case, the court annulled the decision, due to the inappropriate configuration of the parties in conflict. In short, 24% of the cases were somehow negative to the claim of protection and in 76% of the judgments, the Court found that the violation of the right to prior consultation existed and ordered the protection. According to these results, it is possible to affirm that once the court decides to review a case, there is a high probability that it will rule in favour or protecting indigenous peoples and afro-descendants' rights.

Equally important, this study separates the macro and micro interventions to show the different scales of situations that peoples protected by ILO 169 are facing in Colombia. It further demonstrates the type of cases that have been selected and ruled on by the CCC (see Graphs 4 and 5). The dividing line between the categories comes from the scale or impact of the interventions.

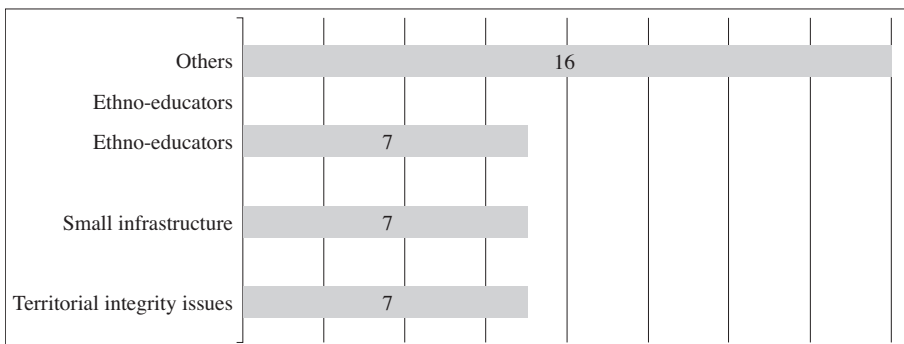
GRAPH 4. CASE LAW OF THE COLOMBIAN CONSTITUTIONAL COURT RELATED TO PRIOR CONSULTATION OF INDIGENOUS PEOPLES AND AFRO-DESCENDANTS (25 YEARS).
MACRO INTERVENTIONS IN CONCRETE CONTROL



Source: Author’s elaboration from the database available at: www.corteconstitucional.gov.co See details in the appendix (table 4).

Infrastructure projects or interventions related to roads, dams, ports, and large scale projects interferences aroused the attention of the Court 23 times (see Graph 4). Moreover, extractive industries were the reason for the Court to intervene on 17 occasions. In addition, five cases concerning the construction of a military base and towers or the use of *tutela* to stop a legislative process. In total 45 macro interventions, cases were ruled on.

GRAPH 5. CASE LAW OF THE COLOMBIAN CONSTITUTIONAL COURT RELATED TO PRIOR CONSULTATION OF INDIGENOUS PEOPLES AND AFRO-DESCENDANTS (25 YEARS).
MICRO INTERVENTIONS IN CONCRETE CONTROL



Source: Author’s compilation from the database available at: www.corteconstitucional.gov.co See details in the appendix (table 4).

Furthermore, the Court studied 37 micro interventions on issues related to territorial integrity and ruled on seven cases (see Graph 5). It also reviewed

small infrastructure constructions such as a water waste or luxury small hotel and spa in Providencia island (seven similar cases). Additionally, (seven cases) of ethno-educators without the authorization of the communities to teach in their territories, and other cases such as the relocation of an informal salesperson on a private beach or a mobile radio station in indigenous territories (16 different cases). This division of macro and micro interventions as well shows that the FPIC of the communities should be checked without regard for the scale of the intervention according to the arguments that follow.

4. THE MAIN DEVELOPMENTS OF COLOMBIAN CASE LAW

As previously mentioned, this article does not provide an empirical review on how to implement the right(s) to prior consultation. However, this section of the study complements and critically annotates the doctrinal approach of D. Bonilla to construct and bolster the understanding of the case law. Bonilla considers that the jurisprudence of the court regarding prior consultation has gone through three main stages. The stages are as follows: (i) *multicultural liberal monism*, where the Court separates consent and consultation SU-039/97; (ii) *procedural liberal monism*: that is to say that the jurisprudence locates prior consultation within a monist structure of the state, and argues that FPIC is not a component of this right (for instance, C-030/08, C-615/09, C-175/09, among others); and (iii) *multicultural liberal pluralism* in which cultural integrity and self-governance are related to the right to veto and this right is linked to a pluralist interpretation *pro homine* (initiated by T-769/09 and extensively explained in case T-129/11).⁴³

At the time of his book's publication in 2013, Bonilla had studied 23 cases. In this current study (see Tables 3 and 4 in the appendix), 82 *tutela* decisions and 41 regarding review of legislation, a total of 123 cases, are studied. However, the categories are still valid with the modifications that this analysis presents and clarifies on the matter. It includes SU-133/17 which confirmed and amalgamated the concrete and abstract control decisions that the CCC has developed in 25 years of case law and protection of indigenous peoples and afro-descendants right to prior and informed consultation. This case confirmed the *ratio decidendi* of case C-389/11 and Decision T-129/11 and the other cases that developed their principles. Additionally, the principal

43 44 of 64 (concrete control) and six of 23 (abstract control) decisions of the [CCC] issued after the publication of T-129/11, have quoted or applied the standards derived from that landmark precedent until the end of 2016: cfr. (T-601/11, T-693/11, T-698/11, C-882/11, T-376/12, C-395/12, T-513/12, T-514/12, C-641/12, T-680/12, T-693/12, T-993/12, T-1080/12, T-049/13, C-068/13, T-245/13, T-172/13, T-300/13, T-657/13, T-858/13, T-204/14, T-294/14, T-353/14, C-371/14, T-384A/14, T-396/14, T-461/14, T-462A-14, T-646/14, T-800/14, T-849/14, T-969/14, T-247/15, T-256/15, T-438/15, T-485/15, T-550/15, T-660/15, T-661/15, T-766/15, T-005/16, T-197/16), C-389/16, T-213/16, T-226/16, T-288A/16, T-436/16, T-475/16, T-530/16 and T-704/16.

message behind this kind of “SU” unification judgment is to clarify or correct contradictory judgments or *dicta* in specific cases.⁴⁴ Also, a reason to draw an objective time limit for this research.

4.1. Why Decision T-129/11 is transformative?

The situation surrounding Decision T-129/11 involved a mixture of problems related to the *Emberá katío* community located near the border with Panama. The community was facing the construction of the Pan-American highway, gold mining, the installation of electrical towers and the systematic appropriation of their territories by settlers. The Court studied the standards developed for the decisions listed in the appendix (see Tables 4 and 5) and created new ones settling an impressive dialogue with the Interamerican Court in the case of *Saramaka v. Suriname* of 2007.⁴⁵

For Colombian jurisprudence, prior consultation constitutes a fundamental right. This category is entirely the elaboration of a former social right with its fundamental nature due to its multiple connections and relevance founded in the cases studied by the court.⁴⁶ The standard (see Table 5 in the appendix) points out that the consultation process should be studied by the authorities using a strategy of differential approach. In accordance with the specific traditions of the groups involved; including the term of the consultation process and ingredients of each case. Apart from this, the precedent determined the relevance of an environmental license and archaeological management plan before the intervention in the protected territories.

Furthermore, an elemental concept was introduced on the grounds that prior consultation has been understood not only at the previous stage but according to subsequent revisions can be “before”, “during” and “after” the intervention.⁴⁷ Additionally, three situations have been elaborated on, in which it is mandatory to pursue the FPIC. Particularly, when:

- (a) it involves the removal or displacement of communities;
- (b) it involves the storage or dumping of toxic waste; and/or
- (c) it represents a high social, cultural, and environmental impact on a community that may lead to endangering its existence and continuity.⁴⁸

44 The “SU” *Sentencia de Unificación* category means unification judgment that is discussed extraordinarily in the Grand Chamber.

45 For more details, see CEPEDA and LANDAU. *Colombian Constitutional Law*, cit., 268-270.

46 For this reason, the regulation must undergo treatment by the special law “Ley Estatutaria” or Statutory Act.

47 “Prior” literally means previous. Nevertheless, prior has more meanings than an indication of an event or situation “coming before in time.” It also means “important” and “existing”. OXFORD DICTIONARIES. *Oxford Dictionary of English*. London: Oxford University Press, 2006, 1400.

48 The Court embraced the recommendations made by the UN Special Rapporteur James Anaya on the fundamental rights of indigenous peoples, made on 26 May 2011, after the promulgation of the prior consultation law in Peru.

When an external party cannot obtain the approval of the community in the events described or where the destruction or disappearance of groups is inferable, authorities and the communities involved in those circumstances must apply or claim the principle of *pro homine* interpretation in favour of the fundamental rights of the community involved.⁴⁹

4.2. *Is there a veto power?*

Is it plausible to claim that in the situations described the *pro homine* interpretation is a kind of veto power? D. Bonilla considers that the Court declared, “The right to consultation includes veto power for cultural minorities in certain circumstances”.⁵⁰ In Bonilla’s opinion, Decision T-129/11 forms the cornerstone of a new so-called “pluralistic” model of approach in contrast to the “monistic” interpretation employed in previous decisions, what in this article is referred to as “binding consent”.⁵¹

Other scholars believe the opposite of Bonilla and the statement of binding consent. For instance: “Unfortunately, the last ruling being revised (T-129/11) states that prior consultation is not a veto right, which contradicts the postulates of the decision.”⁵² Another critic states, “It is true that consultation is a fundamental right; however, it does not constitute a right to veto [...] participation does not imply veto [...] [and] the right to participation could be confused in the popular imagination with a right to veto –and this can be exercised in bad faith or intended to block or delay”.⁵³

According to M. Yriart, the CCC “The no-veto doctrine is out of place with the body of the law the Court develops otherwise on the subject”.⁵⁴

49 The *pro homine* principle “relativizes the absolute protection of conflicting rights [...] thereby creates an open circumstance for striking an appropriate balance most favourable to persons in terms of their substance”. NEGISHI, Y. *The Pro Homine Principle’s Role in Regulating the Relationship between Conventionality Control and Constitutionality Control*. In *European Journal of International Law*. Vol. 28, No. 2, 2017, 457-481, 479-480.

50 “Introduce an element that contradicts the interpretation that the Court had articulated on prior consultation in the previous two stages: the right to veto [...] If no agreement is reached, the minority would have the right to veto; [...] The Court indicates that cultural minorities have the right to veto.” BONILLA. *Constitutionalism of the Global South*, cit., 243 and 290, respectively.

51 Binding consent as less problematic and dissimilar than “veto”.

52 ABELLO, C. J. *Consulta previa en casos de minería para comunidades indígenas y tribales* [Prior consultation of indigenous and tribal communities in mining cases]. In *Traspasando Fronteras*. No. 2, 2012, 111-124, 122. (Own translation).

53 SALINAS, C. E. *Prior Consultation as a Mandatory Requirement within Administrative Content Can Directly Affect Indigenous and Tribal Communities in Colombia*. In *Revista Derecho del Estado*. No. 27, 2011, 241. (Own translation).

54 YRIART, M. *Jurisprudence in a Political Vortex. The Right of Indigenous Peoples to Give or Withhold Consent to Investment and Development Projects – The Implementation of Saramaka v. Suriname*. In HAECK, Y., RUIZ-CHIRIBOGA, O. and BURBANO, C. (Eds.), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future*. Cambridge: Intersentia, 2015, 502.

In contrast, F. Vallejo states, “without there being a veto right, the decision must take into account the considerations made by traditional communities during the consultation process”.⁵⁵

It is clear that some academic interpreters of the jurisprudence have found that a veto power exists in some cases and does not in others. As a former law clerk of the CCC under supervision and orders of Justice Jorge I. Palacio, I had the opportunity to draft Decision T-129/11. During the drafting process, the issue of “veto power” was a main concern. Apart from this, the new standards were widely discussed.⁵⁶ In fact, no passage of the decision states expressly that there is a veto power. What is more, in Chapter 7.1, the Court asked: “Is the right to free prior and informed consent a veto power?” The judgment answered the question, by emphasizing that the problem should not be put forward in terms of “who vetoes who”.⁵⁷

As G. Rubiano properly points out, the CCC suggests looking beyond the veto and considers the consultation as an exercise and experience of democratic cultural formation. However, “in cases of a negative response by the indigenous peoples to an initiative that they consider to be seriously harmful, what is exercised is the right to self-determination and not, some form of veto power”.⁵⁸

Leaving interpretations of secondary sources aside and returning to the primary, there are nine opinions of the Grand Chamber that have been expressed in *dicta* with sparse elaboration that “a veto power does not exist due to the fact that no right is absolute”. See, for instance, cases C-882/11, C-366/11, C-367/11, C-937/11, C-331/12, C-540/12, C-068/13, C-253/13 and C-371/14. Amongst these, only case C-641/12, specified “the impossibility of drawing a uniform rule in this regard”. Fortunately, the last decision of the Grand Chamber C-389/16 and in fact the one that closed the period of the justices from the years 2009-2017, clarified possible doubts about the issue.⁵⁹ According to the Court, the implementation of a measure that directly and intensely affects the fundamental rights of indigenous peoples “is inadmissible without their consent, not by the now obsolete discussion on the

55 VALLEJO, F. *Prior Consultation Process in the Judgments of the Constitutional Court of Colombia*. In *Revista de Estudios Constitucionales*. Vol. 14, 2016, 169.

56 Specially, with Mauricio Dueñas and law clerks of other chambers such as Clara E. Reales, Aquiles Arrieta and Armin Sattler.

57 CCC. T-129/11, Section 7.

58 PADILLA RUBIANO, G. *Consulta previa en Colombia y sus desarrollos jurisprudenciales. Una lectura desde los pueblos indígenas, las empresas y el Estado* [Prior consultation in Colombia and its case law developments. A reading from the indigenous peoples, businesses and the state]. In STEINER, C. (Ed.), *Anuario de Derecho Constitucional Latinoamericano* 19. Bogotá: Universidad del Rosario and Konrad Adenauer-Stiftung, 2013, 364-365. (Own translation).

59 These criteria can also be founded in CCC Decisions T-530/16 and T-704/16, among others.

existence or not of a right to a veto, but because it is openly unreasonable and disproportionate”.

Veto creates the impression of an arbitrary barrier, which does not require reasons to impose itself against other points of view and ways of action and, therefore, does not seem to respond adequately to the meaning that inspires consultation, conceived as a dialogue in good faith, among equals, and aimed to reach agreements that take into account the environmental, social and economic impacts of a measure, in an attempt to reconcile different conceptions of development.⁶⁰

Overall, Bonilla’s doctrinal and philosophical reconstruction still plays a key role because the leading case T-129/11 complemented by T-376/12,⁶¹ states clearly that the interpretation and application of the Constitution⁶² must be decided according to *pro homine* and proportionality principles. In some cases, conceivable consequences may include both freezing the intervention process or not. Therefore, it is important to apply these principles and standards to the specific ingredients of each case. For example, learning from the solution of Decision T-129/11, if it is possible to relocate a road without harming the community, there is no way to consider binding consent. If the impact of a specific mining project does affect the community in terms of displacement, toxic waste and/or high impact or that may lead to endangering its existence and continuity, there may be place to a binding consent.⁶³

4.3. Why are the outcomes of the case law at risk?

Twice the CCC has exhorted Congress and the Presidency of the Republic to exercise their constitutional and legal powers to regulate and through their competent bodies to materialize the fundamental right of prior consultation taking into account the jurisprudence of the tribunal.⁶⁴ The government’s answer is the current draft of the bill or “Statutory Act” that will regulate the fundamental right of prior consultation and unclear the development of several international instruments and the CCC case law.

However, in Articles 13.c, 14.e and 22, it contemplates that prior consultation “does not entail a veto power of the legislative or administrative

60 CCC. C-389/16.

61 CCC. T-376/12 makes a remark in the leading case T-129/11 applying the principle of proportionality to clarify and balance the participation of the communities in the process of consultation. See, considerations 25-31 of the T-376/12 judgment.

62 Especially the executive power.

63 Debates in relation to the veto power is also being addressed in international fora as well as in other jurisdictions. See DOYLE, C. *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free, Prior and Informed Consent*. London: Routledge, 2015, 161-167.

64 See the resolution part of CCC Decisions T-129/11 and C-317/12.

situations under consultation” and the duration of the process cannot be over six months (Article 40).⁶⁵ Deciding whether the *sword* of veto power is in the hand of indigenous peoples or not is a path that will take several efforts to find a proportional solution for this complex issue. Future regulation and the cases before the Colombian court will have to be reviewed by a completely new body. In 2017, the CCC changed four justices: Calle, Palacio, Pretelt and Vargas who have openly protected the right to prior consultation. Four current justices, Guerrero,⁶⁶ Linares,⁶⁷ Lizarazo⁶⁸ and Ortiz,⁶⁹ differ in various restrictive scales to the criteria of the transformative leading cases explained. In the regional arena, regarding the opinions of other relevant national courts for the indigenous rights, the Plurinational Constitutional Court of Bolivia in an *obiter dictum*, asserted that in the three exceptional cases of *pro homine* protection “the consent of indigenous peoples should be obtained, which means that in such cases the peoples have the power to veto the project”.⁷⁰ In contrast, the Constitutional Court of Peru expressed that “the right to consultation does not imply a right to veto for indigenous peoples”.⁷¹

This study presents the work of 25 years of one of the most proactive and well-known courts in the world. Precisely the decisions regarding protection of indigenous peoples and other groups are one of the examples that have put this *curious* and *peripheric* South American tribunal on the global map.⁷² A unique version of magic realism in Court that links transformative and dialogic constitutionalism to plausible results. If the Court does not improve it, the case law accomplished under the progressive realization and non-regression principle should at least respect it. However, the pressure of the media and other actors is evident.⁷³

The Colombian government has shown a restrictive approach breaking the consensus of the American Declaration on the Rights of Indigenous Peoples

65 “Prior Consultation Act”, Ministerio del Interior de Colombia, Version 6 November 2016.

66 CCC. SU-133/17.

67 CCC. Dissenting opinion of Decision C-389/16 and SU-133/17.

68 CCC. Dissenting opinion of Decision SU-133/17.

69 CCC. Decision T-313/16.

70 Decision 2003/2010-R, consideration III (2010).

71 Case of *Gonzalo Tuanama Tunanma y más de 5.000 ciudadanos v. Decreto legislativo n.º 1089*, exp. 0022-2009-PI/TC, consideration VIII, 24 and 25 (2009). To understand the context of prior consultation in Bolivia, see SCHILLING-VACAFLOR, A. *Prior Consultations in Plurinational Bolivia: Democracy, Rights and Real Life Experiences*. In *Latin American and Caribbean Ethnic Studies*. Vol. 8, No. 2, 2013, 202-220; SHAW, J. *Indigenous Veto Power in Bolivia*. In *Peace Review*. Vol. 29, No. 2, 2017, 231-238.

72 See CEPEDA and LANDAU. *Colombian Constitutional Law*, cit.

73 *La Corte Constitucional versus los empresarios* [The Constitutional Court versus businessmen]. In *Semana*. 15 October 2016. Available at: <https://www.semana.com/nacion/articulo/fallos-del-la-corte-constitucional-impactan-el-desarrollo-economico-en-las-regiones/499115>

in the regional sphere,⁷⁴ pointing out in the national sphere that prior consultation is a “a headache”⁷⁵ or an “extortion mechanism”.⁷⁶ Taking the current legal and jurisprudential level of protection in Colombia into consideration, it is possible to conclude that the tribunal has shown a strong commitment to the protection of indigenous peoples and afro-descendants.

Nevertheless, most of the work falls on the shoulders of the Constitutional Court and the protection before this institution should be the *ultima ratio* or last resort scenario. Innovative solutions in the coming years should consider prevention, in the two extremes of solution that exist and avoid what Gargarella denominates the problem of translation or the tendency “to simplify what is normally too complex; it represents an attempt to solve problems that are mainly non-judicial through juridical means”.⁷⁷

5. AN EMBLEMATIC EXAMPLE OF DIALOGUE AND TRANSFORMATIVE CONSTITUTIONALISM

The term dialogue denotes the exchange of arguments to reach an agreement. Likewise, the notion translates into conversation, discussion or discourse, terminology widely accepted in the literature of the supranational European context. The dialogic relationship can be descriptive or explanatory or it may give regulations to provide a common understanding of law.⁷⁸ In other words is the “communication between courts derived from an obligation to consider the case of another Court (foreign or from another legal system) to apply in one’s own system”.⁷⁹ In contrast, in Latin America is possible to find similar understanding regarding dialogue between Courts or other

74 The temporary Colombian government of J. M. Santos broke the consensus of the permanent American Declaration on the Rights of Indigenous Peoples posing false arguments about the case law of the CCC. Putting in quotation marks some decontextualized *dicta* and hinting with the issue, it literally stained the supranational instrument. See footnote 3 of the mentioned declaration.

75 *Santos dice que consultas previas y audiencias públicas “son un dolor de cabeza”* [Santos says that prior consultations and public audiences “are a headache”]. In *El Espectador*. 16 August 2013. Available at: <https://www.elespectador.com/noticias/politica/santos-dice-consultas-previas-y-audiencias-publicas-son-articulo-440645>

76 “*Consulta previa se volvió un mecanismo extorsivo*”: Vargas Lleras [“Prior consultation became an extortion mechanism”: Vargas Lleras]. In *El Tiempo*. 25 April 2016. Available at: <http://www.eltiempo.com/archivo/documento/CMS-16572247>

77 The judicialization of the indigenous question “runs the risk of expropriating the control of these decisions from the same affected communities that it wants to benefit”. GARGARELLA. “*We the People*” outside of the Constitution, cit., 181.

78 TORRES, A. *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication*. Oxford: Oxford University Press, 2009, 106.

79 BUSTOS, R. xv *Proposiciones generales para una teoría de los diálogos judiciales* [xv General proposals for a theory of judicial dialogues]. In *Revista Española de Derecho Constitucional*. No. 95, 2012, 13-63, 21. (Own translation).

institutions⁸⁰ or a broader participation of different actors through public hearings or citizen participation in the review of legislation and understanding of fundamental rights.⁸¹

Considering these notions, this research is focused on the notions of dialogue regarding courts nonetheless appealing for a broader understanding of dialogue and dialogic mechanisms. Regarding the first notion of dialogue, M. Morales precisely highlights the “emblematic” relation between the Constitutional Court of Colombia and the IACTHR in her reference of the *Saramaka* and T-129/11 cases. In Morales’ words, it is necessary to “explore how other national courts are adopting the standards of the Inter-American system, which essentially represents the basis of the *Ius Constitutionale Commune* in human rights and is developed jurisprudentially”.⁸² Additionally, M. Góngora points out the “coevolutive” and “convergence of standards” in the case law of both courts.⁸³

In Colombia, the IACHR recognizes that the CCC has been fulfilling a role of significant importance. The commission underscores the fact that the Colombian tribunal has developed “rich and progressive jurisprudence”. Particularly, the jurisprudential development of the right to free, prior, and informed consent.⁸⁴

The precedents introduced by the Colombian Constitutional Court, especially in judgment T-129/11, established several advances in the standard of protection of prior consultation into the national case law and even expanded

80 ACOSTA, P.A. *Diálogo judicial y constitucionalismo multinivel: el caso interamericano*. Bogotá: Universidad Externado de Colombia, 2015.

81 “The first court to engage in these kinds of dialogic practices was the Colombian Court [...] Latin American tribunals have demonstrated enormous creativity concerning the design and implementation of dialogic mechanism.” GARGARELLA, R. *Scope and Limits of Dialogic Constitutionalism*. In BUSTAMANTE, T. and GONÇALVES, B. (Eds.), *Democratizing Constitutional Law: Perspectives on Legal Theory and the Legitimacy of Constitutionalism*. Switzerland: Springer, 2016, 119-120.

82 MORALES, M. *El Estado abierto como objetivo del ius constitutionale commune* [The open statehood as goal of the *Ius Commune*]. In BOGDANDY, A. V; FIX-FIERRO, H. and MORALES, M. (Eds.), *Ius constitutionale commune en América Latina: rasgos, potencialidades y desafíos*. México: UNAM and MPIL, 2014, 283. (Own translation).

83 “The convergent trend of these processes has enormous potential to develop jurisprudentially an Inter-American constitutional law.” GÓNGORA, M. *Diálogos jurisprudenciales entre la Corte Interamericana de Derechos Humanos y la Corte Constitucional de Colombia: una visión coevolutiva de la convergencia de estándares sobre derechos de las víctimas* [Judicial dialogues between the Inter-American Court of Human Rights and the Colombian Constitutional Court: A coevolutionary vision of the convergence of standards on victims’ rights]. In FERRER, E., BOGDANDY, A. V. and MORALES, M. (Eds.), *La justicia constitucional y su internacionalización. ¿Hacia un ius constitutionale commune en América Latina?* T. II. México: MPIL and Instituto Iberoamericano de Derecho Constitucional, 2010, 403. (Own translation).

84 Inter-American Commission on Human Rights. Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, OEA/Ser.L/V/II. Doc. 47/15, 31 December 2015. Available at: www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf (24.1.2018).

in comparison with Inter-American case law. On the one hand, it paradoxically removed the conception of consultation from the sphere of “prior”. In other words, ILO 169/89 still limited consultation in that period dismissing the right and reducing the voice of the communities along the intervention process. On the other hand, it complemented the dialogue with the reinforcement of the *pro homine* advantages in the most dangerous interventions.⁸⁵

The conception of prior consultation in several cases was considered in a kind of socialization or informative meaningful process instead of a real consultation scenario. After beginning consultation and intervention in protected territories, the affected groups’ main possibility is to appeal to administrative or private jurisdiction grounds by a liability process. However, highly paid advisors protect the interests of private or public players by delaying discussions or postponing the decision at the expense of the displacement of indigenous peoples, deforestation of land, and/or pollution of rivers.

Large corporations or public institutions conduct a cost-benefit analysis of collateral damages related to the exploitation of natural resources or peoples *versus* the payment for destroying a river or an oral tradition of an indigenous community. However, with regard to moral limits, there are some issues that monies should not be able to buy, and every single model of development implies respect of moral limits.⁸⁶ The principles and values that the studied courts are protecting are far more relevant than the archetypal western model of “development”. The call of the CCC and the IACTHR in its case law is clear empowerment of the indigenous peoples and afro-descendant’s voice because it allows their voices and binding consent to be heard *before, during* and *after* interventions.

Alternatively, the Court reformulated the precedent of the Saramaka case applying a similar solution technique but implementing a clause based on the recommendations of the UN Special Rapporteur on the fundamental rights of indigenous peoples along with the *pro homine* principle. Consequently, binding consent in cases where protected groups: (i) are threatened with displacement; (ii) are involved in the use of toxic substances that make it impossible to live in; (iii) suffer high social, cultural and environmental impact in a community that might lead to endangering their existence.

In these situations, it is necessary for external parties to pursue FPIC in which communities can determine the *least harmful alternative*. However, when exploring the least of alternatives and this process concludes that all are harmful, or the intervention would lead to the disappearance of communities, then the solution must ensure that the rights of protected populations under the principle *pro homine* and proportionality shall prevail. In other

85 CCC. T-129/11, Section 8.

86 For such an encompassing concept and several examples, see SANDEL, M. *What Money Can't Buy: The Moral Limits of Markets*. New York: Farrar, Straus and Giroux, 2012.

words, in some specific circumstances a —binding consent— was ruled on. Therefore, the jurisprudential dialogue presented in this research permits the categorization according to Nogueira’s proposal as:⁸⁷

(i) *Receptive*: as the CCC stated in the dialogue in cases T-769/09 and T-129/11 and literally embraced the *ratio decidendi* regarding the FPIC. In several sections of the national decision, it is possible to check how and why T-129/11 and further judgments stand on the shoulders of the Saramaka case. In fact, the CCC following the style of the IACTHR even ordered as a symbolic reparation the translation of several parts of the judgment into the *Emberá* language.

(ii) *Innovative*: the interpretation of the national constitution and the convention offers a broader and new transformative way to protect the rights of indigenous peoples and afro-descendants. Establishing binding consent of the populations before, during, and after interventions and not just an “abstract right to consultation, and where applicable, a duty to obtain consent”.⁸⁸

(iv) *Corrective*: without much argumentation, the Saramaka decision determined that consent must be pursued by the states in cases of “large-scale development or investment”. Is this requirement plausible? Graph 5 of this study shows the kind of “micro” interventions that the CCC studied after Decision T-129/11 that fortunately has corrected the mistake. According to the CCC, interventions in the territories of protected populations by ILO 169/89 should be consulted and consented.⁸⁹

(iv) *Extensive*: partially following Nogueira’s concept of extensive. This analysis argues above, that the CCC has moved the Saramaka precedent and the IACTHR interpretation forward as the first consideration for this type of dialogue. However, it is pertinent to stress that, in the last cases reviewed by the IACTHR (*Sarayaku v. Ecuador* 2012) regarding prior consultation, the tribunal twice quoted the precedent T-129/11 and decisions SU-039/97, C-169/01, C-030/08 and T-235/11.

In addition, the case law studied in both systems is addressing a paradox. The developments are modelled for the world of concepts and ideas but are difficult to apply without the cooperation of the other powers and external actors. The task of jurisprudence rich in concepts has been achieved both at the Inter-American and the national level in Colombia. This first stage of courts designed to gain legitimacy has passed and it seems to me that it is the moment to enforce the solutions in the sphere of economic, politic and social

87 NOGUEIRA, H. *El control de convencionalidad y el diálogo interjurisdiccional entre tribunales nacionales y Corte Interamericana de Derechos Humanos* [Conventionality control and inter-jurisdictional dialogue between national Courts and the Inter-American Court of Human Rights]. In STEINER, C. (Ed.), *Anuario de Derecho Constitucional Latinoamericano* 19. Bogotá: Universidad del Rosario and Konrad Adenauer-Stiftung, 2013, 531-540.

88 See *Saramaka v Suriname*, 28 November 2007, cit., 40-41.

89 See CCC Decision T-129/11, Section 7.II, and Table 5 of the Appendix.

integration.⁹⁰ In other words, a broad *ius commune*.⁹¹ With respect to this, fundamental rights though important and a central part of a supranational *ius commune*, they are then again not the principal, nor the only axis on which the Latin American legal system is built.

Although the problem is even beyond the scope of positive law, taking into consideration the examples elaborated on in this article, there are complex violations of fundamental rights linked with prior consultation. The IACTHR and the CCC on paper offer a high protection standard but achieving that level of protection in several of the real cases is still a challenge. This is due, to some extent, to the consequences of weak public institutions and the lack of democratic governance in addition to, and with special reference to, the strong national and international private power with direct interest in territories of indigenous peoples and afro-descendants. Regardless of that fact, it is possible to conclude that at least some Courts have fulfilled their role.

However, the main part of the solution is in the hands of the executive branch. Unfortunately, in a *hyperpresidentialist* system, which controls almost everything, several developments or emblematic examples of transformative constitutionalism are confined to academic publications and forums. The specialized doctrine has pointed out the relevance of a deliberative and collective process far from a “monologue” or “soliloquy” to find a shared solution to be mutually acceptable.⁹²

Together with other scholars in the region, I also understand judicial dialogue as an exchange that allows both domestic courts in distinct levels and the ACtHR “to be active participants with a mutual give-and-take in defining the content of fundamental rights in the region”.⁹³ This understanding of dia-

90 With regard to supranational integration in the region see e.g. HERRERA, J. C. *Integration Clauses in the Constitutions of South American Countries*. In *Colombia Internacional*. No. 86, 2016, 165; HERRERA, J. C. *Latin American Integration Clause in Colombia: Between the “Bond of Union” and the Tautology of “Straitjacket”*. In *Revista Derecho del Estado*. No. 37, 2016, 127-163, 127.

91 The developments explained attempt to complement the critics and annotations raised by SCHETTINI, A. *Toward a New Paradigm of Human Rights Protection for Indigenous Peoples: A Critical Analysis of the Parameters Established by the Inter-American Court of Human Rights*. In *SUR-International Journal on Human Rights*. Vol. 9, No. 17, 59-86; and AGUILAR CAVALLO, G. *Emergence of a Common Constitutional Law? Indigenous Peoples’ Case, Part I and Part II*. In *Revista Derecho del Estado*. No. 25-26, 41 and 51, respectively.

92 “The objective pursued is not the identity, it is compatibility; not uniformity in other words to harmonize.” SAIZ, A. *La interacción entre los tribunales que garantizan derechos humanos: razones para el diálogo* [Interaction between Courts that guarantee human rights: Reasons for the dialogue]. In SAIZ, A.; SOLANES, J. and ROA, J. E. (Eds.), *Diálogos judiciales en el Sistema Interamericano de Derechos Humanos*. Valencia: Tirant lo Blanch, 2017, 31. (Own translation).

93 CAROZZA, P. G. and GONZÁLEZ, P. *The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights: A Reply to Jorge Contesse*. *International Journal of Constitutional Law*. Vol. 15, No. 2, 2017, 436-442, 440.

logue is constructed without having in mind bottom-up/top-down approaches or hierarchical traditional approaches proper of the nation-state stage. In the construction of a supranational structure, we cannot expect a perfect paradise without conflicts and tensions in the understanding of the law.

There are conflicts and problems in the national sphere between supreme/constitutional courts and federal or regional tribunals and in the supranational space. Uniformity and diversity are a “pervasive and probably everlasting” issue in which a “model of dialogue does not determine a particular outcome in advance”.⁹⁴ However, something is clear in the Latin American case, if today we have seen further and reached a balanced standard of protection in several constitutional matters it is by standing on the shoulders of the Inter-American Court.⁹⁵

CONCLUSIONS: TOWARDS INFORMED CONSENT?

The past decades have seen the rapid development of prior and informed consultation in the case law of the CCC and the IACTHR. Both tribunals have echoed a creative judicial dialogue. Especially, the national court has brought the protection further to empower the voice and self-government of indigenous peoples and afro-descendants. Courts and scholars should consider these constitutional precedents and archetypical examples of *transformative ius commune* in Latin America. Alternatively, the so-called global north should heed these advances. Especially, the self-proclaimed “developed world” (for instance, Canada, USA or Australia), which under basic principles and values have a duty to protect their indigenous and afro-descendants peoples at home and the responsibility in their investments and actions worldwide.⁹⁶

This begets to answer the question: should the international community or single states require the ratification of ILO 169/89 or environmental instruments to allow investments that literally imply exploitation of natural resources and peoples in protected areas? Yes. An era of global investments demands global commitments.

To materialize FPIC in the cases studied, the CCC proposes applying the *pro homine* principle in particular cases and re-conceptualizing the notion

94 See TORRES. *Conflicts of Rights in the European Union*, cit., 183.

95 See SCHÖNSTEINER, BELTRÁN Y PUGA and LOVERA. *Reflections on the Human Rights Challenges of Consolidating Democracies*, cit.

96 For instance, see the careless footnotes one and two of the American Declaration on the Rights of Indigenous Peoples (2016) that shows the level of commitment that “developed” countries in the north of America have with the indigenous peoples and afro-descendants of the hemisphere: “the United States has, however, persistently objected to the text of this American Declaration, which is not itself legally binding and therefore does not create new law”. “Canada has not participated substantively in recent years in negotiations on the American Declaration on the Rights of Indigenous Peoples, it is not able at this time to take a position on the proposed text of this Declaration.”

of prior for the before, during and after principle. In addition, the case law of the Colombian court points out the reasons why it is unbearable to set a specific term in advance for the consultation process and why consultation should be applied in all kind of micro or macro intervention (see Graphs 4 and 5). Nowadays, the opportunity is in the hands of the Inter-American Court and the rest of the national and regional judges, governments, parliaments, scholars, and other parties to take part in this supranational dialogue.

Questions have been raised about the relevance of *binding consent* instead of *veto* in the exclusive hands of no party. Consequently, national parliaments and courts should consider the observations which have been explained and carefully constructed over a period of 25 years. A contribution to the *ius commune* in the region or to the idea of a whole than is more than the sum of its parts.

In moving forward, it is important to note, there is a need to reformulate the boundaries between legislation and case law in Latin America. Although this issue includes the arena of supranational integration and the framework of a broader *ius constitutionale commune*, the execution of such a constitutional challenge does not only imply the protection of fundamental rights. Therefore, a reformulation towards the engine room of the constitution is mandatory and FPIC consultation has become a potential example of it.

This study shows the construction of the most balanced level of protection in the case law of the Inter-American Court and the Constitutional Court of Colombia. Different countries shall be prevented from shaping different standards of protection for communities that historically have faced common discrimination. Take, for instance, the case of indigenous peoples in the Amazon basin. One standard for Brazil, Venezuela or Peru and another in Ecuador or Colombia is unfair. This atomization is itself a cause of inequality and inefficiency. Especially for ancestral groups, concepts such as border or property in western terms are very cumbersome.

Dialogic constitutionalism is an important method but not a goal in and of itself. Therefore, the solution ought to come from the sum of national interests in a systemic and functional approach. Why not in the sphere of economic, political, and social supranational integration? Why not be inspired by the idea of an *ever closer union*? Why not be encouraged by a *clever closer union* among the peoples of Latin America?

APPENDIX

TABLE 3
 CASE LAW OF THE CONSTITUTIONAL COURT OF COLOMBIA RELATED
 TO REVIEW OF LEGISLATION AND PRIOR CONSULTATION OF INDIGENOUS
 PEOPLES AND AFRO-DESCENDANTS.
 ABSTRACT CONTROL

CASE		REGULATION	DECISION
1	C-169/01	Electoral constituency for black communities. Bill 028/99 Senate and 217/99 House of representatives	Partially Unconstitutional
2	C-418/02	Mining Code. Article 122, Law 685/01	Constitutional*
3	C-891/02	Mining Code. Articles 2, 3 and others, Law 685/01	Constitutional*
4	C-620/03	Manaure Saltworks law. Article 1, Law 773/02	Constitutional*
5	C-245/04	Administration of expropriated assets. Law 785/02	Constitutional*
6	C-208/07	Professionalization of Teaching Act. Law-Decree 1278/02	Constitutional*
7	C-921/07	Educational services of education and health.	Constitutional*
8	C-030/08	General Forestry Law. Law 1021/06	Unconstitutional Leading case
9	C-461/08	National Plan of Development (2006-2010). Law 1151/07	Constitutional*
10	C-750/08	Free Trade Agreement, Colombia and USA. Law 1143/07	Constitutional*
11	C-175/09	Development in Rural Areas Act. Law 1152/07	Unconstitutional
12	C-615/09	Integral development and basic assistance for the Wayúu community. Law 1214/08	Unconstitutional
13	C-063/10	Modification in the National Health System. Article 14, Law 1122/07	Constitutional*
14	C-608/10	Free Trade Agreement, Colombia and Canada	Constitutional*
15	C-702/10	Endorsement of indigenous candidates. Section 8 of Article, Legislative Act 01/09, reforming Article 108 of the Constitution. Electoral issues	Unconstitutional
16	C-915/10	Environmental Agreement between Colombia and Canada.	Constitutional*
17	C-941/10	Free Trade Agreement Colombia and some EU Countries.	Constitutional*
18	C-027/11	Technical and Scientific Cooperation between Colombia and Guatemala.	Constitutional
19	C-187/11	Fundamental Rights Agreement between Colombia and Canada regarding FTA. Law 1411/10	Constitutional

CASE		REGULATION	DECISION
20	C-490/11	Statutory Act 190/10. Organization and functioning of political parties. Several articles.	Partially Unconstitutional
21	C-196/12	International Tropical Timber Agreement. Law 1458/11	Constitutional*
22	C-317/12 C-318/12	General “Royalty” System and Compensation. Legislative Act 05/11, Arts. 360 and 361 of the Constitution.	Constitutional*
23	C-366/11	Mining Code. Law 1382/10 and Law 685/01 Ratified I decisions C-367/11 and C-027/12	Unconstitutional
24	C-882/11	Legislative Act 02/09, reforming Article 49 of the Constitution. Coca lead.	Constitutional*
25	C-937/11	General Law of Education. Law 115/94	Inhibition
26	C-051/12	Free Trade Agreement, Modification Protocol (Mexico, Colombia, and Venezuela). Law 1457/11	Constitutional*
27	C-293/12	International Network of Bamboo and Rattan. Law 1461/11	Constitutional*
28	C-331/12 C-398/12	National Plan of Development (2010-2014). Arts. 106 and 276, Law 1450/11	Constitutional*
29	C-395/12	Mining Code. Articles 11, 35 and others, Law 685/01, and Article 76, Law 99/93. Environmental issues.	Constitutional*
30	C-540/12	Intelligence and counter-intelligence activities.	Constitutional
31	C-641/12	National Healthcare System. Law 1438/11	Constitutional*
32	C-765/12	Healthcare System Reform. Law 1438/11	Constitutional
33	C-767/12	Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Law 1516/12	Constitutional*
34	C-822/12	“Metre” Convention. Law 1512/12	Constitutional
35	C-943/12	National Authority of Environmental Licenses. Law 3573/11	Constitutional
36	C-068/13	General Royalty System and Compensations. Article 156, Law 1530/12	Constitutional
37	C-194/13	Criminal Code. Law 1482/11	Constitutional
38	C-253/13	“Negro” expression in the Law 70/93	Constitutional
39	C-371/14	“Peasant farmer reserve zones”. Law 160/94	Constitutional*
40	C-501/14	Vegetables varieties. Article 306, Law 599/00	Constitutional
41	C-389/16	Mining Code. Several articles	Constitutional*

* With specifications regarding the implementation in concrete situations. Decisions are hyperlinked for the digital version.

Source: Author’s compilation from the database available at: www.corteconstitucional.gov.co/

TABLE 4
 CASE LAW OF THE CCC TUTELAS REGARDING DIRECT INTERVENTIONS
 IN TERRITORIES PROTECTED BY PRIOR CONSULTATION OF INDIGENOUS
 PEOPLES AND AFRO-DESCENDANTS.
 CONCRETE CONTROL

CASE		CORE ISSUE	DECISION
1	T-428/92	Construction of Andes-Jardín road	Granted
2	T-405/93	Radar and air base in indigenous communities of the Middle Amazon	Granted
3	SU-039/97	Oil exploitation in U'wa territories	Granted
4	T-652/98	Urrá dam	Granted
5	T-634/99	Expansion of a municipality and other mechanism of protection	Denied
6	SU-383/03	Fumigation of illegal plantations in the Amazon region	Granted
7	T-955/03	Forest exploitation in <i>Cacarica</i> basin territories of Afro-communities	Granted
8	T-737/05	Legal recognition of a <i>Yanacona</i> community	Granted
9	T-382/06	<i>Tutela</i> against General Law Forestry Bill 25/04	Rejected
10	T-880/06	Oil exploitation in <i>Motilón Barí</i> territories <i>El Progreso</i>	Granted
11	T-154/09	Construction of an irrigation district and temporality of <i>tutela</i>	Denied
12	T-769/09	Mining project <i>Mandé Norte</i> of Muriel Mining Corporation	Granted
13	T-547/10	Multipurpose port <i>Brisa</i> in Sierra Nevada	Granted
14	T-745/10	Improvement of a road in Barú Afro territories	Granted
15	T-1045A/10	Gold-mining in Cauca, <i>La Toma de Suárez</i>	Granted
16	T-116/11	Ethno-educators for the <i>Gaitana</i> community	Granted
17	T-129/11 Leading case	Interamerican road construction, gold mining, electricity towers, and illegal occupation in <i>Emberá Katío</i> territories	Granted
18	T-235/11	Disaster prevention and assistance, the case of <i>Pepitas</i> river	Granted
19	T-379/11	Ethno-educators for <i>Quillasinga</i> community	Granted
20	T-474/11	Mining corporation against <i>tutela</i> orders	Rejected
21	T-601/11	Illegal renovation of authorities in <i>San Lorenzo</i> community	Granted
22	T-693/11	Environmental permit for the construction of a pipeline in <i>Campo Rubiales</i> without consultation of <i>Turpial</i> community	Granted
23	T-698/11	License to build a telecommunication base station in <i>Cañamomo-Lomapieta</i> territories	Granted
24	T-376/12	“Private beach” v. Afro-Colombian informal worker from <i>La Boquilla</i> afro community	Granted

CASE		CORE ISSUE	DECISION
25	T-477/12	Government authorization that allowed a private company to commercialize the brand “ <i>Indigenous coca</i> ”	Granted
26	T-513/12	Government authorization which recognizes the existence of a new communal organization due to religious separation	Granted
27	T-514/12	Ethno-educator in the <i>Kwe'sx nasa Ksxa Wnxi</i> institution	Granted
28	T-680/12	Collective title of lands for Afro-Colombians on El Rosario island	Granted
29	T-693/12	Construction of a road Loboguerrero-Mediacaño	Granted
30	T-823/12	Elections of representatives to national and local authorities (afro communities of La Plata Bahía Malaga)	Granted
31	T-993/12	Construction of the <i>variante El Guamo</i> road	Granted
32	T-1080/12	Regulation of streams that cross <i>Dujos Tamás-Páez</i> territories	Granted
33	T-049/13	Ethno-educators for several <i>Yanacona</i> groups	Granted
34	T-245/13	Municipal Development Plan that was consulted	Denied
35	T-172/13	Multipurpose port in the island of <i>Barú</i> and participation of Afro-Colombians of the area	Granted
36	T-300/13	Eradication of African palm without specific harm	Denied
37	T-390/13	Ethno-educators for the <i>Yascual</i> community	Granted
38	T-657/13	Planning of the Mulaló-Loboguerrero road	Granted
39	T-795/13	Mobile army radio station which broadcast music and promotes recruitment of indigenous to participate in the internal conflict	Granted
40	T-858/13	Building materials quarry and inappropriate use of <i>tutela</i>	Rejected
41	T-871/13	Ethno-educators of <i>Pijao</i> community in the Tolima region	Granted
42	T-117/14	Political rights of candidates to Congress of the Republic	Granted
43	T-204/14	Artisanal mining without authorization	Denied
44	T-294/14	Landfill <i>Cantagallo</i> in <i>Venado</i> community territories	Granted
45	T-353/14	Municipal Development Plan of Palermo, Huila	Granted
46	T-355/14	Ethno-educators for the <i>Candelaria</i> community	Granted
47	T-384A/14	Resolution declaring nature reserve and limits in the Natural Park Yaigojé-Apaporis	Denied
48	T-396/14	Road in San Agustín archaeological park	Rejected
49	T-461/14	Problem of boundaries between the territories of an Indigenous community and peoples of African descent	Granted
50	T-462A/14	<i>Salvajina</i> dam in the Cauca region	Granted
51	T-576/14	Recognition and adjudication of territories for Afro-Colombian communities, <i>raizales</i> and <i>palenqueras</i>	Granted
52	T-646/14	<i>Tutela</i> against bill of Customs Act	Denied

CASE		CORE ISSUE	DECISION
53	T-800/14	Spa on Providencia island affecting the <i>raizal</i> community	Granted
54	T-849/14	Mining concession in Sierra Nevada territories of <i>Arhuacos</i> , within the so-called black line	Granted
55	T-857/14	Small dam project in <i>Embera</i> jurisdiction	Denied
56	T-969/14	Wastewater disposal <i>Emisario Submarino</i> in community of African descendants near Cartagena	Granted
57	T-247/15	<i>Mapayerri</i> peoples and reformation of cadaster record without consultation	Granted
58	T-256/15	Pollution by the emission of carbon particles in territories of Afro-Colombians from Barrancas in La Guajira	Granted
59	T-359/15	Oil exploitation in territories of <i>Awa</i> indigenous peoples located in Putumayo region	Granted
60	T-438/15	Artisanal and informal gold mining in the historic and emblematic town of Marmato, Caldas	Annulled
61	T-485/15	Community of African descent on the Barú island near Cartagena. Planning and execution of a hotel project	Granted
62	T-550/15	Tourist boardwalk in Buenaventura on the Pacific coast	Rejected
63	T-597/15	Temporal restriction to work on a beach	Denied
64	T-660/15	Railway line transporting carbon in territories of Afro community <i>Suto Gende Ase Ngande</i>	Granted
65	T-661/15	Wayúu clans in conflict by administrative decision that adjudicated territories under dispute and infrastructure projects	Granted
66	T-764/15	Oil exploitation in territories of <i>Piriri</i> community (Puerto Gaitán)	Granted
67	T-766/15	The high impact case of mining strategic areas across the country	Granted
68	T-005/16	Military base and telecommunications towers in <i>Arhuacos</i> territories	Granted
69	T-041/16	Environmental license for oil extraction in territories of indigenous <i>Corozal Tapaojo</i>	Denied
70	T-110/16	<i>Tutela</i> against bill for special territorial organization <i>Zidres</i>	Denied
71	T-197/16	Pipeline construction and operation <i>Loop San Mateo - Mamonal</i> in territories of indigenous <i>Pasacaballo</i>	Granted
72	T-213/16	<i>Tutela</i> against Law 223/2015 for special territorial organization <i>Zidres</i>	Denied
73	T-226/16	Afro community <i>La Boquilla</i> and fulfilment of Decision T-376/12	Denied
74	T-288A/16	<i>Guatavita Tua</i> indigenous community and the construction of a pipeline towards the Pacific Ocean	Granted
75	T-313/16	<i>Pijao</i> community and a problem of overlapping territories	Denied
76	T-436/16	<i>Zenú</i> people against the construction of a road	Granted

CASE		CORE ISSUE	DECISION
77	T-475/16	Early childhood plan that was not consulted with an afro community	Granted
78	T-530/16	Delimitation of territories of <i>Emberas chamí</i> and afro community in Caldas region	Granted
79	T-605/16	Loop pipeline <i>San Mateo-Mamonal</i> in territories of indigenous <i>Maisheshe La Chivera</i>	Granted
80	T-704/16	Enlargement of a port and the rights of <i>Media Luna Dos</i> peoples	Granted
81	T-730/16	Oil exploitation in Putumayo territories of <i>Naza</i> peoples	Granted
82	SU-133/17	Artisanal and informal gold mining in the historical and emblematic town of Marmato, Caldas	Granted

Note: Decisions are hyperlinked for the digital version.

Source: Author's compilation from the database available at: www.corteconstitucional.gov.co

TABLE 5
STANDARDS OF THE CONSTITUTIONAL COURT OF COLOMBIA REGARDING
DIRECT INTERVENTIONS IN TERRITORIES PROTECTED BY PRIOR
CONSULTATION OF INDIGENOUS PEOPLES AND AFRO-DESCENDANTS.
CONCRETE CONTROL. (DECISION T-129/11)

(i)	Prior consultation is a right of a fundamental nature and the processes of consultation of indigenous peoples and afro-descendants will be developed according to this guiding criterion both in its projection and implementation.
(ii)	Adverse or confrontational postures are not allowed during the prior consultation process. It is a dialogue between equals with differences.
(iii)	Procedures that do not comply with the essential requirements of the prior consultation processes, i.e. associated consultation to mere administrative procedures, briefings or related actions are not allowed.
(iv)	It is necessary to establish effective communication relationships based on the principle of good faith, which contemplates the specific circumstances of each group and the relevance for the territory and its resources.
(v)	It is mandatory that the process of consultation and the search for consent are not set in advance with a fixed term. Each term should be considered under a strategy of differential approach or according to the particularities of the ethnic group and their traditions. Especially in the stage of planning and not just before the execution of the project.
(vi)	It is mandatory to define the procedure to be followed in each consultation process, through a pre-consultative and/or post-consultative process to be carried out between the parties. Participation must be understood not only to the previous stage of the process but also to subsequent stages on the intervention. (<i>Ex-ante</i> , during, and <i>ex-post</i> principle).
(vii)	It is mandatory to carry out an exercise that balances the interests at stake and the rights, alternatives, and perspectives of the indigenous peoples and afro-descendants affected only by those constitutionally imperative limitations. (Principle of proportionality complemented in Decision T-376/12).

(viii)	The search for free, prior, and informed consent is mandatory. Communities may determine the least harmful alternative in those cases when the intervention: (a) involves the displacement; (b) carries out storage or dumping of toxic waste; and/or (c) represents a high social, cultural, and environmental impact on an ethnic community, leading to the risk of its existence. After exploring the less harmful alternatives for ethnic communities and with the demonstration that all are detrimental, and that intervention would lead to the disappearance of indigenous peoples and afro-descendants, the protection of their right prevails under the <i>pro homine</i> principle. (Binding consent).
(ix)	It is mandatory that environmental and archaeological authorities check that the authorizations have not been issued without verification of the prior consultation and approval of an environmental and archaeological management plan. Without this requirement, the interventions in protected territories should stop.
(x)	It is mandatory to ensure that the benefits of the intervention or the exploitation of resources are equitably shared as well with the compliance and mitigation measures or compensation for damages.
(xi)	It is imperative that indigenous peoples and afro-descendants count with the support of the Ombudsman and the General Inspector of the Nation (Procuraduría General de la Nación) in the consultation process. Even with the possibility of having the support of international organizations or NGO's with mandates oriented at preventing and protecting the rights of indigenous peoples and afro-descendants.

Source: Author's translation from the leading case T-129/11.

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