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Indigenous rights in south america: observance with inter-american standards

Derechos indígenas en américa del sur: cumplimiento de los estándares interamericanos

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Abstract

The article details the indigenous legal protection within the Inter-American System of Human Rights, as well as the observance level within the South American countries. It analyses the judicial, constitutional and legal reality of the countries the that ratified the American Convention, the International Labour Organisation Convention n. 169 and accepted the Court's jurisdiction. It aims to analyse the dialogue between those countries' domestic law and the System, applying the efficacy chain theory.

Keywords: Indigenous People; Observance; Enforcement Chaim

Resumen

El artículo analiza la protección jurídica de los pueblos indígenas dentro del Sistema Interamericano de Derechos Humanos, así como el nivel de observancia de estos parámetros entre los países sudamericanos. Analiza el reconocimiento judicial, constitucional y legal de los países que han ratificado la Convención Americana, el Convenio 169 de la OIT, y han aceptado la jurisdicción de la Corte. Su objetivo es detallar el diálogo entre el sistema jurídico de estos países y el SIDH, aplicando la teoría de la cadena de eficacia.

Palabras clave: Pueblos indígenas; Cumplimiento; Cadena de eficacia

1 introduction

This article analyzes the observance, among South American countries, with the jurisprudential parameters developed by the Inter-American Court of Human Rights regarding indigenous territorial rights, consolidated in the case Xucuru v. Brazil.

The Court has built a progressive and transformative jurisprudence tackling the marginalization and exclusion experienced by indigenous peoples. Legal recognition of indigenous rights, however, is nothing new in South America, since most countries recognize the right of indigenous peoples to their territory, either in the Constitution or through international treaties. Although they do not represent legal innovations to the domestic system, the decisions of the regional human rights system serve the role of reinforcing the demands of social movements and indigenous protection organizations. This legal reinforcement becomes important as we observe a context of accelerated pressure on natural resources and lands, causing an exponential growth in violations of the right to indigenous collective property and escalating violence against indigenous peoples (GLOBAL WITNESS, 2018; TAULI-CORPUZ, 2018).

The article adopts the theory of the chain of effectiveness developed by Calabria (2018). The efficacy of international courts is divided into five layers: observance, enforcement, strengthening, implementation, and adequacy. The first layer of efficacy, observance, is adopted. It represents the spontaneous adherence by a country to the parameters of the regional court, preceding a final decision or contentious case involving the country (CALABRIA, 2018).

To achieve the objective, the development of territorial rights in the Inter-American Court is presented (topic 2), followed by a presentation of the international context of the recognition of rights (topic 3), and an analysis of the constitutional rights recognized in South America and the status of the ratification of ILO Convention 169 (topic 4). Although constitutionally guaranteed, territorial rights are gradually being violated (topic 5). The article concludes by affirming that the case law of the Inter-American Court consolidates the domestic recognition of indigenous territorial rights and analyzes it in relation to its present recognition, or not, in the constitutional courts in Latin America, strengthening social and governmental actors that act in the dispute for the effectiveness of the right to collective property (topic 6).

2 Territorial rights recognized by the inter-american court

The Inter-American Court has consolidated the most progressive binding international case law on indigenous territorial rights, representing a model for courts and treaties around the world, praised by several researchers in the field of human rights (ANTKOWIAK; 2014; PASQUALUCCI, 2009; BURGORGUE-LARSEN, 20013; GILBERT, 2014).

Since its creation until 2021, the Court has decided fourteen contentious cases involving indigenous territorial rights, and the right to collective property rights over ancestral territories has been recognized.[1] As the American Convention only recognizes the right to property from an individual perspective and does not mention any indigenous rights, the Court has applied extensive interpretative methods to ensure the protection of territorial rights, such as the *pro homine* principle, the use of indigenous customary law, and systematic interpretation based on the *corpus iuris of* indigenous rights.

Thus, through the extensive interpretation of article 21, the Court recognized the protection of the indissoluble bond between indigenous communities and their ancestral territories, recognizing the state's duty to delimit, demarcate, title, and to perform the *saneamiento* of the lands, and to refrain from any act prejudicial to the enjoyment of property. The right to collective property includes the right to natural resources indispensable to the physical and cultural survival of indigenous peoples. For mineral exploration, the Court established three procedural safeguards: the right to free, prior, and informed consultation, benefit sharing, and the elaboration of a prior socio-environmental impact study. The objective is to guarantee the cultural and physical continuity of the peoples.

The protection of territory is further reinforced by the recognition of other parallel rights. Indigenous peoples must have access to procedural remedies to protect their property in accordance with articles 8 and 25 of the Convention, including the right to collective legal personality (article 3 of the Convention). The Court further recognized the implied rights to cultural identity and self-determination, and recognized the right to a life of dignity and the state duty to guarantee it. In the *Yakye Axa, Sawhoyamaxa, and*

1 Mayagna (sumo) Awas Tingni vs. Nicaragua (2001), Moiwana vs. Suriname (2005), Yakye Axa vs. Paraguay (2005), Sawhoyamaxa vs. Paraguay (2006), Saramaka vs. Suriname (2007), Xámok Kásek vs. Paraguay (2010), Kichwa de Sarayaku vs. Ecuador (2012), Operation genesis vs. Colombia (2013), Kuna de Madugandí y Emberá de Bayano vs. Panama (2014), Garífuna Triunfo de la Cruz vs. Honduras (2015), Garífuna de Punta Piedra vs. Honduras (2015), Kaliña y Lokono vs. Suriname (2015), Xukuru vs. Brazil (2018), and Lhanka Honhat vs. Argentina (2020).

Xákmok Kásek cases, the communities were displaced from their territories and experiencing conditions of misery.

A development in the recognition of territorial rights by the Court can be observed. First, the Court recognized the right to collective property and the procedures necessary to access the right (*Awas Tingni*, 2001). Next, it was recognized that in cases where indigenous communities were forcefully removed from their property, the state has an obligation to guarantee a life of dignity by ensuring basic social rights such as health, education, and housing (*Yakye Axa*, 2005). The next step was to recognize that the right to property encompasses natural resources that are indispensable to the survival of indigenous peoples, establishing safeguards for economic exploitation by the state or third parties (*Saramaka*, 2007). Finally, the state duty of *saneamiento* was recognized in *Garífuna Triunfo de la Cruz* (2015). Implicit rights to self-determination and cultural identity[2] were recognized respectively in *Saramaka* (2007) and *Kichwa of Sarayaku* (2012).

The case *Xucuru v. Brazil* (2018) consolidates the right to collective property. In the same vein, *Kaliña y Lokono v. Suriname* (2018) consolidates the parameters for exploitation of natural resources on indigenous lands.

Finally, in the most recent decision, *Lhaka Honhat v. Argentina* (2020), the court held that article 26 of the American Convention was violated, in relation to the rights to a healthy environment, to adequate food, to water, and to cultural identity. This is the first time that the Court has analyzed these rights autonomously on the basis of article 26 of the American Convention[3]

In the international order, the recognition of territorial rights and the imposition of state duties of protection and non-intervention in indigenous collective property by the Court represented a breakthrough in the indigenous struggle for recognition of their rights.

2 For some authors, the right to cultural identity had already been recognized since Yakye Axa v. Paraguay (2005). However, in Yakye Axa cultural identity is merely mentioned as an integral element of the right to a dignified life, rather than as a singular right. For the first time in Kichwa de Sarayaku (2012), the Court conducted a broad review of the right to cultural identity and recognizes its violation. (CHIRIBOGA, 2006; ODELO, 2012)

3 Article 26 had already been used in previous cases as recognition of the direct justiciability of other social rights, such as labor rights and the right to health. The precursor case was Lagos del Campo v. Peru (2017). For More on the topic, see MORALES, 2019 and SÁNCHEZ, 2018.

3 Treaties and declarations of indigenous rights recognized by international law

In International Law, the developed notion of Nation-State did not attribute to indigenous peoples the condition of subjects of rights, subjugating their culture as a "backwardness" before the State, because they did not match the proposal of civilization and progress (ZIMMERMANN; DAL RI JR, 2016).

This context, exemplified by the privatistic character of the first civil codifications in Latin America, has changed only recently. This change came with the re-democratization of Latin American countries and the development of International Human Rights Law, with the Inter-American Court, generating changes in domestic and international law.

The first change is in International Law, which only studied the relationship established between states, in the ideas of civilization and progress (ZIMMERMANN; DAL RI JR, 2016). This situation was transformed when institutions began to regulate state relations in order to safeguard citizens' rights. Thus, the Humanitarian Law, the International Human Rights Law and the International Labour Organization were created, covering greater human rights.

In this sense, specific declarations and treaties arose, in view of the movement for the decolonization of territories and the self-affirmation of these peoples. The indigenous situation, however, was belatedly observed within this dynamic, in view of two elements: the elaboration of ILO Convention 107, of 1957, and the protection of native peoples by state institutions.

ILO Convention 107 conditioned indigenous peoples to a right to formal equality in relation to other citizens, disregarding their differentiated conditions of existence, as it conferred on the State the guardianship of their rights, with the objective of integrating these peoples into society so that they could achieve equality. Despite emphasizing the duty of protection for indigenous communities, it did not contain definitive protections for their autonomy and their territories, as it tied them to the national economy and, therefore, the single nation (ZIMMERMANN; DAL RI JR, 2016), leading to violations of indigenous peoples' rights. This is revealed by the reports on repression in Latin America, such as the Brazilian National Truth Commission. [4]

4 By way of example, here are some of the findings of the Brazilian National Truth Commission: **"To take possession of these areas and make the extinction of Indians real on paper, companies and private**

The changes in the understanding of indigenous rights generated ILO Convention 169, which revised the content of this 1957 Convention[5]. This new convention was drafted in 1989 and ratified by the various countries throughout the 1990s and 2000s and brings differences from the first one. This last convention is very important in guaranteeing indigenous rights, as it abolished the idea of

integration because the current convention started to give participation and power to the idea of a community as a collective and autonomous subject.[6]

In this sense, importance was given to the performance of economic, labor, and educational activities to indigenous peoples with, minimally, an equality in relation to other social segments.[7] In addition, it gave them the right to consultation in processes that have some impact on the traditional indigenous universe, respecting the form of expression of the original peoples, determining ways to define the institutions that would represent them, later delimited by international organizations (CALDERA, 2013).

Thus, instead of homogenization, it is based on the idea of diversity.[8] Even so, the treaty is criticized in the studies on prior consultation, since it was questioned whether it is the mere participation and the issuing of a mere opinion or effective consent to the proposals, conditioning the carrying out of actions to extract resources from indigenous

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individuals have attempted the physical extinction of whole Indian peoples - which amounts to outsourced genocide - by offering poisoned food, deliberate contagion, kidnapping children, and massacres with firearms. [The National Indian Foundation follows in some ways the practice of its predecessor, the Indian Protection Service. **But it "modernizes" this practice and justifies it in terms of "national development" in order to accelerate the gradual "integration": it absorbs and streamlines those practices, giving them - at the administrative level - a business management** (Indigenous Income, Financial Program of Community Development, etc.).(emphasis added)

5 For those countries that have ratified Convention 169, Convention 107 has been revoked. However, Convention 107 remains in force for those countries that are signatories only to its contents, even though it is closed to new ratifications.

6 **(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sectors of the national community and which are governed wholly or partly by their own customs or traditions** or by special legislation; Article 6 (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

7 **The peoples concerned shall have the right to choose their own priorities for the process of development insofar as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and** to **control, as far as possible, their own economic, social and cultural development**. Furthermore, these peoples shall participate in the formulation, implementation and evaluation of national and regional development plans and programs which may affect them directly. (emphasis added)

8 This is the interpretation defended by Shiraishi Nt: "It seems that there is a radical change to put an end to any form of tutelage, always present in legal devices, that notably see these peoples and social groups as inferior subjects, incapable of discerning their own acts. In this case, **the "equality principle" should be the presupposition and not the objective to be reached, since emancipation derives from the recognition of the existence of diversity and of cultural differences, which involve different subjects that know perfectly well their most immediate and immediate needs".** (emphasis added) (2004)

lands. In this sense, the ILO, in 2003, did not recognize the duty of the State to consider the consent of indigenous peoples to carry out actions that consequently affect them.

Indigenous rights deepen with the United Nations Declaration on the Rights of Indigenous Peoples. The indigenous issue had been a concern at the UN since 1971, when the United Nations Economic and Social Council (ECOSOC) appointed a Special Rapporteur on Indigenous Issues. A draft declaration began to be drafted during the 1980s by the Working Group on Indigenous Populations, a body of the UN Commission on Human Rights, but was only approved by the UN General Assembly in 2007 (TOMASELLI, 2016).

This declaration provides consistent grounds for the recognition of indigenous identities through *soft law*. In this sense, *soft law* has its advantages, with a high number of signatory countries, the greater possibility of participation of non-state actors in its elaboration, and the entry into effect immediately after its signature, regardless of ratification (BARELLI, 2009).

Therefore, the Declaration is considered the broadest and most progressive instrument in terms of recognizing the rights of indigenous peoples (TOMASELLI, 2016; BARELLI, 2009). The Declaration recognizes the right to self-determination and self-government (arts. 3 and 4) of indigenous peoples, as well as the right to the demarcation and protection of ancestral lands (arts. 25 to 20), the right to free, prior and informed consent (arts. 28 and 29), in addition to multiple social and cultural rights, such as education, with the protection of indigenous children and the teaching of their traditions also to other social segments; health; cultural heritage; the right to free, prior and informed consent, advancing the right to consultation.

Nevertheless, there is a difficulty in complying with these provisions. It is important to note the constant violations against native peoples, despite the transformations of Latin American constitutionalism.

4 indigenous territorial rights in south america

The emergence of constitutional indigenous rights in the Southern Cone came with the period of redemocratization and can be distinguished in two distinct moments. In a first moment, in the constitutions enacted between the late 1980s and early 1990s, the constitutions recognized basic rights for indigenous peoples, including the right to

ancestral territories and respect for cultural identity. In the late 1990s and early 21st century, there was a transformative turn in the recognition of indigenous rights, expressed in the Constitutions of Venezuela, Bolivia, and Ecuador, inaugurating the so-called " novo constitucionalismo latino-americano". These three constitutions recognize the plurinational state, valuing legal pluralism and "reinventing the public space based on the interests and needs of majorities historically excluded from decision-making processes" (WOLKMER, 2011).

With a few exceptions, there is unanimous recognition of the right to cultural identity as well as to possession or ownership of ancestrally occupied territories. Most constitutions also recognize the right to prior participation for the exploitation of natural resources in indigenous territories, although only Ecuador and Bolivia expressly mention the right to free, prior, and informed consultation. Paraguay and Peru do not recognize the right to consultation constitutionally, but the absence is partially remedied by the ratification of Convention 169. In relation to procedural rights, there is a trend toward recognition of collective legal personality (Brazil, Argentina, Guyana, and Peru). Some countries establish parameters for political participation (Bolivia, Colombia, Ecuador, Guyana, Paraguay, and Venezuela) and indigenous jurisdiction is constitutionally recognized in Colombia and Ecuador. Finally, the right to self-government is recognized in Bolivia, Colombia, Ecuador, and Paraguay (see Table 1 in the appendix).

Similarly, practically all South American countries have ratified ILO Convention 169. All countries that have ratified the Convention have ensured it a special status within the legal system, whether constitutional or supralegal (see table 2 in the appendix). In Brazil and Chile, the supra-legal status was judicially affirmed in the absence of a specific constitutional provision; in other countries, the Constitution itself ensures a privileged hierarchy to human rights treaties. Even so, many Latin American constitutional courts have recognized the special hierarchy guaranteed to ILO Convention 169 since the early 2000s. This is the case of the constitutional courts of Colombia, Argentina, Bolivia, Ecuador, Peru, and Venezuela (ILO, 2009).

With respect to the three countries that do not recognize constitutional territorial rights, there are differences in the level of protection for traditional peoples. Chile, despite the constitutional gap, ratified Convention 169 (albeit belatedly, in 2008), has internal legislation protecting indigenous rights (Law 19,253/93), and has a specific institution for land demarcation, CONADI - the National Corporation for Indigenous

Development (ANAYA, 2009; ALYWIN, 2004). Suriname and Uruguay, however, do not recognize any indigenous rights constitutionally and are not signatories to Convention 169. While in Suriname there is no legal norm or institution guaranteeing indigenous rights, in Uruguay infra-constitutional legislation recognizes some rights[9]. Furthermore, while Uruguay voted in favor of the UN Declaration on the Rights of Indigenous Peoples, Suriname was one of the very few countries to vote against it.

In general, in most of South America, the recognition of indigenous territorial rights preceded the recognition by the Inter-American Court. This precedence in the recognition of rights is reaffirmed by the Court itself, since in three decisions the domestic legal system was mentioned as part of the *corpus iuris,* reinforcing the extensive interpretation that led to the recognition of the collective right to property and the right to consultation[10].

Some South American countries have already been condemned by the Inter-American Court for violations of indigenous territorial rights. Paraguay was condemned in the cases *Yakye Axa* (2005), *Sawhoyamaxa (*2006) and *Xákmok Kásek (*2010) for dispossession and violation of the right to a dignified life; Suriname was condemned in the cases *Moiwana* (massacre and forced displacement, in 2005), *Saramaka* (logging, in 2007) and Kalina y Lokono (mining exploitation, 2018); Ecuador was convicted in *Kichwa de Sarayaku* for oil exploitation (2012); Colombia was convicted for forced displacement in *Operation Genesis* (2013); and Brazil was convicted in the *Xucuru* case for lack of *saneamiento* (2018).

In the cases against Ecuador, Colombia, and Brazil, the Court recognized domestic legal protection of indigenous rights, but stated that in the specific cases there had been a failure to comply with legislation that violated territorial rights. Finally, in the cases against Suriname, the Court ordered the adoption of a legislative framework that recognizes the indigenous right to territory, as well as providing adequate procedural mechanisms for their claim.

9 Law 18,589 of 2009 establishes the Charrúa Nation and Indigenous Identity Day, recognizing and valuing indigenous cultural identity.

10 Kichwa Indigenous People of Sarayaku v. Ecuador; Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano v. Panama; Garífuna Punta Piedra Community and its members v. Honduras

5 increasing violations against territorial rights

Despite advances in the legislation and the case law, violations of the rights of indigenous communities persist. Despite their recognition, the effective exercise of these rights is not observed. According to the Special Rapporteur on the Rights of Indigenous Peoples, these populations have historically been subject to structural discrimination and, due to the prevalence of commercial interests, indigenous communities have always been victims of aggression when seeking to protect their lands (TAULI-CORPUZ, 2018). This has led to an increase in protests by indigenous peoples and their advocates against these projects that threaten the survival of these communities (IACHR, 2019). The Inter-American Commission on Human Rights has indicated that the free, prior and informed consent of indigenous peoples is not obtained to grant concessions to extractive companies, and the state does not control these projects (IACHR, 2019).

Moreover, the situation of defenders is more endangered. Both the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the issue of human rights obligations related to the enjoyment of the environment speak of a "global crisis" of violence against human rights defenders, and particularly against indigenous rights defenders (FORST, 2016). The United Nations Working Group on the issue of human rights, transnational corporations and other businesses has stated that it has received several reports of killings, attacks and threats against human rights defenders defending indigenous rights against the scourges committed by extractive companies (HRC, 2014).

According to Global Witness, 164 environmental defenders were killed in 2018 (GLOBAL WITNESS, 2019). Half of these murders occurred in Latin America, in part because of this region's tradition of human rights activism. An estimated 28 indigenous rights defenders were murdered in 2019 in this territory (CULTURAL SURVIVAL, 2019), considering Brazil as the most unsafe state for these defenders. Most murders are linked to mining and oil, secondly to agribusiness, thirdly to poaching, and lastly to logging. The Coalition Against Land Grabbing reported 65 cases of arbitrary arrests and judicial harassment, 92 murders, and 46 cases of threats against environmental and human rights defenders in the first quarter of 2019 (COALITION, 2019).

Likewise, the work of indigenous rights defenders is often criminalized, a situation that is increasingly common in Latin America (IACHR, 2015). Countries in the

region use criminal law in retaliation against those who expose the adverse effects they would have on the survival of indigenous communities. Rodolfo Stavenhagen, former UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, pointed out that the criminalization of peaceful protest activities aimed at claiming fundamental rights of indigenous communities should be seen today as one of the most serious failures in the defense of human rights (STAVENHAGEN, 2004).

Peaceful protest by human rights defenders is sanctioned, using figures such as instigation, contempt of authority, or terrorism. Smear campaigns are also carried out against them (STAVENHAGEN, 2004). It is also observed that the declaration of a state of emergency that allows the suspension of guarantees is another tool used to repress social demands (ARTICLE 19, 2015). In this way, it ends up fragmenting indigenous communities.

The Inter-American system has examined the use of the crime of terrorism to impede the claims of indigenous peoples. In Norín Catrimán et al. v. Chile, the Court indicated the pattern of application of the crime of terrorism against the Mapuche people. This situation was also recognized by the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, who denounced the use of the crime of terrorism to deter members of the Mapuche people from their protests, stressing that the social demands of indigenous organizations should not be criminalized (STAVENHAGEN, 2003).

For his part, the UN Special Rapporteur on the situation of human rights defenders has reported that private companies provide fallacious information to sue indigenous leaders and human rights defenders (FORST, 2016). According to the Rapporteur on indigenous rights, the judiciary is often complicit in allowing these unfounded claims to prosper (TAULI-CORPUZ, 2018).

Based on the above, it is clear that action needs to be taken to reverse the trend of aggression against indigenous human rights defenders, because as Victoria Tauli-Corpuz, United Nations Special Rapporteur on the Rights of Indigenous Peoples, says, "If we are going to save the planet, we have to stop killing the people who protect it."

6 Observance in south america: the control of conventionality

6.1 Conventionality control

One of the forms of compliance carried out by the state is the conventionality control, a doctrine disseminated by the Inter-American Court and defined as an obligation of any state agent (mainly courts and judges) to apply the American Convention in the domestic interpretation of rights (MAC-GREGOR, 2015). The legal basis for the doctrine is the Convention articles 1.1 (duty to respect rights and freedoms), 2 (duty to adapt domestic system by adapting it to the Convention), and 29 (extensive or *pro personae* interpretation). Also, the doctrine is related to the principles of good faith, effectiveness and *pacta sunt servanda*, according to articles 26 and 27 of the Vienna Convention (MAC-GREGOR, 2015; MAC-GREGOR, 2016).

The adoption of the doctrine has been distinct according to domestic courts, with some countries ignoring it, others confronting it directly, and some adopting the conventional standards, promoting normative heterogeneity in Latin America (TORELLY, 2017).

With regard to territorial rights, most South American countries already had regulations on indigenous rights in their domestic law, many of them giving constitutional ranking to ILO Convention 169. Thus, the development of regional case law occurs in parallel to the adoption of normative parameters by constitutional courts (GONGORA-MERA, 2017). Some countries expressly mention the Court's decisions (Argentina, Bolivia, Ecuador, Colombia, and Peru), while others adopt parameters very close to the regional ones, although without expressly mentioning the Court (Chile, Paraguay, and Venezuela[11].

The Supreme Court of Justice of Argentina[12] ruled in favor of an indigenous community in the case "Comunidad Indígena Eben Ezer v. Province of Salta", decided on September 30, 2008, mentioning extensive passages from the *Yakye Axa case* on *the* relationship between cultural identity and the right to collective property, citing as well the *Awas Tingni* case and the ILO Convention 169[13].

11 We found no constitutional court decisions recognizing indigenous rights precisely in the countries with the least constitutional protection for indigenous rights, Suriname, Guyana, and Uruguay. The absence of jurisprudence may be related precisely to the absence of recognition of rights.

12 The Argentine Supreme Court has a history of accepting the principle of conventionality, recognizing in several cases the binding nature of the Court's decisions to the Argentine legal system, despite a momentary change of position in 2015, in the Fontevechia case. For more on the Argentine Court, see GONZALEZ-SALZBERG, 2011

13 Suprema Corte Argentina, Comunidad Indígena Eben Ezer c/ provincia de Salta - Ministerio de Empleo y la Producción s/ amparo, Sentencia 30 de septiembre de 2008, n. InternoC2124XLI. *Yakye Axa* had already been mentioned in the Argentine Supreme Court, although only in a dissenting vote in the case "Comunidad Aborígene Lhaka Honhat c/ province of Salta", exhaled by Min. Carlos Fayat. _____. Asociación de Comunidades Aborígenes Lhaka Honhat c/ Salta, Provincia de y otro s/ acción declarativa de certeza. 27 de Septiembre de 2005, separate vote of Min. Carlos Fayat

The Constitutional Court of Peru dialogues with the jurisprudential parameters established by the Inter-American Court. In decided cases, the Peruvian Court has recognized the indispensable relationship between indigenous cultural identity and natural resources and that the absence of formal title to property does not preclude legal protection for traditional peoples, citing Inter-American Court cases (*Awas Tingni*, *Saramaka, Moiwana, Yakye Axa* and *Sawhoyamaxa* [14]), the United Nations Declaration on the Rights of Indigenous Peoples and the binding nature of ILO Convention 169, and affirming the duty of prior consultation with indigenous peoples[15]. This reaffirmation continued to occur in a subsequent 2011 decision, reaffirming them with conventional precedents (*Sawhoyamaxa*). Constitutional Court of Peru, Pleno, Lima, Exp. No. 24-2009-PI, Gonzalo Tuanama Tuanama and others, July 26, 2011.

The use of conventionality control in Bolivia is very close to the Peruvian case. The Plurinational Constitutional Court recognizes the binding character of regional decisions and dialogues with its cases[16] . In the words of the Court, *"the judgments issued by the Inter-American Court of Human Rights must be used to reveal the constitutionality of a given legal norm"*[17].

The most relevant judgment issued refers to the emblematic TIPNIS case[18]. The Court reaffirmed constitutional protection, reaffirming the rights in ILO Convention 169 and in the UN Declaration on the Rights of Indigenous Peoples, and unanimously recognized the constitutionality of the legislation[19]. The Court also applied various IACHR reports, reports of the UN Special Rapporteur on Indigenous Rights, the Colombian Constitutional Court decision No. T-129/2011, decision of the Tripartite Committee of the ILO Governing Body, and the Inter-American Court decision in *Saramaka*.

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14 Tribunal Constitucional de Perú, Pleno, Lima, Exp. N. 3343-2009-PA/TC, Jaime Hans Bustamante Johnson, February 19, 2009. In a similar vein, see Tribunal Constitucional de Perú, Pleno, Lima, Exp. N. 6316-2008-PA/TC, Asociación interétnica de desarrollo de la selva peruana (AIDESP), November 11, 2009, single vote of Mag. Landa Arroyo, mentioned parameters adopted in *Saramaka.*

15 Constitutional Tribunal of Peru, Pleno, Lima, Exp. No. 22-2009-PI/TC, Gonzalo Tuanama Tuanama and others, June 9, 2010.

16 Plurinational Constitutional Court, Sala Plena, Sentencia 2056/2012, Mag. Rel. Soraida Rosario Chánez Chire, exp. N. 00213-2012-01-AIA, October 16, 2012 (reproducing ipsis *literis* large excerpt from Kichwa de Sarayaku); _____, Sala Primera Especializada, Sentencia 0572/2014, Mag. Rel. Tata Gualberto Cusi Mamani, exp. N. 02889-2013-06-AP, March 10, 2014 (with extensive and detailed analysis about the doctrine of conventionality control and bindingness of regional court decisions);

17 Plurinational Constitutional Court, Full Court, Sentence 0079/2015, Mag. Rel. Macario Lahor Cortez Chavez, exp. N. 09543-2014-20-AIA, September 9, 2015. Original in Spanish, our translation.

18 Plurinational Constitutional Court, Full Court, Sentence 0300/2012, Mag. Rel. Mirtha Camacho Quiroga, exp. N. 00157-2012-01-AIA and 00188-2012-01-AIA (cumulative), June 18, 2012

19 For an in-depth analysis of the TIPNIS case, see LAING, 2014 and BOHR ILAHOLA, 2015.

In the area of the right to consultation, the most progressive jurisprudence has been issued by the Colombian Constitutional Court (CCC), which has multiple decisions in the area produced in open dialogue with the Inter-American Court. The CCC has consolidated jurisprudence on indigenous rights, based on ILO Convention 169 and the parameters of the Inter-American Court, repeatedly citing the cases of *Awas Tingni, Yakye Axa, Sawhoyamaxa,* and *Xákmok Kásek* to interpret the right to property and multiculturalism, as well as the *Saramaka* decision, with respect to the right to consultation, [20]and has cited the case of the Xucuru people[21].

The most paradigmatic decision, Judgment T-129/11, is observed. The CCC recognized the cultural and territorial protection of indigenous peoples guaranteed both in the Constitution and in ILO Convention 169. The Convention was interpreted using the UN Declaration on Indigenous Peoples and the interpretation made by the Inter-American Court in *Saramaka*. At the international law level, reports issued by the UN Rapporteur on Indigenous Rights, Mr. James Anaya, were also mentioned. Finally, the CCC has revised its own jurisprudence regarding the right to consultation, establishing specific parameters for consultation. The parameters established in Judgment T-129/11 become the benchmark for multiple subsequent decisions.

It is important to mention that the Colombian decision offers more protective standards for indigenous peoples than the Inter-American Court itself. The regional Court has referred to the obligation to consult indigenous peoples in good faith, referring to consent exclusively in *Saramaka* and only for high-impact projects. In contrast, the CCC understands consent as mandatory regardless of the size of the impact caused by the project. This may be one reason why the CCC does not mention any Inter-American Court cases regarding the right to consultation subsequent to *Saramaka*, as none of them refer to consent.

One of the countries with the most advanced protection of indigenous rights is Ecuador. The 2008 constitutional reform was revolutionary in recognizing the state as plurinational and constitutionally guaranteeing indigenous values, such as *sumak kawsay* and the protection of the *pacha mama*. Furthermore, international human rights treaties

20 By way of example only, we mention the following decisions: CCC, Sentencia T-307/2018, Tercera Sala de Revision, Exp. T-3836834, July 27, 2018; CCC, Sentencia T-766/15, Cuarta Sala de Revision, Exp. T-4327004, December 16, 2015;

21 CCC, Sentencia T-153/19 Novena Sala de Revisión, Exp. T-7.056.143, April 3, 2019

are considered supraconstitutional, as is the case of ILO Convention 169 (WOLKMER; FAGUNDES, 2011). Even so, the Ecuadorian Constitutional Court has referenced the decisions of the regional court as an interpretative parameter for territorial rights. It should be noted, however, that the mentions of the Inter-American Court are subsequent to the Kichwa de Sarayaku case (2012), fitting, within the chain of effectiveness, at the level of application, rather than observance[22].

Regarding Brazil, the Supreme Federal Court (STF), in general, has been refractory to the new understandings surrounding the indigenous issue. The STF attributes to international human rights treaties the status of supra-legal norms, submitting the Court's jurisprudential parameters to a hierarchy inferior to the Constitution. The first time the STF cited indigenous cases from the Inter-American Court was in ADI 3239 regarding the recognition of *quilombola* rights. The *Saramaka* and *Moiwana* cases were cited.

Contradictorily to the situations of *quilombola* rights, the jurisprudential parameters of the Court are not applied to the rights of indigenous peoples. In 2009, in the judgment of Petition No. 3888 concerning the constitutionality of the demarcation of the *Raposa Serra do Sol* indigenous reserve, this bias can be identified in the reporting of Justice Carlos Ayres Britto[23]. The minister reiterated that the constitutional guarantee and the concept of tradition, which underpins the perpetual possession of these peoples, would have, as its temporal limit, the date of the enactment of the 1988 Constitution, under the justification that fraud could occur, ignoring the criterion of ancestry. The decision fixed nineteen restrictions on indigenous land that were not preceded by any consultation with the peoples concerne[24].

In indigenous cases, the STF has only cited Inter-American precedents in two

22 In a case decided in 2014, the application of a penalty by the indigenous justice system to the commission of a homicide was analyzed. The Ecuadorian Court used the regional parameters of interculturality, appreciation of indigenous identity, and the right to cultural identity, citing multiple court cases (Corte Constitucional del Ecuador, Sentencia n. 113-14-SEP-CC, Caso n. 0731-10-EP, July 30, 2014). In another decision of the same year regarding territorial rights, the Ecuadorian court recognized and applied the rules of interpretation of indigenous collective property established in Awas Tingni and Sawhoyamaxa (Corte Constitucional del Ecuador, Sentencia n. 141-14-SEP-CC, Case n. 0210-09-EP, September 24, 2014). Finally, in 2017, the Saramaka and Kalina y Lokono cases were mentioned regarding the right to recognition of the legal personality of indigenous communities (Corte Constitucional del Ecuador, Sentencia n. 001-17-PJO-CC, Case n. 0564-109-JP, November 8, 2017).

23 In particular, the Justice states that a "constitutional era is in force that goes beyond the value of social inclusion itself to reach, now yes, the superior stage of community integration of the entire Brazilian people". Furthermore, the minister uses the disused denomination "aboriginal".

24 The Inter-American Court is mentioned in a separate vote by Justice Menezes de Direito, in which the Awas Tingni case is cited as recognition of indigenous peoples' right to property.

recent monocratic decisions: in the decision of the Precautionary Measure in the Direct Action of Unconstitutionality 6.062, reported by Justice Luís Roberto Barroso, regarding the unconstitutionality of the transfer of competence for the demarcation of indigenous lands and other matters related to indigenous peoples from the Ministry of Justice to the Ministries of Agriculture, Livestock and Supply and of Women, the Family and Human Rights; and the Precautionary Injunction in a lawsuit for the demarcation of lands that did not count indigenous participation. [25]

In summary, despite some mentions of legal instruments ratified by Brazil, such as ILO Convention 169 and the Universal Declaration of Indigenous Peoples, and the Court's own case law, it should be noted that the Brazilian Supreme Court applied conventional parameters, but as a persuasive argument to support other arguments.

6.2. Compliance with conventional parameters by state entities and social actors

Conventionality control is often associated with the Judiciary, but the control can also be seen in the actions of other state bodies, which can either propose lawsuits to the Judiciary or confront organs and entities of the federative pact in defense of territorial rights (MAC-GREGOR, 2017).

In relation to indigenous procedural rights, it is important to mention the ratification of the international agreement between several countries called the "Brasilia Rules on Access to Justice for Persons in Situations of Vulnerability", which establishes principles to facilitate access to justice in relation to the conditions of vulnerability that some peoples suffer. The agreement was drafted by a working group composed of the following organizations: Ibero-American Judicial Conference, Ibero-American Association of Public Prosecutors (AIAMP), Inter-American Association of Public Defenders (AIDEF), Ibero-American Ombudsman Federation (FIO) and the Ibero-American Union of Colleges and Bar Associations (UIBA). The agreement adopts parameters established by the Court in its territorial jurisprudence vis-à-vis the state judicial apparatus (IBEROAMERICANA, 2013; RIBOTTA, 2012). In the commented manual on the application of the Brasilia Rules, its content is interpreted in light of the Inter-American Court's case law, citing several territorial cases (MARTÍN, 2018).

25 STF, Pleno, ADI - MC 6062 (1 August 2019); STF, Mon. Luis Roberto Barroso, AR - MC 2761 (5 November 2019).

In relation to the actions of state agencies, Brazilian examples include the Federal Public Prosecution, which brought a case before the Judiciary regarding indigenous territorial rights in the case of the Belo Monte Hydroelectric Plant, which sought the demarcation of indigenous lands prior to the implementation of the project;[26] and the Public Defender's Office, which was amicus curiae in the case of Xukuru v. Brazil, in favor of the indigenous community.

The Argentinian examples consist of the participation of the "Defensor del Pueblo de Argentina" and the Public Prosecution Office of the Argentine Nation, both in the case of the Indigenous Community Iwi Imemby expressing that the Inter-American Court *"supposes a greater guarantee both for the recognition as* well as *for the exercise and implementation of these rights*"[27], and in the "dictámen": "Comunidad Toba c/ Provincia de Formosa s/ Amparo" - CSJ 528/2011, citing the cases of the "Comunidad Indígena Xákmok Kásek vs. Paraguay", "Comunidad Mayagna (Sumo) Awas Tingni vs. Nicaragua" and "Comunidad Indígena Sawhoyamaxa vs.

A supranational initiative was the organization of the publication "Estandares regionales de actuación defensorial en procesos de consulta previa de Bolivia, Colombia, Ecuador y Peru", strengthening minimum standards of the right to consultation. Both documents mention the Court's jurisprudence on the right to consultation (ALMENARA; LINARA, 2017). This protagonism of public defenders is explained by the agreement with the Inter-American Court to represent victims in court before the Inter-American Court, giving greater access to justice to these vulnerable groups[28].

The jurisprudence of the Inter-American Court has also outlined the content of indigenous consultation processes. In a request made to the Library of the National Congress of Chile on the origin of the consultation of indigenous peoples regarding the modification of the "Ley General de Urbanismo y Construcciones" (Boletín N°11175-01), the "asesoría técnica parlamentaria" cites the case "Pueblo indígena Kichwa de Sarayaku vs. Ecuador" to establish that consultation with indigenous communities in cases such as

26 MPF-PA, ACP 0000655-78.2013.4.01.3903, initial petition, April 19, 2013. Available at http://www.mpf.mp.br/atuacao-tematica/ccr6/atuacao-do-mpf/acoes-coordenadas-11/dia-do-indio/docs_dia-do-indio/acp-0000655-78-2013-4-01-3903-belo-monte-protecao-territorial/view. Accessed April 10, 2020.

27 Defensor del Pueblo de la Nación. Afectación a Derechos de una comunidad aborigen. Actuación nro. 1331/14 7 de Septiembre de 2016, folio nro. 10. Original in Spanish.

28 Agreement made between the Inter-American Association of Ombudsmen and the Inter-American Court of Human Rights for the representation of vulnerable groups. Available at: http://www.mpd.gov.ar/users/uploads/1402684164Acuerdo%20final%20 OEA%20AIDEF.pdf. Accessed on: 10 April 2020.

the present is an international obligation (BCN, 2019).

In addition to the influence on state bodies, there is an impact of the Court's jurisprudence on the work of Non-Governmental Organizations working on human rights protection. There is a vast literature relating this interaction, both in the sense of strengthening social demands (CAVALLARO, 2002; SOLEY, 2019), formation of international human rights networks (KECK; SIKKINK, 2018), and also influence of social movements on compliance with decisions (CAVALLARO; BREWER, 2008), but little has been written on the topic of indigenous rights, with the exception of work developed by Open Society Foundations (2017).

An example of these actions is the international mission promoted by Chilean organizations, denouncing abuses against the Mapuche people and the use of anti-terrorist laws to criminalize their legitimate claims for their ancestral lands, numerous cases have been cited from the Inter-American Court supporting the allegations against the repression of social claims (FINAL REPORT OF THE INTERNATIONAL MISIÓN TO CHILE, 2020).

With this, some examples of compliance with the Court are shown, in a list that is not exhaustive, given that the goal is only to show good practices in the relationship between the State and the Inter-American Court, beyond the presence of the Judiciary.

7 final considerations

This article has presented the influence of the judicial parameters created by the Inter-American Court of Human Rights regarding territorial rights on legal systems in South America. The level of conventionality control in South American countries varies greatly. While some countries, such as Bolivia, Colombia, and Peru, have a long and consolidated dialogue with the Inter-American Court, other countries have ignored regional jurisprudential developments (such as Paraguay and Chile). In an intermediate position, there are countries that, although they cite the jurisprudence of the regional Court, it does not seem to have a substantial impact on the recognition of rights (such as Argentina and Brazil).

The proposed analysis brought two observations to the theoretical construction of the chain of efficacy. The first one is that the separation between observance and

application may not have so many practical effects, as the Colombian case demonstrates. The CCC's references to the regional Court did not change at all after the judgment of the Operation Genesis case against Colombia, so the effectiveness of regional parameters specifically in that case seems to be disconnected from the existence of a decision against the country in question.

A second consequence of the analysis of territorial cases for the chain of efficacy is to present scenarios of evolution in the recognition of simultaneous rights in various countries and internationally, dispelling an interpretation that the impact of the Inter-American Court on the domestic legal system would be unilateral.

In any case, the Inter-American Court has strengthened indigenous protection bodies and influenced constitutional courts to adopt interpretative parameters. At a time of great pressure on traditional peoples, the role of the Inter-American Court as an ally in the transformation of factual situations of exclusion becomes unquestionably necessary.

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