

The Right of Indigenous Self-Determination and the Right to Consultation in the
Peruvian Constitutional Tribunal Jurisprudence (2005-2011)

by

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LL.B. University of Lima, 2002

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Supervisory Committee

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Abstract

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The main argument of this study is that the right of Indigenous peoples in Peru to consultation has little practical force and effect, since the Peruvian Constitutional Tribunal is not prepared to base it on a broader right of self-determination. I centre my investigation on the 2005-2011 decisions of the Constitutional Tribunal of Peru regarding the right to consultation. In these decisions, the application of the right to consultation is divorced from a perspective informed by the right of Indigenous self-determination. The main consequence of this divorce is that it obscures the pragmatic and symbolic dimension of the right to Indigenous self-determination, debilitating the practical and symbolic potential of the right to consultation. The lack of correspondence between the right to consultation and the right of indigenous self-determination is built into the jurisprudence of the Constitutional Tribunal and reflects the bias of its judges. This bias is actually a continuation and accommodation of old prejudices of the dominant society against Indigenous peoples in Peru; it is part of the pervasive cultural discrimination that is embedded in Peruvian society and that has been translated into jurisprudential terms and language. This bias is also a symptom of the invisibility of the cultural manifestations of Indigenous peoples and the resultant obscuring of cultural differences in general. This situation illustrates that the racism that existed in the colony, and continued during the republican era in Peru, has not died, but has merely been transformed into a more subtle form of legal and constitutional colonialism.

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Dedication

For my parents, Dante and Luz.
For Diego and Vanessa.

Chapter 1: Introduction

Social hierarchies and discrimination still exist and are prevalent in Peru. In general these discriminatory patterns retain a subtle existence in the legal discourse, primarily in how rules are applied in concrete situations. It is clear in the *Peruvian Constitution of 1993*, which established an anti-discriminatory clause, that at least formally the dominant society agrees that, racial, cultural, and gender discrimination is something negative. Racist discourse is strongly criticized by the media, so one would assume it is also criticized by society in general. Nevertheless, the constitutional rhetoric of no discrimination coexists with everyday racist conventions and patterns embedded in Peruvian society.

Some social scholars have tried to make sense of this contradiction by questioning how Peruvian society rejects discrimination while still adopting discriminatory approaches against certain groups in society. These scholars usually focus on the declarations made by politicians or the messages disseminated by commercial advertising, in which racial or cultural discrimination is embedded.¹ However, the juridical discourse, specifically that derived from the decisions of judges and tribunals, has not been scrutinized in light of the anti-discriminatory perspective.

In this work, I explore the right of Indigenous peoples to consultation and its relationship with the right of Indigenous self-determination. Through my research, I have found that subtle ethnocentrism and cultural racism influence and distort this relationship. Indeed, in view of the fact that patterns of racial discrimination persist in Peruvian society, it is worth exploring the degree to which these seep into the rulings of the Constitutional Tribunal of Peru (the “Tribunal”), the highest constitutional tribunal in the country. I also raise the question as to how racist discourse, or at least traces of it, might be found in the decisions of the Tribunal. Knowing the process of how the decisions of the Tribunal are made, and the precision and judicious thoughts put into these rulings (most of the time), and the effort to show the apolitical approach that law supposedly has, these questions proved to be challenging.

¹ See Jorge Bruce, *Nos Habíamos Choleado Tanto: Psicoanálisis y Racismo* (Lima: Universidad de San Martín de Porres, 2007).

In effect, there are no obviously discriminatory rulings in the Tribunal's jurisprudence. To find evidence of discrimination, one has to contextualize, read between the lines, and reevaluate what one considered obvious. However, after reviewing the Tribunal's rulings about Indigenous rights, especially about the right to consultation and self-determination, it was possible to perceive the bias imbedded in the Tribunal.

1.1.- The Relevance of the Right to Indigenous Self-Determination

The right to self-determination (and self-government) of Indigenous peoples has been one of the most important and persistent demands of the international Indigenous movement since the 1970s. Although such demands have not been fully accepted by many states, North American legislators, judges and scholars commonly employ the terms "Indigenous self-determination" and "Indigenous self-government".² In contrast, these terms are unusual in Latin America, where terms such as "autonomy" are used more frequently.³ The current Peruvian constitution, which dates from 1993, recognizes the administrative and economic autonomy of Indigenous peoples (both peasant and native communities), as well as their customary laws.⁴ However, in many cases and for many years, this has been an acknowledgement made on paper that has not had any real impact on such communities.

In light of the efforts made by the international Indigenous movement to achieve acknowledgement and the implementation of the Indigenous right to self-determination, it is surprising that there is such low visibility and under-utilization of the internationally accepted terms in the debates regarding the question of Indigenous rights in Peru. More importantly, given this omission in the context of the debate regarding Indigenous

² See generally Stephen Cornell, "Remaking the Tools of Governance: Colonial Legacies, Indigenous Solutions" in Miriam Jorgensen, ed, *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson, AZ: University of Arizona Press, 2007) 57.

³ See generally Donna Lee Van Cott, "Explaining Ethnic Autonomy Regimes in Latin America" (2001) 35:4 *Studies in Comparative International Development* 30; Anthony Stocks, "Too Much for Too Few: Problems of Indigenous Land Rights in Latin America" (2005) 34 *Annual Review of Anthropology* 85.

⁴ The terms "peasant" and "native" communities are used as separate terms by the *Peruvian Constitution of 1993* and the legislation; however, I will use the term "Indigenous peoples" to refer to both "peasant" and "native" peoples. I will also use the terms "Indian" and "Aboriginal", understanding them as synonyms of "Indigenous peoples". Although I know that each of these terms might have a more precise definition, it is important for the clarity of this work to use the term "Indigenous peoples" to define the peoples whose ancestors inhabited what is now the territory of the Peruvian state. See *infra* Chapter 2 for more on this topic.

peoples' right to consultation, it seemed to me that the omission was becoming even more pronounced. That is why, focusing my attention on the rulings of Peru's Constitutional Tribunal, I decided to investigate the possible impacts of that omission.

The main argument of this study is that the construction and notion of the right to consultation is seriously weakened when the issue of Indigenous peoples' right to self-determination is neglected. This is a symptom of the invisibility of the cultural manifestations of Indigenous peoples and the resultant obscuring of cultural differences in general. In order to explain this issue, I do not focus my attention upon the possible political and economic pressures to which the Tribunal may have been subject. While such factors should not be ruled out in any explanation of the Tribunal's jurisprudence regarding the right to consultation,⁵ I am interested here in exploring the Tribunal's failure to positively address the issue of the right of Indigenous self-determination as a manifestation of what has been termed "cultural racism".⁶ Regarding this concept, well-known U.S. Indigenous scholar Robert Williams explains that colonization "indelibly inscribes a legal system of racial discrimination based on cultural differences, denying the right of self-determination to the colonized race [...]."⁷ In this sense, he understands cultural racism as the negation, based on cultural patterns, of the recognition of Indigenous peoples' right to self-determination. This pattern originates from the first contact between Europeans and the Indigenous peoples of America, where racial differentiation was determined by the colour of the skin. However, the skin was also the signifier of a culture, a way of social organization and government that was interrupted by the imposition of the colonial forces from Europe onto Indigenous peoples.

It is my contention that the absence of a debate on Indigenous self-determination and the consequent erosion of the right to consultation is the result of a monocultural

⁵ Cesar Landa Arroyo, "Interculturalidad en la Jurisprudencia del Tribunal Constitucional" (2011) 93 *Revista de Análisis Especializada de Jurisprudencia* at 73-81. This author explains that during the administration of President Alan García Pérez (2006-2011), the Tribunal had a regressive tendency regarding Indigenous rights. The author suggests an important influence of the executive over the Tribunal on this topic, where the administration was interested in the implementation of mining and oil projects.

⁶ See Robert Williams, "Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination" (1991) 8:2 *Ariz J Int'l & Comp L* 51; Carol C. Mukhopadhyay & Peter Chua, "Cultural Racism" in John Hartwell Moore, ed, *Encyclopaedia of Race and Racism* (Detroit: Macmillan/Thomson Gale, 2008).

⁷ *Ibid* at 52.

perspective that is deeply rooted in the Peruvian legal culture. In this context, by developing and constructing in legal terms the right to consultation without the right to Indigenous self-determination, the former is undermined along with the tools available to Indigenous peoples for the protection of their culture.

1.2.- Situating Myself: A Non-Indigenous Perspective on Indigenous Rights in the Peruvian Constitutional Tribunal

Given that this research deals in large part with the jurisprudence of Peru's Constitutional Tribunal and issues regarding Indigenous rights, I recognize the need to mention, in these first pages, at least two facts concerning these points. These facts have certainly influenced, consciously or unconsciously, not only my decision to concentrate on this research, but also the methodology I have chosen to employ and the conclusions I have reached. To begin with, I should point out that I work as a briefing attorney for the Peruvian Constitutional Tribunal. I must also point out that I do not belong to any Indigenous community nor have I had close or sustained contact over time with Indigenous communities.

Without a doubt, the fact that I have worked with the Tribunal since 2004, and that I continue to do so to date, lends to this research a singular focus. In fact, since 2006, I have been working exclusively as a briefing attorney, and I have even collaborated on the elaboration of a number of the rulings analyzed in this work,⁸ although I have not necessarily been in agreement with the results of the rulings. As a result of my implication in the very system that I examine, my research serves to a certain degree as a review of certain ideas and reflections I experienced at the time.

This disclosure may provoke two reactions from readers. On the one hand, they may find themselves interested in learning about the perspective of someone who has witnessed the development of such cases from within the Tribunal. On the other hand, they may find themselves doubting the objectivity of the research, and even suspecting that its intention may be that of an academic defence of the jurisprudence of the Tribunal. In this regard, I must confess that these reservations are not exclusive to readers, for they

⁸ According to article 42 of the *Internal Organization Chart of the Peruvian Constitutional Tribunal (Reglamento de Organización y Funciones, RA 0145-2010-P* (17 December 2010), the “cabinet of briefing attorneys is the body which provides advice to the judges in those issues with which they have been entrusted, and in the analysis and study of cases”.

have been present in my own reflections and preoccupations during the production of this work. To such concerns must be added the possible consequences in the workplace, as it is possible that my employers could misinterpret some of the critical points I make.

In this regard, I would like to emphasize that I have the utmost respect for the Constitutional Tribunal of Peru, although this should not be confused with the absence of a critical perspective of the work undertaken by this constitutional body. I am also conscious of the fact that throughout this research I had to be careful to reconcile my duty as a briefing attorney obliged to maintain confidentiality, and my work as a researcher. And so, I must underline the fact that the sincere objective of this research is to shed light upon a problem that, as a matter of fact, goes far beyond the Tribunal's jurisprudence. My aim is to observe the process through which a supposedly objective and neutral body of law was implemented via a judicial discourse in the multicultural context of Peru. To this end, I focus upon the Tribunal's right to consultation jurisprudence merely as one of several manifestations of this process impacting upon the rights of Indigenous peoples.

Furthermore, I am aware that the fact that I do not belong to an Indigenous community, as well as the fact that I have not maintained close ties with any Indigenous community, may be viewed as a disadvantage or as a shortcoming of this research. Of course, it is common to have questions arise about the work of those academics who write about Indigenous affairs without having been able to truly understand the Indigenous perspective. I attempt to address this problem by focusing on Indigenous rights from a non-Indigenous perspective in order to analyze a way of seeing in which I am involved – a process that also allows me to question my own way of viewing Indigenous affairs.

I do not mean to imply that the Indigenous perspective regarding Indigenous rights is not important or that it is not a worthy subject for research. However, such an approach requires training in and familiarity with the worldview of at least one Indigenous group and this is knowledge, which, for the time being, I do not possess. In sum, I am a non-Indigenous individual engaged in research regarding how a non-Indigenous institution implements Indigenous rights. I have tried not to turn away from these issues. Instead, I have tried to embrace this reality and incorporate it into the

methodology of this research, thereby attempting to reinforce my arguments where I feel that they might be questioned in light of the aforementioned circumstances.

1.3.- From a Monocultural to a Multicultural Approach in Analyzing the Constitutional Tribunal's Decisions

In order to analyze the Constitutional Tribunal's rulings and the legislation applied, I adopted a multicultural perspective. Through a multicultural perspective, cultures begin to see one another in a less prejudiced way; for example, cultures which were previously perceived as uncivilized or less developed can come to be seen as possessing the same "value" as western culture. It is in this way that those elements that sustain specific cultural practices start to enjoy protection as a consequence of the success of those social movements whose objective is to modify perspectives and legislation.

Even though legislation may acknowledge a given social reality and certain cultural rights, the implementation of such legislation may still exhibit a markedly monocultural perspective. This can be seen in the implementation of public policies and the jurisprudence designed to resolve cases associated with Indigenous rights. For the purposes of this research, it is therefore necessary to emphasize the political and cultural components of the law in order to highlight the cultural bias inherent in the legal system. Therefore, it is not only the implementation of norms that fosters respect of different cultural practices, like multiculturalism, that interested me, but also the specific cultural origins of these ostensibly accepted norms.

Thus, although legal and state phenomena can be conceived as neutral and deprived of any ideology, it must be understood that legal discourse is imbued with a number of historically rooted assumptions that constitute, and also continue to inform, judicial processes. In this regard, I understand that the judges of the highest Constitutional Tribunal in Peru respond to certain historically situated assumptions that will inevitably lie behind interpretations that have an appearance of objectivity and neutrality. This is why many of the prevailing beliefs and conceptions of Peruvian society can be found in the perspectives of these judges. I am interested in the colonial filtrations contained in liberal legal discourse, which lauds objectivity as the central tenet of its work. Mainly, I take into account the fact that the law is a cultural manifestation and that as such it responds to certain stimuli and interests unique to those cultural groups that

construct the legal system.⁹ The law seeks to regulate conduct by proscribing, authorizing, sanctioning and defining legal concepts used in the legal discourse. However, the law is not divorced from the historically situated social relations from which its concepts emerged—and one has to question the broader role the law, an apparatus of the dominant society, plays in maintaining the *status quo*.

In the Peruvian context, where the democratic institutions are fragile, there is an absence of the effective control of political power, which is usually monopolized by the executive power. At the same time, these institutions are weak, in the sense that in many areas far removed from urban centres they are absent or simply unable to apply the legal norms or to provide public services.¹⁰

Taking these elements into consideration, I intend to question the basis of the Tribunal's rulings, while at the same time understanding that they merely reflect one facet of a society in which democratic principles have still not penetrated deeply—particularly when it comes to the issue of equality. I must also confess that I have wavered between optimism and pessimism with regard to the work of the judges and courts and the social impact their decisions may have. I question to what degree we are facing a “hollow hope,” and to what degree social change could actually be introduced by the work of the courts.¹¹ The answer to these concerns must be considered individually, according to every case, context and historical moment. It is my impression that in the case of Peru's Constitutional Tribunal there has been a relatively positive impact given the passive stance frequently adopted by judges *vis-à-vis* political power. The decisions made by Peru's Constitutional Tribunal, at least when the legal apparatus has enjoyed its

⁹ See Naomi Mezey, “Law as Culture” (2001) 13:1 Yale JL & Human 35 at 47. She explains, “law's power is discursive and productive as well as coercive. Law participates in the production of meaning within the shared semiotic system of a culture, but it is also a product of that culture and the practices that reproduce it. A constitutive theory of law rejects law's claim to autonomy and its tendency towards self-referentiality.”

¹⁰ Guillermo O'Donnell, “Acerca del Estado, la Democratización y algunos Problemas Conceptuales: Una Perspectiva Latinoamericana con referencias a Países Poscomunistas” in Miguel Carbonell, ed, *Estado de Derecho, Conceptos y Fundamentos y Democratización en America Latina* (Mexico: Siglo Veintiuno Editores, 2002) at 235-263. There is also an English version: see Guillermo O'Donnell, “On the State, Democratization and Some Conceptual Problems: A Latin American View with Glances at Some Postcommunist Countries” (1993) 21:8 World Development 1355. This author maintains that in countries like Peru, the effectiveness of law and authority of the state fades off outside of urban centres. Therefore, rural areas are examples of the “evaporation of the public dimension of the state” at 1359.

¹¹ See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago, 1993.)

greatest legitimacy, have carried considerable symbolic significance in creating and modernizing legal concepts. Today that legitimacy has somewhat eroded, although some rulings regarding the issue of political control would appear to represent a basis for hope in the midst of institutional inertia. In any case, even when the majority of legal scholars might seriously question some of the Tribunal's rulings, those decisions are useful in shedding light upon inherent bias and upon the Tribunal and its members' political profile. In other words, an understanding of why, out of several options the Tribunal opted for a given solution, raises questions regarding what the consequences of such decisions might be.

1.4. - Defining Bias

Now I would like to express my understanding of the term "bias" in the context of this investigation, which basically implies an analysis of the behaviour of judges in resolving multicultural or intercultural cases. These kinds of cases are extremely difficult because they oblige judges to confront not only the interpretation of the law, but also the interpretation of the law taking into account different cultural perspectives. To define the term "bias" in a multicultural context like Peru, I will use the conceptions developed by the Canadian legal scholar Jeremy Webber.¹² In his normative theory of adjudication in a pluralistic society, Webber refers to three forms of biases that can be found among judges: 1) the "visceral corrosive dislike" bias that is manifest in the "animosity that some [...] judges, feel towards persons of another culture, sex or class";¹³ 2) the reliance of certain judges on inaccurate stereotypical attitudes of minority groups, a bias that "suggest[s] that particular judges act upon mistaken notions of a group's aspirations, capabilities, or social and economic position";¹⁴ and 3) the bias revealed when judges are not able to share different understandings of justice, which is the "inability to transcend attitudes shaped by their gender, class and culture."¹⁵

¹² Jeremy Webber, "A Judicial Ethic for a Pluralistic Age" in Omid Payrow Shabani, ed, *Multiculturalism and Law: A Critical Debate* (Cardiff: University of Wales Press, 2007) at 72 [Webber, *Judicial Ethic*].

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

In order to avoid or control the last of these biases Webber proposes that judges have to seek a synthesis among the different conceptions of justice. Judges “must attempt to understand fully the sides of the conversation and come to some moral resolution of the difference. They must engage in the rational search for normative reconciliation.”¹⁶ Hence, for Webber, an absence of this approach would turn the judges’ decisions into illegitimate rulings because those judges are not showing any interest or ability to transcend their own conceptions of justice.

I found traces of the second and third kinds of bias in some decisions of the Tribunal. For example, when the Tribunal keeps silent about the right of Indigenous self-determination, consciously or unconsciously it is showing its intention to not take into account other notions of justice that come from different cultural patterns. Indeed, the right of Indigenous self-determination is a process that is part of Indigenous peoples’ cultural expressions; to obscure those expressions is to obliterate Indigenous cultures and values.

1.5.- Peru’s Constitutional Tribunal: Nature and Characteristics

Following this brief introduction, it is relevant to introduce further details regarding the work of the Peruvian Constitutional Tribunal. It is particularly important to understand that, among ordinary Peruvian citizens, the Tribunal is not a very well known institution. This is due in part to the fact that it is a relatively new institution within the structure of the state, and that it performs a relatively new role in terms of the legal defence of the constitution. However, it is a body with the same status as the Supreme Court of the Republic, while remaining independent of the judicial power. Its main function is that of resolving cases in which the constitutional validity of an Act is called into question. In this way, it also exercises a considerable degree of political power, by counteracting the political decisions of Congress and the executive branch of government. This function of political control is also something new within the context of the political and legal traditions of Peru, in which judges, immersed in the formalistic traditions of civil law, understood their role as being mere instruments of the law. Nevertheless, this perspective has begun to change, particularly since the 1990s. Indeed,

¹⁶ *Ibid* at 88.

since its creation the Constitutional Tribunal has been seen not only as a new institution, but also as a new hope, enjoying an important legitimacy among political actors in Peru. Although in recent years this legitimacy has been eroded, the Tribunal still maintains some legitimacy.

1.6.- The Judiciary in Peru and the Process of “Legal Empowerment”

According to Merryman, the civil judge was traditionally considered an “expert clerk” who performed the mechanical task of applying the law. That is why it was not important among the scholars and lawyers of this tradition to study the “individual ways” and “apparent preconceptions and biases” of judges.¹⁷ In this tradition, congressmen and women usually have a central role, and judges have a strong sense of deference in favour of the Congress. However, Merryman also affirms that since the introduction of rigid constitutions and judicial review in civil law systems, the image of the civil judge has started to change.

There have been 13 constitutions in Peru since 1823.¹⁸ Indeed, Peru has a long history of drafting and proclaiming constitutions. However, although Peru has had many constitutions, we have not had a strong constitutional tradition. Actually, the large number of constitutions is a manifestation of political instability due to the similarly long history of *caudillos* in Peru. Originally, the term *caudillo* referred to a political and military leader who took power by force rather than relying on the democratic system to access political power. This was very common in Peru during the first years of the republic, from 1821-1850. *Caudillos* are still part of the Peruvian political landscape; however, in contrast with the traditional definition they currently access political power through the democratic system. An important characteristic of *caudillos* is that they exercise power by relying on their charismatic qualities, rather than on institutional

¹⁷ John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford, CA: Stanford University Press, 1969) at 38.

¹⁸ The last stage of the Peruvian independence process started with the proclamation made by the Argentinean General Jose de San Martin on July 28, 1821. During 1822, while Spanish troops still occupied great parts of the Peruvian territory, a constituent assembly met and issued the *Peruvian Constitution of 1823*, the first constitution of Peru. However, this constitution was immediately suspended in order to give absolute powers to Simón Bolívar, a General from Gran-Colombia (now Venezuela and Colombia) who came to complete the task initiated by San Martin. The purpose was to expel the Spanish troops remaining in Peru and force the Spanish crown to capitulate, which finally happened in 1824.

procedures, once they get into a position of power. Thus, check and balance systems and therefore the division of powers collapse into the personal character of the *caudillo*.

In order to avoid this situation, power was given to the judiciary in order to determine the constitutionality of norms and other political acts. In Peru, the institution of judicial review was recognized for the first time in 1936.¹⁹ Nevertheless, the judicial power did not exercise this faculty in more than 50 years, making visible the “painful conflict between the theory and practice of constitutional supremacy”²⁰ in Peru. This was not only because constitutional adjudication was uncommon in Peru,²¹ but also because of the weakness of the judicial power as a political actor. In effect, the Supreme Court did not effectively control the excesses of the political actors, with the court essentially being absent from the check and balance dynamic. In 1984 Verner classified the Peruvian Supreme Court as a “minimalist court,” performing a “minimal policy function.” For the author, the Peruvian Supreme Court was “completely dependent on and subordinate to external political forces.”²² In sum, the civil law tradition and the historical political weakness of the judicial branch in Peru prevented the judiciary from applying judicial review as a political tool to control the excesses of the executive power.

However, since the 1980s, not only in Peru but also in the rest of Latin America, the emergence or resurgence of constitutional tribunals or constitutional chambers became widespread.²³ In Peru, the *Constitution of 1979* established the Tribunal of Constitutional Guarantees (TGC; 1983-1992) and instituted at the constitutional level the judicial review by the judiciary. Due to historical distrust in the Supreme Court, the constitutional framers established the TGC as a separate body from the judicial power. This first attempt to introduce an abstract, centralized, *a posteriori* model of

¹⁹ The Peruvian *Civil Code of 1936* (no abrogated) established that when incompatibility exists between a constitutional norm and a statutory norm, the former takes precedence.

²⁰ Dale Beck Furnish, “The Hierarchy of Peruvian Laws: Context for Law and Development” (1971) 19:1 Am J Comp L 91 at 97.

²¹ See Dale Beck Furnish, “Courts and Statute Law in Peru” (1980) 28:3 Am J Comp L 487. The author affirms that the “doctrinal teaching of strict construction is seriously regarded in Peru and constrains judges at all levels”.

²² Joel Verner, “The Independence of Supreme Courts in Latin America: A Review of the Literature” (1984) 16:2 Journal of Latin American Studies 463 at 494.

²³ See e.g. Julio Ríos-Figueroa, and Patricio Navia, “The Constitutional Adjudication Mosaic of Latin America” (2005) 38:2 Comparative Political Studies 193.

constitutional adjudication was deemed to be a failure by Peruvian scholars²⁴ and ended in April 1992, when Alberto Fujimori, the elected president for the 1990-1995 term, suspended the *Constitution of 1979* and dissolved the Congress as well as the TGC.

A second attempt was introduced in the *Constitution of 1993*. This constitution was put in place after the self-coup led by president Alberto Fujimori. This constitutional reform had two main objectives: to implement neoliberal policies and to allow the immediate presidential re-election.²⁵ Regarding constitutional adjudication, it is worth highlighting that the majority of the Constitutional Assembly presented a first constitutional draft without any reference to a Constitutional Tribunal. Nevertheless, in a second draft a Constitutional Tribunal was included.²⁶ Contrasting with the TGC, important changes were implemented: the Constitutional Tribunal is now made up of seven judges appointed by two-thirds of the Congress; there is no possibility of re-electing judges; and judges remain in their positions for only five years. The *Constitution of 1993* defined the Tribunal as an autonomous constitutional organ and established its jurisdiction. Thus, the Tribunal monopolizes (in original jurisdiction) the abstract, centralized, and *a posteriori* constitutional control through the writ of

²⁴ See Eduardo Dargent, “Determinants of Judicial Independence: Lessons from Three ‘Cases’ of Constitutional Courts in Peru (1982–2007)” (2009) 41:2 *Journal of Latin American Studies* 258. For Dargent the failure of the TGC was mainly due to a defective institutional design: “The [...] requirement of six votes [out of 9] to declare a law unconstitutional, combined with the rules concerning the appointment of judges, allowed the executive to gridlock the TGC.” [...] “The point to underscore is that the executive party did not need to elect all the judges named by the Congress to be sure that the TGC would not act against them: given the six out of nine vote requirement, four judges were enough to gridlock the court. Additionally, the possibility of re-election created a pervasive incentive for the judges to remain dependent on the institution that elected them instead of putting their loyalty in the TGC.” See Dargent at 263. The judges of the TGC were appointed by a mixed method: three by the executive, three by the legislature and three by the Supreme Court. See also Cesar Landa Arroyo, *Tribunal Constitucional y Estado Democrático* 2d ed (Lima: Palestra Editores, 2003). The author, a Peruvian constitutional scholar, also affirms that the TGC left a weak conviction among the citizenship and the governmental agencies because of “it could not consolidate a social legitimacy in the public opinion as the constitutional organ in charge of control the excess of power” See Landa Arroyo at 74.

²⁵ Those were important reforms in the context of the constitutional history of Peru. For example, in the Peruvian constitutional tradition, immediate presidential re-election is prohibited. See: Cynthia McClintock “Presidents, Messiahs and Constitutional Breakdowns in Peru” in Juan Linz & Arturo Valenzuela, eds, *The Failure of Presidential Democracy*, vol 2 (Baltimore, MD: John Hopkins University Press, 1994) 286.

²⁶ See Dargent *supra* note 24 at 266.

unconstitutionality²⁷, although it can also carry out concrete judicial control in the habeas corpus, *amparo*, habeas data and mandamus, or *cumplimiento* writs.²⁸

The Tribunal was installed in 1996; however, after a confrontation with the executive, the Congress impeached three judges and only judges loyal to the Fujimori administration remained. From 1997-2001 the Congress did not appoint judges to the Tribunal; thus, it was unable to perform its main task: determining writs of unconstitutionality.²⁹ Some scholars named this phase the “court in captivity”.³⁰ This scenario changed after 2001, with the end of the Fujimori regime and the recomposition of the members of Tribunal. Since then, the general opinion began to consider the Tribunal as an independent and influential political institution,³¹ since its decisions, although sometimes criticized, were always executed. However, since 2008, the Tribunal has had some setbacks that have affected its legitimacy. Examples of this include the sudden resignation of Judge Landa Arroyo from the Tribunal’s presidency in July 2008,³² internal disagreements between judges (generally known via the mass media³³), and some

²⁷ Only a few officials are entitled to bring a writ of unconstitutionality (article 203 of the *Peruvian Constitution of 1993*): the President, the Prosecutor General, the Ombudsman’s Office, 25 percent of members of Parliament acting by joint petition, the presidents of the regions, provincial municipalities, professional associations, and 5000 citizens acting by joint petition. In this kind of lawsuit the Tribunal has original jurisdiction and the parties cannot appeal the decision of the Tribunal. According to article 203, the Tribunal also hears disputes over jurisdiction among constitutional organs.

²⁸ All these are constitutional writs (summary actions), which protect fundamental rights of Peruvian citizens. *Amparo* lies against an act or omission by any authority or person that violates or threatens any fundamental rights. The writ habeas data is used to protect personal data and to claim access to public information. In contrast, the *cumplimiento* is similar to the writ of *mandamus*. It can be filed against any authority or official who refuses to obey the law or an administrative act. Although it entails an omission of the administration, according to the precedents of the Tribunal and the *Constitutional Procedural Code*, the omitted action should be clear and unconditional.

²⁹ According to the *Organic Act of the Constitutional Tribunal* (OACT), in order to declare an act unconstitutional, the Tribunal needs 5 votes. This changed with the modification of the OACT in 2001. Since then it is only necessary to have 4 out of 7 votes.

³⁰ Landa Arroyo, *supra* note 24 at 74.

³¹ See Pedro Grández, “Tribunal Constitucional y Transición Democrática” (Lima: Palestra Editores, 2010), Lydia Brashear Tiede & Aldo Fernando Ponce, “Ruling against the Executive in *Amparo* Cases: Evidence from the Peruvian Constitutional Tribunal” (2011) 3:2 *Journal of Politics in Latin America* 107 at 109. Tiede and Ponce consider that the Tribunal is a “relatively new and weak institution in a young democracy, [that] has demonstrated sign of assertiveness under certain conditions”: see also at 129; Dargent, *supra* note 24 at 271-275; Landa, *supra* note 24 at 258.

³² “La renuncia de Landa”, *Caretas* (17 June 2008) online:
<<http://www.caretas.com.pe/Main.asp?T=3082&idE=785&idS=82>>

³³ “Cuando la Elección del Presidente del Tribunal Constitucional puede Marcar el Inicio del Fin del Tribunal Constitucional” IDEELE-mail (29 November 2008) online:

controversial decisions. Thus, currently the Tribunal's legitimacy is waning as it struggles to be as well-regarded it had been in the first years of the 21st century.

1.7.- The “Two-Staged Judicial Reforms” and Indigenous Rights in Peru

It is important to explore why an authoritarian administration such as Fujimori's regime formally empowered an institution like the Tribunal, which as a judicial/political body could restrain the power of the executive branch. Actually, judicial empowerment was a tendency throughout Latin America during the 1990s. Finkel explains the apparent paradox, answering the question “why would politicians enact institutional reforms that appear to limit their own political power?”³⁴ She answers this question by posing the “insurance policy” theory,³⁵ which maintains that when a ruling party (in Latin America) is not expecting to remain in the administration, it will implement reforms and, more importantly, the regulations needed to strengthen the judiciary. In doing so, the leaving party ensures that an independent judiciary shall scrutinize any political persecution of the incoming administration.

Finkel considers that Latin America's judicial reforms have two main stages: the *initiation phase* and the *implementation phase*. The *initiation phase* is a “proclamation period” in which judicial reforms are announced via constitutional reform. The *implementation stage* “entails the passage of congressional legislation to translate the newly agreed-upon constitutional principles into working reality.”³⁶ The elegantly drafted paramount constitutional principles do not assure that these will be applied, as they need to be implemented by the Congress. The implementation of principles into a set of

<http://www.pdfdownload.org/pdf2html/view_online.php?url=http%3A%2F%2Fwww.justiciaviva.org.pe%2Fnuevos%2F2008%2Fdiciembre%2F04%2Fideemail.pdf>

“El Tribunal Constitucional se ‘desangra’” *Peru21* (26 May 2011) online: <<http://peru21.pe/noticia/763578/tribunal-constitucional-se-desangra>>

“Problemas en el TC: Magistrado Calle Denuncia Amenazas de Presidente Mesía” *El Comercio* (27 May 2011) online: <<http://elcomercio.pe/politica/763923/noticia-amenazas-al-interior-tc-magistrado-calle-denuncia-hostigamiento-presidente-mesia>>

“Carlos Mesía: El Congreso ha sido un Fracaso al Nombrar Magistrados del TC” *El Comercio* (09 June 2011) online: <<http://www.larepublica.pe/09-06-2011/carlos-mesia-el-congreso-ha-sido-un-fracaso-al-nombrar-magistrados-del-tc>>

³⁴ Jodi S. Finkel, *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s* (Notre Dame, IN: University of Notre Dame Press, 2008) at 111.

³⁵ *Ibid* at 21-37.

³⁶ *Ibid*.

practices is much more difficult to achieve than proclaiming a need for change. The ruling party can therefore delay or minimize the regulation needed to implement the judicial reforms.³⁷ Finkel concludes that the implementation of judicial reforms is not fixed and depends “on [the] ruling party’s perception of retaining political power.”³⁸

It is interesting to highlight the “two-staged” reform approach, which can be helpful in understanding the reasons why the *Constitution of 1993* consolidated important Indigenous rights, and why the constitutional assembly of 1993 ratified the *International Labour Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1989* (Convention 169).³⁹ I assert that a parallel can be drawn between the proclamation and the implementation period of judicial reform in Peru, and the proclamation and implementation period of Indigenous rights. In both cases, the proclamation period was not followed by the actual implementation of the paramount constitutional principles. However, in contrast to the judicial reform, the ruling party’s perception of retaining political power was not a relevant element in the implementation of Indigenous rights. Thus, the Congress only implemented the right to consultation, contained in Convention 169, in 2011. It might be suggested that the ratification of the convention and the rest of Indigenous rights were part of a strategy employed by the Peruvian state to give an appearance of being respectful of Indigenous rights, but without any real intention to enforce these rights.

1.8.- Racism and Cultural Racism in Peru

I start from the premise that the failure to implement Indigenous rights is in part due to the perspective known as “cultural racism,” which is deeply imbedded in Peru. It is important to realize that discrimination is of a dual nature: on the one hand, it prevents

³⁷ *Ibid.* Finkel concludes that “although politicians were willing to initiate constitutional changes increasing judicial power, only under a particular set of circumstances were these leaders willing to follow through with the legislation necessary to make these changes a working reality.” Regarding Peru, she establishes that the judicial reforms “were stymied during implementation, and the courts [...] remained unable to challenge political authority” at 111.

³⁸ *Ibid.* at 36. Therefore, if the ruling party foresees that it might stay in the administration, the reforms will be delayed. On the other hand, if the ruling party perceives that it will be not in power, it will promote the implementation of the reforms at the end of its term.

³⁹ *International Labour Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1989* (adopted 27 June 1989, entered into force 5 September 1991, ratified by Peru 2 February 1994).

Indigenous peoples from fully participating in the dominant society; on the other hand, it destroys Indigenous material and spiritual conditions required for the preservation of the Indigenous culture. Therefore, I wish to make a few references to racism in Peru, in order to provide readers with some background regarding the Peruvian debate surrounding this phenomenon.

Social and academic debate regarding racism in Peru has been intermittent. The “Indigenous question” had prominence during the early decades of the 20th century, when urban, middle-class scholars introduced the issue into the public discourse. This was an important moment in which scientific theories regarding racism were put aside, and the integration of Indigenous populations into Peruvian society and the modern world was proposed.⁴⁰ This indigenism movement (*movimiento indigenista*) was concerned with how to bring the Indigenous populations into modernity. The debate in those times was over whether the Indigenous peoples could be “modernized” or whether they were “condemned” to stay in their “primitive” position.

Towards the end of the 1970s and 1980s historians and sociologists renewed the debate surrounding racism.⁴¹ However, it was after the publication of the report by the Truth and Reconciliation Commission of Peru (TRC), in 2003 that this debate spread beyond academia. This was because in its conclusion the TRC estimated that 79% of those killed during the internal armed conflict that afflicted Peru in the 1980s and 1990s lived in rural areas. Of the total number of those killed, 56% were engaged in agricultural activities, while 75% were Quechua speakers or speakers of other Indigenous languages as their mother tongue. It was this report that highlighted the prevailing socioeconomic and ethno-cultural gaps within the country. It is important to mention that the parties involved in the internal conflict did not represent specific ethnic values. In other words, none of the groups involved fought in the name of the vindication of any Indigenous culture.

Nevertheless, as Corntassel and Holder point out, the TRC glossed over, or failed to mention at the very least, the fact that these people were members of Indigenous

⁴⁰ Carlos Aguirre, “Crime, Race and Morals: The Development of Criminology in Peru 1890-1930” (1998) 2:2 *Crime, Histoire & Sociétés/Crime, History & Societies* at 73.

⁴¹ Flores Galindo, “República sin Ciudadanos” in *Obras Completas* 3:1 (Lima: Sur, 2008); and Walter Twanama, “Cholear en Lima” (1992) 9 *Revista Márgenes: Encuentros y Debates* 206.

groups or communities. In this way the Indigenous element of these communities was depoliticized. As a result, the authors concluded that the reparations recommended by the TRC did not mention the strengthening of Indigenous government or of the institutions of Indigenous communities.⁴²

Corntassel and Holder's view certainly contrasts with the aforementioned debate regarding racism, which was focused upon the modern urban context, rather than the rural and institutional Indigenous context. In that debate, racism was analyzed from the urban perspective by which "they" or "others" were racially categorized in the urban context of day-to-day coexistence within the same space. The debate placed an emphasis upon the individual formed by a non-western or quasi-western culture and their integration into spaces traditionally occupied by white, creole or *mestizo* groups. In that sense, the debate was focused upon the concept of race and its different manifestations within urban areas; it also placed emphasis on determining whether racism exists in Peru, and whether this racism is the product of the colonial legacy or the result of a breaking away from the colonial order in the republican years.⁴³ Other concerns related to the racism debate in Peru have been the predominance of whites in advertising⁴⁴ and the prevalence of discrimination in the workplace.⁴⁵

Analyzing racism by examining the day-to-day perspective transcends the merely visual aspects of those discriminated against. In Peru as well as in the rest of Latin America, it is not only colour that forms the basis for differentiation and hierarchies, given the process of ethnic mixing undergone in these societies. As a result, notions of superiority or inferiority must be determined on a case-by-case basis, "in every new

⁴² Jeff Corntassel & Cindy Holder, "Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru" (2008) 9:4 Human Rights Review at 480.

⁴³ See Patricia Ames, "Cultura y Desigualdad: Discriminación, Territorio y Jerarquías en Redefinición" in Julio Cotler & Ricardo Cuenca, eds, *La Desigualdad en el Perú: Balances Críticos* (Lima: Instituto de Estudios Peruanos, 2011) 229.

⁴⁴ See Bruce, *supra* note 1.

⁴⁵ See Manuel Barron, "Exclusion and Discrimination as Sources of Inter-Ethnic Inequality in Peru" (2008) 31:61 *Economía*, 51.

encounter, through a process of mutual evaluation which tends to be arbitrary and conflictive, given that very often it is not clear who ought to bow down to whom.”⁴⁶

In contrast to racism based on black and white categorization, the problem of cultural racism I will explore here emerges from a different place. It is not the anti-racism movement led by whites or *mestizos*, pretending to integrate Indigenous people into modernity, that I am interested in. Rather, I am interested in the Indigenous movements that aim to protect Indigenous institutions of self-government or autonomy; I am interested in the implementation of the right to consultation in Peru, and in exploring how Indigenous institutions, essential to the existence of Indigenous groups and the continuation of their respective cultures, are ignored or seen as obstacles to the “modernization” of their economies. In this regard, Williams understands that cultural racism refutes the idea that Indigenous peoples ought to control their own destinies, while imposing upon them a legal system founded upon domination, which refuses to acknowledge the fundamental right to self-determination.⁴⁷

This is why I base my research on examinations of the self-determination of Indigenous peoples. Taking into account the principle of self-determination, the relevance of the sovereignty of Indigenous peoples can be more clearly defined, and the process of eliminating this sovereignty through colonial domination, followed by the internal colonialism of the republican period, can also be assessed. It is certainly true that the issue of self-determination for Indigenous peoples in Peru has been ignored, enabling the right to consultation to be translated, in some circles, as the reinforcement of the right to citizen participation, without taking into consideration the cultural distinctions that define Indigenous peoples.

Indeed, cultural racism is a salient feature of the Peruvian state’s Indigenous policy, as it has been since the Spaniards arrived to what is currently Peru. Following the colonial period, cultural racism did not lessen with the birth of the republic; rather it intensified under the construction of the nation state and the implementation of “liberal”

⁴⁶ Gonzalo Portocarrero, *Racismo y Mestizaje y Otros Ensayos* (Lima: Congreso de la República, 2009) at 16.

⁴⁷ Williams, *supra* note 6 at 51.

policies. Although equality among Peruvian citizens is currently a general and accepted concept, it is still common to observe racist patterns in Peruvian society. In this sense, one can interpret how legal principles might also be imbued with standards associated with cultural hierarchy and racial superiority.

The arguments presented in this study will be developed in the following chapters. In Chapter 2, I will provide an overview of legislation regarding the Indigenous peoples of Peru. I will also outline the common representations of Indigenous people in Peru upheld by mainstream society, as well as how these are embedded in many Peruvian laws of the 19th and the 20th century, and how some of these representations are still alive in the collective imagination of Peruvian society. In Chapter 3, I will look at the basic legislation associated with the right to consultation and the jurisprudence of Peru's Constitutional Tribunal, focusing on its tendencies and successes, and on criticisms directed at the Tribunal. There is a clear instability in the Tribunal's jurisprudence regarding the right to consultation, in part because of Congress' omission of the regulation, as well the executive power's omission of Convention 169. In Chapter 4, I will concentrate on aspects associated with Indigenous self-determination and how this is connected with the right to consultation. I will examine how both rights interrelate, and how a weak conception of self-determination undermines a strong conception of the right to consultation. In the final chapter, I will explain in greater detail the relationship between the Indigenous right to consultation and Indigenous self-determination.

Chapter 2: Setting the Historical and Social Context

In her article about “Creole nationalism” (*nacionalismo criollo*) in Peru, Peruvian historian Cecilia Méndez cites Christopher Hill’s phrase: “nothing ever wholly dies”.⁴⁸ Méndez explores the origins and main features of *creole nationalism* in the context of the first four decades of the Peruvian Republic (1821-1860). She highlights the contrasting racism of the political elite against Indigenous populations with their appropriation of Indigenous symbols. In the end of the article, Méndez asks: “which elements have died, and which survive, among that ensemble of ideas, fears, prejudice, discourses, rhetoric, sensibilities and satirical gestures that we have recovered from history in these brief pages in the nowadays Peru?”⁴⁹

This question helps to contextualize the objective of this chapter, which is to highlight the important episodes in Peruvian history that still echo in political relations between the state and the Indigenous peoples of Peru. In order to accomplish this objective some legal norms that regulate the relationship between the state and Indigenous peoples will be reviewed. To do this, I will also highlight some tendencies of how Indigenous peoples have been represented by mainstream Peruvian society, and also by the state legislation. Due to the extensiveness of this topic I will only refer to the most relevant body of legislation in the Republic period, with mention of relevant events in the Peruvian Vice-Kingdom (1542-1824) period, as appropriate.

The overview provided here will contextualize the Peruvian Constitutional Tribunal’s decisions that are going to be analyzed in the subsequent chapter. In this current chapter I will outline the key developments necessary to understand the issues of Indigenous exclusion from a historical perspective. These will include the policy of separation between Indians and Spaniards during the Vice-Kingdom of Peru and its crisis, the collapse of this policy under the liberal dreams of the Republic and its reinstatement, the first republican *indigenismo* movement in the 20th century, the

⁴⁸ Cecilia Méndez, “Incas Si, Indios No: Notes on Peruvian Creole Nationalism and Its Contemporary Crisis” (1996) 28:1 *Journal of Latin American Studies*, at 203 [Méndez, “Incas Si”].

⁴⁹ *Ibid* at 225.

constitutional recognition of the Indigenous community in 1920 and its consolidation in the last decades of the 20th century.

2.1. - Notions and Representations of Indigenous Peoples in the Peruvian Context

Before exploring some of the important episodes of the Peruvian history, it is important to point out some of the notions that have been used to portray Indigenous peoples. Many of the notions used by European governments and settlers convey a clear legacy of racist ideologies that materialized prejudices against Indigenous peoples since the time of first contact. The Canadian scholar Marlee Kline has developed the first framework I will use to illustrate the different representations of Indigenous peoples.⁵⁰ Although Kline illustrates the different representations of the Indigenous peoples of Canada, these can be also applicable to a certain extent to the Peruvian context. After all, such notions have a common root in racial and cultural prejudice. Kline refers to three different ideologies: the “devaluative ideology of Indianness,” the “ideology of homogenous Indianness,” and the “static Indianness.” The devaluative notion constructs an image of Indigenous peoples not only as different, but also as inferior because of their lack of European heritage. The ideology of homogenous Indianness represents Indigenous peoples as a “unity across culture variations,” without consideration of the diversity within Indigenous peoples. The third conception represents Indigenous peoples as members of a static culture across time: “real Indians” depicted as “those who live as they did before or during the early period of European contact.”⁵¹

The other framework I will use is the classification system employed by Rodriguez-Piñera, which differentiates two international legal notions of Indigenous peoples: the *classic* as well as the *modern* conceptions of Indigenous peoples.⁵² The classic notion of the Indigenous refers to a period in the “scale of human lineal evolution towards ‘civilization’ where “Indigenous meant ‘primitive’.” In contrast, the modern concept of “Indigenous peoples” refers to “culturally distinct groups living within the

⁵⁰ Marlee Kline, “The Colour of Law: Ideological Representations of First Nations in Legal Discourse.” (1994) 3:4 Soc & Leg Stud at 451-476.

⁵¹ *Ibid* at 455.

⁵² Luis Rodriguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: the ILO Regime, 1919-1989* (New York: Oxford University Press, 2005) at 39.

borders of independent states that are descendant of the peoples that inhabited the region prior to colonization and the subsequent establishment of postcolonial states.”⁵³

Using a more common framework, Indigenous peoples have been also portrayed as savages needing to be redeemed through Christianity. This was a common approach used by the Spanish Crown, especially during the first years of encounter and during the colonial regime. This representation has been brought up to date, and is currently used in social dynamics, where we can see today how some people refer to Indigenous peoples as “savages opposed to progress.”⁵⁴ The Peruvian anthropologist Espinosa de Rivera points out how this “savages opposed to progress” rhetoric was used by a certain sector of public opinion and the executive branch, especially during the social conflicts of 2009.⁵⁵ According to Espinosa de Rivera this tendency is built up by two contradictory representations of Indigenous peoples: seeing them as violent savages or as traditional warriors inclined towards violent confrontations, while being, at the same time, ignorant individuals and therefore easy to manipulate.

All these trends are then mixed with the traditional division of the Indigenous of the Andes and the Indigenous of the Amazonia. As it will be shown, since the time of the Peruvian Vice-Kingdom there have been different approaches to these two groups, with the latter considered to be less advanced and less “civilized” than the Indigenous peoples of the Andes where the Inca Empire emerged. This differentiation has been reinforced in the 20th century, supported by the belief that Andean Indigenous people have been already “civilized” through the educational system. Furthermore, as a result of their proximity to the “civilized” and “white” coast, Indigenous communities from the Andes are now considered “de-Indianized”. What is more, some members of the Indigenous communities of the Andes refer to themselves as ex-Indigenous, meaning that they are

⁵³ *Ibid* at 39.

⁵⁴ Oscar Espinosa de Rivero, “¿Salvajes Opuestos al Progreso?: Aproximaciones Históricas y Antropológicas a las Movilizaciones Indígenas en la Amazonía” (2009) 27:27 *Anthropologica* 123. The rhetoric of Indigenous peoples as “savages opposed to progress” was used in the context of the Peruvian state dramatically increasing access to areas for oil and mining exploitations, a policy that would affect Indigenous territories. When the Indigenous peoples from the Amazonia protested against that policy, the executive power claimed that the Indigenous groups were against investment and therefore against progress.

⁵⁵ *Ibid*.

already “educated” and “civilized.”⁵⁶ Thus, at a basic level, the urban population of Peru has often understood intuitively that Indigenous Peoples are those who live in the Amazonia and not those who live in the Andes, although this conception is changing. The underpinning of such an argument is that, the closer Indigenous peoples are to the “civilized” coast, the less “Indian” Indigenous communities become. Such beliefs are actually a consequence of the aforementioned classical notion of Indigenous peoples that defines indigeneity according to how “civilized” a social group is. Thus, the rhetoric of de-indianization is also part of the racist profile of the Peruvian dominant society, which has often been camouflaged under the mixed-blooded discourse (*mestizaje*). In effect, since the 19th century many states in Latin America, including Peru, were immersed in the construction of the nation-state. The *mestizaje* discourse helped to implement this project because, according to this discourse, there was no place for pure “races.” Latin American societies were basically *mestizo*; therefore, there were no Indigenous cultures that could vindicate Indigenous rights. From this perspective, Indigenous cultures are already mixed with western cultures and therefore there are no actual Indigenous peoples in Peru.

Despite such notions, one can also find a concept of racialized geography that portrays the Peruvian Indigenous peoples as natural inhabitants of the Andean highlands (*sierra*) of Peru, where the “process of civilization” has not yet been completed. The other side of this racialized geography would be the “white” and “civilized” coast. Orlove⁵⁷ and Méndez⁵⁸ explore this idea and conclude that in Peru, the Indigenous peoples are seen as natural inhabitants of the *sierra*, and therefore, a *serrano* is an Indigenous person. Therefore, there is in one hand a discourse that portrays Indigenous peoples as semi-Indigenous or even as ex-Indigenous peoples (de-indianization), and on the other hand a discourse that understands inhabitants of the *sierra* are Indigenous peoples. This tension expresses the fluidity in the conception of Indigenous peoples in

⁵⁶ See María Elena García, *Desafíos de la Interculturalidad: Educación, Desarrollo e Identidades Indígenas en el Perú* (Lima: Instituto de Estudios Peruanos, 2008) at 201-237.

⁵⁷ Benjamin Orlove, “Putting Race in Its Place: Order in Colonial and Postcolonial Peruvian Geography.” (1993) 60:2 *Social Research* 301.

⁵⁸ Cecilia Méndez “De Indio a Serrano: Nociones de Raza y Geografía en el Perú” (2011) 35:1 *Historica* at 53 [Méndez, “De Indio a Serrano”].

Peru by the elites. This contradiction could be explained as the idea that Indigenous people are only Indigenous when someone wants to oppress or obscure their presence whereas in contrast, when real legal titles and rights are at stake, Indigenous peoples are not considered Indigenous. All of these different trends have merged and can be found in almost all of the historical episodes presented here. They are also found in present day Peruvian debates about Indigenous rights and their implementation, specifically regarding the right to consultation.

2.2. - The Two Republics in the Peruvian Vice-Kingdom

The destructuring of native societies in the Americas by the European powers entailed demographic disaster⁵⁹ and territorial reorganization; It also entailed military subjugation as well as a new organization of the complex relationships existing before the arrival of the Spaniards.⁶⁰ In the 16th century, in order to organize the new territories, the Spanish Crown created the division of the “*República de indios*” and “*República de españoles*,” in other words, the colonial order of the “Indian Republic” and the “Spanish Republic.”⁶¹ Indeed, right after the creation of the Peruvian Vice-Kingdom (1542-1824), and in order to keep the division between Spaniards and the so-called “Indians,” the Spanish Crown established this division. These two “republics” were under the control of the Vice-Kingdom, and no supremacy or dominion had to exist between them.⁶²

⁵⁹ Magnus Mörner, *Race Mixture in the History of Latin America* (Boston: Little, Brown & Company, 1967) at 31.

⁶⁰ See María Isabel Remy, “The Indigenous Population and the Construction of Democracy in Peru” in Donna Lee Van Cott, ed, *Indigenous Peoples and Democracy in Latin America* (New York: St. Martin’s Press, 1995) 107. In the Peruvian Vice-Kingdom after the first 30 years of colonial anarchism -where the settlers even murdered a Vice-King- the Spanish crown decided to implement important reforms. Vice-King Toledo (reign 1569-1581), implemented highly important reforms that directly impacted the Indigenous communities. One of the most important reforms was the intensification of the *reducciones*, a policy that resettled Indigenous communities into towns. The Peruvian historian Remy explains that: “The pattern of organization defined a set of families as a *pueblo de reducción* (*ayllu* or *parcialidad*), a community that collectively held a continuous space delimited by borders (a novelty introduced by the Spaniards that fragmented the large *ayllus* and brought an end to the forms of discontinuity and “interdigitation” that characterized the management of their lands) with lands that sufficed to support each family and to meet their obligation to the authorities” at 110.

⁶¹ See Abelardo Levaggi, “República de Indios y República de Españoles en los Reinos de Indias” (2001) 23 *Revista de Estudios Histórico-Jurídicos* 419. As this author explains the conception of republic used by the Spaniards in those times was a platonic one. A republic was a political society endowed with sufficient means to self-governance.

⁶² Luis Miguel Glave, “The ‘Republic of Indians’ in Revolt (c. 1680–1790)” in Frank Salomon and Stuart B. Schwartz, eds, *Cambridge History of the Native Peoples of the Americas* Vol, 3 (Cambridge, UK:

Although one of the objectives of this dual policy was to protect Indigenous people from abuse by Spanish settlers, such a policy also brought different effects. The Spanish crown established different privileges and obligations for each of these republics.⁶³ Although recognized as native vassals, Indigenous peoples had some level of self-governance in their own communities according to their customs. They were obliged to pay tribute and perform forced work for the Crown (*mita*), but were exempt from military service and the inquisition.⁶⁴ The *Caciques* or *Kurakas*, who were Indigenous nobles that exercised an ethnic leadership, were in charge of collecting the taxes. Nevertheless, regardless of the efforts of the crown to keep a division between these “republics,” there was a large degree of interethnic sexual relations, concubinage, intermarriage, and polygyny. Such relations gave rise to a new ethnic group, the *mestizos* (mixed blooded), perceived as a group that had contradictory loyalties, therefore an ambiguous status. *Mestizos* were considered by the Spaniards with disdain, but also as the offspring of two great civilizations inheriting the best attributes of both groups.

Some historians assert that although Indigenous people were governed by their own *Kurakas*, they were ruled by Spaniards,⁶⁵ and that the “Indian republic” did not significantly help the Indigenous populations. This dual system was a colonial project with one of its main objectives being to ease the collection of taxes. The collection of taxes created a dynamic between the colonial state and the Indigenous population. In exchange for the Indian tribute and the *mita*, the Indigenous communities benefited from self-government and protection from the Crown. In short, the Indigenous tribute created a

Cambridge University Press, 1999) at 502. The author indicates that the “republic of Indians”, was not an “Inka residue but a specifically colonial order.”

⁶³ See Mörner *supra* note 59 at 41. The author explains: “The Indians were to be free vassals and subjects of the Crown, and their caciques were granted the rank of hidalgos. But theoretically the mass of Indians were put on equal footing with the inferior stratum of Spanish society, that of “miserable rustic”. [...] “The Indians were to be governed by authorities of their own and ruled, partly, in accordance with their ancient customs, but they were specially supervised and their liberty of movement was restricted. They had to pay tribute to the king or to the encomendero and they also had to perform forced labor (*mita*, *cuatequil*). On the other hand, they were exempted from tithes (*diezmos*) and sales tax (*alcabala*). They were also exempt from military service but were not allowed to use firearms, swords or to ride on horseback. As “minors” they enjoyed special legal protection and were exempted from the jurisdiction of the Inquisition. On the same grounds they were not capable of concluding legal contracts, nor were they allowed to purchase wine”, at 41.

⁶⁴ Although they were not subject to inquisition, they received a much more rude treatment in the *expulsion of idolatries*.

⁶⁵ Glave, *supra* note 62 at 504.

bond between the colonial state and the Indigenous peoples, where the payment of taxes created some obligations on the Spanish Crown. Such a relationship is called the “colonial pact” or the “tributary pact” because it captures the dynamic created between a certain amount of autonomy and protection for Indigenous peoples by the crown in exchange for the payment of taxes. This situation assured that, at least to some degree, the Indigenous nobility were respected and recognized among Spaniards.

2.3. - Nourishing the Fear and Disdain of Indigenous Peoples; The Indigenous Uprising of the 18th Century

The Indigenous uprising in 1742 was the starting point of what Thurner calls the age of “Andean insurrection” (1742-1780).⁶⁶ These specific uprisings are considered the manifestation of “Inca nationalism” or the origin of the “Andean Utopia.” The uprising meant an ethnic restoration of the Inca culture, which certainly threatened the “Spanish Republic” on the basis of ethnic values. Juan Santos Atahualpa (1742-1750) and Tupac Amaru II (1780) led the most important rebellions, claiming to be the new Inca. Although these uprisings were crushed at the end of the 18th century, they left a permanent fear among the Spaniards and creoles governing the Vice-Kingdom. Méndez emphasizes that the Tupac Amaru II uprising was a “traumatic incident” that left the Creoles with a profound sense of “fear and distrust of the Indigenous population,” and intensified “the cultural abyss and nourish[ed] fantasies of horror.”⁶⁷

Fearing a new uprising, the Crown decided to eliminate every sign of Indigenous identity in things such as clothing, jewellery, paintings, books and the performance of Inca plays. In Cusco, schooling was not allowed for children of the Indigenous elite, and as Glave points out, “non-Andean Peru developed a near phobia about the educating of Indians, lest it again breed Indigenous nationalism.”⁶⁸ On the other side, the administrative reforms implemented in the Vice-Kingdom, imposed by the Bourbon dynasty, introduced an important tax reform that debilitated the ethnic authority of the

⁶⁶ Mark Thurner, *From Two Republics to One Divided: Contradictions of Postcolonial Nationmaking in Andean Peru* (Durham, NC: Duke University Press, 1997), at 138. Although, it is important to take into account that there were many more uprisings, the most important were led by Juan Santos Atahualpa (1742-1750) and by Tupac Amaru II (1780). In both cases, the leaders of the uprisings claimed to be the new Inca.

⁶⁷ Méndez, “Incas Sí” *supra* note 48 at 220.

⁶⁸ Glave, *supra* note 62 at 554.

Caciques. All these acts started the complex and gradual erosion of the “colonial pact” and, ultimately, the autonomy of Indigenous communities.⁶⁹ Indeed, Glave affirms that those reforms started the depoliticization of Indigenous roles and the end of the “illusory republic of Indians.”⁷⁰

As the native nobility initiated its own decline, the differentiation between aboriginal nobility and the masses began to be unclear. Without any differentiation, the Spaniards began to generalize a derogatory perception of all Indians. The fear of a new Indigenous uprising and the disdain for Indians grew together in the proto-independence period. Along with these trends, another influential tendency was established: the appropriation of Indigenous symbolism by the Creole or mestizo elite. In the last decades of the 18th century, the once contrasting images of the idyllic Inca Empire and the image of the Indigenous peoples as ignorant, lazy, superstitious, drunk and litigious, were consolidated.⁷¹

2.4. - The New Republic and the Indian Tax: Implementing the Liberal Project

The fear of an Indian insurrection was present in the Peruvian revolution of independence (1821-1824). The creoles and *mestizos*, who led the revolution of independence, were also worried about Indigenous mobilizations that could threaten their own leading position. In this sense the creoles had to compete with the Indians for the legitimacy of an independence movement, and for the status that each of these groups would have in the new republican regime.⁷² Thurner calls this situation the *postcolonial creole predicament* as the creoles found themselves in the difficult situation of trying to gain independence without unleashing an Indigenous or African slave uprising.⁷³

⁶⁹ See Nuria Sala i Vila, *Y se Armó el Tole Tole: Tributo Indígena y Movimientos Sociales en el Virreinato del Perú, 1790-1814* (Ayacucho: Instituto de Estudios Regionales José María Arguedas, 1996) at 66-76.

⁷⁰ Glave, *supra* note 62 at 552 and 554.

⁷¹ Claudia Rosas Lauro, “La Reivindicación de la Memoria. Los Incas en los Periódicos de Lima y Cusco de la Colonia a la República” in Luis Millones ed, *Ensayos de Historia Andina* (Lima: Fondo Editorial de la Facultad de Ciencias Sociales de la Universidad Nacional Mayor de San Marcos, 2005) 119 at 141.

⁷² Méndez, “Incas Sí” *supra* note 48 at 221.

⁷³ Thurner *supra* note 66 at 138. See also Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. ed. (London: Verso, 2006). The author points out that this creole fear was generalized in South America, and even expressed by Simón Bolívar, the liberator of the northern states of South America and Peru. Once Bolívar affirmed that “a Negro revolt was ‘a thousand times worse than Spanish invasion’” at 49.

The independence movement of Peru had two stages led by two non-Peruvians. The first stage was led by José de San Martín, an Argentinean General who declared independence after the defeat of the Spanish forces in the northern and central coast of Peru, including Lima.⁷⁴ A second stage was led by Simón Bolívar, born in Caracas, who expelled the remaining Spanish troops stationed in the south and central Andes, forcing the Crown to capitulate (1824). Although they had different political projects for Peru, both shared a liberal enlightening ideology. The emancipatory liberal policies greatly impacted the Indigenous population. For example, in the first years of the Republic, San Martín abolished the Indian tribute and Indian forced work. Further, in an attempt to implement liberal and egalitarian ideas, San Martín decreed in August 1821, that “aborigines shall not be called Indians or natives; they are children and citizens of Peru and they shall be known as Peruvians.”⁷⁵ These measures removed the cornerstone of the relationship between the state and the Indigenous communities, affecting the already weak tributary pact; for if there was no Indigenous tribute, there was no obligation by the state to maintain the Indigenous communities’ old colonial privileges.⁷⁶

After San Martín left Peru in 1822, the Peruvian Congress suspended the *Peruvian Constitution of 1823*, and conferred Bolívar absolute power in order to fight the Spanish troops who had retreated to the central Andes of Peru. The Spanish crown capitulated in 1824, and Bolívar started the implementation of a plan for the government of Peru. Bolívar’s project was to transform the Peruvian rural world by generating individual owners in the Andes. For that reason, he promoted free land transaction and decreed the distribution of communal lands among the Indians who owned no land. On July 4, 1825, invoking the principle of equality, he abolished the privileges of any kind of

⁷⁴ On July 28th, 1821, San Martín proclaimed the independence of Peru saying the memorable phrase: “From this moment on, Peru is free and independent, by the general will of the people and the justice of its cause that God defends.”

⁷⁵ Anderson *supra* note 73, at 50. The decree also meant that “the aborigines remained steeped into the moral degradation in which the Spanish government had reduced them, continuing paying the outrageous exaction with the name of tax imposed by the tyranny as a sign of greatness.” Román Mendoza Robles, *Legislación Peruana sobre Comunidades Campesinas* (Lima: Universidad Nacional Mayor de San Marcos, 2002) at 36.y

⁷⁶ Heraclio Bonilla, *Estado y Tributo Campesino: La experiencia de Ayacucho* (Lima: Instituto de Estudios Peruanos, Documento de Trabajo No. 30, 1989) at 9. The author affirms that the abolition of the Indigenous tribute did not have any real significance, because by 1821, the country was still occupied (in the south highlands) by the Spanish army.

nobility and decreed that the land of the *Caciques* should be distributed among the Indigenous population. In the next year, the government established a twenty-five year prohibition on Indigenous people selling these lands. With this measure the government wanted to stop the abuses related to land distribution since the provincial Creole and *mestizo* elites were taking advantage of Indigenous peoples by acquiring Indigenous lands at a very low cost and even in a fraudulent manner. At the same time, a new Indigenous tax was imposed, although this time it was called “Indigenous contribution.” According to Jacobsen, this set of policies implied reconverting Indigenous peoples, considered Peruvians by San Martín’s decree, “back into an ethnically defined corporate group, requiring special protection.”⁷⁷

Jacobsen explains this ambiguity between extending individual property as part of an egalitarian project, and enforcing an Indigenous tax for purely fiscal-utilitarian reasons. Indeed, in the 1840s, the Peruvian Minister of Finance explained to Congress that the reduction of the Indian land (either by sales or through the abuses of the Creole large landowner), would cause a decline in the income of the Public Treasury.⁷⁸ The liberal project had to yield to the financial needs of the nascent state. For this reason, several attempts were made to limit the disposal of lands of illiterate Indians. Such a situation explains why Jacobsen concludes that Indigenous communities until 1850 did not lose a significant amount of land to the new regional elites.

2.5. - Mid-Century Liberalism and the Post-Abolition Tax Period

The situation described in the previous section started changing in the mid-1850s. The important incomes coming from the boom of guano exportation (1854-1879) enabled the abrogation of the Indigenous contribution in 1854,⁷⁹ and initiated what Jacobsen calls

⁷⁷ Nils Jacobsen, “Liberalism and Indian Communities in Peru, 1821-1920” in Robert H. Jackson, ed, *Liberals, the Church, and Indian Peasants: Corporate Lands and the Challenge of Reform in Nineteenth-Century Spanish America* (Albuquerque, NM: University of New Mexico Press, 1997) 123 at 131.

⁷⁸ In 1840 the Peruvian minister of finance expressed: “When granted the freedom to alienate their lands, the ownership rights will pass to non-indian sectors; the Indians will become simply rural workers. And not being able to assess them at the current rate, there will be a decline in income for the Public Treasury.” Cited by Richard Chase Smith, “Liberal Ideology and Indigenous Communities in Post-Independence Peru” (1982) 36:1 *Journal of International Affairs* 73 at 79.

⁷⁹ However, the Indigenous contribution was restored and repealed many times for short periods in the 19th century.

a period of “Liberalism unbound and the invisible community.”⁸⁰ In 1852, the first Civil Code was issued in Peru, however, the Code kept absolutely silent about Indigenous communities and any reference to Indigenous communities was obliterated. The formalistic and individualistic approach of the civil code triggered a debate regarding whether Indigenous peoples could be considered landowners and, ultimately, citizens of the new republic. Indeed, since individual property was closely tied to the notion of citizenship at those times, the collective property of Indigenous communities was an ambiguous creature that did not fit in the liberal project,⁸¹ since the elites’ concern relied on the Indigenous individual citizen more than the Indigenous community.⁸² The problem, as seen by the creole elites, was to integrate the Indigenous peoples -the others- into the nation and ultimately into modernity.

As a result of the implementation of the liberal project, which included the abolition of Indigenous contribution and the liberalizations of the land market, the creoles or *mestizos* landowners (*ganamonales* or *latifundistas*) proceeded to directly take the Indigenous community lands. The seizure of Indigenous lands was especially intense in the highland provinces, where the national government exhibited its incapacity to control the local oligarchies. Thus, the traditional link between the Peruvian state and the Indigenous communities was broken and, as a result, the local oligarchies reinforced their control over those communities. In sum, as Larson indicates, “The mid-century liberal vanguard was torn between free-trade ideologies and authoritarian impulses, between assimilative programs and segregationist projects, and between economic optimism and racial anxiety.”⁸³ For Jacobsen, the impact of liberalism in the 19th century on the Indigenous community contained different layers: Some Indigenous were assimilated, as happened in the northern coast, while other Indigenous peoples were subject to genocidal attacks, as with the Indigenous people of the Amazonia.⁸⁴

⁸⁰ Jacobsen, *supra* note 77 at 139.

⁸¹ *Ibid* at 140.

⁸² *Ibid* at 144.

⁸³ Brooke Larson, *Trials of Nation Making: Liberalism, Race, and Ethnicity in the Andes, 1810-1910* (Cambridge: Cambridge University Press, 2004) at 152.

⁸⁴ *Ibid* at 155.

The war against Chile (1879-1883) was a traumatic episode in Peruvian history. It meant a humiliating defeat and loss of territories in the south, as well as the invasion and looting of the country. In 1881 Chilean troops occupied Lima, creating (or increasing) the fragmentation of political power. The oppressed groups (Indigenous peoples, Afro-Peruvians, and Chinese workers) began to rebel and, as a result, the landowners and the privileged classes started to view Chilean authority as a way to maintain their positions against the rebellious groups.⁸⁵ After the official Peruvian army was defeated, only Marshal Andres Avelino Cáseres, with the support of guerrillas of peasants (*montoneros*), led a stubborn resistance in the central and southern highlands, inflicting some damage to the Chilean army. The action of the *montoneros* targeted the Chilean army and punished the collaborators of the invading army. However, they also targeted the oligarch landowners, “their most direct and oldest oppressors.”⁸⁶ As a result, after the war, instead of being seen as national heroes, the *montoneros* were portrayed as barbarians.

The elite of the capital city of Peru, Lima, conducted this period of “unbound liberalism” that was the origin of geo-racial feelings that portrayed the coast as white, urban and modern in contrast to the highlands that were from then on seen as Indigenous, rural, difficult and backwards.⁸⁷ Also common in those years was the persistent stereotype of the Indigenous peoples as naturally lazy--a degraded image of the “glorious” inhabitants of the Inca empire. During this liberal era, the problem of the Indigenous was framed in terms of the Indigenous as an individual. This meant that between 1850-1870, the situation of the Indigenous communities was no longer discussed in the social mainstream debate. It was only after the Peruvian-Chilean war that some voices began to shed light on the situations of Indigenous communities; however, this was always from an urban and paternalistic perspective.

2.6. - The Indigenous Movement and “Official *Indigenismo*”

In the last decades of the 19th century, the Indigenous peoples’ situation caught the attention of some creole and *mestizo* intellectuals. This was the beginning of the indigenist movement (*movimiento indigenista*). Carlos Ramos, a contemporary Peruvian

⁸⁵ Bonilla, *supra* note 76 at 65

⁸⁶ *Ibid* at 65.

⁸⁷ Orlove, *supra* note 57.

legal historian, schematizes this process as follows: The first phase of this movement was interested in the rediscovery of the aboriginal world (1885-1900). A second stage, called “sociological indigenism,” focused on social criticism, advocating in favour of Indigenous causes (1900-1919). Finally, an official indigenism, established from above through the state apparatus, issued several regulations officially recognizing Indigenous communities (1920-1930).⁸⁸

In August 1867, the Indians’ Friends Society (*Sociedad Amiga de los Indios*), the first Peruvian pro-Indian movement, was founded. The Society strived for the vindication of the Indigenous peoples. However, this being said, the Society was not necessarily concerned about the Indigenous community, but rather, seeing the Indigenous as an individual citizen.⁸⁹ In order to protect the Indigenous peoples, the Society proposed methods based on the assimilation of Indigenous peoples, with emphasis on teaching the Indigenous peoples Spanish, improving their hygiene, and sending Indigenous children to school. Such an assimilative transformation, nevertheless, had to be achieved by exhorting the Indigenous peoples to a “voluntary liberalism”.⁹⁰ Initiatives like the Indians’ Friends Society were a product of mainstream society’s perception of the Indigenous person as “originally vigorous and intelligent,” but currently “dim-witted, lazy [and] brut[ish]”⁹¹—a misconception that remained in an important sector of mainstream Peruvian society.

In 1905 the *Asociación Pro-Indígena* was founded, and was part of the indigenism movement led by progressive mestizos and creoles in the early decades of the 20th century. Mostly led by Spanish-speaking, urban middle-class intellectuals, these individuals started to advocate in favour of Indigenous peoples through the newspapers. The movement was animated by an “urban vision of the Andes” where paternalistic, exoticized and homogenized views of the Indigenous converged.⁹² The movement

⁸⁸ Carlos Augusto Ramos Núñez, *Historia del Derecho Civil Peruano: Siglos XIX y XX. Los Signos del Cambio. Las Instituciones*, vol 5:2 (Lima: Fondo Editorial de la Pontificia Universidad Católica del Perú, 2006) at 213.

⁸⁹ Jacobsen, *supra* note 77 at 144.

⁹⁰ *Ibid* at 145.

⁹¹ *Ibid*.

⁹² Carlos Iván Degregori and Pablo Sandoval, “Peru: From Otherness to a Shared Diversity” in Deborah Poole, ed, *A Companion to Latin American Anthropology* (Malden, MA: Blackwell, 2008) 150 at 154.

emerged as a reaction against the expansion of the *latifundios* in the Andes, the romantic, historic reconstruction of the glorious past of the Inca Empire, and its automatic association with the Indigenous peoples of the contemporary moment. The movement was also influenced by the impulse of progressive ideologies like anarchism, Marxism, socialism, as well as the repercussions of the Historic School of Law (which extolled the past and customs of the nations), and the previous and successive government proclamations (genuine or demagogic) in favour of Indigenous people.⁹³

The *Peruvian Constitution of 1920* recognized for the first time the legal existence of the Indigenous community. Ostensible, the intention behind the constitutional recognition of Indigenous communities was to protect the populations from the despoliation of their lands. Since 1925, a policy of recognition and registration of Indigenous communities was implemented. The *Patronato de la Raza Indígena* (1922) and the Ministry of Labour and Indigenous Matters (1921) were created.⁹⁴ However, these measures did not substantially modify the situation of Indigenous peoples. Instead, they had the real objective of mitigating Indigenous discontent in the south Andes.⁹⁵

This official approach to the “*problema indígena*” resided in how to assimilate Indigenous people into mainstream society, and ultimately, into the liberal project. Thus, despite this constitutional recognition and implementation of certain policies in favour of Indigenous people, they were still portrayed as persons unable to stand up for themselves. For example, the president of the commission in charge of creating a new constitution affirmed in 1931 that illiterate people should not vote. He further clarified that by illiterate, he was referring to Indigenous people as they did not know how to vote and therefore should not be allowed.⁹⁶ Furthermore, the Criminal Code of 1924 identified Indigenous people as “uncivilized” (Amazonian Indigenous peoples) or “semi-civilized”

⁹³ Ramos Núñez, *supra* note 88 at 208-209.

⁹⁴ Francois Chevalier, “Official *Indigenismo* in Peru in 1920: Origins, Significance, and Socioeconomic Scope” in Magnus Mörner ed, *Race and Class in Latin America* (New York: Columbia University Press, 1970) 184 at 193.

⁹⁵ Peter F. Klarén, “The Origins of Modern Peru, 1880–1930” in Leslie Bethel, ed, *The Cambridge History of Latin America*, vol. 5 (Cambridge: Cambridge University Press, 1989) 587 at 633; See also Deborah J. Yashar, *Contesting Citizenship in Latin America: The Rise of Indigenous Movements and the Postliberal Challenge* (Cambridge: Cambridge University Press, 2005) at 228-229.

⁹⁶ Manuel Vicente Villarán, *Anteproyecto de Constitución de 1931. Exposición de Motivos y Texto* (Lima: np, 1962).

(highland Indigenous peoples); reinforcing the paternalistic notion that the Indigenous could not take care of themselves.

The *Peruvian Constitution of 1933* also included special clauses to protect Indigenous peoples. Interestingly, the Constitution extended this protection by stating that Indigenous communities' lands rights were indefeasible and imprescriptible (article 209).⁹⁷ Even though the constitutional reforms encompassed protection for Indigenous communities, especially their land ownership, the dominant power of the oligarchic elite in Peru continued to control large areas of land in the highlands as well as the coast.

The educational laws of those times also clearly show the state's project regarding Indigenous peoples. The *Organic Law of Public Education of 1941* referred to schools outside the city as "rural schools," where the use of Indigenous dialects was predominant. Article 122 provided that the chief aim of these schools was the "learning of the Spanish language and the habits of civilized life," and article 123 goes on to indicate that nonetheless, "Indigenous dialects may be used as a means to initiation into a cultured world". Thus, reference is made in the Act to a prompt "hispanization of the aborigines." The Act also mentioned the incorporation of Indigenous people into the mainstream culture by means of the rural schools, and also by means of land allocation and road building. Article 130 also established that the Indigenous peoples from the Eastern rainforest would be "incorporated to civilization" by means of travelling schools and boarding schools preferably led by catholic missionaries. Adult education where the Indigenous dialect was predominant was to be conducted by "culturization brigades."

2.7. - The Indigenous Peoples of Amazonia (Foothills and Lowlands)

Up to this point, many of the references regarding Indigenous peoples have been focused on Indigenous peoples from the Andes. This is in part because the population of Andean Indigenous peoples was traditionally bigger than the population of Indigenous peoples from Amazonia, and also because there has been more contact between the Indigenous peoples of the Andes with the Peruvian state. In contrast, due to geographic distance from Lima, contact with the Indigenous peoples from Amazonia was far less frequent, and they were therefore considered in a lower stage of evolution than the

⁹⁷ Furthermore, Department Councils were empowered to register Indigenous communities in their records, and with that recognize their juridical presence (article 193 and 207).

Indigenous peoples from the Andes. The situation of these groups was also quite different regarding their distinct colonial experience. The rainforest aboriginals' fierce defence, as well as the difficulty of the landscape there, generated caution in the Peruvian Vice-Kingdom, which had little or no access to those areas. The Ashaninkas (also dubbed Campas) were one of the groups of the Amazonia that resisted religious missions, and thus resisted aculturization. Nevertheless, during the 17th and 18th centuries, it is reckoned that depopulation as high as fifty-five percent of Indigenous, due to epidemics, was reached in the Amazonian area. This being said, after the war of independence (1821-1824), which left the Peruvian State bankrupt and therefore unable to carry out the rainforest colonization projects, the decimated Indigenous populations began to grow back as well as regain some of the lands lost during the times of the colony.

Then in 1850 the discovery of rubber also altered the Indigenous repopulation. The rubber boom (1875-1920) started a new means of penetrating in the rainforest: it was no longer an evangelization mission or a military-led quest; this time it all came down to powerful economic interests.⁹⁸ For Hill these:

“[...] new political and economic forces provided the material grounding for ideologies of progress and increasingly dehumanized objectification of indigenous peoples as animal-like beings whose destiny was to be assimilation, relocation or death”⁹⁹ (sic). [...] “The rubber boom brought an extremist ideology of cultural domination in which indigenous peoples were stereotyped as wild, cannibalistic savages even as they suffered from the most brutal forms of physical coercion, torture, and genocide.”¹⁰⁰

This penetration into the Indigenous lands of the Amazonia gave birth to what Hill called the “American holocaust:” thousands of Indigenous individuals were enslaved or slaughtered. Despite this holocaust, as with many other Indigenous groups in the face of genocide, Peruvian Indigenous communities continued to resist and managed to continue to live out their own distinct cultural patterns as much as possible.

The different experiences of these two groups of Indigenous peoples determined their current situations and political agendas. Thus, an important contrast between the

⁹⁸ Jonathan D. Hill, “Indigenous Peoples and the Rise of Independent Nation-States in Lowland South America” in Frank Salomon and Stuart B. Schwartz, eds, *The Cambridge History of the Native Peoples of the Americas - Volume 3: South America* (Cambridge: Cambridge University Press, 1999) 704 at 739.

⁹⁹ *Ibid* at 744.

¹⁰⁰ *Ibid* at 747.

Indigenous peoples of the Amazon and the Indigenous peoples of the Andes is that even today Indigenous communities of Amazonia have managed to retain the ethnic distinctiveness of their individual communities, while the Indigenous peoples of the Andes have not. Thus, in Amazonia one can find at least 16 linguistic families that are sub-divided into different ethnic groups like: *Ashuar*, *Ashaninkas*, *Nomatiguenga*, *Harakmbut*, and *Huitoto* to name a few. In contrast, in the Andes, there are only two main linguistic families surviving: the *Quechua* and the *Aymara*. Therefore, with no subdivisions among the linguistic families, *Quechua* and *Aymara* communities are seen to be more homogenized.

Another distinction between Andean and Amazonian Indigenous peoples has to do with their demands for education. For the Indigenous peoples of Amazonia, bilingual or intercultural education is important because it helps these communities to preserve their culture. In contrast, the Indigenous communities of the Andes have never demanded this kind of education and as a matter of fact, they reject the teaching of *Quechua* in their schools.¹⁰¹

2.8. - The Revolutionary Government of the Armed Forces (1969-1980)

The discriminatory tendencies of the dominant society toward Indigenous communities present in the law and social perspectives continued into the 1940s and 1950s. But with the military government of the 1960s and 1970s, some perspectives began to shift. On October 3, 1968, the Peruvian army overthrew the democratic government of President Belaunde Terry (1963-1968), sending him into exile and taking control of the state. Different factors led to this radical action, but suffice it to say that the military accused the government of not carrying out the social reforms the country needed. As such, General Velasco Alvarado (1968-1975) led the *coup d'état* and controlled the government for seven years. The so-called Revolutionary Government of the Armed Forces (RGAF) began several deep structural policies, for example, land reform and expropriation of the mass media. It is important to highlight the peculiarity of this military government. In contrast to the military governments of Argentina, Paraguay or Chile of those years, the RGAF had leftist leanings, and several of its policies aimed to

¹⁰¹ García, *supra* note 56; Remy, *supra* note 60 at 118.

debilitate the Peruvian oligarchy. For instance, with the *Land Reform Act* of 1969,¹⁰² significant areas of land were redistributed among Indigenous communities. However, with this same Act, the legal term “Indigenous communities” disappeared. Instead, the state came to refer to such communities as peasant and native communities. The objective of changing the name to peasant and native communities was to avoid the use of the term Indigenous, which was considered derogatory, and to substitute the language of class for the language of ethnicity. The military formalized this differentiation, and therefore established that the Indigenous of the Andes were called peasant communities, while the Indigenous communities from the Amazonia were called native communities.¹⁰³

These policies aimed to protect peasant and native communities, giving them lands, but eroding the ethnic component of the Indigenous peoples rendering invisible the ethnic component of the Indigenous peoples’ identities. Indigenous peoples, especially from the Andes, stopped referring to themselves as such. This being said, at the same time, the RGAF recognized *Quechua* as an official language at the same level as Spanish,¹⁰⁴ and also established in 1976 that *Quechua* teaching would be mandatory at every educational level. However, these language regulations were never officially enforced.

Thus, it appeared that the RGAF wanted to protect Indigenous peoples by de-indianizing them, while saving and promoting — at least on paper — the *Quechua* language, a major ethnic value of one of the Indigenous groups in Peru. Such an Act brought an important change to the Peruvian legal system in that it erased the legal term “indigenous communities.” From a legal perspective, there were no longer Indigenous communities or Indigenous peoples in Peru. Rather, legally there were only native and peasant communities, which could be considered socially Indigenous.

In sum, the legal status of Indigenous peoples disappeared; however, “Indigenous,” as a social status, remained within the predominant framework of the

¹⁰² *Land Reform Act of 1969*, Decree Law No. 17716 (24 June 1969).

¹⁰³ The RGAF consolidated this differentiation issuing two Acts to regulate each of those Indigenous groups: the *Peasant Community Act*, Decree Law No. 19400 (9 May 1972) and the *Native Community Act*, Decree Law No. 20653 (18 June 1974).

¹⁰⁴ *Act that Recognizes Quechua as an Official Language of the Republic*, Decree Law No. 21156 (28 May 1975)

classical notion of Indigenous peoples. Despite these changes, it is important to note that the Indigenous peoples from the Amazonia continued to consider themselves Indigenous peoples.

2.9. - The Constitutional Reforms in Latin America and the *Peruvian Constitution of 1979*

After General Velasco Alvarado left the administration, the moderate General Morales Bermudez (1975-1980) took the presidential post and two years later began to give some signals of returning to a state of democracy. The most important reform was the establishment of a constituent assembly in 1978.¹⁰⁵ Regarding Indigenous issues, the Constituent Assembly took into account not only the previous constitutions, but also the regulations about this topic that had been enacted during the military government.¹⁰⁶ For example, while maintaining the terms of peasant and native communities, article 35 of the *Peruvian Constitution of 1979* established that the state promoted the study and knowledge of aboriginal languages, and guaranteed the right of *Quechua* and *Aymara* communities and other native communities to receive primary education in their language.¹⁰⁷ Article 83 established Spanish as the official language of the republic, but it also established that *Quechua* and *Aymara* could be used as official languages in areas and manners established by law. The constitution also added “the other aboriginal languages also integrate the nation’s cultural heritage.” *Quechua* was no longer considered at the same level as Spanish, which the RGAF had legally established but never implemented. The novelty here was that an implicit differentiation and hierarchy was established between *Quechua* and *Aymara* languages to the rest of Indigenous languages spoken in Peru.

¹⁰⁵ It was mainly composed by the *Alianza Popular Revolucionaria Americana*-APRA (35%), the *Partido Popular Cristiano*-PPC (24%) and the *Izquierda Unida*-IU (30%). APRA (central left) and PPC (central right) established an alliance that allowed them the control of the assembly against the IU, which was an amalgamation of different left-wing parties. There were no Indigenous representatives present.

¹⁰⁶ Articles 35, 83, 161, 162, 163 of the *Constitution of 1979* referred directly to peasant and native communities.

¹⁰⁷ Constituent Pareja Paz Soldan, *Comisión Principal de Constitución de la Asamblea Constituyente 1978-1979*, Tomo I (Lima: Congreso de la República, 1985) at 84. Nevertheless, the classic conception of Indigenous was still present, and an example of this was that in the constituent debate, a member of the Congress affirmed that the most developed provinces in Peru were those where Spanish was spoken; that is why the promotion of the aboriginal languages was not a preferable option.

During this time, the members of the constituent assembly continued to use the terms peasant and native communities, even drafting a specific chapter in the constitution with that title, composed in articles 161 to 163. Such articles established the legal existence and status of those communities in that these communities were autonomous in their “organization, communal work and land use, as well as economic and administrative matters within the framework established by law.”¹⁰⁸ Article 161 established that the Peruvian state respects and protects the traditions of these communities and “fosters the cultural improvement of its members.” Article 163 established special protection of the lands of peasant and native communities: these could not be repossessed and were imprescriptible and inalienable. In this sense, lands could be sold only if two thirds of the members of the Indigenous community agreed, and could be expropriated only “for public convenience and necessity.” Finally, article 163 prohibited the hoarding of land within the community.

The most important feature of these constitutional clauses was the continuation of the rhetoric of autonomy, as well as the protection of peasant and native community lands. As I outlined above Indigenous people were prevented from using their land as loan collateral and they could only sell the land with the approval of two thirds of the members of the Indigenous community. In this sense, the state was protecting the land ownership of peasant and native communities by rejecting any kind of deed transfers of the land, with the only exception being expropriation. This being said, the references to the “cultural improvement of the members” of those communities, made in article 161, shows that the constituent assembly was still portraying Indigenous peoples from an evolutionist, ethnocentric approach. The state had to be simultaneously respectful of aboriginal cultures, while at the same time promoting the “cultural improvement” of the members of those communities. The autonomy of peasant and native communities was somewhat recognized; however at the same time, according to the constitution, these communities had to learn how to be “civilized.” Thus, the dominant society seemed to be saying that respect for the different cultures would be possible only if these different cultures became “civilized” like “them”, in other words, only if minority cultures became similar to the dominant culture. This shows the clear overlapping of the classical and the

¹⁰⁸ Article 161 of the *Constitution of 1979*.

modern notions of Indigenous peoples in the minds of the members of the constituent assembly; an overlapping that expresses the beginning of a shift in paradigms.

2.10. - The Peruvian Constitution of 1993

After the first administration of García Pérez (1985-1990), which ended amidst economical and social crisis, Alberto Fujimori (1990-1995 and 1995-2000) was elected. On April 5, 1992, with the support of the military, Fujimori conducted a self-coup, ordering the closure of the Parliament, the TGC, and the General Comptroller and decreeing the restructuring of the judiciary. Public opinion supported these measures while the international community pushed for the return to democracy, suspending any monetary support. The regime committed to organizing an election for a constituent assembly where the Fujimorist political party, having important popular support, constituted a comfortable majority and subsequently controlled this assembly that would be officially called the *Democratic Constituent Congress*.

The 1993 Constitution, which is the current fundamental law of Peru, brought some important setbacks for the Indigenous movement. Although this constitution is very similar to the previous constitution, it has some relevant differences that were intended to implement two major political projects of Fujimori: 1) to consolidate the presidential powers (direct re-election, prohibited in the 1979 constitution), and 2) to implement neoliberal reforms (focusing on the privatization and deregulation of the market). With a very fragmented left wing and a disarticulated Indigenous movement, Fujimori's regime did not have any problem inserting these changes.

In such a context, and with the constitutional reform of 1993 dominated by Fujimori's regime, there was no longer space for the disarticulated Indigenous claims. The changes regarding ownership of the lands of Indigenous communities were the most notorious setback. For example, article 89 establishes that ownership of Indigenous land is inalienable, but sets aside the word inalienable,¹⁰⁹ included in the *Constitution of 1979*. In addition, the requirement of the agreement of two thirds of the community members to sell communal land was removed from the constitution and preserved only in

¹⁰⁹ Article 89 of the *Constitution of 1993* establishes: "The ownership of their lands is imprescriptible, except in the case of abandonment described in the preceding article. The State respects the cultural identity of the rural and native communities."

statutes. Severely influenced by the neoliberal framework, the members of the assembly decided that the peasants and native communities were entitled to involve themselves in financial agreements. In allowing this involvement the assembly maintained Indigenous land as imprescriptible, while at the same time allowed for the sale of Indigenous land (which was much more difficult under the previous constitution).

In all of these historical reforms, it is very important to note here the absence of a real debate regarding cultural identity. In the fifty pages of the constituent's official record that contains the debate regarding land and autonomy of peasant and native communities, there was no considerable reference to Indigenous identities. Instead the debate was mainly about the "land," and the "peasants." What this reveals is an evident bias and the continuation of the de-indianization of Indigenous peoples. For the constituent assembly, the peasant and the native communities' prerogatives were not an issue of identity, but rather, an issue merely framed in terms of the protection of land property.

Although the recognition of the ethnic and cultural identity in article 2 of the constitution could be just a formal declaration, article 149 of the constitution recognizes Indigenous jurisdictional functions in accordance with customary law.¹¹⁰ Although it was not the first time the state had recognized this,¹¹¹ it was the first time that this prerogative was recognized at a constitutional level. Nonetheless, it also brought conflicts between the Indigenous and the state jurisdictions. Yrigoyen, a Peruvian socio-legal scholar, indicates that, in spite of the establishment of a pluralist constitution in Peru, the judiciary still acts without taking into consideration the Indigenous jurisdictions.¹¹² An important consideration is the number of Indigenous leaders who were charged with kidnapping or

¹¹⁰ Article 149.- "Authorities of peasant and native communities, in conjunction with the peasant patrols, shall exercise jurisdictional functions at territorial level in accordance with customary law, provided they do not violate the fundamental rights of the individual. The law provides for the way of coordination of such jurisdiction with justice-of-the-peace court and other instances of the Judiciary"

¹¹¹ Article 16 of the *Native Community Act*, Decree Law No. 20653 (18 June 1974) established that: "Any conflicts and disputes in small civil nature claims arising between members of a native community and the faults committed, shall be resolved or punished, in a final form by its governing bodies" [translated by the author]. It is important to take into consideration that the Indigenous communities of the highland did not have such a prerogative; the application of the customary law was reserved for Indigenous communities of the Amazonia (native community) and only for small civil claims and minor offences.

¹¹² Raquel Yrigoyen Fajardo, "Peru: Pluralist Constitution, Monist Judiciary: A Post-Reform Assessment" in Rachel Sieder, ed, *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (New York: Palgrave Macmillan, 2002) 157.

for having inflicted damage to third parties as a consequence of exercising Indigenous jurisdiction.¹¹³ It appears then that while the law changed, the legal operators were still working under a nation state paradigm. It was only in 2009 that the Peruvian Supreme Court decided to deliver a binding opinion regarding these issues and to establish standards to apply in these cases, which was a good first step in changing the mentality of the judiciary.¹¹⁴

This being said, in an apparent act of counter tendency, the constituent assembly issued the *Legislative Resolution No. 26253*, which approved Convention 169.¹¹⁵ A few months later, the executive power ratified the convention and sent the proper documentation to the ILO office, concluding the process of creating a binding obligation for the Peruvian government: one of those obligations was the right to consultation for Indigenous peoples.

2.11. - Indigenous Protest in 21st Century Peru

Three factors created a scenario of general uncertainty among Indigenous communities in the 21st century: 1) the increasing overlapping problems of mining and oil projects over Indigenous and protected areas, 2) an article written by president García Pérez at the beginning of his second term (2006-2011), that contains dismissive comments about Indigenous peoples, and 3) the lack of consultation with Indigenous peoples about the Peru-United States Trade Promotion Agreement (Peru-US TPA) whose legislative implementation directly affected Indigenous peoples.

The tension caused by these three factors intensified in August 2008, when the native communities from Amazonia began mobilizations against the lack of consultation surrounding many legislative decrees. They adopted radical actions such as blockading

¹¹³ As Yrigoyen explains, “the recognition of customary law and the special jurisdiction was effectively ignored in rulings by the courts [...]” *Ibid* at 171. In effect, if Indigenous communities apply justice according to their customary law and detained a person and forced him or her to work, judges charge Indigenous communities leaders with kidnaping and crimes against individual liberty. In this way judges ignore Indigenous customary law.

¹¹⁴ Supreme Court, *Plenary Accord No. 001-2009/CJ-116* (November 2009).

¹¹⁵ *An Act Approving Convention 169 of the International Labour Organization*, Legislative Resolution No. 26253 (5 December 1993)

roads and rivers, occupying electrical stations, and pushing for negotiation with the Peruvian Congress and the executive branch. The Interethnic Association for the Development of the Peruvian Rainforest (AIDSESP), a very active Indigenous NGO, led most of these protests making the Indigenous claims more visible in the streets, and in certain forms of media.¹¹⁶ An interesting aspect about this politically charged situation is that the Indigenous right to consultation was one of the relevant claims made by the Indigenous movement in its struggles. More than ten years since the ILO Convention 169 was ratified, a major Indigenous mobilization claimed the application of the right to consultation.

Since the 1990s the mining and oil regulation sector was deregulated and started growing and intensifying drastically since the 2000s with the increasing value of oil and minerals. Such deregulation entailed the exploration of new areas creating the problematic overlapping of mining and oil projects on Indigenous land and in other protected areas. In 2007, García Pérez, who was a centre left politician in his first government, wrote an article where he explained his new political and economic perspective: neoliberalism. He also claimed that the creation of the peasant communities was a model imposed by the colonial power, implying that it was not the “natural” and “authentic” way in which Indigenous people were originally organized. Therefore, he understood that Indigenous rights should not be recognized for those “inauthentic,” peasant communities. Regarding non-contacted native communities, García Pérez represented these as simply as a pretext manipulated by the anti-capitalist movement. His article was strongly criticized by Indigenous organizations, and the left-wing sectors, which saw in this a clear endorsement by the government of mining and oil projects.

A policy in favour of the trade promotion agreements was also implemented and reinforced in the 2000s. Thus, in the Alejandro Toledo administration (2001-2006), a series of free trade agreements were negotiated: one of the most relevant was the Peru-US TPA whose implementation entailed a series of important reforms in the Peruvian legal system. In December 2007, already in the second term of García Pérez (2006-2011), the executive power requested the special legislative powers of the Congress to specifically

¹¹⁶ The leader of this NGO, Alberto Pizango, even called for an insurrection (invoking article 46 of the constitution) in May 2009, however he retracted the following day. This action was enough for the government to accuse Pizango of rebellion and sedition and intensify their audits on the NGO.

facilitate the Peru-US TPA implementation. The Congress rapidly accepted this request and delegated legislative faculties to the executive power for 180 days.¹¹⁷ Between March and June 2008, the executive power issued 99 legislative decrees, some of which were related to native and peasant communities, rural lands, and natural resources. It was legislative decrees 1015, 1064 and 1073 that actually triggered the Indigenous claims. With these decrees, the executive modified the procedure regarding land transfer in peasant and native communities. Before these decrees, peasant and native communities could sell and lease their lands only with the approval of two-thirds of the members of the community, as I mentioned earlier, in this research. These legislative decrees permitted the sale of communal lands with the approval of half of the members of the communities which, according to the executive power, would improve the productivity and competitiveness of these communities.

The ombudsman's office immediately challenged Legislative Decree No. 1015 on May 30, 2008 before the Tribunal. The office argued that the norms imbedded in the decree were intended to regulate the internal mechanism of the native and peasant communities' land transfer prerogatives, as well as the form of organization of these communities. This ultimately breached the autonomy and rights to prior informed consultation of Indigenous groups.¹¹⁸ Under the pressure of general and specialized public opinion, the Congress revoked the legislative decrees on September 21, 2008.¹¹⁹ The parliamentary debate almost exclusively centered on the lack of consultation with the Indigenous communities.

Although the legislative decrees were repealed by the Congress, Indigenous protest continued, especially in the Peruvian Amazon against other legislative decrees. Here it was argued that Indigenous communities in the Amazon had not been consulted,

¹¹⁷ Act No. 29157 (19 December 2007). The Congress' authoritative Act established that the delegation of legislative faculties was to legislate on specific matters of the implementation of the agreement such as: trade facilitation, improving the regulatory framework, promotion of private investment, employment promotion and the improvement of the competitiveness of agricultural production.

¹¹⁸ The ombudsman also questioned the broad scope of the delegation of legislative powers made by the Congress. Since the delegation is such a delicate issue, important literature and case law agree in indicating that the delegation must be precise, defining the topics that will be regulated. In this case, the authoritative Act that delegated the legislative powers established broad and general topics, like "improvement of the competitiveness of agricultural production and promotion of private investment".

¹¹⁹ Act No. 29261 (21 September 2008).

even though the decrees directly affected them. In the region of Amazonas in the north of Peru, a large group of members from the Indigenous communities of the rainforest blockaded a road near the town of Bagua.

Such mobilizations, and the debate about the legislative decrees, forced and expedited the parliamentary debate about the bill on the right to consultation. Although several bills on the right to consultation had been introduced since 2003, they had all been shelved. Only in May 2009, after an important debate, did the Congress officially pass the bill. One of the main topics of the debate was the nature of the consultation; many Members of the Congress expressed concerns about whether consultation should be binding or not. The veto or no-veto debate was the “deal-breaker” among the political forces of the Congress, which meant the passing of the bill without expressly asserting whether Indigenous communities have a veto power. The bill was passed and, as the Constitution indicates, it was referred to the President for the enactment of the law within fifteen days. However, the executive branch did not issue any official declaration, and therefore the bill did not become law.

After fifty-five days of the roadblock on Bagua, on June 5, 2009, the police broke up the roadblock causing a major incident. As already stated, the roadblock in Bagua was a protest against the legislative decrees issued by the García Pérez administration lead by *Awajun* and *Wampis* Indigenous peoples. On that day, 34 people died (among them police officers and Indigenous peoples) and 200 were injured as a result of the struggle between the police and the Indigenous people involved. This event, also termed “*El Baguazo*”, constituted a major political crisis and resulted in the resignation of the Minister of Internal Security and the initiation of several criminal and parliamentary investigations.¹²⁰

The journalistic coverage of the event showed how the media and public opinion from Lima often depicted the Indigenous people of the Amazonia. For the Peruvian anthropologist Espinosa, there is an ambiguous understanding of the Indigenous people of the native communities portrayed in these representations. He observes that the two main perceptions of the Indigenous people of the Amazonia were exacerbated; they were

¹²⁰ See, Gerardo Renique, “Law of the Jungle in Peru: Indigenous Amazonian Uprising Against Neoliberalism” (2009) 23:3 *Socialism & Democracy* 117.

perceived as either savage and violent, or meek and ignorant (easily manipulated).¹²¹ For example, the executive power used both classifications: on the one hand, the president described the event of June 5 as an act of “savagery, barbarism and ferocity” against the missing and murdered policemen. And on the other hand, the Minister of Internal Security defended herself by arguing that NGOs, left leaning politicians, and even other states had manipulated Indigenous people.

On June 21, 2009, the executive power finally submitted its observations regarding the bill on the right to consultation, refusing to enact it. The executive’s principal observation was that the bill did not definitively state whether Indigenous peoples had a veto power against the state. In this sense, the government expressed its concern regarding the situation in which no agreement between the parties could be reached, because it might be understood that, in such cases, the government would be unable to implement the legal measure. The government also claimed that the Congress went too far when it chose to add its legal and administrative measures programs and projects possibly requiring consultation, especially because the latter were not included explicitly in Convention 169. Another observation was the “doubtful” nature of the peasant communities. Although the administration did not question the indigeneity of the native communities, it did express doubts about the peasant communities. According to the García Pérez administration, because of the permanent contact with the cities, peasant communities, as well as the communities established on the coast, are no longer Indigenous.

Only during the administration of Humala Tasso (2011-2016), who was a supporter of the Indigenous movement during the García Pérez administration, and after a new parliamentary debate in the new Congress elected in 2011, did the executive power pass the bill of the *Act of Indigenous Peoples Right to Consultation*.¹²² This Act was symbolically enacted in Bagua, the same place that in 2009 was the bleak landscape of Indigenous protests and the scene of the deaths of many Indigenous and non-Indigenous individuals.

¹²¹ See Espinosa *supra* note 54 at 127-140.

¹²² *Act of Indigenous Peoples Right to Consultation*, Act No. 29785 (7 September 2011).

The Tribunal's decisions, which will be analyzed in Chapter 3 were issued in this historical context (2005-2011)—a time of awakening and confrontation. Indigenous peoples from Amazonia firmly confronted the government using the right to consultation as the major element of mobilization. In effect, this period was a time of strong confrontation, which forced the government to negotiate, ultimately leading to the ratification of Convention 169 as an important element in the Peruvian legal system. The Indigenous peoples and the government understood Convention 169 as an actual legal norm that required regulation in order to be implemented.

This public debate allows us also to analyze the different representations of Indigenous peoples that exist in Peruvian society, and to see how these representations contain continuities of patterns that exist within new contexts. It is clear that today we are witnessing a transition in which the classical notion of "Indigenous" has started to slowly lose its legitimacy in Peruvian society. Nevertheless, the classical representation, among other notions of Indigenous peoples, is still an important symbolic force that determines the way judges and politicians continue to apply Indigenous rights.

The construction of the right to consultation in the Peruvian Constitutional Tribunal's jurisprudence was made in the heat of a social convulsion, which divided Peruvian society between those who supported Indigenous rights, and those who understood Indigenous peoples' rights as barriers to capitalism and "development." Currently, peasant communities are starting to rediscover their indigeneity and to claim respect for their Indigenous rights. The right to consultation was one of the most important legal arguments used by Indigenous peoples and, although Congress did not clarify the veto/no-veto debate, the adoption of the Act recognizing the right implies an important advancement, at least on the symbolic plane. At the same time, because the Congress did not give an answer to the veto/no-veto debate, the decision on this question will have to be made by the administration and the judiciary during the concrete implementation of the consultations. This is why the Tribunal's jurisprudence acquired such relevance, as it now has to make concrete decisions in areas that are not yet regulated by the Congress.

Chapter 3: The Constitutional Tribunal and the Right to Consultation

This chapter has three sections. In the first section, I will briefly summarize the legal content of the right to consultation, taking into account what Convention 169 established about the right to consultation. I also will explain the Act that regulates the right to consultation in Peru and how the consultation process is regulated. The objective is to present the legal body that primarily started the debate in Peru regarding the consultation to Indigenous peoples, and how these rules of international law were introduced into the domestic law.

In the second section, I will summarize the decisions of the Peruvian Constitutional Tribunal regarding Indigenous rights. This has an expositive purpose; the objective is to show the Tribunal's core arguments regarding Indigenous rights, specifically about the right to consultation, as well as to observe how the rhetoric of Indigenous rights is grounded in the real world. These cases are important not only because they were recently reported, but also because they were the first cases decided by the Tribunal specifically regarding Indigenous issues.

In the third part of this chapter, I will analyze the arguments deployed by the Tribunal in the cases previously presented. I choose this order because it allows the reader to first appreciate the complexities of the decisions of the Tribunal before considering a more general perspective about the meaning of these decisions' arguments in the specific context.

Overall, I will explain the link between the right to consultation and the right to self-determination. Although an explanation of this link will be analyzed in depth in Chapter 5, it is important here to begin by building my argument by examining the Tribunal's decisions in the pertinent cases discussed here.

In Chapter 1, I have provided a glimpse of the place occupied by the Constitutional Tribunal in the Peruvian legal system. I also explained Finkel's "Two-Stage" approach regarding the judicial reform in Latin America during the 1990s, drawing a parallel between the Indigenous rights recognized in the Peruvian *Constitution of 1993* and Convention 169. In this chapter I will clarify how the Peruvian State's strategy, regarding Indigenous peoples, was implemented, specifically taking into

account the fact that the implementation of the right to consultation began 16 years after the ratification of Convention 169.

3.1.- Convention 169 and the Right to Consultation¹²³

Prior to Act No. 29785, reported in 2011, which implemented Convention 169, this international treaty was the single legal base of the right to consultation in Peru. Convention 169 has its origins in the revisions of the International Labour Organization Convention No. 107, *Indigenous and Tribal Populations Convention*,¹²⁴ which was drafted in the 1950s. Convention 107 reflected a paternal and assimilationist ideology--one where the term “Indigenous” was synonymous with “primitive”. Therefore, according to the prevalent ideology of the time, indigenous people needed to be integrated into the national community in order to become “civilized”.¹²⁵ Leaving aside assimilationist policies, Convention 169 replaced the previous approach with a new perspective sensitive to the affirmation of Indigenous rights, and considers Indigenous peoples as a distinct society.¹²⁶ This Convention consists of 44 articles, with articles 6, 15

¹²³ In Peru it is very common to refer to consultation as a right. The Tribunal established (*Tuanama I* case, para. 28) that Indigenous communities could not reject engaging in a consultation process. Consequently, one can question the real nature of the “right” to consultation. If the right to consultation is understood as being a mechanism that promotes intercultural dialogue between the state and the people, does a compulsory intercultural dialogue fulfill the essential definition of a right? As already stated, the source of the right to consultation is an international treaty. In this sense, consultation has to be understood also as an international duty and a state’s failure to comply generates an international wrongful act. Without expatiating the relationship between rights and duties, I base my argument on Raz’s approach to this issue: “rights ground duties” [Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1986) at. 183-192]. In this sense the dynamic force of rights, which can create moral obligations, is more consistent with the diverse situation that can arise in a multicultural encounter. The problem with this approach, is that taking into account the complexity and the amount of norms created by the state, it could be difficult for Indigenous people to be aware of all the possible administrative or legislative threats. In this case, Indigenous communities have to rely on the duty of the state to inform them about those possible administrative or legislative norms that can affect them. Therefore, the state not only has the responsibility, but also must take the initiative to undertake this process, especially in cases like *Aidesep I* case, where isolated Indigenous communities could be affected. The *Act of the Right to Consultation*, passed in August 2011, implements consultation as a right. I do not see any conflict in this situation. The state still has an international duty, which was implemented in the language of rights in Peruvian domestic law and in the social conscience.

¹²⁴ *International Labour Organization (ILO), Indigenous and Tribal Populations Convention, C107* (adopted 26 June 1957, ratified by Peru 6 December 1960 and denounced 2 February 1994) [hereinafter Convention 107].

¹²⁵ Rodríguez-Piñero, *supra* note 52 at 39.

¹²⁶ Rodríguez-Piñero, *supra* note 52 at 291. For the author the Convention 169 is “the outcome of the dialogue between an old handbook of Indigenist policy, which sought to solve the ‘Indigenous problem’ using the recipe of ‘development’ and applied anthropology, and a new sensitivity towards the affirmation of Indigenous peoples’ rights to perpetuate and thrive as distinct societies, cultures, and territorial entities.”

and 16 being the most important. Article 6 presents a general and abstract definition of the right to consultation, whereas the other articles establish consultation in cases where Indigenous territories could be affected through the relocation of Indigenous peoples.

Article 6

1. In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

[...]

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 15

[...]

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16

[...]

2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

As we can see, Article 6 imposes an obligation on the state to consult Indigenous peoples regarding any legal or administrative measure that could affect them directly. Some scholars refer to this article as the “heart of the Convention,”¹²⁷ or the “key article in the whole convention.”¹²⁸ Others affirm that the right to consultation is an “unusual

¹²⁷ Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-determination, Culture and Land* (Cambridge, UK: Cambridge University Press, 2007) at 77.

¹²⁸ Lee Swepston, “Economic, Social and Cultural Rights Under the 1989 ILO Convention” in F. Horn, ed., *Economic, Social and Cultural Rights of the Sami, International and National Aspects* (Rovaniemi, Finland: Northern Institute for Environmental and Minority Law, 1988) at 44.

right”.¹²⁹ What is beyond any doubt is that the wording of the clause contains standards that could be interpreted in different ways. Interestingly, since the days when the draft of the convention was being discussed, the scope and concept of “consent” and “consultation” were intensely debated, particularly by Spanish-speaking states.¹³⁰ Some of these countries feared that the term “consent” could be understood as a right of veto, undermining the sovereignty of the majority of the population and the states’ decisions. In the end, it was established that the clause of the Convention was not intended to suggest that consultation means obtaining consent or agreement of Indigenous peoples.¹³¹ A similar clarification was proposed regarding article 15, which states that relocation of Indigenous peoples should require their “free and informed consent.” However, at the same time, the Convention establishes the consequences of the situation, acknowledging the relocation of Indigenous communities. According to Swepston, this means that there must be a real attempt to consult with Indigenous peoples, and to try to get their consent to the relocation measure.¹³²

Regardless of the apparent consensus among state representatives regarding the interpretation of the consultation clause, the phrasing of the clause leads to more questions than answers; for instance, questions surrounding how to determine whether an administrative or legal measure will affect Indigenous people, and to what extent. Another question is whether or not Indigenous people could opt to reject to undertake a dialogue with the state. Also, do Indigenous people have veto power if they disagree with the measure? From a more sceptical perspective it is important to consider if such consultations would in fact generate an actual dialogue between two different cultures, or

¹²⁹ Amanda Fulmer “Consultation and its Discontents: Mining, Indigenous Communities and Rights in Peru and Guatemala”, paper delivered at the Latin America Studies Association Conference, Toronto, (8 October 2010), online: <<http://lasa.international.pitt.edu/members/congress-papers/lasa2010/files/1724.pdf>>

¹³⁰ See Lee Swepston, “A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989” (1990) 15:3 Okla City UL Rev 677 [Swepston, “A new Step”].

¹³¹ *Ibid* at 691. The author affirms: “Some, particularly from Spanish-speaking countries, maintained that a veto power was being inserted into the text, while most others accepted the explanation given by the secretariat that “the Office had not intended to suggest that the consultations... would have to result in the obtaining of agreement or consent... but rather to express an objective for the consultation.”

¹³² *Ibid* at 707.

rather, if this is just another way to co-opt Indigenous people.¹³³ Some of these preoccupations are now part of a fierce political debate in Peru regarding the right to consultation.

In light of such questions, it is important to bear in mind the open texture form used by the drafters of the convention, which is actually a common practice due to the fact that the abstractly redacted clauses left significant discretion for the domestic legislatures to implement domestic regulations on the matter. However, when there is no domestic regulation or the domestic regulation is as abstract as the international treaty, judges have significant discretion to interpret the treaty in a manner that draws on political criteria. This aspect of the convention could represent a responsibility that the courts do not necessarily want, as it is a heavy burden to solve a complex problem that no other political actor wants to attempt to solve. In Peru, Convention 169 lacked domestic regulation for more than 15 years. Due to the legislative omission of any specific regulation regarding the right to consultation, the Peruvian Constitutional Tribunal could have had an important role in interpreting Convention 169 if it had wanted to assume this assertive role.

3.2.- The Inter-American Court of Human Rights Jurisprudence on the Right to Consultation

Before analyzing the decisions of the Tribunal, it is pertinent to review the Inter American Court of Human Rights (IACHR)'s jurisprudence regarding Indigenous rights. Although the Peruvian Constitutional Tribunal has referred to the decisions of this international court regarding Indigenous rights, it is important to note that according to some scholars, the Tribunal has not always followed the criteria developed by the IACHR, which is a fact that has been used by some Indigenous activists to question some of the decisions of the Tribunal.¹³⁴

Nevertheless, the decisions of the IACHR, in general, have an important symbolic weight in Peruvian society; after all, Peru is the state that has had more cases (all of

¹³³ Cesar Rodriguez-Garavito, "Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields" (2011) 18:1 Ind J Glob Leg Stud 263.

¹³⁴ See Juan Carlos Ruiz Molleda, *Guía de Interpretación de la Ley de Consulta Previa de los Pueblos Indígenas (Ley No. 29785): Análisis, Comentarios y Concordancias* (Lima: Instituto de Defensa Legal, 2011) at 43.

which they lost) at the IACHR than any other state. As a result, in the final years of the Fujimori regime, the Peruvian state decided to withdraw from the IACHR's contentious jurisdiction, arguing the intromission on national issues.¹³⁵ Such a manoeuvre was done to avoid the impact of the IACHR decisions regarding the due process of law on members of the Shining Path and the Tupac Amaru Revolutionary Movement, as well as other rulings. However, in 2001 one of the first measures of the Paniagua administration was to repeal that withdrawal.¹³⁶

The Tribunal takes into account IACHR rulings, even when Peru was not a litigant in those cases. For example, the Tribunal used the *Yatama v. Nicaragua* case¹³⁷ to expand its competence, and to be able to review a decision of the Peruvian National Electoral Board.¹³⁸ There were similar examples in cases dealing with Indigenous peoples, for example: *Aloeboete et al. vs. Suriname* (1993)¹³⁹; *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua* (2001)¹⁴⁰; *Yakye Axe Indigenous Community vs. Paraguay* (2005)¹⁴¹; *Moiwana Village vs. Suriname* (2005)¹⁴²; *Sawhoyamaxa Indigenous Community vs. Paraguay* (2006)¹⁴³; *Saramaka People vs. Suriname* (2007)¹⁴⁴; and *Kichwa Indigenous People of Sarayaku vs. Ecuador* (2012)¹⁴⁵.

In these cases the IACHR ruled on several issues concerning the protection of Indigenous lands and the right to electoral participation. This being said, it was only in

¹³⁵ *Legislative Resolution Approving the Withdrawal from the Contentious Jurisdiction of the Inter-American Court of Human Rights*, Legislative Resolution No. 27152 (8 July 1999).

¹³⁶ *Legislative Resolution Repealing Legislative Resolution No. 27152*, Legislative Resolution No. 27401 (12 January 2001).

¹³⁷ *Yatama (Nicaragua)* (2005), Inter-Am Ct HR (Ser C) No. 127.

¹³⁸ Accordingly to the Peruvian *Constitution of 1993* the decisions of the *National Electoral Board* cannot be reviewed. However, in the Case No. 05854-2005-PA/TC the Tribunal ruled that if the decisions on the *National Electoral Board* were not reviewed, then the Peruvian state will be sued in the international jurisdiction because it was against the criteria used by the IACHR.

¹³⁹ *Aloeboete et al (Surinam)* (1993), Inter-Am Ct HR (Ser C) No. 15.

¹⁴⁰ *Mayagna (Sumo) Awas Tingni Community (Nicaragua)* (2001), Inter-Am Ct HR (Ser C) No. 79.

¹⁴¹ *Yakye Axe Indigenous Community (Paraguay)* (2005), Inter-Am Ct HR (Ser C) No. 125.

¹⁴² *Moiwana Village (Surinam)* (2005), Inter-Am Ct HR (Ser C) No. 124.

¹⁴³ *Sawhoyamaxa Indigenous Community (Paraguay)* (2006), Inter-Am Ct HR (Ser C) No. 146.

¹⁴⁴ *Saramaka People (Suriname)* (2007), Inter-Am Ct HR (Ser C) No. 172.

¹⁴⁵ *Indigenous Community of Sarayaku (Ecuador)* (2012), Inter-Am Ct HR (Ser C) No. 245.

2007, with *Saramaka People vs. Suriname*, that the ICAHR ruled on a case regarding the right to consultation. Although the Suriname state did not ratify Convention 169, or recognize Indigenous communal property, the IACHR established that the duty to consult is a manifestation of the right to property of Indigenous peoples. The IACHR indicates that if the state of Suriname grants concessions over natural resources located in an Indigenous territory, the state is required to consult with the aim of reaching an agreement with the Indigenous peoples of that territory. Such consultation should be conducted in good faith, and in conformity with the traditions of the Indigenous peoples. The IACHR also distinguishes between consultation and consent, affirming that:

[in cases of] large-scale development or investment projects that would have a major impact within Saramaka territory the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions (para. 134).

In this manner, the IACHR refers to the duty to obtain consent. However, the IACHR did not define the legal meaning of the terms “large-scale development or investment projects” or “major impact”. In 2012, the IACHR issued *Kichwa Indigenous People of Sarayaku vs. Ecuador*, which was a relevant decision regarding the right to consultation. Nevertheless, here the IACHR focused solely on the manner of consultation and the opportunity for consultation, ignoring any further considerations regarding how to best understand the previous concepts.

3.3.- The Peruvian Constitutional Tribunal and the Right to Consultation

Between 1996 and 2005 the Tribunal did not issue relevant cases regarding Indigenous rights. Although peasant or native communities did file some lawsuits, neither the cases brought forth by the plaintiff, nor the Tribunal decisions, focused on the issues of cultural identity or Indigenous rights. Cases regarding mineral easements or the unjustified expulsion of members of Indigenous communities were dealt with under civil law, and without any consideration to Indigenous traditions or perspectives.¹⁴⁶

However, between 2005 and 2011, the Tribunal did hand down 13 decisions

¹⁴⁶ From the official summary of the Tribunal’s rulings in this period none of the lawsuits contain cultural identity arguments. It is important to point out that the summary of the claims was made by the Tribunal, therefore, the judges could just obviate any reference to identity rights if they did not realize the relevance of these values.

where Indigenous rights were mentioned. I will classify these decisions into three groups: The first group includes the initial approach of the Tribunal to Indigenous rights, using a multicultural perspective; the second group comprises two decisions reported in 2010 that were not concerned with the right to consultation, but which did include interesting reflections by the Tribunal on Indigenous rights;¹⁴⁷ the third group includes eight decisions issued from 2007 to 2011 from cases that specifically dealt with the right to consultation, among other related topics.¹⁴⁸ From these eight cases, six were delivered after the Baguazo. Out of these post-Baguazo decisions, only one actually favoured Indigenous aspirations; and out of the eight cases, the Tribunal found none to contain an Act or a legislative decree that was unconstitutional. Such instances prompt the question whether or not this indicates, or at least provides some clues, about a certain bias of the Peruvian Constitutional Tribunal. As I will illustrate, the arguments used by the Tribunal tended not to engage clearly with other cultural perspectives. Whether consciously or unconsciously, the judges of the Tribunal do not seem to find arguments to uphold the various Indigenous claims; In other words, the judges find reasons to avoid striking down legislation that has not been subject to consultation to Indigenous peoples.

In the following sections, I will present a brief summary of relevant aspects of each of these cases. I will then provide an analysis of the cases, attempting to interpret the Tribunal's underlying conceptualization of Indigenous rights. In doing so, I hope to develop the content of the right to consultation that the Tribunal outlined through its legal and political stance regarding Indigenous demands.

3.3.1. - First References to Indigenous Peoples' Rights in the Constitutional Tribunal Jurisprudence

One of the first references made by the Tribunal to Indigenous rights can be found in the *Bullfighting Tax* case,¹⁴⁹ decided in August 2005. Although not an Indigenous

¹⁴⁷ Although reference to these cases can break the flow of the chronological exposition, it is important to point them out in order to contrast the different outcomes in these decisions made by the Tribunal.

¹⁴⁸ I am not taking into account the cases questioning Legislative Decrees No. 1015 and No. 1064, as the Congress repealed these soon after the Tribunal had admitted the claims.

¹⁴⁹ See Case No. 0042-2005-PI/TC, reported on August 12, 2005. This was the first decision of the Tribunal that engaged the topic of multiculturalism. In the first 3 paragraphs of the decision, the Tribunal presents a series of arguments on the multicultural nature of the Peruvian state. In this case, the Tribunal examined the constitutionality of the bullfighting tax exemption determined by the National Institute of Culture (INC, in Spanish initials). The INC, which is an executive branch agency, argued that bullfighting was a cultural

rights case, it is relevant in that it recognized, for the first time, the Peruvian state as multicultural and polyethnic. It also introduced the concept of “cultural constitution” by which the Tribunal highlights the obligation of the state to respect¹⁵⁰ and promote cultural activities,¹⁵¹ and to discourage activities disguised by the label of “cultural” that could be harmful for the general interest of the population.¹⁵²

The *Coca Leaf* case¹⁵³ of September 2005 is another decision, which made some reference to Indigenous peoples. In essence, this case resolved a conflict of jurisdiction between the regional and the national governments regarding the coca leaf policy in Peru.¹⁵⁴ The important point to highlight in this case is the link made between the traditional consumption of coca leaf and Indigenous peoples, by the Tribunal. In its decision, under the section “Traditional use of coca leaf and cultural rights (para. 92-101),” the Tribunal holds that: “The cultivation and consumption of coca leaf in Peru has been part of the historical and cultural tradition of a large portion of the Andean population (para. 92, my underline).” Based on official statistics, the Tribunal affirmed that 4,095,036 Peruvians consumed coca for traditional use (para. 96). Later, the Tribunal concluded that: “the traditional use [...] of the coca leaf plant is part of the cultural identity of the aboriginal people of Peru” (para. 111).

Two different interpretations can be drawn from these statements: 1) the Tribunal

activity and therefore it was exempt from taxes. The Tribunal held that the INC exemption was unconstitutional because, according to the constitution, only the Congress is allowed to grant tax exemptions. It also established a test to determine what can be considered a “cultural activity”, and, although it did not explicitly state that bullfighting was unconstitutional, one gets the sense that the Tribunal was going in that direction.

¹⁵⁰ The Tribunal noted the protection of cultural activities like “the ownership of peasant and native communities of their collective knowledge, traditional medicine and [...] their biodiversity, in accordance with articles 88, 89, and 149 of the Constitution” (para. 4).

¹⁵¹ With respect to the duties of promotion, the Tribunal affirmed that the state must develop a set of knowledge that allows public demonstrations that contribute to the cultural identity of the nation.

¹⁵² The Tribunal understands pseudo-cultural activities as those that “incentivize the drug consumption, promote violence, perform anti-natural or cruel acts against animals, cause environmental damages and carry on the illegal hunt of endangered animals”. Despite the reference to the cruel acts against animals, the Tribunal did not prohibit the bullfighting.

¹⁵³ Case No. 0020-2005-PI/TC, reported on September 27, 2005.

¹⁵⁴ The Regional Government of Cusco and Huanuco declared that coca leaf was a natural and cultural regional “patrimony” permitting unrestrained cultivation of coca plantations in those regions. The executive power challenged those regional ordinances, arguing that coca policy is within their exclusive competence. The Tribunal decided unanimously that regional government ordinances were unconstitutional because provincial governments do not have jurisdiction to regulate coca policy.

considers that a large portion of the Andean population is Indigenous or, 2) that Peruvian Indigenous people are just a group within the universe of the population that consumes coca leaf. There is no more data available that can help us to affirm which of these two interpretations expresses most closely the Tribunal's point of view.¹⁵⁵ However, each of these options encompasses the question of who may or may not be considered an Indigenous person by the Tribunal. It is important to note that at the time these cases were reported there was not a meaningful debate around who should be considered indigenous. Mainstream legal scholars were not interested in exploring this topic, which potentially explains why these rulings did not catch the attention of specialized public opinion or spark a debate around the scope of the legal term "Indigenous peoples." In this sense, being an Indigenous person was seen to be associated with the traditional consumption of coca leaf, but not yet with special rights, such as the right to consultation.

3.3.2.- Cases That Tangentially Address Issues Relating to Indigenous Rights

Those cases that tangentially address issues relating to Indigenous rights dealt with two matters that were not unfamiliar to the Tribunal: administrative issues and libel questions. However, an interesting aspect of these cases is the multicultural approach used in such decisions. For example, in the *Cocama Tarapacá Native Community* case¹⁵⁶ the community challenged the *National and Decentralized Register of Native Communities* decision to reject the registration of this group as a native community. The Cocama Tarapacá community argued that this outcome violated their right to cultural identity (article 2.19 and 89 of the Constitution). Since the lower courts dismissed the *amparo* lawsuit without merit (dismissed *in limine*), the Tribunal, through an interlocutory decision, ordered the lower civil court to admit the lawsuit and reach a decision on the merits. The Tribunal held that, as stated in the Constitution, peasant and native communities "have legal existence and are artificial persons;" therefore, peasant and native communities do not need to register to demonstrate their existence, as is

¹⁵⁵ See Case No. 0006-2008-PI/TC, reported on August 7, 2008. In 2008 the Regional Government of Puno enacted a similar ordinance. Again, the executive challenged this ordinance and the Tribunal declared it unconstitutional. Interestingly, the Tribunal established that the legislator is obliged to pass an Act meeting the aspirations of the Andean and Amazonian communities, which reflects their cultural identity in the cultivation and use of the coca (para. 47).

¹⁵⁶ Case No. 0906-2009-PA/TC, reported on November 3, 2010.

mandatory for other kinds of legal persons in Peru. The Tribunal supported this decision citing Convention 169, the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*¹⁵⁷, and an official report of the Ombudsman Office regarding the situation of the Indigenous people in Amazonia. Although the Tribunal did not issue any substantive determinations in this case, the reference to those international treaties sent a clear message to the lower judges: that the judges have to take into account the special situation of Indigenous communities. In this case, Judge Alvarez Miranda issued a dissenting vote. He held that the administrative resolution, which had rejected the petition for registration of the peasant community, was arbitrary; and that therefore the Tribunal had to deliver a decision on the merits in favour of the Indigenous community.¹⁵⁸

In the *Native community Sawawo Hito 40* case,¹⁵⁹ the native community, based in the Ucayali Region of the Amazonia, sued the director of the newspaper *El Patriota*. In January 2007 the newspaper alleged that the native community was an accomplice to a logging company responsible for the destruction of the Ucayali Region rainforest. In contrast, the native community claimed that the newspaper was lying and impugning the honour of the members of the community.

The importance of this case is that the Tribunal reaffirmed the legal existence of the Indigenous communities regardless of their registration as a legal person (para. 22-26). It also held that a juridical person is entitled to the fundamental rights of honour and reputation. Regarding the accusation of defamation, the Tribunal ruled in favour of the community, arguing that the words used by the newspaper were not pertinent or necessary.

The concurring opinions of judges Landa Arroyo and Eto Cruz addressed some

¹⁵⁷ *United Nations Declaration on the Rights of Indigenous Peoples* (2 October 2007), A/RES/61/295. Nevertheless, the Tribunal did not express anything about the status of this declaration within the Peruvian legal order.

¹⁵⁸ He understood that, precisely because of the vulnerable situation of the Indigenous communities, the Tribunal should have to resolve the case as soon as possible, instead of returning it to the lower court. This is a common conflict in the Tribunal. This occurs when the claimant appeals a decision of a lower court that had dismissed the writ of *amparo in limine*; that is, without notifying the defendant because the lawsuit was obviously unmerited. Once in the Tribunal, they can disagree with the decision of the lower court and order the lower court to admit the lawsuit to trial or decide the matter pursuant the urgency of the situation. There is a tension in this kind of situation: on one hand the due processes of law infringement because the defendant was never notified, and on the other hand, the urgency protection inherent in the *amparo*, which impels the Judges of the Tribunal to issue a decision solving the case.

¹⁵⁹ Case No. 04611-2007-PA/TC, reported on April 15, 2010.

important points regarding multiculturalism and the role of judges in a multicultural state. The judges affirmed that the *Peruvian Constitution of 1993* recognizes cultural diversity and ethnic pluralism as essential features of Peruvian society, which entails the recognition of the specific rights of Indigenous people.¹⁶⁰ Nevertheless, they warned that there is no point in incorporating a multicultural legal framework if judges fail to apply the multicultural perspective.¹⁶¹ Hence, they explained that, “the interpretative process conducive to defining the content of the rights of the so called *Multicultural Constitution* requires a *culturally open approach* [...]” (para. 16). They also asserted that constitutional judges have to be aware of the Indigenous group *weltanschauung*, and the particular conception of rights embraced by the members of that group. However, at the same time judges must be “disposed to forget [their] prejudice, and even [their] own worldview in order to aim for an equitable solution, in accordance to the cultural substratum that the Fundamental Law recognizes (para. 16).”

The position of these judges is that the *culturally open approach* entails a *cultural self-awareness* and a *disposition to forget* their own cultural standards. This statement is interesting but at the same time incomplete. On the one hand the issues of multiculturalism are addressed; however, on the other hand they do not provide any method for how judges can achieve this *awareness* and *disposition to forget*. Another interesting aspect of this concurring vote is that it also established that *this self-awareness and disposition to forget* must be concretized in accordance with the constitution. Therefore, Indigenous peoples are constrained to develop their worldview within the frame that the constitution allows. The question is not only if such a view is fair, or even possible to achieve, but also, if the judges are going to put this statement into practice,

¹⁶⁰ Such as the right to ethnic and cultural identity, the organizational, economic, and administrative autonomy of native and peasant communities, the application of customary law of these communities, the recognition of other languages besides Spanish, and the representative quotas for Indigenous peoples in the municipal and regional elections.

¹⁶¹ The judges affirmed; “...the multicultural constitution [...] marks a change and a departure from the formal equality postulated for many years by the liberal state” (para. 8). It was also added that the interpretation of the *multicultural constitution* norms requires taking into consideration its own peculiarities. In that sense, judges would have to assume a multidisciplinary approach that included taking into account extra-normative elements in the interpretative work of the judges. They also added that judges have to be aware of the underpinnings of the fundamental rights -universalism and individualism-and at the same time take into consideration the communitarian cosmology (para. 13). Therefore ‘notions like “progress”, “property”, “wellbeing”, “religion”, “honour”, among others, are always in relation to the community as a whole, instead of referring to its individually considered members” (para. 15).

how they might actually go about doing this.

3.3.3.- The Right to Consultation Cases

In contrast to the previous cases the next eight decisions directly address the right to consultation. The eight cases are, in chronological order: a) the *Lauricocha Province* case; b) the *Cordillera Escalera* case; c) *Tuanama 1*, d) *Aidesepe 1* case; e) *Aidesepe 2* case; f) *Tuanama 2* case; g) *Tuanama 3* case; and; h) *Tuanama 4-WRA* case. *Tuanama 2* and 3 cases will not be summarized because they basically repeat what was established in the *Tuanama 1* decision.

a) Lauricocha Province Case: The Veiled Unconstitutionality of ILO Convention No. 169 (2006-2009)

In the *Lauricocha Province* case (reported on September 19, 2006) the plaintiff, the Pasco Regional Government, challenged Act No. 26458 of the Congress, arguing that it modified the boundaries of the Pasco region without following constitutional procedures.¹⁶² The plaintiff also argued that the Act affected the traditional boundaries of two peasant communities that were not consulted in accordance with Convention 169. In fact, the Tribunal's decision left aside any mention of Convention 169. It was only after the plaintiff requested clarification of the decision that the Tribunal maintained that the treaty was not applicable in the Peruvian legal system, as it was ratified without following processes established by the *Constitution of 1993*. Implicitly, and via a resolution of clarification, the Tribunal affirmed that this international treaty was unconstitutional. Interestingly, the decision went unnoticed by legal scholars in Peru.

b) Cordillera Escalera Case: The U-Turn of the Tribunal

In this writ of *amparo*, the plaintiff requested the suspension of an oil extraction project in the *Cordillera Escalera* regional natural reserve. The complainant argued that the hydrocarbon project was threatening the headwaters, watershed and ecosystem of the reserve. Although the plaintiff did not argue for the protection of Indigenous rights, the Tribunal nevertheless formulated arguments concerning the right to ethnic and cultural identity, natural resources and Convention 169.

¹⁶² *An Act Creating the Lauricocha Province in Huanuco Department*, Act No. 26458 (2 June 1995).

In a clear demonstration of judicial activism¹⁶³, and without any mention of the *Lauricocha Province* case, the Tribunal stated that Convention 169 was part of the Peruvian legal order and therefore enforceable in the Peruvian territory.¹⁶⁴ Fourteen paragraphs of this decision developed considerations regarding the right to consultation even when this was not strictly necessary to solve the case because the plaintiff did not mention the right to consultation in his claim.

The consultation process, as said by the Tribunal, should be conducted before undertaking any “significant project that could affect the health of the community or its environment”. It cited the case of *Saramaka People v. Suriname* from the IACHR. As already established, in this case the Court affirmed the duty of the state to not only consult, but also to obtain the free, prior, and informed consent of Indigenous communities when large-scale projects would have a major impact on them. The Tribunal also cited the *Mayagna (Sumo) Awas Tingni v. Nicaragua* decision of the IACHR, which specifically addressed the issue of the material and spiritual Indigenous relation to the land.¹⁶⁵ However, despite this reference the Tribunal did not decide anything concrete regarding the right to consultation; theirs were mere *obiter dicta* arguments. The Tribunal also established that there was no general norm that implements the Convention 169, indicating the responsibility of the Congress for that omission.

c) Tuanama 1 Case: Developing the Content of the Right to Consultation (No-Veto Doctrine)

On July 2009, more than 5,000 citizens represented by Gonzalo Tuanama Tuanama filed a constitutional claim against the executive power, challenging Legislative Decree No. 1089.¹⁶⁶ This norm establishes a *Temporary Extraordinary Regime of Formalization and Land Titling of Rural Property*. The plaintiffs argued that Indigenous

¹⁶³ The activism is revealed by the letter submitted, *ex proprio motu*, by the Tribunal to the executive power asking for information about Indigenous people near the lot. The answer to the letter indicated that there were 64 native communities in the lot.

¹⁶⁴ Case No. 0025-2005-PI/TC. In paragraph 31 the Tribunal established that with the *Legislative Resolution No. 26253*, of December 5, 1993, Convention 169 was ratified by the Peruvian state. According to article 55 of the *Constitution of 1993 of Peru*: “The treaties celebrated by the States form part of the domestic law.” In addition, as was stated in a previous decision of the Tribunal, human rights treaties ratified by the state are not only part of the legal system, but also have constitutional status.

¹⁶⁵ *Mayagna (Sumo) Awas Tingni Community (Nicaragua)* (2001), Inter-Am Ct HR (Ser C) No. 79.

¹⁶⁶ Note that it was filed after the events of Bagua on June 5, 2009.

communities were not consulted during the formulation of the legislative decree, even though it directly affects these communities.¹⁶⁷ The executive power responded to the claim arguing that Convention 169 was not applicable, since the majority of the Peruvian population are *mestizos*, and because Convention 169 was not implemented in the Peruvian legal system. The following argument was made to justify this position: The peasant communities were originally Indigenous, but with the “development of civilization [they] are now *mestizos*, as in the case of the peasant communities of the coast and the Andes.” It was also alleged that Indigenous communities were not affected by this legislative decree as it was simply addressing a better way to formalize rural property.

On June 9, 2010, the Tribunal rejected the plaintiffs’ claim and confirmed the constitutionality of the legislative decree. Nevertheless, the Tribunal held that the constitutionality of the norm could only be considered if the Indigenous communities were excluded from its application. Therefore, applying the “reading down technique,”¹⁶⁸ the Tribunal excluded the application of the norm to Indigenous communities, bringing into constitutional conformity the legislative decree.

In this decision, the Tribunal focused its attention on the validity of Convention 169, the configuration of the right to consultation, and the contents of this right. It reaffirmed the validity of Convention 169 in the Peruvian legal system, citing the *Cordillera Escalera* case.¹⁶⁹ The Tribunal rejected the arguments regarding the absence of Indigenous people in Peru and, most importantly, it asserted that it was not

¹⁶⁷ The lawsuit, however, did not adequately explain the nature of the constitutional controversy. It did not contain a fair exposition of how and in what form this legislation directly affects Indigenous people. Then, without clearly establishing the arguments that supported their claim, they cited entire paragraphs of the *Cordillera Escalera* case. They did not even indicate which article of the legislative decree had a direct effect on Indigenous people. Even further, they did not identify themselves as Indigenous people. Only the oral submission of the lawyer indicated that the representative of the plaintiffs was indeed an Indigenous leader (“*Apu*”). See *La República* “Entregan 100 mil firmas para derogar decreto ley” (sic), (9 June 2009), at 7.

¹⁶⁸ Richard Edwards, “Reading Down Legislation Under the Human Rights Act” (2000) 20:3 LS 353. “Reading down legislation allows the court to bring into conformity with the Convention through the process of interpretation by adopting a narrow or modified interpretation, thereby avoiding the incompatibility.” This technique is used to “maintain constitutional validity of a legislative provision by narrowly interpreting one of its term in a fashion which does not infringe any one of the freedoms guaranteed by the Charter” at 356. In this case the Peruvian Constitutional Tribunal gave a narrow interpretation to the norm, excluding Indigenous people from its application.

¹⁶⁹ Nevertheless, the Tribunal asserts that the *UNDRIP* has to be considered as soft law and therefore, not binding (para. 6-8).

constitutionally valid to prevent the application of fundamental rights (in this case the right to consultation) due to a lack of domestic implementation (para. 11-13).

The Tribunal established that the right to consultation entails an intercultural dialogue. It also centered its attention on establishing the situations in which Indigenous people have to be consulted. For the Tribunal, the consultation process should be triggered when the administrative or legislative measures significantly alter the juridical situation of Indigenous people (para. 21). As well, the Tribunal emphasized that Indigenous people do not have a veto power; therefore, the Tribunal indicated that no ability to prevent the application of these administrative or legislative measures is granted by articles 6 or 15 of Convention 169 (para. 24-25). Furthermore, in paragraph 28 the Tribunal affirmed that Indigenous communities could not simply avoid consultation. The Tribunal realized that some reluctance to participate in the consultation proceedings by Indigenous communities could be understood due to the historic abuse against them by the “dominant society;” however, it also affirmed that this must not be used to reject engagement with the consultation process. The Tribunal also elaborates some elements and principles of the right to consultation such as good faith, flexibility of the process, and transparency. Thus, in cases where the parties act against these principles, the consultation process could be challenged.

The *Tuanama I* decision includes two joint opinions; the one delivered by judge Vergara Gotelli and the other delivered by judge Landa Arroyo. For Vergara Gotelli, the right to consultation can only be invoked if the Indigenous people claim the infringement, or threat of infringement, of a fundamental or legal right. He also emphasizes that article 6 of Convention 169 does not invest Indigenous people with a veto power, and he warns about the dangers of transforming the consultation into a formal procedure deprived of any substantive and real dialogue between the state and Indigenous peoples. However, in one of the last paragraphs of his opinion he states: “This is not to express a biased position in defense of Indigenous communities but the effectiveness of the consultation process [...]” Judge Vergara’s opinion could reflect his reluctance to be considered a “pro Indigenous Peoples’ judge” by the government at a time of large scale Indigenous street protest.

In contrast, Landa Arroyo asserted that it was not necessary to define whether

the right to consultation entails a veto power or not; especially considering that at that moment the Congress was debating a Right to Consultation bill. Unlike Vergara Gotelli, he understood, as with the rest of the Tribunal, that no actual harm was necessary in order to invoke the right to consultation; it was only necessary to prove that a legislative or administrative measure would have a relevant impact on an Indigenous community.

Given the post-Baguazo crisis context, *Tuanama I* was in all, a moderately activist decision on behalf of the Indigenous people. Only through a significant effort at interpretation (reading down technique) the Tribunal decided the constitutional validity of the legislative decree, while at the same time favouring the plaintiffs' objectives, making the application of this extraordinary regime to Indigenous people constitutionally inapplicable. Hence, although the plaintiffs lost the case, the decision might bring positive consequences to the Indigenous people of Peru.

d) *Aidesepe I* Case: Gradual Implementation as a Setback

On July 10, 2007, the Interethnic Association for the Development of the Peruvian Rainforest (AIDSEPE), an NGO dedicated to the defence of Indigenous people in the Peruvian Amazonia, filed a writ of *amparo*. They requested that the Ministry of Energy and Mines (MEM) ban or suspend the exploration and extraction of hydrocarbons in lots 39 and 67, located in the Loreto region. They argued that those lots overlapped onto un-contacted Indigenous peoples' territories, threatening their health and cultural rights. Additionally, the NGO argued that some other legally recognized Indigenous communities around those lots were not consulted according to Convention 169.

The administration answered the claim by maintaining that the oil companies involved conducted an environmental impact assessment, which concluded that the extraction activities would not involve negative environmental effects. Furthermore, they argued that the suspension of activities in lots 67 and 39 would cause serious harm to the state, since it would send a wrong signal to private investors.

On June 20, 2010, the Tribunal dismissed the claim. Their decision can be divided into two parts: In the first part, the Tribunal held that the existence of Indigenous communities in voluntary isolation on those lots was, in fact, not demonstrated; in the second part, the Tribunal addressed the situation of the already recognized Indigenous communities that lived in proximity to those lots by affirming that, although the right to

consultation had not been respected, the oil companies acted in good faith by developing their activities under contracts that could not be modified. The Tribunal also maintained that the right to consultation in this case should have been put into practice “gradually.” The Tribunal did not define this concept, or how this process would be undertaken.

The plaintiff filed a motion for clarification alleging that some of the decisions’ points were not clear enough. A couple of months later the Tribunal rejected the motion, but affirmed in a very surprising manner that the right to consultation was to be considered mandatory only since the decision of *Tuanama 1* (June 17, 2010).

e) *Aideseq 2* Case: Split Decision in Favour of Implementing the Convention at the Administrative Level

On July 3, 2007, AIDSESEP filed a writ of mandamus (*cumplimiento*) requesting that the MEM comply with Convention 169. They claimed that despite the existence of Convention 169, the Peruvian government, and in particular the MEM, had not issued any regulations toward implementing the right to consultation. On August 23, 2010, the Tribunal voted five against two to uphold the lawsuit. The majority opinion was split into three groups: The concurrent opinions of Landa Arroyo and Eto Cruz, the concurrent opinions of judges Mesía Ramírez and Beaumont Callirgos, and the concurrent opinion of judge Calle Hayen. Alvarez Miranda and Vergara Gotelli issued dissenting opinions.

Landa Arroyo and Eto Cruz held (in 37 pages) that this unconstitutionality by omission could be addressed by means of a *cumplimiento*.¹⁷⁰ Although the MEM alleged that it had promulgated regulations regarding the right to consultation, the judges ruled that such regulation did not reflect the content and spirit of Convention 169.¹⁷¹ In sum, they concluded that the MEM had not regulated a genuine right to consultation; they

¹⁷⁰ Although they acknowledge that this writ was not the proper legal process to challenge the unconstitutionality by omission, they concluded that rejecting the lawsuit would be the same as denying access to constitutional justice. Therefore, they elaborated an “extraordinary writ of *cumplimiento*”. This was an exceptional manoeuvre and has never been used again by the Tribunal or one of the judges.

¹⁷¹ Judge Landa Arroyo already had expressed this argument in his *Tuanama 1* concurrent opinion. In this joint opinion they relied on the ILO’s 2010 *Report of the Committee of Experts on the Application of Convention and Recommendations*, which establishes that Convention 169 requires the establishment of a “genuine dialogue” between the parties involved. Actually, the committee had referred to MEM’s regulation, establishing that: “[...] meeting solely for the purpose of information or socialization does not meet the requirement of the Convention.” In that sense, the judges held: First, that the regulation referred by the MEM was aimed to regulate citizen participation in general; it was not specifically addressing the participation of Indigenous people, and second, the MEM only regulated briefings and workshops with the population that might be affected, but it did not regulate a real process of dialogue.

ordered the MEM to issue a regulation on the subject, and they also urged the Congress to introduce a bill and debate on the subject in accordance with Convention 169.

This opinion is full of quotes by specialized authors, as well as decisions of the Constitutional Tribunals of Spain and Germany. These judges used comparative constitutional law, referring to how unconstitutional omission has been recognized by the constitutions of Portugal, Ecuador, Venezuela, and Brazil. Although the use of comparative constitutional law might not be unusual in the Peruvian Constitutional Tribunal, it is not very common for the Tribunal to use such a diversity of doctrinal and comparative tools, which shows the special interest of these judges in supporting their arguments in this case.

The concurrent opinions of judges Mesía Ramírez and Beaumont Callirgos agreed with the above-mentioned opinion, but rejected the reasoning that supported it. The same is true of Judge Calle Hayen. According to these three judges, the *cumplimiento* must be converted into a different constitutional writ, the writ of *amparo*. These opinions, unlike those of Judges Landa Arroyo and Eto Cruz, are briefly expressed in only three pages. It could be said that this case generated an important tension among the judges, with no one desiring to modify their positions.

Alvarez Miranda and Vergara Gotelli's dissenting opinions would have dismissed the lawsuit on formal or procedural bases. They held that the writ of mandamus was not the proper procedural remedy, as it was designed to enforce legal or infra-legal ranked norms and, according to the Tribunal's own precedents, Convention 169 has a constitutional rank. As a result of this decision, the MEM enacted the Supreme Decree N.º 023-2011-EM in 2011. This was the first time that the right to consultation was expressly regulated in Peru.

h) Tuanama 4-WRA Case: Changes and Reinterpretation of the Jurisprudence

On June 26, 2009, more than 5000 citizens represented by Gonzalo Tuanama Tuanama, filed a constitutional claim challenging the *Water Resource Act (WRA)*¹⁷². The claimants questioned the system of water licensing incentives for operators that generate surpluses in the management of water resources. It was argued that such licensing

¹⁷² *Water Resource Act*, Act No. 29338 (31 March 2009).

incentives put Indigenous people in a disadvantaged position, because Indigenous communities do not have the capacity to compete with large operating companies. In contrast with the other *Tuanama* cases, where there was no direct mention of Indigenous people, the *WRA* expressly indicates how Indigenous communities have to organize themselves in order to manage water resources.

This lawsuit was filed against the Congress, in contrast with the other *Tuanama* cases, because the Congress issued the *WRA*. In the other cases the plaintiffs challenged legislative decrees that were issued by the executive power. The *WRA* regulates in a general manner the hydro resources of Peru; therefore, Indigenous communities are not the only subjects of this Act. The government also affirmed that instead of causing harm to Indigenous people, the Act established a positive discrimination in favour of Indigenous communities. On March 17, 2011, the Tribunal rejected the claim. It ruled that the challenged legislation was not regulating Indigenous peoples' conduct and was not directly infringing their collective rights. It concluded that the articles of the Act that specifically referred to Indigenous communities were isolated and did not cause detriment, harm, or direct injury to Indigenous people. Contrary to the claimants' arguments, the Tribunal reasoned that the Act was indeed accomplishing the mandates of Convention 169.

With respect to the date of the enforcement of Convention 169, the Tribunal overruled what was previously established in *Aidesep I* clarification decision. Basically, the Tribunal affirmed that Convention 169 was enforceable since 1995 and not since the publication of the *Tuanama I* decision (para. 24). The judges explained what they had meant in the *Aidesep I* clarification decision: that principles and criteria to resolve cases regarding the right to consultation had only existed since *Tuanama I*. This was an obvious correction as a consequence of the strong critiques addressed against the *Aidesep I* clarification.

3.7.- General Appreciation of the Constitutional Tribunal Jurisprudence on the Right to Consultation

The decisions grouped here present an interesting panorama. Three relevant issues can be identified in almost all the previous cases: First, the legal status of Convention 169 in the Peruvian legal system is disputed. Second, the date that Convention 169 came into

force is disputed. Third, the Tribunal's interpretation regarding the right to consultation, including the debate about whether parties to a consultation have a veto over the outcome and what kind of legislative and administrative measures triggers the process of consultation, is disputed.

As I have already pointed out, Convention 169 was the only legal source of law of the right to consultation in Peru, at least until the Act No. 29785 was issued in August 2011. This is relevant to mention because the Tribunal changed its position regarding the validity of Convention 169 in the Peruvian legal system. In the 2007 *Lauricocha Province* case, the Tribunal assumed that Convention 169 was not part of the Peruvian legal order; but in 2009, in the *Cordillera Escalera* case, a case where the right to consultation was not at issue, the Tribunal affirmed that the convention is in fact part of the Peruvian legal system, asserting that the legislative power should regulate how to apply this convention. It is also interesting to note that in the *Lauricocha Province* case the plaintiff bases part of its arguments on the fact that the Indigenous communities affected were not consulted. However, the Tribunal fails to make any reference to the right to consultation; it was only upon a request for clarification that the Tribunal was forced to say something about the topic.

In the clarification resolution of *Lauricocha Province* case, the arguments of the Tribunal were very feeble. Indeed, the Tribunal did not take into consideration the fact that the *Constitution of 1993* was only legally enforceable since December 30, 1993, and that the Congress's approval of Convention 169 was on December 5, 1993. Therefore, the decision lacked a legal base. However, the question regarding which norm was used to ratify Convention 169 still presented itself. There are two options here: the Peruvian *Constitution of 1979* -which was suspended in April 1992- or the mere power of the constituent assembly of 1993. It could be said that Convention 169 was approved by the Congress in its role as constituent assembly, and that, therefore, it did not need to follow any specific procedure. The problem with this argument is that the constituent assembly also had the role of an ordinary congress, and as a matter of fact, the Act that accepted Convention 169 did not indicate in what role the constituent assembly was accepting the Convention.

Taking this unusual situation into account, a better argument would be to rely on the international law. Article 46 of the *Vienna Convention on the Law of Treaties*¹⁷³, establishes that no internal law can be argued in order to avoid the treaty obligation.¹⁷⁴ Moreover, with the ratification of the Convention 169 by the executive power in 1993, the Peruvian state was clearly acting as though Convention 169 was part of the Peruvian legal system. Therefore it is puzzling to observe why the Tribunal decided to not recognize the legal validity of the convention. How could such a situation be explained? Questions can be posed as to why the Tribunal altered its position about Convention 169 so radically in only 2 years, and without having given any explanation of this change. Is this change a consequence of the new judges that joined the Tribunal after 2008? Why did judges Landa Arroyo and Vergara Gotelli change their opinions? Even further, what happened between *Lauricocha Province* and the *Cordillera Escalera* case?

Courts act strategically. One of the elements judges bear in mind when deciding a case is the actual or potential consequences of their decision. Considering the way the Tribunal solved the *Lauricocha Province* case, it could be argued that Indigenous rights were not an important issue for the Tribunal. It is not that the judges were against Indigenous rights, but rather, it is my opinion that they did not give, consciously or unconsciously, the proper relevance, and perhaps they felt comfortable in their expectations that such decisions were not going to generate social resistance. After all, the *Lauricocha Province* case was not considered a crucial case, and indeed, did not receive any attention from Indigenous organizations or any legal scholar. The case was considered more like a conflict between two provinces or as a decentralization problem. Therefore it could be affirmed that it was easy for the Tribunal to obscure Indigenous rights in 2006 and 2007 by establishing that Convention 169 was not part of the Peruvian legal framework.

It is my impression that between 2006 and 2007, the judges of the Tribunal were definitely not familiar with the right to consultation as there was basically no debate

¹⁷³ United Nations, *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, UNTS, vol. 1155, ratified by Peru 14 September 2000).

¹⁷⁴ “A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.”

about the right to consultation among legal scholars during this time in Peru. However, ignoring an international treaty of human rights -specifically in favour of Indigenous peoples- denotes something else than mere ignorance or incomprehension. The judges of the Tribunal must have known that there was going to be almost no opposition to *Lauricocha Province* decision, because consciously or unconsciously, Indigenous peoples' rights were not real and fully recognized. Therefore, real implementation of Indigenous rights could wait and was left aside in favour of other freedoms or constitutional values. At the core of this "de-constitutionalization" of the right to consultation lies the representation of Indigenous communities as a dispensable population of Peruvian society, a population that is not worthy of certain cultural rights.

However, by 2009 the context was different. The extension of mining and oil concessions had been growing steadily since 2001, affecting Indigenous territories and also natural protected areas. In 2007, President García Pérez wrote an article where he explained the neoliberal program of his administration, showing disregard for the non-contacted Indigenous groups. Between March and June 2008, the administration issued the legislative package regulating the Peru-US TPA. Such a package caused protest from Indigenous organizations of the Amazonia against some of those legislative decrees due to the fact Indigenous peoples were not consulted. In sum, Indigenous claims were clearly more visible in the streets, and some left wing groups began to join in the protests. Reasons such as these can help us to understand the radical and unexplained change in the Tribunal at that time. Furthermore, while the *Cordillera Escalera* case was being written, the protest of the Indigenous peoples of the Amazonia started its radicalization. Therefore, although in the *Cordillera Escalera* case the plaintiffs did not even cite Convention 169 in the claim, the Tribunal found a good opportunity to convey something different about the convention. Obviously they did so without referring to the *Lauricocha Province* case that would expose the hollowness of that decision.

In the *Tuanama I* decision, the Tribunal reaffirmed the validity of Convention 169 in the Peruvian legal system, citing the *Cordillera Escalera* case. Moreover, the Tribunal also asserted that it was not constitutionally valid to prevent the application of fundamental rights contained in international treaties due to a lack of domestic implementation. It held that this would mean leaving the protection of fundamental rights

to the discretion of the Congress. According to the Tribunal, such normative omission did not enable the state to escape its obligations under Convention 169.

In this case, the executive power relied on the myth of “racial homogeneity,” denying the existence of Indigenous people in Peru.¹⁷⁵ It argued that with the “development of civilization (sic)” in Peru there were no more Indigenous people: all Peruvians were mestizos. Such an argument is not only hypocritical, but also evokes the cultural racist discourse; it completely overlooks the social programs¹⁷⁶ that the executive power implemented in favour of the Indigenous population, and implies that Indigenous people are not “civilized.” The lawyers of the executive power used the rhetoric of the “uncivilized” Indigenous peoples, and therefore considered that there were only “ex-Indigenous peoples” in Peru. It is important to emphasize that this was the executive power’s official response to the claimants. It is also important to mention that the plaintiffs did not respond to this argument, which was perhaps due to the neglectful conduct of the plaintiffs’ lawyer or because the lawyer himself, as well as the Indigenous leaders, accepted such an ideology as something not to be questioned.

Nevertheless, for the Tribunal the validity of Convention 169 was not in doubt so it rejected the executive power’s argument regarding racial homogeneity, asserting that the verification of classification of an Indigenous person ought to be elucidated case by case (*Tuanama I*, para. 10). This being said, the Tribunal did not deploy any definition regarding who should be considered an Indigenous person. The Tribunal simply paraphrased article 1 of Convention 169, which contains the parameters that define to whom Convention 169 will be applied.¹⁷⁷ With this, the Tribunal reaffirmed its position

¹⁷⁵ See Christina Sue and Jonathan Warren, “Comparative Racisms: What Anti-racists Can Learn from Latin America” (2011) 11:1 *Ethnicities* 32. The race mixing thesis has a long history in Latin America. This *mestizaje* approach supports the idea of the nation-state, consequently denying the multicultural project. [...] [I]ntellectuals, governments and ordinary citizens have long promoted *mestizaje* (race mixture) as the means for transcending race and producing national cohesion” at 34-35. The central argument of the “race mixer” is that *mestizaje* will erase racial categories and therefore racial discrimination.

¹⁷⁶ For example, since 2001 there was the *National Institute of Development of Andean, Amazonian and Afro-Peruvians Peoples* (INDEPA, for the initials Spanish).

¹⁷⁷ Section 1 of the convention establishes: “This Convention applies to:

(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

regarding the Convention, however leaving a great deal of discretion to the administration to define to whom the Convention can be applied. My perception is that the tribunal did not in fact want to address this issue, because it is indeed one of the “hottest topics” in current Peruvian politics. To define who is Indigenous is to define who is entitled to special rights, which could lead to social and legal *status quo* instability.¹⁷⁸

When asserting that Convention 169 was part of the Peruvian legal system, the Tribunal also established that it was applicable since 1995. However, in the clarification of the *Aidesepe I* case, the Tribunal ruled that because of the Congress’s legislative omission, Convention 169 should be applied since the *Tuanama I* case was reported. This explanatory decision was issued within an important and persistent debate about what the state should do with the concession already granted. Indeed, during the debates in the Congress regarding the bill on the right to consultation, this point was crucial. However, the Tribunal sent a sign to Indigenous associations and NGOs that assist Indigenous communities. They responded quickly this time, criticising *Aidesepe I* clarification ruling through academic articles and lobbying in the ILO.¹⁷⁹ That is why the *Committee of Experts on the Application of the Conventions and Recommendations* (CEACR) of the ILO questioned the *Aidesepe I* clarification ruling, reminding the Tribunal that all the provisions of Convention 169 have been binding since February 2nd of 1995.¹⁸⁰ The Tribunal changed this criterion only in the ruling of *Tuanama 4-WRA*

(b) Peoples in independent countries who are regarded as Indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”

¹⁷⁸ See Marco Sifuentes, “La Consulta Previa: Una Fuente de Conflictos Dentro y Fuera del Gobierno” in *La República*, (05 January 2013) online: <<http://www.larepublica.pe/05-02-2013/la-consulta-previa-una-fuente-de-conflictos-dentro-y-fuera-del-gobierno>>. This entails huge questions. First, who has to decide this, the state or the Indigenous groups themselves? The Vice-Ministry of Interculturality started drawing up a list of Indigenous communities in 2011 but it has not been published until 2013. The second problem is what is going to happen with those communities who are excluded from that list. It is most probable that those groups choose to use the legal system or to initiate protests that might threaten governability. Furthermore, in the context where consultations have been ignored since 1995, several Indigenous groups are claiming that many mining and oil concessions issued after 1995 should be reviewed.

¹⁷⁹ Juan Carlos Ruiz Molleda, “Nueva Sentencia del TC sobre Derecho a la Consulta: Un Paso Adelante, dos Atrás”, online: Justicia Viva <<http://www.justiciaviva.org.pe/notihome/notihome01.php?noti=507>>

¹⁸⁰ Observation of the CEACR - adopted 2010, published 100th ILC session (2011), *Indigenous and Tribal Peoples Convention, 1989 (No. 169) - C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) Peru* (Ratification: 1994) (Online: <http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID:2328582>

(par. 24), in 2011, when it “clarified” that since the *Tuanama I* ruling, principles existed to solve cases regarding the right to consultation, and that it did not mean to conclude that Convention 169 was applicable only since the *Tuanama I* case.

The question of whether or not there exists a veto power on the part of Indigenous peoples is another issue in the Tribunal’s jurisprudence. This debate is, however, as old as Convention 169. During the drafting process of the convention, many Latin American states showed their concerns about the concepts of agreement and consent, understanding them as synonyms of veto power for Indigenous communities.¹⁸¹ In the Tribunal’s jurisprudence this topic also showed a zigzagged tendency. First the Tribunal did not seem to want to give an answer to the veto/no veto debate, establishing that this topic was something to be decided by the Legislative power (*Cordillera Escalera* case). Then in 2010, the Tribunal firmly ruled that there was no veto in the consultation process, at least not for the Indigenous communities (*Tuanama I* case).

In effect, in the *Cordillera Escalera* case, the Tribunal, *obiter dictum*, established that the Congress should regulate this aspect of the right to consultation. However, in the *Tuanama I*, the Tribunal opted to strongly affirm that the right to consultation did not entail a veto power. Judge Landa Arroyo questioned this in his separate opinion in *Tuanama I*. He emphasized that it was not appropriate to establish a position regarding that topic when the Congress was debating a bill on the right to consultation. Indeed, the tribunal issued the *Tuanama I* decision in June 2010, while the Congress was trying to pass an Act regulating the right to consultation. One of the huge debates in the Congress was regarding the concept of consultation, and if this did or did not entail a veto power of the Indigenous communities.

Certainly, the argument of the Tribunal about the no-veto power of the consultation does not help solve the juridical problem of the case. In *Tuanama I*, the question raised by the case was to determine if certain legislative decrees should have been subject to consultation or not, therefore, there was no need to establish anything about the veto/no-veto debate. The Tribunal argued that Convention 169 did not establish

¹⁸¹ Swepston, “A new Step”, *supra* note 130 at 691.

a veto in favour of Indigenous peoples; that the consent was the intention, but not a condition of the consultation.

In the middle of the legislative debate, perhaps the Tribunal wanted to establish some boundaries, and with this, ultimately tip the balance towards one position, giving a “constitutional legitimacy” to the no-veto position. Interestingly, in *Tuanama I* the Tribunal cited two IACHR decisions to reinforce specific arguments regarding the protection of Indigenous land. However, they did not cite *Saramaka v. Surinam* (para. 134), where the IACHR addressed the interpretation of the right to consultation. Furthermore, in the case that was cited in the *Cordillera Escalera* ruling, the IACHR established that the Suriname state needs the consent of Indigenous communities to carry out large-scale or investment projects that will have a significant impact in those communities, which is basically a veto power, as it closes any possibility for the state to carry on those kinds of projects if there is no consent from the Indigenous communities potentially affected. Based on this it appears that the Tribunal did not want to take into account the “consent doctrine” settled by the IACHR. There has not been any legal claim on behalf of Indigenous communities specifically for the application of the IACHR criteria regarding the “consent doctrine.” However, it is obvious that they will point out this divergence of criteria between the Tribunal and the IACHR regarding the meaning of consultation.

Another important issue in Tribunal jurisprudence is the determination of what triggers consultation. There are two possibilities: 1) when an administrative or legal measure is susceptible to affect Indigenous people (and by this I mean the probability of significantly changing the juridical situation or status of Indigenous communities) or, 2) when those measures probably or actually harm Indigenous rights.

The difference is subtle but relevant. The first option shows more respect to Indigenous self-determination as it gives more capacity to Indigenous peoples to argue from their own perspective, and decide which legal or administrative measures, that could be considered harmless for the mainstream society, are in fact significantly changing the juridical status of Indigenous communities. This position also highlights the autonomy of the right to consultation in that it separates the breach of the right to consultation from the breach of other fundamental rights. In contrast, the latter option asks for the

determination of a threat or actual damage to Indigenous people; the problem here is that, taking into account the no veto doctrine upheld by the Tribunal, it produces a disjointing situation where Indigenous rights can only be obliterated through the consultation process.

In the *Tuanama I* ruling the majority of the Tribunal established that consultation arose in accordance with option 1, mentioned above, when a measure is susceptible to directly affect Indigenous peoples (para. 19-21). Only judge Vergara Gotelli, in his concurrent opinion, affirmed that it was necessary to prove potential of actual harm to Indigenous peoples. In the *Tuanama 4-WRA* decision, the Tribunal established that a measure which directly “affects” the collective rights of Indigenous communities could be a measure of any kind that acts to harm, damage or “produce direct alteration” to the collective rights of these peoples (para. 25). However, the Tribunal established that the *WRA* entails no detriment against Indigenous collective rights; for this reason, the claim was rejected. In its decision, the Tribunal does not include any reference to “direct alteration.” It would appear then that the Tribunal had established a new rule, whereby the right to consultation can only be invoked when an Indigenous community proves damage.

The Tribunal held in *Tuanama 4-WRA* that there was no evident “harm”, and therefore rejected the lawsuit. The Tribunal concluded that, the fact that Indigenous communities have to organize themselves in committees cannot be considered a direct detriment against Indigenous peoples. In this case, the Tribunal was not only changing its position without providing an explanation as to why, it was also assuming a paternalistic view, arguing that the *WRA* does not exclusively address Indigenous peoples, that it does not regulate Indigenous collective rights, and that the Act only affects Indigenous people indirectly (para. 28). Indeed, the Tribunal assumes that the *WRA* regulation was “good” and better for the Indigenous communities than the previous regulation. The problem is that this assumption was made without any participation of Indigenous communities.

Considering that the Act makes explicit reference to how Indigenous peoples have to be organized in order to administer the water that is on their territories, it is my opinion that the Act has a direct impact in the juridical status of Indigenous peoples. For example, article 32 of the *WRA* establishes that peasant and native communities organized

themselves according to their traditions, however it also establishes that they will have the same status as other organizations that are users of water resource. Although this could be understood as a legislative measure that does not interfere with Indigenous people, it opens many possible consequences that could not be anticipated by the legislative body. Therefore, it is important for the Indigenous groups to have a measure of participation in the elaboration of this Act. Another example is the article 19, which indicates that the board of the institution responsible to manage the water in Peru shall be formed, among others, by one representative of peasant communities and one representative of native communities. Considering the number of Indigenous communities, a single representative does not reflect a realistic recognition of the number and diversity of Indigenous communities (there are more than 5000), and therefore would be deemed by Indigenous communities as deeply problematic. Indeed, this clause assumes that there is a structure that allows Indigenous communities to elect their representative where no such structure exists. Therefore, the state is imposing a determined organization and participation on Indigenous peoples, interfering with the Indigenous self-determination of the Peruvian Indigenous groups.

The Tribunal affirmed that with the WRA, the state was actually enforcing Convention 169, meaning that this Act has an important protective approach in favour of Indigenous peoples. This argument brings out a paternalistic approach where Indigenous peoples have to accept something because “it is good for them”, and that is why there is no need for its participation. This argument is accommodated by a paternalist philosophy that as a matter of fact, is rejected by the ideological underpinnings of Convention 169. Certainly, Convention 169 establishes in article 6 that in “applying the provisions of this Convention, governments shall” consult Indigenous peoples, establish means for participation, and for a full development of Indigenous peoples’ institutions and initiatives.

Thus, the Tribunal restricted the Indigenous peoples’ scope of action, making not even a minimal effort to try to understand their perspectives. If the Tribunal had shown interest in these issues, or had been able to demonstrate the ability to transcend their own conceptions of justice and rights,¹⁸² there would have been another outcome to the case.

¹⁸² Webber, *Judicial Ethics*, *supra* note 12 at 72.

In effect, the Tribunal's lack of humility is obvious in this decision, circumventing all avenues for meaningful dialogue. For the Tribunal, it was enough to hear that the *WRA* was good for the Indigenous peoples; they chose to close the debate instead of really listening to the voices of Indigenous communities. This decision is far from exhibiting an intercultural approach. The Tribunal concludes in *Tuanama 4-WRA*, that the Act challenged in this case did not involve an issue that directly affects Indigenous people. At the same time, it pointed out that the Congress was "just" implementing Convention 169.

It is here that we can see a pattern in the Tribunal's jurisprudence regarding the right to consultation: a pattern of instability. First, in the case where the plaintiff claimed that the state did not consult Indigenous peoples, the Tribunal decided to omit any reference to the right to consultation, and proceeded to establish that Convention 169 was not part of the Peruvian legal system (2007). Second, in a case where the plaintiffs did not claim the right of consultation (2009), the Tribunal established that Convention 169 was part of the Peruvian legal system since 1995. Third, in August 2010, in a right to consultation case - the second case where the plaintiffs explicitly claim the right to consultation - the Tribunal developed principles and the content of that right. Although the Tribunal rejected the plaintiff's claim, it ruled that the legislative decree would be considered constitutional only if it was not applied to Indigenous peoples. It also affirmed the no-veto interpretation of the right to consultation. Fourth, in June 2010, the Tribunal affirmed that the right to consultation was legally effective only since June, 2010. Then, in March 2011, it clarified that Convention 169 was legally effective in the Peruvian legal system since 1995.

This zigzagging jurisprudence is the Tribunal's response not only to the plaintiffs' and defendant's arguments, but also to the political and social context. It can be proposed that this is the way the Tribunal deploys its strategy to confront, not only the right to consultation, but also the relationship between the state and the Indigenous peoples. The significant aspect here is that the Tribunal seems to shape its jurisprudence against the clear efforts of the plaintiffs and some Indigenous organizations.

In all the cases the Tribunal was unwilling to apply the right to consultation. Although it decided to order the MEM to elaborate a regulation of the right to consultation, in the *Aidesep 2* decision, the order was very broad. *Aidesep 1* also has to be

taken into account. The euphemism used by the Tribunal to avoid the future “gradual application” of the right to consultation, is another piece of evidence that supports the idea of a bias built into the Tribunal regarding the jurisprudential implementation of the right to consultation.

It is also interesting to take into account the political context in which the Tribunal delivered its decisions and how such a context could influence the Tribunal’s rulings. Indeed, both the post-Baguazo context and the Peru-US FTA were relevant factors that influenced the Tribunal’s work. However these factors were also mediated by the traditional disdain against Indigenous peoples and their rights. Thus, although an important element to explain the Tribunal jurisprudence is the legislative package to implement Peru-US FTA, I propose that it was easier for the judges of the Tribunal to reject the Indigenous consultation cases because they overlooked Indigenous self-determination. If the judges had felt compelled to say something firm about the right to self-determination, it would be difficult for them to argue against the Indigenous rights claims, especially in the *WRA* case. Indeed, this could explain why the Tribunal was apparently unwilling to strike down any legislative decree or Act on the basis of a lack of consultation with Indigenous peoples. It could also be said that in general, the Tribunal was reluctant to favour the claims regarding Indigenous rights.

However, one must question why this zigzagging jurisprudence was so easy for the Tribunal to perform. To use a hypothetical example, what would have happened if the Tribunal decided to declare another international treaty unconstitutional, for instance, the Peru-USA TPA, or to wait more than fifteen years to implement this treaty? This difference can be understood as stemming from the Tribunal’s lack of assertiveness regarding Indigenous rights. I would argue that such attitudes are due to the persistent disregard, and even spite, for Indigenous values and rights immanent in Peruvian society. In order to explain this more in depth, it is necessary to analyze the right that supports the duty or right to consultation: the right to self-determination of Indigenous people.

Chapter 4: Indigenous Peoples and the Right to Self-Determination

Some authors have indirectly pointed out the relationship between Indigenous self-determination and the right to consultation.¹⁸³ Although both principles interact very closely, not much attention has been paid to their impact on each other. Therefore, as I will explain, a deficient conception of the right to self-determination implies an insufficient formulation of the right to consultation. The main elements of the right to consultation are explained in the previous chapter; hence, it is now necessary to explain the right to Indigenous self-determination.

There are many written works regarding the general right to self-determination; many different approaches have emerged from international politics and negotiations, out of which important scholarship has been written that continues to influence ongoing debates.¹⁸⁴ For instance, self-determination could be defined as the right of peoples to decide their own destinies;¹⁸⁵ however, this broad definition raises interpretative problems regarding the meaning of “peoples”, and more so what such “peoples” may be entitled to determine. Indeed, the exploration of these two points has been an important focus of the self-determination debate. Hence, one can see that the above basic definition reveals merely a general scope, or more of a notion, and it is precisely for this reason that definitions of self-determination depend on historical, political, economical, social, and cultural contexts.

The main characteristic of the self-determination debate is the struggle for the expansion of the scope of the right to self-determination and, at the same time, the

¹⁸³ See Bartolome Clavero, “The Indigenous Rights of Participation and International Development Policies” (2005) 41 *Ariz J Int’l & Comp L* 42.

¹⁸⁴ See Hurst Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990) [Hannum, *Autonomy*]; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (New York: Cambridge University Press, 1996); James Crawford, “The Right of Self-Determination in International Law: Its Development and Future” in Philip Alston, ed. *Peoples’ Rights* (Oxford: Oxford University Press, 2001) 7; Allen E. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 2004).

¹⁸⁵ James Anaya, “A Contemporary Definition of the International Norm of Self-Determination” (1993) 3 *Transnat’l L & Contemp Prob* 131 at 151 [Anaya, “A Contemporary Definition”].

recognition of the right to self-determination to new rights holders.¹⁸⁶ In this sense, one of the most significant issues in the self-determination debate within the international legal realm is the differentiation between self-determination and secession. It was seen previously that self-determination was often equated with secession. This approach made it almost impossible for minority groups to discuss notions of self-determination, as often such groups would be portrayed as radicals aiming to disintegrate a state. Today, however, the term “self-determination” is no longer usually equated with secession. This important departure from earlier views has helped minorities and Indigenous groups become holders of the right to self-determination, while at the same time has created new dimensions, meanings and challenges in the understanding of this right.

In this chapter, I will start by presenting the historical evolution of the notion of self-determination during the 20th century. I will then discuss the scope of the right to Indigenous self-determination and, finally, I will expose in what manner the Indigenous right to self-determination is linked to the right to consultation.

As I will illustrate, the right to self-determination was, in the early decades of the 1920s, a right related to European issues concerning the post-WW1 era. With the end of the classical colonial order in the 1970s, the application of the right to self-determination expanded to other non-European realities. After this, and with the re-conceptualization of the classical colonial phenomena spreading within post-colonial states, Indigenous groups appropriated and used the self-determination rhetoric in a much more effective way than other groups, such as sub-national minorities. Thus, whereas in 1989 the inclusion of the term “self-determination” in ILO Convention 169 assured the rejection of its ratification, in 2007, the inclusion of the right to self-determination was a non-negotiable issue for approval of the *UNDRIP* by Indigenous groups. Finally, I will focus on the intersection between the right to self-determination and the right to consultation in order to show that the right to consultation is a tool for concretizing the right to self-determination.

¹⁸⁶ See Benedict Kingsbury, “Self-Determination and ‘Indigenous Peoples’” (1992) 86, *American Society of International Law Proceedings* 383 (86th Proceedings of the Annual Meeting) at 386; Gudmundur Alfredsson, “Different Forms of and Claims to the Right of Self-Determination” in Robert G. Williamson, Donald Clark & Allan Blakeney, eds, *Self-Determination: International Perspectives* (Basingstoke, UK: Macmillan, 1996) 58; Xanthaki *supra* note 127.

4.1.- “Right to Self-Determination” and Other Terms

Buchanan equates self-determination with autonomy and it seems that Kymlicka equates self-determination with self-government.¹⁸⁷ Other authors speak of self-determination with self-government and autonomy, stressing the practicality of using the latter term already codified in international law.¹⁸⁸ Anaya, in contrast, differentiates self-determination from self-government.¹⁸⁹ In contrast to the “thin promises of autonomy”, Muelhebach differentiates autonomy and self-government from self-determination, where the latter entails the power to control political and economic issues.¹⁹⁰ In 1990 Hannum proposed the right to autonomy to be a new international law principle, built into the interstices of sovereignty, self-determination and human rights.¹⁹¹ In the United States,

¹⁸⁷ Will Kymlicka, *Multicultural Citizenship* (New York: Calendron Press-Oxford, 1995) at 27; Allen E. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 2004) at 333 [Buchanan, *Justice*].

¹⁸⁸ Andina Preda, “The Principle of Self-Determination and National Minorities” (2003) 27:3 *Dialectical Anthropology* 207. See Preda at 206: “As a concept, self-determination is very close or even equivalent in meaning to autonomy or self-government. It basically refers to the capacity of a person or of a group to ‘make its own rule’, to conduct their affairs in a way they see fit. However, legal terminology differentiates between these notions, and while there is no collective right to autonomy or self-government as such, self-determination made its way into codified international standards and is nowadays part of positive law”.

¹⁸⁹ James Anaya, “Canada’s Fiduciary Obligation towards Aboriginal Peoples in Quebec under International Law in General” in *Canada’s Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, vol 1 (Ottawa, Papers Prepared as Part of the Research Program of the Royal Commission on Aboriginal Peoples 1995) 9 [Anaya, “Canada’s Fiduciary”]. Anaya describes the consensus around the term “self-determination” as “the view that Indigenous peoples are entitled to continue as distinct groups and, as such, to be in control of their own destinies under conditions of equality. This principle has implications for any decision that may affect the interest of an Indigenous group, and it bears generally upon the contours of related norms” at 31, Self-government instead is described as “the political dimension of continuing self-determination. The essential elements of a *sui generis* self-government norm developing in the context of Indigenous peoples are grounded in the juncture of widely accepted precepts of cultural integrity and democracy, including precepts of local governance. The norm upholds local governmental or administrative autonomy for Indigenous communities in accordance with their historical or continuing political and cultural patterns, while at the same time upholding their effective participation in all decisions affecting them left to the larger institution or government” at 32.

¹⁹⁰ Andrea Muehlebach, “What Self in Self-Determination? Notes from the Frontiers of Transnational Indigenous Activism” (2003) 10:2 *Identities* 241. Muehlebach affirms that the first two terms “do not guarantee the collective right of local communities to land and natural resources.” It would only give “thin promises of local autonomy” at 253. In contrast, claims of self-determination include the right of Indigenous people to natural wealth and natural resources: “the right to decide freely over their futures. In this sense, it is not only about politics, but economic freedom and control” at 253.

¹⁹¹ Hurst Hannum, *Autonomy*, *supra* note 184 at 473-474. The author affirms at 473: “Personal and political autonomy is in some real sense the right to be different and to be left alone; to preserve, protect, and promote values which are beyond the legitimate reach of the rest of society”; and at 473-474: “This right to autonomy recognizes the rights of minority and Indigenous communities to exercise meaningful internal self-determination and control over their own affairs in a manner that is not inconsistent with the ultimate sovereignty—as that is properly understood—of the state.”

Stephen Cornell, an Indigenous scholar, differentiates between self-administration and self-government, with the latter involving a more meaningful exercise of jurisdiction.¹⁹²

As can be seen, it is common to find a variety of terms around the self-determination debate. Other terms like “secession”, “autonomy”, “self-rule”, “self-government”, “self-regulation” and “sovereignty” are also present in the debate. Sometimes these terms are equated with self-determination, and in other cases they may be differentiated from it. It is also common to see terms such as “internal” and “external” self-determination, “constitutive” and “ongoing” self-determination¹⁹³ and “sustainable” self-determination,¹⁹⁴ among other. It is not my intention here to elucidate each of these terms; rather, my intention is to expose the variety of terms that are used in the self-determination debate in order to illustrate that such variety reveals the complexity of how the concept can be understood.

This being said, it is important to address one of the biggest differences found in this debate: although self-determination and secession were previously wedded concepts, in the 1980s some authors began to distinguish between these two terms. Traditionally, secession was understood as a challenge to the “state’s own conception of what its boundaries are.”¹⁹⁵ This entailed specifically independence from a political unit in order to create a new unit or to become part of another political unit. Cassese and Buchanan affirm that secession is the most dramatic and radical form of external self-determination.¹⁹⁶ Therefore, secession is not a necessary consequence of the right to self-determination, and it would be a mistake, in light of the current debate, to immediately link self-determination with secession as an inevitable consequence. This important differentiation also involves a new understanding of the right to self-determination, which

¹⁹² Cornell, “Remaking the Tools” *supra* note 2 at 74-75.

¹⁹³ Anaya, “A Contemporary Definition”, *supra* note 185. Constitutive self-determination imposes a requirement of meaningful participation in the procedures of creation or implementation of important changes in the institution of government. Ongoing self-determination applies continuously, requiring, according to Anaya at 133, “an institutional governing order under which individuals and groups are able to make meaningful choices in matter touching upon all spheres of life on a continuous basis”.

¹⁹⁴ Jeff Corntassel, “Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse” (2008) 33:1 *Alternatives* 105 [Corntassel, “Sustainable Self-Determination”].

¹⁹⁵ Allen E. Buchanan. *Secession: The Morality of Political Divorce: From Fort Sumter to Lithuania and Quebec* (Boulder, CO: Westview, 1991) at 10 [Buchanan, *Secession*].

¹⁹⁶ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (New York: Cambridge University Press, 1996) at 120; see also Buchanan, *Justice*, *supra* note 187 at 332.

gives rise to important questions such as: what remains of the right to self-determination without secession? Although this question could be answered from different perspectives, I am interested here in linking these answers with the topic of Indigenous self-determination.

It is also important to indicate that among Peruvian legal scholars the concept of Indigenous self-determination is rarely used,¹⁹⁷ and the same is true of legislative and administrative normativity. In Peruvian legal society, it is more common to find terms such as “self-regulation” or “autonomy” than “self-determination”.¹⁹⁸ In my view, the concept of self-determination evokes in the urban elites of Lima the perils of the dismemberment of the state; obviously such a group must associate self-determination with secession in a country that already has serious problems with social and administrative integration. Thus, to mention the right to self-determination in a state with an absence of an effective control over its territory could bring the ghost of disintegration of the state. “Sovereignty” is another term that is commonly used in the mainstream Peruvian legal context; however, this concept is reserved for describing the competences and exclusive power of the state. Therefore, although the international Indigenous movement uses the term “Indigenous sovereignty”, in Peru “sovereignty” is still generally used to refer to the state’s exclusive prerogatives entrusted by the people.

¹⁹⁷ Among the legal scholars who use this term are Raquel Yrigoyen Fajardo and Francisco Ballón Aguirre, Peruvian experts on Indigenous issues. See Raquel Yrigoyen Fajardo “De la Tutela a los Derechos de Libre Determinación del Desarrollo, Participación, Consulta y Consentimiento” (January 2009, online: <www.justiciaviva.org.pe/derecho_consulta/02_ryf_derechos.pdf>); Francisco Ballón Aguirre, *Manual de Derecho de los Pueblos Indígenas* (Lima: Defensoría del Pueblo, 2004). Other authors, who support Indigenous claims or study them, do not give self-determination much relevance. Although they develop important considerations regarding the Indigenous issues in Peru, they do not focus on the right of Indigenous self-determination. See for example, Comisión Andina de Juristas, *Lineamientos Para una Agenda Pública en Derechos de los Pueblos Indígenas* (Lima: Comisión Andina de Juristas, 2011), and Juan Carlos Ruiz Molleda, *La Implementación del Derecho a la Consulta Previa de los Pueblos Indígenas: Una Mirada Constitucional* (Lima: Instituto de Defensa Legal, 2011). In this last book, dedicated to the analysis of the implementation of the right to consultation in Peru, the author refers to the right to self-determination only on seven occasions. Ruiz Molleda understands self-determination as the right of Indigenous people to decide freely (*decidir autonomamente*).

¹⁹⁸ See Armando Guevara Gil, “Las Causas Estructurales de la Pluralidad Legal en el Perú” (2006) 6:1 *Global Jurist Frontiers* 1; Wilfredo Ardito, “Right to Self-Regulation in Peru” (1997) 39:1 *Legal Pluralism & Unofficial Law* 1; Gerardo Eto Cruz & Roger Rodríguez Santander, “La Agenda Multicultural: Problemas Inconclusos en el siglo XXI” preliminary study in Antonio Peña Jumpa, *Multiculturalidad y Constitución. El caso de la Justicia Comunal Aguaruna en el Alto Marañón* (Lima: Centro de Estudios Constitucionales del Tribunal Constitucional, 2009) at 13.

Terms such as “peasant” and “native community autonomy”, by contrast, are in common use among Peruvian legal scholars.

In the first paragraph of this section, I noted that the different terms used in the self-determination debate are, depending on the author, usually distinguished by the intensity or degree of autonomy. However, a hint of legitimacy surrounds the term “self-determination”, because it is recognized in international positive law. Thus it can be seen why the international Indigenous movement appropriated the term in the first place, and why it tries to reconceptualize it, rather than just advancing another term.¹⁹⁹ Therefore, for practical reasons, in this chapter, the term “self-determination” will primarily be used.

4.2.- Abandonment Is Not Autonomy

Prior to reviewing the literature on the right to self-determination, it is important to distinguish between the absence of the state, and what could be imagined as the fulfillment of the Indigenous self-determination right. The absence of the state in some parts of the Peruvian territory is not uncommon. By this I mean that in some areas there is no effective control or effective implementation of the state law.²⁰⁰ This is not due to the desire of the state to leave spheres of autonomy to some communities. On the contrary, it is a manifestation of the lack of effective organization of the state.²⁰¹ A common consequence of this “state-less” space is that political power is usually taken by other actors: power may be held by part of a community or outsiders may even control and support specific individuals from the community in order to have control of that area. This absence of the state occurs in areas with Indigenous majorities, as well as in areas with non-Indigenous majorities. In non-Indigenous spaces, state law might be implemented without any specific cultural awareness. In contrast, in some areas where Indigenous populations live, the mere presence of the state imposing national legal institutions, which neglect Indigenous legal traditions, is not useful in solving the

¹⁹⁹ Benedict Kingsbury, “Self-Determination and ‘Indigenous Peoples’” (1992) 86 *American Society of International Law Proceedings* 383 at 386.

²⁰⁰ O’Donnell, *supra* note 10.

²⁰¹ This situation was evident during the 1980s when the terrorist group the Shining Path took control of many small towns in the Peruvian south highlands. Although this kind of control was temporary, because the Shining Path recognized its limited firepower against the military, it was a clear demonstration of the lack of state authority in some areas of Peru.

problem. It can be proposed that a multicultural approach, recognizing distinct Indigenous societies and their legal traditions, would be more useful in these cases. Such approaches would have to take into account the cohesion of the Indigenous community around its particular values and identity. In this sense, in recovering state jurisdiction over forgotten areas, states have to avoid eradicating cultural patterns that keep communities together.

It is important, therefore, to avoid confusion between impositions of the rule of law in spaces where no distinct societies have developed, and Indigenous territories where distinct societies have established their own governing institutions. In the former, the imposition of the state law could bring recognition and inclusion, leading to the reinforcement of liberties eliminating *de facto* landlord powers. In the latter, imposition of the state law would not signify inclusion or recognition but rather assimilation.

4.3.- Historical Backgrounds of the Self-Determination Debate; The Process of the Re-Conceptualization of the Right to Self-determination

Reviewing the history of the concept of self-determination helps to contextualize the current debate surrounding this concept. Using Hannum's description of the evolution of the general concept of self-determination throughout the 20th century, I will explore how the debate shaped Indigenous self-determination. Hannum recognizes three different stages of the concept of self-determination: the Wilsonian, the decolonization, and the postcolonial stages. The Wilsonian stage began in the earliest decades of the 20th century and ended with World War II. The decolonization stage started with the creation of the United Nations and the recognition of self-determination as an international right in the decolonization process of non-self-governing territories. The post-colonial stage started in the 1970s, pushed by Indigenous and minority groups. In the following pages, I will explain the different stages of the right to self-determination in order to contextualize the debates within the Peruvian context.

a) The Wilsonian Formulation: Self-Determination as a Political Notion.

Important references to the principle of self-determination can be found in the 19th century. By first conceiving of nations as homogenous populations, ethnic values were used to justify the creation of 19th century states. Thus, the so-called nation-states were

created on the basis of a supposedly homogenous nation.²⁰² Ethnicity was the most relevant criterion for creating new states. For Hannum, the Wilsonian principle of national self-determination was based on ethnic and language elements; therefore, groups bound by language and ancestry could invoke the right to territorial and political independence.²⁰³

In the early decades of the 20th century, this trend was still valid and national self-determination was the prototype of political organization. Such a paradigm fuelled nationalist fervour, demanding the disintegration of the Austro-Hungarian and Ottoman empires during the First World War, as well as in its aftermath.²⁰⁴ Woodrow Wilson was the main figure in this period who emphasized self-determination, along with his ideas about the “equality of nations”, and peaceful resolution of conflicts as fundamental elements that he wanted to embed in a new international order. Nevertheless, together with the ethnic element, Wilson also recognized the “consent of the governed” as an important component of self-government. Therefore, according to Wilson, even when an ethnic or linguistic minority did not create its own state, the host state had to guarantee political participation to that minority. According to Throntveit, the real principle behind Wilson’s intention was “that all people should have a voice in the government under which they lived and that politically mature communities should control the institutions that shaped their lives.”²⁰⁵ Hannum however, questions whether this was ever really a priority for Wilson or the victorious powers, and whether there were obligations that

²⁰² Hurst Hannum, “Rethinking Self-Determination” (1993) 34:1 Va J Int’l L 1 at 3 [Hannum, “Rethinking”].

²⁰³ But see Trygve Throntveit, “The Fable of the Fourteen Points: Woodrow Wilson and National Self-Determination” (2011) 35:3 Diplomatic History 445. Throntveit rejects this approach, considering that Wilson did not understand self-determination as being exclusively linked to ethnicity. The author states at 455: “It is merely to emphasize that for Wilson ‘self-determination’ meant something far more subtle than the mere drawing of territorial boundaries (as impossibly complicated as that was), whether along ethnic or any other line”.

²⁰⁴ Hannum, “Rethinking”, *supra* note 202 at 3, “at the end of the World War, the principle of self-determination provided a guideline principle or rationale for dismembering the defeated Austro-Hungarian and Ottoman empires”.

²⁰⁵ Throntveit, *supra* note 203. The author explains at 464-465: “Wilson’s belief that self-government within and between states was the best remedy for conflict-prone regions”. [...] “In discussing the Balkans, Wilson again subordinated nationalist aspiration to deliberative politics, regional stability, and freedom from foreigner intrigue”.

supported addressing this issue.²⁰⁶ For Hannum, during the negotiation at the end of the First World War, *realpolitik* considerations defined the creation of new states. Ethnic elements, and the rest of the Wilsonian values, were subordinated to the political convenience of the victorious powers using the national self-determination rhetoric.²⁰⁷ In this sense, only if supported by the victorious powers were new nation-states allowed to emerge from the ruins of decaying empires, letting peoples formerly ruled by those empires finally gain control of their own destinies. It is for this reason that Hannum concludes, “while lip service was given to satisfying ‘national’ aspirations and promoting democracy, there was no meaningful recognition of the ‘right’ of all peoples to be free from external domination or to live in their own democratic ‘nation-state’.”²⁰⁸ It is also important to briefly address how Wilson considered colonial phenomena. Manela points out that Wilson did not contemplate that his rhetoric would impact colonial peoples. The author considers that although, for Wilson, self-determination could, in principle, be extended to colonies, they had to achieve self-governance “under the benevolent tutelage of a ‘civilized’ power that would prepare them for self-government.”²⁰⁹ This thought was reflected in the *Covenant of the League of Nations* (1919), where tutelage of colonies not prepared for self-rule was established.²¹⁰ The problem with this perspective was, as

²⁰⁶ Hannum, “Rethinking”, *supra* note 202 at 8.

²⁰⁷ Hurst Hannum, “The Right of Self-Determination in the Twenty-First Century” (1998) 50:3 Wash & Lee L Rev 773 [Hannum, “The Right of Self-Determination”]. The author states at 774, “As a political principle, but not a right under international law, self-determination in this period was subject to many limitations. The most obvious limitation, consistent with *realpolitik* concerns, was that the successful exercise of self-determination required the support of the victorious powers if there had been a war or the support of major powers even absent a war”.

²⁰⁸ Hannum, “Rethinking”, *supra* note 202 at 67.

²⁰⁹ Erez Manela, *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (New York: Oxford University Press, 2007) at 25. It is also relevant to observe how this approach could be interpreted. Interestingly, Robert Lansing, a Secretary of State under Wilson, affirmed that self-determination should not apply to “races, peoples, or communities whose state of barbarism or ignorance deprive them of the capacity to choose intelligently their political affiliations.” Therefore, imperialist powers like France or England could interpret Wilson’s ideology to mean that “non-modern” nations still had to be under their supervision, without establishing for how long or to what degree. See Manela at 31.

²¹⁰ League of Nations, *Covenant of the League of Nations*, 28 April 1919. Article 22 of the Covenant established in part: “To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.”

Manela points out, that there were no real indicators to determine how much time, or in what manner this transition should have been conducted.²¹¹

In sum, although the process of re-organizing Europe was imbued with the self-determination rhetoric, other forces collided with it, subordinating its force to *realpolitik* criteria. At the same time, the broad concept of self-determination left space for different interpretations, including racially determined views or colonial rationales that supposedly justified expanding the “civilizing power”.

b) The Decolonization Stage: Re-Dimensioning the Right to Self-Determination

Two milestones mark this phase, the *Charter of the United Nations* (1945)²¹² and the anti-colonial movement. After the Second World War, the UN Charter recognized the principle of self-determination for the first time in an international document.²¹³ This reference to the principle of self-determination, however, did not originally have the aim of questioning colonial empires, otherwise states like the United Kingdom and France, would not have agreed to the *UN Charter*.²¹⁴ Although weakened as a consequence of the Second World War, European powers retained their colonies, implementing a special condition for non-self-governing territories and a system of trusteeship for peoples that had not “yet attained a full measure of self-government”.²¹⁵ In 1995, Falk, an international scholar, criticized the Charter’s ambivalence regarding the colonial problem, affirming, “[...] the normative content is ambiguous –paternalistic with respect to administration, and subversive in relation to aspiration.”²¹⁶

²¹¹ Manela, *supra* note 209 at 31.

²¹² United Nations, *Charter of the United Nations* (26 June 1945), Can TS 1945 No. 7.

²¹³ Article 1 (2): “The purposes of the United Nations are: [...] To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; [...]” Article 55 of the UN Charter also refers to the principle of self-determination: “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote”.

²¹⁴ Hannum, “The Right to Self-Determination”, *supra*, note 207 at 775.

²¹⁵ In effect, see article articles 73 and 75 to 86 of the UN Charter. Article 73(b) of the Charter refers to states that assume responsibilities for the administration of territories that have not yet attained a full measure of self-government which contrasts with a maximized conception of self-determination

²¹⁶ Richard Falk, “The Relevance of the Right of Self-Determination of Peoples under International Law to Canada’s Fiduciary Obligations to the Aboriginal People of Quebec in the Context of Quebec’s Possible Accession to Sovereignty” in *Canada’s Fiduciary Obligation to Aboriginal Peoples in the Context of*

This tension started to become more visible in the years following the enactment of the *UN Charter*. The assertiveness of the anti-colonial movement, together with an international forum more receptive to the colonial predicament, led to a shift in the international political consciousness. For Falk, the expansion of the right to self-determination was a consequence of three factors: 1) the weakening of the European colonial power; 2) the rise of the ideology of nationalism along with a basic democratic perspective; and, 3) the fact that, in the context of the cold war, the Soviet Union and the United States did not want to diminish their geopolitical positions among Third World populations that were claiming the right to self-determination.²¹⁷ Several international documents were enacted in the battle about colonialism in Africa and Asia.²¹⁸ The first, and most important document enacted was the *Resolution 1514 (XV) of the UN General Assembly in 1960*.²¹⁹ This document recognized the “ardent desire” of the world to end colonialism “in all manifestations” establishing that all people have the right to self-determination. In sum, these international documents were designed to meet the objective of guaranteeing that non-self-governing territories, or “other territories which have not yet attained independence”, had the right to independence. In this sense, the right to self-determination was equated with the creation of independent states, no different than the Wilsonian approach described previously. Nevertheless, in the anti-colonial phase, the other principles competing with the right to self-determination were more visible; again, ethnicity was not the only element to take into account in the self-determination rhetoric.

Accession to Sovereignty by Quebec, vol 1 (Ottawa: Royal Commission on Aboriginal Peoples, 1995) 41 at 46-47.

²¹⁷ *Ibid* at 47.

²¹⁸ Many scholars have extensively analyzed these documents and a detailed analysis of each of these documents goes far beyond the objective of this study. However, it is important to take these documents into account: (i) General Assembly Resolution 1541(XV) “Principles which should guide Members in determining whether or not an obligation exist to transmit the information called for under Article 73e of the Charter” (15 December of 1960); (ii) General Assembly 1514 (XV) *The Declaration on the Granting of Independence to Colonial Countries and Peoples* (December 1960); (iii) General Assembly 2625, *The Declaration on Principles of International Law Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* (Resolution 2625, of 1970)”, (iv) *The Final Act of the Conference on Security and Co-Operation in Europe* (1 August 1975) 14 I.L.M. 1292; (v) *The African Charter on Human and Peoples’ Rights* (adopted 27 June 1981), O.A.U. Doc. CAB/LEG/67/3 Rev. 5.

²¹⁹ *The Declaration on the Granting of Independence to Colonial Countries and Peoples*. Resolution 1514 (XV) of the General Assembly of December of 1960.

Instead, in the decolonization years, the principles of territorial integrity²²⁰ and *uti possidetis*²²¹ shaped the right to self-determination differently than during the Wilsonian stage. Hence, the new states' boundaries were drawn following those established by the colonial powers, regardless of the ethnic composition of the new states. Such shaping began to generate tensions; if these new countries were created as a consequence of the right to self-determination, could smaller units within these new countries exercise this right as well?

In the UN forum, Belgium warned of internal colonization within the states, which could lead to the logical consequence of recognizing the right to self-determination of those internally colonized right-holders. The proposal was rejected, and instead the UN established the “saltwater” thesis, which allowed self-determination only in those situations in which the metropolis was geographically separated from the colonial territory.²²² This entailed that, more than peoples, it was the non-self-governing territories that could exercise the right to self-determination.²²³ Another consequence was that peoples within sovereign and independent states could not exercise the right to self-determination. *The UN Human Rights Covenants* prompted the debate, since in the first article of both treaties, the right of all peoples to self-determination was recognized. In that sense “All peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.”²²⁴ This being said, the exercise of the right had to respect the provisions

²²⁰ Paragraph 6 of *The Declaration on the Granting of Independence to Colonial Countries and Peoples* establishes: “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”

²²¹ Black’s Law Dictionary, 8th ed, *sub verbo* “uti possidetis”: “The doctrine that colonial administrative boundaries will become international boundaries when a political subdivision or colony achieves independence.”

²²² Lea Brilmayer, “Secession and Self-determination: A Territorial Interpretation” (1991) 16 *Yale J Int’l L* 177 at 182.

²²³ Asbjørn Eide, “Peaceful Group Accommodation as an Alternative to Secession in Sovereign States” in Robert G. Williamson, Donald Clark & Allan Blakeney, eds, *Self-Determination: International Perspectives* (Basingstoke, UK: Macmillan, 1996) 87. The author states at 90, “Hence, although the international norms refer to “all peoples” the right-holders of the right to self-determination were “defined by the territory in which the population lives, not by the ethnicity, language, or religion of the different groups which constitute the population”.

²²⁴ *International Covenant on Economic, Social and Cultural Rights*, (16 December 1966), 993 UNTS 3 (entered into force 3 January 1976, ratified by Peru 28 April 1978) established:

of the *UN Charter*, including the principle of territorial integrity, as well as the saltwater theory.

In sum, this stage re-dimensioned the notion of self-determination. Firstly, self-determination was recognized as a right, and then included specific units (colonized territories) as rights-holders. This was done under the contradictory rhetoric of self-determination for all peoples, which again, highlighted the exclusion of other groups not allowed to legitimately claim the right to self-determination.

c) Post-Colonial Era: Only Some Can Exercise Universal Rights?

Given that the right to self-determination was once directly linked to secession, it was, and still is, a delicate labour to define the rights-holders of self-determination, being that this might lead to a permanent threat against territorial integrity. When a specific group was excluded from asserting or exercising this right, they swiftly countered with the argument that they were not considered as being peoples, because “all peoples have the right to self-determination”. Furthermore, some of these groups, mainly Indigenous peoples, alleged that they also suffered alien subjugation, domination, and exploitation in reference to being internally colonized. Additionally, such groups claimed that they found themselves in a similar situation to the populations of non-self-governing territories, which had sparked the anti-colonial movement in the 1960s.

Thus, the main characteristic of this phase was the struggle for the expansion of the right to self-determination within the context of sovereign independent states. It also meant the struggle to re-conceptualize the right to self-determination without the necessary consequence of secession. In this sense, as Kingsbury highlights, the international Indigenous movement had an important role in advancing and benefiting from the new directions of the right to self-determination. For Kingsbury, this movement

1. All peoples have the right to self-determination by virtue of that right their freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right in conformity with the provision of the Charter of the United Nations.

used three main strategies: 1) using and expanding the categories used by already established units of self-determination; 2) extending and redefining the categories of rights-holders; and 3) reconceptualizing what was conferred by the right to self-determination.²²⁵ In this section, I will focus my attention on the Indigenous peoples' struggles for self-determination; this focus is due to the relevance of this issue for my investigation of the Peruvian context, although other groups also played an important role in the development of the self-determination concept.

Since all peoples were entitled to the right to self-determination, Indigenous groups' first aim was to be recognized as "peoples" in international law; however, this goal was constantly denied. For example, ILO Convention 107 used the term "indigenous, tribal or semi-tribal populations". However, after the decolonization stage this convention was seen as obsolete; thus, Indigenous groups shifted their priorities, emphasizing the recognition of the right to self-determination and questioning the integrationist/assimilationist model of ILO Convention 107, which would explain why no other state ratified this convention after 1971.²²⁶

This movement coincided with international organizations' growing interest in Indigenous issues, which generated support for Indigenous struggles.²²⁷ As a consequence, the ILO drafted and approved Convention 169, replacing the assimilationist view of the previous convention. During the debates, members of the Indigenous movement were resolved to have the term "peoples" included in the document, and they succeeded. Nevertheless, the group in charge of the draft of Convention 169 was cautious and did not include the term "self-determination", arguing that this would discourage ratification.²²⁸ In the end, this term was not included; instead, in Falk's words, the

²²⁵ Kingsbury, *supra* note 199 at 384.

²²⁶ Russel Lawrence Barsh, "Revision of ILO Convention No 107" (1987) 81:3 Am J Int'l L at 758 [Barsh, "Convention No. 107"]. In effect, Indigenous groups questioned the language of integration, which was actually a discourse of assimilation in which Indigenous populations were seen as backward groups.

²²⁷ See Russel Lawrence Barsh, "Indigenous Peoples: An Emerging Object of International Law" (1986) 80:2 Am J Int'l L 369 [Barsh, "Indigenous Peoples"].

²²⁸ Barsh, "Convention No. 107", *supra* note 226 at 760. In order to avoid this, they contemplated the idea of defining self-determination as internal self-determination. Others have suggested using a "substitute or ellipsis" because the exact term "may be not necessary." Hannum makes a similar argument in: "The Right to Self-Determination", *supra* note 206 at 777. In 1998, noticing the role of the human rights in the international context and being pessimistic regarding the possibility of enforcing the right to self-determination for Indigenous peoples, Hannum suggested an alternative to the Indigenous self-determination

convention established the “strange formulation”²²⁹ of article 1(3), which contrasts with article 3(1).²³⁰ The former holds that the use of the term “peoples” does not recognize any right commonly granted under international law. In other words, it does not allow the use of the right to self-determination. The latter holds that Indigenous people shall enjoy “full measure of human rights and fundamental freedoms without hindrance or discrimination”. In response to this contradiction Falk states, “Yet prime among these human rights and fundamental freedoms is the right of self-determination!” Clearly, the recognition of Indigenous peoples as “peoples” –avoiding referring to the right to self-determination– was the strategy employed by the drafters to gain support from the member states.²³¹

Nevertheless, the Indigenous movement still continued to pursue formal recognition of the right to self-determination, and one of its strategies was to reconceptualize this right, understanding it as a right to autonomy, unwedded from the secession; with this, Indigenous groups did not have to question the principle of territorial integrity or the *saltwater thesis*. This debate was conducted mostly in the UN ambit within the drafting process of the *UNDRIP*.

Finally adopted by the UN General Assembly on September 13, 2007, the *UNDRIP* is a real benchmark of the recognition of the right to self-determination of Indigenous peoples. For the first time in history, this non-binding document recognized the right to self-determination for Indigenous peoples, as well as the right to autonomy.²³²

debate. His idea was to avoid the term, like the drafters of the ILO Convention 169, by using other human rights that already had a consensus in the international legal context. For Hannum, the right to protection of cultural, religious, linguistic, and ethnic identity of individuals and groups and the right of individuals and groups to participate effectively in economic and the political life, have the same aims as the right to self-determination. Thus, instead of insisting on the right to self-determination, Indigenous groups and their supporters should invoke these other rights that would lead to similar consequences or effects.

²²⁹ Falk, *supra* note 216 at 56.

²³⁰ Article 1(3) of ILO Convention 169, literally establishes, “The use of the term people in this Convention shall not be construed as having any implication as regards the rights which may attach to the term, under international law”; and article 3(1): “Indigenous and tribal peoples shall enjoy the full measures of human rights and fundamental freedoms without hindrance or discrimination [...]”

²³¹ See Swepston, “A New Step”, *supra* note 130 at 692-94.

²³² Article 3: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

Article 4: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”

Two aspects are important to note: first, the document does not provide a definition of self-determination or of the right to autonomy; and second, article 46.1 clearly orders that any interpretation implying the authorization of any action that would threaten the territorial integrity or political unity of sovereign state should be disavowed. Thus, the association between self-determination and statehood (or independence) began to be appreciated as being unnecessary, and self-determination started to be perceived as a way of “peaceful group accommodation”²³³ within state sovereignty.

In conclusion, in the current international climate, Indigenous self-determination claims are not seen as a radical. Such vocabulary entered the legal language and is now commonly discussed and debated in international law circles. Nevertheless, this concept has not yet been defined, and more debate will bring new perspectives to the content of the Indigenous self-determination. Taking into consideration the diversity of Indigenous groups, it goes without saying that the right to self-determination will always have different meanings.

4.4.- Indigenous Self-Determination in Domestic Legal Systems

The self-determination debate is focused on two themes: 1) the growth and acceptance of new rights-holders (units); and 2) the question of the distinction between secession and self-determination. However, it is also relevant to review the statements of several authors concerning the differentiation of internal and external self-determination. According to Alfredsson, the first concept can be understood as the right of a state’s population to govern itself and to participate in all matters and at all levels of that government; this is similar to the well-accepted idea of popular sovereignty, without ignoring, of course, the inclusion of all minorities by the government.²³⁴

External self-determination, in turn, is usually understood as secession, or independence. In general, the right to secession is not recognized by international positive norms. Specialized literature affirms that external self-determination (secession) can only

²³³ Eide, *supra* note 223 at 90.

²³⁴ Gudmundur Alfredsson, “The Right to Self-Determination and Its Many Manifestations” in Ruth Thompson, ed, *The Rights of Indigenous Peoples in International Law: Selected Essays on Self-Determination* (Saskatoon: University of Saskatchewan, Native Law Centre, 1987) 53.

be demanded by populations of non-self-governing territories (“classical decolonization”), and by populations in territories under unjust military occupation.²³⁵

Nevertheless, since the downfall of the Union of Soviet Socialist Republics (USSR) in 1991, and the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) in 1992, a new condition has been considered for the exercise of external self-determination. This new condition supposes a link between internal and external self-determination, allowing the remedial right to secede in those situations in which a minority population is seriously deprived of internal self-determination and without any prospect of being able to resolve that situation. Based on this logic, this approach would include, *prima facie*, all sub-national-groups, not only Indigenous peoples. This argument is based on the so-called “safeguard clause” of the *Declaration on Principles of International Law Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*.²³⁶ Although this argument does not enjoy support among a majority of scholars, it has partly destabilized the notion that only a colonial population (under classical colonization) can exercise the right to external self-determination.

Regarding the case of Indigenous peoples, during the negotiations concerning Convention 169 and later, during the debates on the *UNDRIP*, the states made their support conditional; they rejected every threat against the principle of territorial integrity. It is for this reason that during the negotiation of the *UNDRIP* state actors only referred to internal self-determination. Nevertheless, the *UNDRIP* recognizes the right to self-determination and autonomy.

Numerous authors have supported the idea that Indigenous self-determination should be equated with internal self-determination.²³⁷ Barelli questions to what extent it is convenient to differentiate two types of rights to self-determination: a general type, maintaining the alternative to the remedial right to secede (art. 1, *UNHR Conventions*);

²³⁵ Buchanan, *Justice*, *supra* note 187 at 333.

²³⁶ Cassese, *supra* note 195 at 121. Nevertheless, Cassese explains that according to the *Declaration on Principles of International Law, Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, there is a relationship between internal and external self-determination. For him, only if all possible attempts to reach internal self-determination fail would secession be justified.

²³⁷ See Hannum, “The Right to Self-Determination” *supra* note 207; Xanthaki, *supra* note 127; Eide, *supra* note 223.

and a particular type: Indigenous self-determination applicable only to Indigenous groups, without the possibility of secession (arts. 3, 4, 46.1, *UNDRIP*).²³⁸

If the right to general self-determination is formally recognized for “all peoples”, which in principle signifies the possibility of exercising external self-determination, then why has the *UNDRIP* rejected this alternative in the case of Indigenous groups? Is cultural and ethnic discrimination being reproduced against Indigenous groups? Barelli explains that without the non-secession condition imposed by the states during the *UNDRIP* negotiations, states would not have ratified the declaration. However, for Anaya and Barelli, it is possible that under special circumstances (like the systematic violation of their human rights) Indigenous people can also invoke the right to external self-determination or the remedial right to secede.²³⁹

This being said, another difference has to be highlighted: even if the Indigenous movement achieved the recognition of the right to self-determination at the international level, the application of such right has to be developed by domestic legislation. This implies regulating the scope of the right to Indigenous self-determination within the internal legal system (politics of recognition, delimitation of Indigenous autonomies, Indigenous self-government, protection of language, permitting application of customary rights, and so forth). In contrast to this, the general right to self-determination is normally not imagined as part of or as being regulated by domestic legislation, precisely because it will be perceived as being in contravention of the territorial principle.

Indeed, it is common to find the right to Indigenous self-determination (or an equivalent, like autonomy) recognized either expressly or implicitly in domestic legislation. However, it is very rare to find such recognition for a general right to self-determination with the possibility of secession. For instance, it is possible to find judicial decisions by national tribunals concerning Indigenous self-determination; however, it is extremely rare to find decisions regarding a general right to self-determination or

²³⁸ Mauro Barelli, “Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?” (2011) 13:4 *Int’l Community L Rev* 413 at 417.

²³⁹ *Ibid* at 426. It is not my intention to explore this topic here: however, it is important to indicate that Barelli concludes that, given an extremely serious violation of Indigenous peoples’ basic rights, the exclusion established in article 46(1) could be trumped.

secession.²⁴⁰ Furthermore, the latter right must be resolved according to the constitutional framework, which assumes the protection of the territory of the state. Thus, it is common that secessionist claims are accommodated as de-centralization processes, or the recognition of the need for more political autonomy for such groups.

Hence, there are two perspectives from which to analyze this situation: international law and domestic law. Taking into consideration these two levels of analysis, if the right of Indigenous self-determination is demanded at the level of international law, the possibility of secession could be argued for in very exceptional cases. However, from the domestic law perspective such an option is deemed, in principle, as not viable. Therefore, the application of the right to self-determination within domestic law has its price: by no means shall the territorial integrity of the state be threatened. For this reason, the content of Indigenous self-determination may be different at different levels of the analysis. The procedures for giving this right material form at the national level may diverge widely, considering the historical and organizational aspects of each state.

4.5.- Self-Determination and Political Participation

An important group of authors agrees that the majority of Indigenous peoples do not aspire to form independent states when exercising their right to self-determination.²⁴¹ Instead, many do aspire to achieve a certain level of autonomy inside the state. Thus, Indigenous self-determination has been thought of as a means to manifest autonomy and participation of Indigenous people within the sovereignty of a host state,²⁴² rather than as means to possible secession. However, there are many forms of understanding autonomy,

²⁴⁰ See Falk, *supra* note 216. The Canadian case is one exception, where the Supreme Court of Canada decided regarding the secessionist claim of Quebec. Additionally, it is interesting to consider the proposal of Falk that posits the creation of an international court specialized in resolving secession claims.

²⁴¹ See Erica-Irene A. Daes, “The Right of Indigenous Peoples to ‘Self-Determination’ in the Contemporary World Order” in Robert G. Williamson, Donald Clark & Allan Blakeney eds, *Self-Determination: International Perspectives* (Basingstoke, UK: Macmillan, 1996) 47 at 52; Alison Brysk, *From Tribal Village to Global Village: Indian Rights and International Relations in Latin America* (Stanford, CA: Stanford University Press, 2000) at 294; Gudmundur Alfredsson, “Different Forms of and Claims to the Right of Self-Determination” in Williamson, Clark & Blakeney *supra* at 70.

²⁴² Eide *supra* note 223. The author points out at 89: “There is, however some support for claims made by Indigenous peoples for a right to some form of autonomy within sovereign states. The scope and modalities remain vague, however, and further discourse within international law will be required before its content can become clear.”

and the heterogeneous nature of Indigenous peoples' autonomy could mean something different for each Indigenous community. Thus, the intensity of this autonomy varies tremendously depending on the context. For example, the United States of America is seen as a reference for the maximum scope of Indigenous people's autonomy, because the US legal system gives Indigenous peoples relevant space to develop their traditions and laws.²⁴³

I will now turn to analyzing the different understandings that have developed regarding the concept of Indigenous self-determination. As earlier observed, self-determination is historically inspired in its conception of independence as non-interference, adapted by the *UN Charter* as a way of protecting state sovereignty. However, as political philosopher Iris M. Young understands, instead of comprehending self-determination as independence, it must be comprehended as a relational autonomy in a non-dominating context. In this sense, the author proposes four elements of self-determination that are relevant to our discussion: 1) "A people has the *prima facie* right to set its own governance procedures and make its own decisions about its activities, without interference from others";²⁴⁴ 2) if a group is adversely affected by others, that group has the right to claim, negotiate and adjust the effects of that grievance; and 3) self-determination requires the recognition of institutions and procedures that make negotiation possible, which can resolve conflicts and implement agreements: "Self-determination does not imply independence, but rather that peoples dwell together within political institutions which minimize domination among peoples";²⁴⁵ and, 4) the right to self-determination entails the recognition of the right to participation as peoples in the

²⁴³ Michael F. Brown, "Sovereignty's Betrayals" in Marisol de la Cadena & Orin Starn, eds, *Indigenous Experience Today* (Oxford: Berg, 2007) 171. The author recognizes the benefits of the Indigenous self-determination, but also points out some of the tensions and negative consequences generated in its implementation. For example, he refers to the damaging effects of Native gaming on surrounding non-Native communities, the use of Indigenous lands by corporations in order to avoid state and local environment codes (e.g. the Goshutes of Utah issue) and impacts on communal relationships among Indigenous peoples.

²⁴⁴ Iris M. Young, "Two Concepts of Self-Determination" in Stephen May, Tariq Modood, & Judith Squires eds, *Ethnicity, Nationalism, and Minority Rights* (Cambridge: Cambridge University Press, 2004) 176 at 187.

²⁴⁵ *Ibid.*

design, and implementation of intergovernmental institutions in order to minimize domination.²⁴⁶

Thus, Young's arguments rely on an important measure of participation of different groups involved in a relationship, each designing their own institutions, participating in the resolution of conflicts with others, and participating in the design of intergovernmental institutions. In the same manner, in 1996, Daes, a member of the UN Working Group on Indigenous Populations (1984-2001), defined the right to self-determination as the right of Indigenous peoples to freely negotiate their "political status and representation in the States in which they live."²⁴⁷ Daes emphasizes the fact that Indigenous peoples were never considered full partners in the political process of state-building. Indeed, the author points out the absence of Indigenous peoples in the creation of host states. To reverse this situation, Daes believes in the empowerment of Indigenous peoples by increasing their participation in the institutions of the dominant society. However, she does not specify the level of participation and whether it should be guaranteed only when Indigenous peoples are directly affected, or if general participation in the state institutions of the dominant society should also be guaranteed. In her paper under comment here, Daes only considers the general participation of Indigenous people within the state institutions rather than a specific representation through particular institutions created for Indigenous representation.

The Canadian academic context provides an interesting way of comprehending two possible forms of participation. According to John Borrows two doctrines can be reconstructed: the *Aboriginal control of Aboriginal affairs* and the *Aboriginal control of Canadian affairs* doctrines.²⁴⁸ The former argues for reinforcing the self-governance of Aboriginal people by avoiding interference in Canadian political issues. From this perspective Indigenous peoples should be exclusively focused on Indigenous issues. The latter doctrine, instead, holds that Indigenous participation in Canadian central institutions, in addition to their own autonomous institutions, would be the optimal

²⁴⁶ *Ibid* at 187-188.

²⁴⁷ Erica-Irene A. Daes, "An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations" (2008) 21:1 *Cambridge Review of International Affairs* 9 at 23.

²⁴⁸ John Borrows, "Landed Citizenship: Narratives of Aboriginal Political Participation" in Will Kymlicka & Wayne Norman, eds, *Citizenship in Diverse Societies* (New York: Oxford University Press, 2000).

manner in which to improve the relationship between Aboriginal peoples and the Canadian state and empower Indigenous peoples. Borrows supports this position. He argues that the inclusion of First Nations citizens in the political, social and economic life of Canada would not weaken their Indigenous identities or their traditions; on the contrary, wider political participation in Canadian governmental institutions is a way of challenging the process of segregation and assimilation that Indigenous people have suffered since the time of contact. Thus, embracing the *Aboriginal control of Canadian affairs* approach, and, given the fact that almost five per cent of the Canadian population is Indigenous, could result in the election and appointment of an important number of Indigenous legislators and judges. For Borrows, this would lead to changes in how, for example, Indigenous lands are treated in Canada.

Murphy, a professor at the University of Northern British Columbia, analyses whether Indigenous electoral participation in Canadian affairs is an effective method for empowering Indigenous self-determination.²⁴⁹ He affirms that, although it is a worthwhile method, Indigenous electoral participation has its limitations. He affirms that this should be only one of a number of strategies for empowering Indigenous peoples, along with the reinforcement of Indigenous self-determination. For example, Murphy also refers to the symbolic strength that the Indigenous electoral participation injects into the collective imagination in mainstream society. The interesting thing to be highlighted is that he develops a model of relational self-determination, based on the relational autonomy coined by Young.²⁵⁰

These authors propose that a fair degree of compatibility exists between self-determination and the participation of Indigenous peoples in the state-building process, and emphasize both the participation of Indigenous peoples in the political institutions of host states, and a dialogue between self-determined communities (state and Indigenous communities). Thus, instead of understanding self-determination as a non-intervention by Indigenous groups in mainstream institutions, Young, Daes, Borrows, and Murphy recommend the participation of Indigenous peoples in mainstream political institutions,

²⁴⁹ Michael A. Murphy, "Representing Indigenous Self-Determination" (2008) 58 UTLJ 185.

²⁵⁰ *Ibid* at 200.

while, at the same time, the protection of the right to self-determination of Indigenous communities.

Clavero, a member of the United Nations Permanent Forum on Indigenous Peoples (2008-2010), affirms that Indigenous participation is a manifestation of self-determination. He maintains that the free and informed consent of Indigenous peoples should not be considered as an “extension of the constitutional right of civic participation”, but that it should be considered as a “legal attribute of a self-determining people”.²⁵¹ It entails that decisions of Indigenous communities have to be realized through representatives chosen by them, acting through their own institutions, through their own procedures, and, most importantly, it requires the consent of Indigenous peoples. Thus, the author focuses on the participation of Indigenous peoples only when administrative or legislative measures may affect them. Clavero seems to claim Indigenous participation only for Indigenous matters. In this manner, it seems that he equates participation with the right to consultation, where consent is needed in order to apply the legal or administrative measure. That potentially explains why he criticizes the Convention 169, asserting that it does not link consultation with self-determination and, hence, the consent of Indigenous peoples would not necessarily be required by the consultation process.²⁵² Falk follows this reasoning when he states that the main demand of Indigenous groups is to avoid changes alleged to be threatening to them; and, if any modification is considered to be necessary it should be submitted to the “full consultation and participation” of Indigenous groups.²⁵³

The relationship between Indigenous self-government and group representation offers another lens through which to analyze this problem. For Kymlicka, self-government is a right against the federal authority, reducing federal power over national minorities. However, at the same time, it reduces the influence of minority groups at the federal level, specifically regarding issues that do not have any connection with the group. For Kymlicka, the “logical consequence of self-government is reduced representation, not increased representation. The right to self-government is a right

²⁵¹ Clavero, *supra* note 183 at 42-43.

²⁵² *Ibid* at 42.

²⁵³ Falk, *supra* note 216 at 71.

against the authority of the federal government, not a right to share in the exercise of that authority.”²⁵⁴ In fact, as the author highlights, some Indigenous peoples in Canada reject the proposition of guaranteed seats within the federal legislative body because this could lead to the impression that this federal body might govern matters relevant to their communities.²⁵⁵

Anaya suggests a method, which could be described as a test, to determine how Indigenous peoples’ self-determination is affected. First, he analyzes whether constitutive self-determination has been violated, then if the ongoing self-determination has been violated by an intervention without consultation. If a breach is detected, then a remedy must be selected. Even if Anaya does not discard the right to secession as a remedy, he cautions that it will not solve all problems of Indigenous peoples. Therefore, he primarily proposes the accommodation of Indigenous peoples within the sovereign state.²⁵⁶

For the last important perspective on self-determination I refer to Barelli, who concludes that autonomy (meaning self-determination) also implies a “special form of participation” in which Indigenous peoples exercise control over issues that affect them. Here, the author is referring not only to electoral participation, but also to “prior, informed and free consultation”.²⁵⁷

One can observe that, across the perspectives presented in this chapter, there is a strong relation between self-determination and representation in cases involving Indigenous peoples. Some authors agree in affirming that to most Indigenous peoples, self-determination entails at least a right to representation. This representation can be classified in two ways: 1) representation activated only when the self-determination of Indigenous peoples or Indigenous rights is directly affected; and 2) representation as a right that ensures general participation of Indigenous peoples in the construction of the state, including the establishment and operation of non-Indigenous institutions, in order to achieve greater empowerment of Indigenous peoples. Critics of the latter notion point out that this could be used as a form of assimilation or cooptation, allowing the

²⁵⁴ Kymlicka, *supra* note 187 at 143-44.

²⁵⁵ *Ibid.*

²⁵⁶ Anaya, “A Contemporary Definition”, *supra* note 185 at 163.

²⁵⁷ Barelli, *supra* note 238 at 429.

intromission of non-Indigenous rulers into Indigenous issues. Murphy proposes a combination of all possible strategies to empower Indigenous peoples, observing the limits, but also the advantages of each strategy. Hence, he combines electoral participation with the defence of self-determination.

Although in the Peruvian context it is not common to find such positions clearly developed, it is possible to find a manifestation of them. For example, in Gray's investigation about Indigenous self-determination in an Amazonian community in Peru, he recalls what a young Indigenous man from the Arakmbut peoples told him: "When someone comes into the community and says *"todos somos Peruanos"* (we are all Peruvians), watch out, he is trying to screw you."²⁵⁸ In contrast, it is possible to also find claims like: "I hope that one day I will be a Peruvian", cried by an old Indigenous man to the Peruvian Truth and Reconciliation Commission.²⁵⁹ Both quotations express different ways of understanding Indigenous claims: the suspicion about outsiders interfering in the community (intromission into their autonomy) in order to take advantage of them, and the sense of being excluded from the benefits belonging to other Peruvians (social policies and political participation in governmental institutions). Nevertheless, the tendency in Peru is to aim towards encouraging the participation of Indigenous peoples in the decision-making process of the state. The logic surrounding this is that the state has to give voice to the forgotten Indigenous peoples, rather than focusing only on the autonomy of Indigenous peoples, which is understandable in a context in which many Indigenous communities have been assimilated over decades, and in which Indigenous self-determination is considered a mere administrative autonomy.

Internal self-determination has an important relationship to the political participation of people in the construction of democratic systems. In the case of the right to consultation, an important participation of Indigenous people should be guaranteed, but only in cases in which Indigenous peoples are significantly affected by administrative or legislative measures. An important difference between the right to consultation and the right to political participation is the intensity and specific nature of the parties involved in

²⁵⁸ Andrew Gray, *Indigenous Rights and Development: Self-determination in an Amazon Community*, vol 3 (Providence RI: Berghahn, 1997) at 54.

²⁵⁹ Martin Edwin Andersen, *Peoples of the Earth: Ethnonationalism, Democracy, and the Indigenous Challenge in "Latin" America* (Lanham, MD: Lexington, 2010) at 125.

the right to consultation. In the right to consultation, specific historical situations should be taken into account such as the fact that Indigenous peoples inhabited their territories before the creation of the Peruvian state, exercising sovereignty through their own governmental institutions. More than just a symbolic fact, such a situation is an assertion that begs for political recognition of the existence of distinct societies within the Peruvian state.

This being said, it is important to note that this does not mean that Indigenous peoples cannot invoke the right to civic participation. As Peruvian citizens they are entitled to this right. The problem, however, is that in Peru Indigenous people have not been considered real citizens for centuries; such people were considered citizens only when they assimilated into the mainstream society and, therefore, some of their rights were conveniently ignored.

4.6.- The Right to Consultation through the Right to Self-Determination

One strategy adopted by the Indigenous groups in Peru is to strengthen their position through the recognition and implementation of the right to consultation, which has been understood by some as a reinforced right of political and civil participation in the democratic process.²⁶⁰ However, equating the right to consultation with the right to civic participation²⁶¹ can obscure the foundational element of the right to consultation, which is the right to self-determination and the cultural distinctiveness of Indigenous peoples. Indeed, because the right to civic participation belongs to every citizen of the state, it obscures all reference to the distinctiveness of Indigenous peoples and their particular cultures. Here, then, the right to self-determination of Indigenous peoples should not be understood only as participation in a democratic political process, but mostly, as Tamir affirms, as the right to preserve the culture of a distinct social group.²⁶²

²⁶⁰ See Luis Carlos Rodrigo Pastor, Antonio Peña Jumpa & Ramón Huapaya Tapia, “Debate en Torno a la Ley de Consulta Previa” (2011) 43 *Ius et Veritas* 402.

²⁶¹ Art. 2.17 of the Peruvian *Constitution of 1993*: “Every person has the right: [...] to participate, individually or in association with others, in the political, economic, social and cultural life of the Nation. Citizens, in accordance with the law, have the right to elect, remove from office or revoke public authorities, to legislative initiative and referendum.”

²⁶² Yael Tamir, “The Right to National Self-Determination” (1997) 7:1 *The Good Society* 18. The author asserts that at 18 “at the core of the right to national self-determination, lies a cultural rather than a democratic claim.” She then insists at 18 that in “its communal form, national self-determination entails a process whereby individuals seek to express their national identity within the public sphere.”

Therefore, it should be understood that the construction of the right to consultation without taking into account the right to self-determination reproduces and reinforces the process of domestication²⁶³ of Indigenous peoples; without taking into account the right to self-determination, Indigenous peoples are stripped of the particular characteristics which shape them as societies distinct from the predominant culture.

Understanding Indigenous peoples as distinct societies is therefore the first step in recognizing the right to self-determination, and it is through this legal framework that the right to consultation has to be constructed. In this sense, interpreting the right to consultation without taking into account the right to self-determination implies a disregard of Indigenous peoples' distinctiveness. Hence, without recognition of distinctive Indigenous cultures, there can be no space for a real exercise of Indigenous rights.

The existence of distinct societies within the state need not be considered a threat to national unity.²⁶⁴ The illusion of *mestizaje* only deploys the illusion of a cohesive Peruvian identity. One can see that the idea of constructing a culturally homogenous state has been under severe questioning in the last decades and multicultural approaches have been providing options to replace that theoretical framework. Manifestations of the multicultural approach have been recognized in the Peruvian Constitution; nevertheless, their potential has been silenced by a nationalistic and ethnocentric consciousness which currently shapes the law and the imagination of legal scholars. For example, although Peru is organized as a decentralized-unitary state,²⁶⁵ without any space for constitutional

²⁶³ The term is borrowed from Avigail Eisenberg, *Reason for Identity: A Normative Guide to the Political and Legal Assessment of Identity Claims* (Oxford: Oxford University Press, 2009). At 62-63, Eisenberg argues "Domestication refers to the tendency found within several political accommodation strategies, such as multiculturalism and identity claiming, to undermine the political and legal legitimacy of the broader project sought by some minorities to secure recognition of their right to self-government or self-determination." [...] "The peril of domestication is that identity claiming, at best, secures for indigenous minorities minor adjustment to existing state policies. At the same time, it disempowers these communities by leading them into costly legal battles that drain their resources and divert their energy from the larger more important project of fighting for their right to self-determination. And finally, identity claiming implicitly legitimizes the decision-making processes which are external to minority communities and controlled by the state or state system which is often responsible for domesticating the community in the first place."

²⁶⁴ For example, countries like United States recognize the self-determination of Indigenous peoples. See Cornell, "Remaking the Tools", *supra* note 2. Regarding Canada, the right of internal self-determination has been recognized to Quebecois. See Crawford *supra* note 184.

²⁶⁵ See Case No.0020-2005-AI/TC.

asymmetry, article 149 of the constitution establishes that Indigenous peoples “shall exercise jurisdictional functions at territorial level in accordance with customary law, provided they do not violate the fundamental rights of the individual”. The underpinnings of this constitutional clause rest on Indigenous peoples’ claims for the recognition of their legal institutions and in other words, the recognition of legal pluralism. This being said, while recognized for the first time at a constitutional level in 1993, the implementation of the Indigenous jurisdiction clause remains constrained by the judicial bureaucracy. Thus, in developing an interpretation of the fundamental rights that limit Indigenous jurisdiction, Peruvian judges apply a minimalist interpretation, and hence delineate a narrow Indigenous jurisdiction. In my opinion, the narrowness of Indigenous jurisdiction based on the interpretation of fundamental rights reveals a presumption of cultural superiority among the judiciary. In effect, such events may be a result of judges not considering multicultural perspectives, which may or may not be because there is no desire to consider different interpretations of fundamental rights outside a western perspective. These manifestations of distrust and fear have to be counterbalanced by a more respectful view, which does not mean an unavoidable disintegration of nation or the state territory. Such constitutional asymmetry, allowed by the constitution, presents the real possibility of having a fairer dialogue between the state and the Indigenous groups in Peru.

4.7.- Indigenous Critiques of Indigenous Self-Determination

The critiques posed by non-Indigenous actors against Indigenous self-determination focus on the threat to state integrity. Nevertheless, it is also important to consider the concerns raised by Indigenous scholars like Taiaiake Alfred and Jeff Corntassel, with regard to the Indigenous sovereignty/self-determination movement.

Taiaiake Alfred, a Mohawk scholar, holds that the concept of sovereignty is not appropriate “as a political objective for Indigenous peoples”.²⁶⁶ For him, this concept, forged by western legal/political ideologies, only reinforces the colonial domination against Indigenous peoples, indicating that any advancement towards Indigenous self-

²⁶⁶ Taiaiake Alfred, “Sovereignty” in Joanne Barker, ed, *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Self-Determination* (Lincoln, NB: University of Nebraska Press, 2005) at 38 [Alfred, “Sovereignty”].

determination will always be “only a limited form of autonomy, not independence.”²⁶⁷ For Alfred, a real Indigenous self-determination should be recreated within Indigenous values and outside the historical oppressive and racist structures of state sovereignty.²⁶⁸ Thus, Alfred seeks a more respectful relationship between the state and Indigenous peoples, which will materialize into more autonomy for Indigenous peoples. Simplifying Alfred’s thesis regarding Indigenous self-determination, he argues in favour of a return to a *nation-to-nation* relationship between Indigenous peoples, leaving aside the model of negotiation that conceived aboriginal nations as “*nations within*” the host-state.

Alfred’s point of view is interesting and poses important questions regarding the limits of the self-determination movement. However, with his constant references to “authentic” and “true” Indigenous approaches, he tends to essentialize or generalize Indigenous cultures, which could be problematic if we take into account the heterogeneous reality of Indigenous cultures around the world.

Alfred’s argument to establish a nation-to-nation relationship could be disadvantageous for those Indigenous peoples that have suffered intense cultural devastation, and who have lost almost all elements of societal culture. In these cases, a previous reconstruction of Indigenous identity will have to acknowledge the reciprocal influence between Indigenous and European cultures. The concept of state sovereignty, which was elaborated in certain contexts (17th century western legal theory), will be part of the negotiations between the state and Indigenous peoples. In this sense, it could be said that Alfred does not reject the notion of Indigenous autonomy itself; he rejects how these concepts have been used to coopt Indigenous communities.

In my opinion, Alfred does not reject some of the advancements made by the self-determination movement; he just considers that these advancements are limited contributions. In my understanding, these limited contributions could be considered part of the process to overcome this current context. However, it seems that Alfred is more

²⁶⁷ Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*, 2nd ed (Oxford: Oxford University Press, 2009), at 81.

²⁶⁸ Alfred, “Sovereignty”, *supra* note 266. At 46-47 Alfred affirms that “True indigenous formulations are nonintrusive and build frameworks of respectful coexistence by acknowledging the integrity and autonomy of the various constituent elements of the relationship. [...] For people committed to transcending the imperialism of state sovereignty, the challenge is to de-think the concept of sovereignty and replace it with a notion of power that has at its root a more appropriate premise.”

concerned with describing this unattained goal of Indigenous peoples, rather than the process needed to reach this goal. Hence, it should be seen that instead of approaching the current state of self-determination of North American Indigenous peoples as a failed attempt, it should be understood as a process. For Alfred, respectful relationships coincide with his specific view of the authentic Indigenous idea of self-determination.

From a similar perspective, Jeff Corntassel, a Cherokee scholar, argues that Indigenous self-determination has been compartmentalized “by separating questions of homelands and natural resources from those of political/legal recognition of limited Indigenous autonomy within the existing framework of the host state(s).”²⁶⁹ Corntassel is worried about how the movement of self-determination “deemphasize[s] the responsibilities and relationships that Indigenous peoples have with their families and the natural world [...]” Nevertheless, he does not reject the entire notion of Indigenous self-determination; rather, he thinks it is incomplete because the notion is not taking into account a sustainable approach. Therefore, he holds that “Indigenous self-determination needs to be rearticulated on Indigenous terms as part of a sustainable, community-based process, instead of narrowly constructed political/legal entitlements.”²⁷⁰

The critical approach developed by these authors should be read as complementary to the approach of the self-determination movement. These critical theories are useful for the self-determination movement in terms of detecting shortcomings and keeping an eye on how Indigenous self-determination is being applied. In other words, they should help us to realize where the process of Indigenous self-determination is leading Indigenous communities. In that sense, self-determination should be understood as a process rather than as a goal. From this perspective, and being an expression of the culture that it protects, self-determination is, as Tully describes culture, overlapping, interdependent and negotiated.²⁷¹ The right to consultation is one of the tools for putting self-determination into practice.

²⁶⁹ Corntassel, “Sustainable Self-Determination” *supra* note 194 at 116

²⁷⁰ *Ibid.*

²⁷¹ James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 10.

4.8.- Negotiating the Scope of Self-Determination through the Right to Consultation

The objective of the right to consultation is to create spaces for dialogue between Indigenous groups and the state. First, such dialogue implies (or should imply) the state leaving aside its paternalistic views, and committing itself to a new way of establishing relationships with the Indigenous groups. This should be the first step. That is, a state accustomed to treating Indigenous peoples as “uncivilized” or even savage needs now to reach a consensus with groups that have special rights.

Second, dialogue implies that the state should discard its position as being cultural-neutral or “culturally blind”. This entails an exploratory journey into each group’s own identities, analyzing the core components of its identities. This is important because sometimes a group’s self-definition could disregard and even denigrate the main components of another group, or the group itself. For example, if a specific nation defines itself as a *mestizo* Catholic society, it would leave aside the Indigenous non-Catholics and every other distinct society within the nation.

Kelman, an Austrian/American social scientist, explores the process of implementing the principle of self-determination in establishing new states. Although he does not address the topic of Indigenous self-determination, some of his ideas are applicable to the Indigenous self-determination issues. He holds that the establishment of self-determination is an “attempt to give political expression to a group’s national identity,”²⁷² and that self-determination should not be understood as an “automatic right” in that the implementation of the right of self-determination should include necessary negotiations among the parties involved. For Kelman the purpose of negotiation is ensuring that “no group defines its identity in ways that threaten rights, interests, and identity of others.”²⁷³ He also states that “implementing” identity is “of legitimate concern to other groups that are affected by the definition, and must therefore be open to “negotiation” with those other groups.”²⁷⁴ Kelman also affirms that “[...] the social construction of an identity involves a dual process of *discovery* (or rediscovery) and

²⁷² Herbert C. Kelman, “Negotiating National Identity and Self-determination in Ethnic Conflicts: The Choice between Pluralism and Ethnic Cleansing” (1997) 13:4 *Negotiation Journal* 327 at 336.

²⁷³ *Ibid.*

²⁷⁴ *Ibid* at 335.

creation [...]”²⁷⁵ of common elements existing within a population. The most important lesson that can be taken from Kelman is the notion that self-determination is a process, and that this process entails negotiations within the distinct group and between the different national identities involved. As he points out, a “group’s formulation of its identity is not just its own business, but a matter of vital concern to others. Mutually acceptable identities must therefore be shaped through a joint process of give and take.”²⁷⁶

It is important to note, however, that there are some perils in this process of negotiation. In light of the colonization, co-optation and domestication of Indigenous peoples there are legitimate concerns about negotiation as a process. However, negotiation should not be understood as a negative factor. The “dual process of *discovery* (or rediscovery) and *creation*”, as mentioned above, is in my opinion, an essential previous step to a process of recognition, especially where the classic notion of Indigenous peoples gives way to the modern conception, which is more respectful of the cultural distinctiveness of Indigenous groups. It could also be argued that one of the perils of negotiation is the possible intervention of the state in controlling the membership of Indigenous groups. Indeed, a dimension of the right to self-determination is to control membership of the community, which is why the state should not intervene in such a process. This being said, an absolute prohibition against intervention could leave unprotected some minorities within Indigenous groups, so negotiation and dialogue may help to avoid such problems.

Concepts such as intercultural dialogue and multiculturalism should cease to be mere promises; rather, they should become part of state policy about living together. However, the concretizations of these concepts in public policy are sometimes accompanied by unforeseen complexities visible only during their formulation phase of the concept, which may pose a challenge to the involved parties; therefore, factors such as language and budget, among others, need to be taken into consideration. Different cultural perspectives may be manifested during state-Indigenous dialogue; certainly, these points of views are shaped by different ways of comprehending notions of self-

²⁷⁵ *Ibid* at 337.

²⁷⁶ *Ibid* at 336.

determination. Consequently, the right to consultation necessarily implies the *negotiation of self-determination*, or autonomies, both Indigenous autonomy and the nation-state's autonomy. It is also important to emphasize that the use of the term "negotiation" entails a process, and more than one party.²⁷⁷

Thus, on the foundation of Indigenous self-determination, the right to consultation becomes the formal sphere for negotiating the autonomies of Indigenous peoples and the state. It is the tool that can allow change from a model of domination and invisibility of Indigenous peoples' self-determination towards a model of recognition and negotiation of such autonomy. Emphasis should be placed on self-determination in relation to the right to consultation. For example, in accordance with Anaya's approach, lack of consultation has an impact on ongoing self-determination. In effect, non-consultation not only implies disrespect and neglect of differences and singularities of Indigenous peoples, it also implies a direct threat to their sphere of self-determination, which is the generating core of their characteristics. Hence, if the right to consultation is formulated with serious defects, Indigenous self-determination will be under severe threat. In almost the same manner, a weak formulation of self-determination will lead to a fragile right to consultation.

As already stated, the manifestation of Indigenous peoples' self-determination embraces uncountable variables as a result of the multitude of cultural realities of each Indigenous group; in contrast, the right to consultation is configured within defined (in principle) legal schemes. As a result of analyzing its legal configuration, one cannot only measure the strength of the right to consultation, but also the strength of the right to self-determination, as this allows an understanding of how self-determination is constituted in specific contexts.

At least two moments can be distinguished when determining the strength of the right to consultation. One is the moment of *entry*, in which one can verify who and under what conditions this right could be exercised. For example, the argument that there are no authentic Indigenous people within a country – that there are only *mestizos* – leads directly to the conclusion that there is no one to whom the right applies. Such an argument does not question the right *per se*, but rather the existence of right-holders and,

²⁷⁷ *Ibid.*

thus, the impact of the Convention 169 (or any domestic enactment that regulates the right to consultation) in reality. Another critical question concerns what kinds of measures require consultation; how should one determine whether a legislative act or administrative measure directly affects an Indigenous group? Convention 169 refers to “legislative or administrative measures which may affect them directly”,²⁷⁸ “them” meaning Indigenous and tribal peoples. The Tribunal establishes that Indigenous peoples will be directly affected if the legislative or administrative measures significantly impact the juridical situation. Although the decision to consult could be initiated by the administration in cases in which an intense impact is detected, in other cases, Indigenous peoples will have to request consultation about certain measures. In administrative-initiated cases Indigenous groups have the burden of explaining how measures directly affect them. As such, these groups have the important role of explaining, from their own cultural perspective, the impact of the measure. This is relevant in that institutions that would determine the merits of the request, or the validity of the consultation process, would be non-Indigenous. Indeed, Convention 169 does not establish a specific institution in charge of solving these kinds of cases. Therefore, the judges, in their role of supervising the administration and the legislative bodies, would be in charge of this job. The problem here is that members of judicial entities may be unsympathetic towards Indigenous peoples or even, as argued in Chapter 1, not interested in taking into account other notions of justice based on different cultural patterns. Therefore, judges should develop a broad notion of the phrase “affect them directly”, which offers more possibilities for negotiation and cultural awareness than a narrow conception, ultimately expanding the opportunities to negotiate. The other moment is the *exit* moment. Here the relevant issue to analyze is the degree of interlinkage between the issues discussed and decided upon during the process of the consultation. For example, Clavero states that consultation without the capacity to apply a veto right would be a non-coherent exertion of Indigenous peoples’ self-determination, being that the power of negotiation would be substantially reduced.²⁷⁹

²⁷⁸ Section 6.1 (a) of *Convention 169*.

²⁷⁹ Clavero, *supra* note 183 at 50.

Analysis of these points of entry and exit can reveal the extent of the state's recognition of Indigenous peoples' self-determination and, in addition, the extent to which certain Indigenous groups comprehend their right to self-determination. Finally, it remains to be analyzed to what degree the Peruvian Constitutional Tribunal jurisprudence takes into account Indigenous self-determination when analyzing right-to-consultation cases, as well as — ultimately — the linkage between these two elements. Thus, the method for verifying the respect for Indigenous self-determination is to assess the level and intensity of consultation with Indigenous peoples.

Chapter 5: Conclusions

The main argument of this thesis has been that the construction and notion of Indigenous peoples' right to consultation is seriously weakened when the right to self-determination is neglected. I have centred my investigation on the decisions of the Constitutional Tribunal of Peru from 2005-2011 regarding the right to consultation. Such decisions, analyzed in Chapter 3, clearly convey that the application of the right to consultation is divorced from the Indigenous self-determination perspective. This lack of correspondence is built into the jurisprudence of the Tribunal and expresses the bias of its judges. Such bias is a continuation and accommodation of old prejudices of the dominant society against Indigenous peoples in Peru; it is part of the pervasive cultural racism embedded in Peruvian society, translated into jurisprudential terms and language.

In the first part of this chapter, I examine the two decisions of the Tribunal that refer to the right to Indigenous self-determination. It is important to point out that the relevant statements in these rulings were not determinative of the issues, but were mere *obiter dicta* of the Tribunal judges. Nevertheless, it is important to analyze these *obiter dicta* as to how the Tribunal explained the concept of the right to self-determination. Perhaps even more importantly, it is crucial to pay special attention to the silence of the Tribunal on the right to Indigenous self-determination in other cases analyzed in chapter 3; such silence continues to echo more strongly than the statements of the Tribunal. In effect, when it was expected that the Tribunal would apply the Indigenous right to self-determination, it did not. Thus, on one side, the Tribunal was apparently trying to advance the Indigenous right to self-determination by making reference to it and developing the concept for the first time in its jurisprudence. On the other side, the Tribunal did not seem to take into consideration its own *obiter dicta* in cases in which the right of consultation was imperative.

In the second part of this chapter, I conclude by focusing on the interaction that should exist between the right to consultation and the right to Indigenous self-determination. I recapitulate some ideas about the right to Indigenous self-determination, and the complexities of defining that right within the Peruvian legal process. Following that, I explain the possibilities of reversing the dangerous tendency to "domesticate"

Indigenous peoples by using cultural values to give content to the right to self-determination.

5.1.- The Indigenous Right to Self-Determination: A Right Trapped in the Constitutional Tribunal's *Obiter Dicta*

There are only two rulings in which the Tribunal uses the term “Indigenous self-determination”:²⁸⁰ the *Cordillera Escalera* case and the *Aidesep I* case. The fact that the Tribunal used this term is nevertheless significant, not only because neither Convention 169, nor the Peruvian Constitution expressly uses the term, or even recognizes the right to self-determination of Indigenous communities, but also because it is a very contentious term. It is also important that, in all of these cases, the plaintiffs do not argue specifically and exclusively about the right to self-determination of Indigenous peoples. As explained in Chapter 3, the plaintiffs invoked other rights, like the right to consultation, and the right to their territory. Therefore, it is arguable that the Tribunal’s references to the right of Indigenous self-determination are acts of moderate activism in favour of Indigenous populations.

In the *Cordillera Escalera* case (2009), the Tribunal develops the concept of Indigenous self-determination. However, this first reference to Indigenous self-determination in the Peruvian legal system is immediately followed by a disclaimer (para. 32):

Self-determination however, does not have to be confused with autarchic, separatist or anti-systemic pretensions, since [self-determination] has to be considered in conjunction with the principles of unity of government and territorial integrity of the State. [...]

[...] self-determination is the capacity of Indigenous peoples to organize themselves in an autonomous manner, without political or economical intervention by third parties, and the faculty to apply their customary law to resolve social conflicts that have arisen in the community, as long as the exercise of this function does not violate fundamental rights of third parties [...].²⁸¹

In this case, the Tribunal also held that the right to self-determination and

²⁸⁰ The term “self-determination” is mostly used by the Tribunal in cases regarding the protection of privacy rights (*informational self-determination*), in cases concerning the morning-after birth control pill (*reproductive self-determination*), and in cases concerning contractual freedom.

²⁸¹ Translated by the author.

Indigenous peoples' conceptions of their lands serve as the foundation of the characterization of the right to consultation. Thus, it can be argued that the Tribunal is only half right in this instance. Although land rights are intimately linked with the right to consultation, it is Indigenous culture which embeds the configuration of land rights for Indigenous communities. The right to preserve Indigenous cultures is, from my point of view, the original foundation that supports the claims of self-determination and therefore, many other goods that are essential for Indigenous communities. The right to consultation is one way of asserting the right to self-determination against the state.

These cited excerpts also give a hint of the initial approach of the Tribunal to the notion of Indigenous self-determination; the generous definition of this right is at the same time constrained by the abstract concepts of "fundamental rights" and the "public interest". Although it could be argued that in *Cordillera Escalera* the Tribunal was trying to balance the Indigenous right to self-determination with the principle of state sovereignty, this was done so broadly and abstractly that no real guidance can be extracted from this case. Unfortunately, in practice, the real consequence of this so-called "balance" is the total absorption of the right to Indigenous self-determination into the concept of state sovereignty. Such absorption of the right immediately reflects a lack of dialogue in the process of recognizing Indigenous cultural patterns. Here then, the Tribunal is basically stating that Indigenous practices are going to be shaped in a process in which only mainstream values will be considered. Such broad standards give the Tribunal critical leeway in characterizing the essence of the right to self-determination on a case-by-case basis. Therefore, only future cases can shape this right. Such decisions may have minimalist or more progressive tendencies, which will depend on the tendencies of the judges on the bench.

This being said, it is also important to question why the plaintiffs in the *Cordillera Escalera* case did not argue in favour of Indigenous self-determination. It could be because the plaintiffs were not part of an Indigenous community, and therefore did not argue that the Indigenous communities that inhabit the area would be impacted by the oil project. The Indigenous self-determination concept was raised by the Tribunal, and developed as an *obiter dicta* consideration. In doing this, the Tribunal introduced the concept of Indigenous self-determination into constitutional jurisprudence. The reference

to Indigenous self-determination was not something problematic for the Tribunal; after all, this issue was not raised as an argument in the *Cordillera Escalera* case, and thus did not impact the decision of the Tribunal. Furthermore, in this particular case, reference to Indigenous self-determination did not directly affect any relevant interest of the government.

In the *Tuanama 1* case (2010), there is no direct reference to the right to self-determination of Indigenous peoples. Nevertheless, in paragraph 4, the Tribunal mentions articles 89 and 149 of the constitution, highlighting the importance of cultural diversity and cultural pluralism, and how those concepts must be concretized in the framework of fundamental rights, democratic government and the social market economy. The Tribunal concludes that with the fundamental rights enumerated in the constitution, the existence and the culture of the Indigenous peoples in this case were protected. Only in the concurring opinion of Judge Landa Arroyo was the right to consultation held as an expression of self-governance, as well as an expression of self-determination of Indigenous peoples.

Only in the *Aidesep 1* case (2010) did the Tribunal refer again to the right to self-determination. In this case, the Tribunal held that the self-determination of Indigenous communities added to the conception that these communities have regarding the land, serving to aid in characterizing and supporting the foundation of the right to consultation. However, immediately after this definition, disclaimers followed regarding the limits of the right to self-determination previously made in the *Cordillera Escalera* case. *Aidesep 1* was the last decision in which the Tribunal referred to the right to self-determination. It is interesting here to emphasize that the mention of this right has always been linked to the right to consultation. Despite this, the Tribunal did not discuss the right to Indigenous self-determination in a way that was relevant to solving the case.

In the *Tuanama 4-WRA* case, the Tribunal did not mention the right to self-determination. However, an important point to emphasize in this decision is the silence of the Tribunal regarding the right to self-determination. As explained in Chapter 3, in the *Tuanama 4-WRA* case, the Tribunal was examining the *Water Resource Act*. At least seven articles of the Act make direct mention of Indigenous peoples, and regulate matters that directly affect Indigenous peoples. In all of these articles, the norm under scrutiny

indicates the special status of Indigenous peoples, ultimately attempting to include more participation of Indigenous peoples in water management.

I would like to highlight that among the several arguments presented by Congress in the contestation of the claim, assertions were made that Indigenous peoples were not directly affected by the Act, because the reference to Indigenous peoples treats them as exceptions to the general norm, ultimately favouring and not harming them. However, it is clear to me that the Act modifies the juridical situation of Indigenous peoples, specifically regarding how Indigenous communities are organized in order to manage water resources. As already stated, judicial institutions should be the entities deciding whether there should be consultation regarding a specific administrative or legislative measure. In order to prevent this serving to intensify or to reinforce a policy of domestication, judges should demonstrate that they are treating Indigenous groups respectfully, through addressing their interests and perspectives.

Reference to Indigenous self-determination in the *Water Resource Act* should oblige the Tribunal to analyze the proportionality (reasonability) of the act or to examine how the components of Indigenous self-determination could be reasonably accommodated within the constitutional framework. However, the Tribunal ultimately remained silent and did not introduce in its reasoning the concept of self-determination. Taking into account the effort of the Tribunal to save the legislation, one rationale for their silence could have been that they thought the degree of intervention of the norm into Indigenous autonomy (and self-determination) would not be very intense. Consciously or subconsciously the Tribunal decided to avoid making this kind of argument; Indigenous peoples can legitimately perceive the *WRA* as another demonstration of paternalistic decision-making because it was imposed without any serious consultation. Instead of generating spaces for dialogue, the legislature tries to legitimize the absence of consultation in light of the supposed positive effects that such an Act may have on Indigenous peoples.

In the cases analyzed in this section, it is clear that the Tribunal brought the self-determination rhetoric into cases only when it was recognized that the right to self-determination would not alter the ruling in the case. In contrast, in the cases in which the issue of self-determination was important to solving the case, the Tribunal did not

mention this right.

5.2.- Joining the Right to Consultation with the Right to Indigenous Self-Determination

Some of the ideas surrounding the relationship between the right to consultation and the right to self-determination have been advanced in the previous chapter. I stated in Chapter 4 that the objective of the right to consultation is to create spaces for dialogue between Indigenous groups and the state. Integral to the right of Indigenous self-determination, as the Tribunal affirmed, is the capacity of Indigenous peoples to organize themselves in an autonomous manner, without political or economical intervention by third parties, and with the ability to apply their customary laws to resolve social conflicts as they arise in their communities. Anaya broadly explains this as the right of Indigenous peoples to define their own destinies.

Thus, the process of consultation in particular instances entails dialogue between at least two self-determining parties: the state, and the relevant Indigenous peoples. Such a dialogue should imply the state leaving aside its paternalistic views and committing itself to a new way of interaction with Indigenous groups. This would be a radical change that would challenge the traditional and racist conception of Indigenous peoples constructed during the colonial and republican eras in Peru. For the first time in the republican history of Peru, the state has to consult, and even negotiate with, Indigenous peoples, not only to avoid social conflict, but also because the legal system establishes this obligation. There is a strong and practical symbolism in this legal mandate. This is not futile symbolism; the relevance of this practical symbolism is found in the fact that, in principle, dialogue implies a relationship among equals. It is also true that dialogue can disguise imposition and assimilation, which is always a risk. However, if such a risk were to materialize, Indigenous peoples could call into question the legitimacy of the dialogue, and the courts could scrutinize the process, unveiling these kinds of manoeuvres.

In the *Tuanama 4-WRA* case, as well as in the *Aidesepe 1* case, the Tribunal failed to read the right to consultation in terms of Indigenous self-determination. The *Aidesepe 1* decision was a particularly difficult case as a result of the possible consequences of the decision. Indeed, to declare void mining concessions that had been granted more than 10 years previously would definitely have had an impact on investments in Peru. However,

to simply ignore Indigenous rights, using this situation as an excuse, reflects the bias of the Tribunal. A possible option that the Tribunal could have exercised was to consider consultation without nullifying the mining concessions. This would obviously not have been the best outcome for the Indigenous litigants, but it would have shown, at least, a hint of respect towards Indigenous peoples. In the *Tuanama 4-WRA* decision, the Tribunal should have declared unconstitutional the articles that regulated Indigenous communities. The Tribunal could have also given time to the Congress to consult Indigenous peoples. If the *WRA* is so favourable to Indigenous communities, as the Tribunal asserted it is, surely Indigenous communities would have accepted the regulations it prescribed.

The right to consultation is a direct manifestation of Indigenous self-determination. Indeed, it is the process of consultation that has allowed the deployment of different dimensions of the right to Indigenous self-determination, such as the recognition by the state of certain groups of people who share different cultures and are entitled to make their own decisions regarding their present and future. It is true that in the first decades of the 20th century the Peruvian state recognized the legal existence of Indigenous communities; however, this recognition was developed within the framework of assimilation, and also exhibited a strong ethnocentric trend: the state recognized Indigenous rights, but conceived of Indigenous peoples as uncivilized or semi-civilized, and planned to acculturate Indigenous communities. Fundamentally, there is no chance of real recognition if the “others” are not recognized as equals entitled to be recipients of dignity.²⁸² Although there is still pervasive ethnocentric and cultural discrimination in Peru, discriminatory discourses are no longer politically correct, meaning that the government can no longer use these kinds of arguments overtly. Obviously, discriminatory discourses are adapting to new contexts, but it is still an improvement that ethnocentric and racist discourses are not as powerful as they were 20 years ago.

This being said, it is important to question what kinds of consequences are generated by the evident disassociation of the right to consultation from the right to self-

²⁸² See especially Charles Taylor, “The Politics of Recognition” in Amy Gutmann, ed, *Multiculturalism: Examining the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1994) at 64.

determination made by the Tribunal. The main consequence is that this dissociation obscures the pragmatic and symbolic dimension of the right to Indigenous self-determination, debilitating the practical and symbolic potential of the right to consultation. Although Convention 169 did not recognize the right to self-determination in favour of Indigenous peoples, the one condition needed to activate the consultation process is precisely a legislative or administrative measure that may directly affect Indigenous peoples' self-determination. As stated in Chapter 4, Indigenous self-determination has been thought of as a means to manifest autonomy, and to encourage participation of Indigenous people within the host state. However, there are many ways of understanding autonomy, and, given the heterogeneous nature of Indigenous peoples' autonomy, could mean something different for each Indigenous community. There are different ways to instantiate the concept of self-determination, which largely depend on the nature and traditions of Indigenous peoples, as well as on the social and political context through which self-determination is deployed. Thus, using their own values and perspectives, Indigenous communities can determine which measures directly affect them. In other words, the right to consultation can be invoked when the peoples decide that their own destinies are directly affected. The ability to determine one's own destiny is bound up with the mechanisms that Indigenous peoples are going to use in order to realize their own autonomy.

I argue that a strong interaction between the right to self-determination and the right to consultation will reverse the effects of "domestication" of Indigenous peoples and, hence, will encourage the decolonization processes of Indigenous groups. Indeed, the identification of Indigenous groups as autonomous and self-determining entails that they are owners of their destinies, and that they can govern themselves according to their own customs and values. This implies a modification in how the Peruvian state has in the past related to Indigenous groups: instead of assimilation, respect; instead of paternalism, autonomy. The state would be obligated to not just provide public services, which are generally absent in Indigenous communities, but to also filter such decisions through the values and conceptions of Indigenous groups.

Claiming the right to control their destinies could be a difficult task for Indigenous communities, and also difficult for non-Indigenous judges to understand. The

question can be posed: How will judges and tribunals understand the content of Indigenous self-determination if Indigenous groups do not explain the relevance and particular understanding of self-determination within their own Indigenous communities? In my opinion the best method for judges to use is to refer to the “Aboriginal perspective”, and have Indigenous communities express their traditions, acknowledging and exploring what it is to be part of a specific Indigenous community, as well as how this perspective impacts their understanding of the relationship with the land, their community, and their institutions.²⁸³ The decisions of the Tribunal analyzed in Chapter 3 started with claims that did not make any explicit or practical reference to an Aboriginal perspective. This is part of the colonized context currently inhibiting Indigenous peoples in Peru, where even Indigenous NGOs try to accommodate Indigenous perspectives within mainstream legal frameworks, forgetting in the process their own conceptions of self-determination. Although this is relevant in explaining the position of the Tribunal, it is also true that the Tribunal has not required that Indigenous peoples make arguments regarding the right to self-determination, because, as observed in Chapter 3, the Tribunal brought forward such arguments even when the plaintiffs did not raise them. It is true that the Tribunal helped at one point to normalize the term “Indigenous self-determination”; however, it later stepped back from this position.

The cases analyzed in this paper are the first and only cases regarding Indigenous peoples heard prior to 2011 by the Peruvian Constitutional Tribunal. The instability of the jurisprudence of the Tribunal in this area is evident and expresses the conflicted feelings among judges, as well as in the wider society. One of the most revealing examples of this instability is the disjointed perspective put forward by the Tribunal that fails to connect the right to consultation and the right to Indigenous self-determination. This fragmented view debilitates the symbolic and practical effects of both rights, reducing the protection of cultural values of Indigenous peoples. The underpinnings of this perspective are the ethnocentric and cultural biases of a Tribunal that, consciously or unconsciously, is still unable to hear the voices of other cultures.

²⁸³ Christina Godlewska & Jeremy Webber, “The Calder Decision, Aboriginal Title, Treaties, and the Nisga’a” in Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) at 30.

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