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The Juridification of Indigenous Claims in  
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## The Juridification of Indigenous Claims in Latin America: Obstacles and Challenges

### 1 Introduction

In this article, we will comment on the document by Orlando Villas Bôas Filho entitled “Juridification and the Indigenous Peoples in Brazil”. The author, following Rodríguez Barón (2015), Dandler (2000), and Davis (2000), states that the increase in “normative inflation” is a verifiable phenomenon in the entire Latin American context. He recognizes that this process, also observable in the international context, would be the result of an increase in the expression and political influence of Indigenous movements in the Southern Hemisphere.

The author describes, from an anthropological and sociological approach, some fundamental aspects involved in the impact of juridification on Indigenous peoples in Brazil and his hypothesis is that this process involves “obstacles and challenges”, “false beginnings and persistent frustrations” for Indigenous peoples that have ultimately weakened the real impact of the Indigenous movement and its demands in the Brazilian context.

Bôas Fihlo criticizes jurists’ general tendency to conceive of juridification as a progressive process of guaranteed implementation that would only present positive dimensions. He concludes that “common legal sense” is unable to see the complex and ambivalent nature of juridification, and emphasizes how jurists can receive a precious contribution from anthropological and sociological approaches to overcome these barriers of understanding. According to the author, juridification is described as the imposition of an exogenous normativity on the Indigenous order, ignoring its traditional uses and forms of regulation which, according to Davis,<sup>1</sup> substantially differ from Eurocentric judicial systems. In a comparative analysis, the contrast between these normative orders is evident, revealing that juridification guarantees the hegemony of the Eurocentric/Western state legal

1 DAVIS (2000).

system. This is based on written documents, as opposed to the oral system that is typical of Indigenous forms of regulation of social life; developed by legal professionals, outlawing the ecology of knowledge that is desirable in a plurinational community, imposing legal processes against adversaries and decisions in which there are clear winners and losers, omitting alternative processes for conflict resolution. In conclusion, juridification takes place in a context of asymmetry of power that discriminates against Indigenous peoples and guarantees the rule of law as a strategy of political subordination and ‘plundering’ of these peoples to make their common goods available to capitalism and its power structures.

In principle, I must express my agreement with Professor Villas Bôas’s proposals regarding the impact that the hegemony of the law implies concerning Indigenous peoples when it is the result of a legal order that responds exclusively to the epistemological paradigms of the dominant culture of the colonialist type and is functional to the groups of power in excluding societies, as most countries of the continent have expressed. However, it is my opinion that this perspective – unlike the author’s – shows a dimension of the problem that does not shed light on the complexity of the phenomenon of juridification of Indigenous demands in Latin America. In this paper, I would like to propose, in contrast to what Villas Bôas said, that the increase in normative inflation related to the recognition of Indigenous rights is not reduced exclusively to the rule of law and the hegemony of a colonialist and contemporary capitalist order. The situation of the region in these matters reflects a diversity of political processes of different kinds that have been driven by Indigenous peoples and their demands for the juridification of their rights, raised as a counter-hegemonic strategy of the ethnic movement.<sup>2</sup> It has implied in some countries of the continent the re-foundation, more or less successful, of the modern capitalist colonial state,<sup>3</sup> and the recognition of Indigenous peoples as a differentiated collective subject within the political community, with the right to self-determination and the maintenance of their institutions and legal systems, using the deconstructive potential of a properly liberal and hegemonic institution such as human rights.<sup>4</sup>

2 SANTOS (2010); BONDIA et al. (2011).

3 SANTOS (2010).

4 SANTOS (2010).

The scenario of the juridification of Indigenous rights in Latin America took its place in the constituent debate in the first phase during the democratic transition in the 1990s, including the recognition of Indigenous peoples and their specific collective rights in a multicultural society. Later, from the first decade of the 21st century onwards, the reconfiguration of the nation-state and its replacement by plurinational states took place. Plurinational states aimed precisely to end the colonial state, a concept constituted by a single nation whose cultural homogeneity is an artifice expressed in the loyalty of this group to the state project that gives it existence. At the level of the hegemonic empire of the positive law of the state, plurinationality provides a normative development that moderates the unrestricted rule of written law and promotes a normative order of legal pluralism.

From this perspective, the notion of juridification as a framework for the rule of state/colonial/positive law contrasts with the legal pluralism recognized in international law and the domestic law of many Latin American countries as a result of the Indigenous movement's demand for juridification of their rights. It omits the processes of re-foundation and decolonization of the state that have taken place in the continent and their specific complexities, advances, and frustrations.

Undoubtedly in Latin America, we face questioning of the legitimacy of the state-nation. In this struggle, "a counter-hegemonic use of hegemonic political instruments such as representative democracy, law, human rights, and constitutionalism" has been made explicit, as stated by Santos.<sup>5</sup> In a similar line, Ferrajoli describes the phenomenon of globalization and pluralism, as an expression of the struggle between state legitimacy and the people to survive as a political subject in a plural state.

"Globalization is bringing out, precisely because of increasing world integration, the value of both differences and identities. Furthermore, it is revealing, sometimes explosively and dramatically, the artificial nature of states, especially those of recent formation, the arbitrariness of their territorial boundaries, and the unsustainability of their claim to subsume peoples and nations into forced units that deny differences as well as common identities. Thus the form of the state – as a factor of forced inclusion and undue exclusion of fictitious unity and division – has come into conflict with that of 'people' becoming a permanent source of war and threat to peace and the very right of self-determination of peoples."<sup>6</sup>

5 SANTOS (2010).

6 FERRAJOLI (2001 [1999]).

Under the new paradigm of ‘plurinationality’, it highlights the positive impacts of the international human rights framework in defining the rule of law, generating a new paradigm that includes under this principle the rights of Indigenous peoples and their legal systems. It also emphasizes that this concept provides people with suitable guarantees for making peace and fundamental rights effective, both those of individuals and peoples as a collective subject, concerning states.<sup>7</sup>

In Santos’s conception, plurinationality emerges as a critical requirement in the construction of the new democracy: “The moment when peoples, cultures, nationalities become visible on the national scene after centuries of opprobrium and exclusionism against them.”<sup>8</sup> Plurinational democracy recognizes these actors, explicitly differentiated by their native past. They claim specificity in national society, not within a statute that grants them privileged attention as sub societies but in the progressiveness of their struggles and rights. They pose the same conditions within the state as nationalities, which result in Indigenous demands for self-government, territory, language, culture, justice, control of natural resources, and prior and informed consent to deliberate and decide on their affairs.<sup>9</sup>

The diversity of normative systems that converge in a context of legal pluralism arises as an expression of the coexistence of different social groups. It demonstrates that each one of them is organized according to its particular cosmovision and cultural patterns, regulating the social life of its members.<sup>10</sup> The process of coexistence of regulatory systems has been characterized by the hegemony of those who exercise higher political power in the national states of Latin America; this has been represented by the state, the ruling classes and transnational corporations which, under the regulatory framework provided by globalization, have undermined the sovereign bases of those states.<sup>11</sup>

However, social groups experience greater complexity by the increase of their members, resulting in diversification of their internal groups and/or by the interaction with other groups. These more complex groups give way

7 FERRAJOLI (2001 [1999]).

8 SANTOS (2008).

9 SANTOS (2008).

10 SÁNCHEZ (1998).

11 BONDIA et al. (2011).

to legal pluralism not only as a juridification process but also as a social reality.<sup>12</sup> Besides, social groups are intrinsically dynamic, adapting their cultural patterns and their different normative systems to the problems they have to face in different historical situations, contexts, and needs, according to the circumstances imposed by the expectations of each group or social subgroup and the interaction with others.<sup>13</sup>

In the international community, there is no state without a pluralistic social structure, and this is even more characteristic in Latin America due to the extensive presence of Indigenous peoples. Indeed, Latin America concentrates the most significant diversity of Indigenous peoples in the world, and the population is growing as a result of the processes of self-identification. According to the Economic Commission for Latin America and the Caribbean (ECLAC, 2014), the Indigenous population in Latin America grew by 49.3 % between 2000 and 2010. It is made up of 826 peoples, comprising 45 million people, representing 8.3 % of the total population.

Given this plurality and the conditions of subordination in which the continent's Indigenous peoples have lived in their relations with states, subject to the legal order and the hegemonic social, economic, and cultural model, there is no doubt that the democratization of our countries implies the recognition of pluralism in its most solid expression. In the normative field, this diversity, as Cabedo rightly states, is reflected in the enforcement of Indigenous law and its necessary coexistence with state law. It gives rise to legal pluralism and imposes the need to articulate or coordinate both jurisdictions<sup>14</sup> under the paradigm of self-determination and respect for fundamental rights as Ferrajoli and Santos propose.<sup>15</sup> These notions favor a process of deconstruction of the Eurocentric cultural homogeneity of the state-nation and the hegemonic processes of colonial roots that sustain it, in order to build an environment of diversity and pluralism that favors a properly democratic intercultural dialogue.

In other articles we have argued, following Rouland and others, that

“[the] challenge presented by legal pluralism is to validate the different ways in which normative systems interrelate to regulate social behavior at the same time and place and, in parallel, to settle a persistent dichotomy between equality and/or

12 DAVID (1968).

13 BERTINI/YÁÑEZ (2013).

14 CABEDO MALLOL (2012).

15 FERRAJOLI (2001 [1999]); SANTOS (2008, 2010).

domination. Indeed, the question of legal pluralism has historically been addressed in different ways, such as relations of extermination or exclusion, assimilation or integration, and finally, the peaceful coexistence of different legal systems in a context of recognition of the right to self-determination of peoples.”<sup>16</sup>

Although in modern times the homogenization policy of the dominant legal system has prevailed, the reality shows the persistence of several normative models among the social groups that share the same political community.<sup>17</sup>

Together with Bertini, we follow Eugene Ehrlich in this approach, who refers to juridical pluralism as a spontaneous process that arises from the convergence of different normative orders parallel to the state, which he calls “living law”, emanating from custom and nourished by popular legal consciousness as a form of self-regulation.<sup>18</sup> In this same line Bobbio expresses himself, who notes that as there is an organized social group, there is a legal system which questions the hegemonic conceptions that consider as right only the norms and institutions belonging to the state legal system.<sup>19</sup> Following this approach, we have argued that “law is not determined by the notion of a legal norm, but rather by each legal system, and its validation – of the legal norm – is not related to recognition by other systems, but rather each legal system develops independently within its sphere and has autonomy”.<sup>20</sup>

However, when different social groups are interrelated and interdependent, even in a context of colonization or globalization, it is necessary to identify the most appropriate legal and political mechanisms for intercultural dialogue. This includes institutional instruments that guarantee respect for the differences of all nationalities that converge in the political community, the preservation of their respective civilizing projects, and the legal systems through which they regulate their social relations and organize their societies. Plurinationality as a model of state and legal pluralism is fundamental to guaranteeing the subsistence of these peoples in the current historical situation, and also to providing legitimacy to the state. The above becomes relevant if we consider that the self-determination of Indigenous peoples seems to be projected mostly, although not exclusively, within plurinational states and

16 ROULAND et al. (1999), quoted in BERTINI/YÁÑEZ (2013).

17 BERTINI/YÁÑEZ (2013).

18 EHRlich (2002 [1913]).

19 BOBBIO (1992).

20 BERTINI/YÁÑEZ (2013).

not outside them. On the other hand, plurinational states cannot survive without their diverse peoples maintaining loyalty to the extended political community in which they are integrated and in which they live. This framework imposes on the state and the peoples the need to live together within more global orders, in conditions of equality and where an intercultural interpretation of certain value distinctions for coexistence is allowed.<sup>21</sup>

Because of the above, from the 1990s and into the first decade of the 21st century, a new horizon opened up for plurinationality and legal pluralism in most Latin American countries; the challenge of articulating Indigenous regulatory models and the state legal order arose, guaranteeing respect for the collective rights of Indigenous peoples, their cultural characteristics, and the epistemological bases that sustain them, while safeguarding state unity and respect for the human rights contained in international treaties and constitutional.<sup>22</sup>

## 2 The challenges of legal pluralism in Latin America

Since the implementation in Latin America of international treaties on human rights, and in particular Convention 169 on Indigenous and Tribal Peoples in Independent Countries of the International Labor Organization (ILO), Convention 169 has allowed, to a greater or lesser extent depending on the normative density and the strength and autonomy of democratic institutions in the countries, the practice and enforcement of Indigenous law, in such a way that these legal systems transcend the borders of Indigenous societies. In this way, normative contents, rules, and procedures are known, and can be invoked as a counter-hegemonic right to the state legal order.<sup>23</sup>

In practice, legal pluralism poses challenges. Martínez and other authors point out that the coexistence and implementation of the programmatic and normative precepts that make up Indigenous peoples' law and state law generate difficulties. On the one hand, this expresses the irrefutable fact that the coexistence of diverse cosmovisions and values entails social, political, and

21 BONDIA et al. (2011).

22 SIEDER (2006); SANTOS (2008, 2009, 2010); VALLADARES (2009); ALBÓ (2010); SIERRA (2010); BONDIA et al. (2011).

23 MARTÍNEZ et al. (2012).

economic conflicts, exacerbated by the historical burden of colonial relations; on the other hand, plurinational states face the task of redefining their democracies within the framework of internationally recognized Indigenous rights, legal pluralism, and the maximization of Indigenous autonomies.<sup>24</sup>

Human rights have contributed to the legal validity of legal pluralism in Latin America. In this same line, the option for legal pluralism in domestic law was taken up in the constitutional reforms adopted in the 1990s after the end of dictatorial regimes, and more solidly in the Constitutions of Ecuador (2008) and Bolivia (2009), where plurinational states were configured. In this process of legal pluralism *constitutionalization*, with greater or lesser force, the conceptions of the nation-state and legal monism that have prevailed in our republican history are beginning to be demolished.

The same authors mentioned in the preceding paragraphs maintain that the flow of information favors intercultural dialogue in a context of legal pluralism, where the state can better perceive the virtues of Indigenous institutions to more effectively resolve social conflict. Likewise, it can influence the government of Indigenous peoples who incorporate human rights as parameters of intercultural coexistence.<sup>25</sup>

The analysis reveals an unresolved problem regarding the supremacy of human rights over the uses and customs of Indigenous peoples, and I would like to take this up. The truth is that human rights act as a limit to the sovereignty exercised by states, Indigenous peoples, or citizens. This limit acts as an irreplaceable rule of democratic coexistence. However, this requires that the exercise of intercultural dialogue be nuanced by agreeing on minimum standards. Such is the case of the paradigm referred to the minimization of restrictions and maximization of the autonomy principle,<sup>26</sup> developed by the Colombian Constitutional Court and which indicates that the legal minimums that act as a material limit to Indigenous jurisdiction are: the right to life, to physical and psychological integrity, and to due process.<sup>27</sup>

In this scenario, legal pluralism also implies obligations for states that stem from the material limit (the legal minimum) imposed by human rights and that require them to define the areas of competence and the scope of the

24 MARTÍNEZ et al. (2012).

25 MARTÍNEZ et al. (2012).

26 Constitutional Court of Colombia. Ruling T-349/96.

27 Constitutional Court of Colombia. Ruling T-349/96.

exercise of collective rights that Indigenous peoples have, by constitutional, legal, or jurisprudential means. It includes the delimitation of the powers reserved for Indigenous peoples on their affairs, within a framework of self-determination (maximization of autonomy).

From the above, the conclusion is that Indigenous peoples, under their status as peoples, exercise powers as collective subjects that – before the constitutional implementation of Indigenous rights in the continent – were reserved exclusively for the national state. In this new context, where states are reconfigured as plurinational and allowing for legal pluralism, Indigenous peoples validly exercise powers and competencies in their territories that had been appropriated by the state.

In the current circumstances, this juridification of legal pluralism results in the Indigenous peoples becoming part of the constitutional pact. Actually, this has been evident in the political processes on the continent that led to constitutional reformulation, particularly those in Ecuador and Bolivia in the first decade of the 21st century.

One area of tension expresses itself in the administration of justice. The effectiveness of Indigenous jurisdictions results from the horizontality of the relations between the parties and the level of their institutions, which allows to agree on procedures and to bring positions closer together, favored by a common language, values and shared culture, and full access to the authorities in charge of administering justice.<sup>28</sup> This does not mean that Indigenous justice is free from omissions, abuses, and excesses, and there are mechanisms for coordination with the state to bridge these gaps, especially when Indigenous peoples themselves remove their affairs from traditional jurisdictions because they feel that the justice system itself does not sufficiently guarantee their rights and interests, and they turn to coordination mechanisms to define the outlines of state and Indigenous justice. The rules of coordination condition the subsistence of Indigenous legal systems within a framework of respect for human dignity and human rights, so that voices and views converge from that normative diversity that imposes legal pluralism.<sup>29</sup> We agree with Padilla that “the challenge generated by legal pluralism for society, peoples, and the state is one of coordination, dialogue,

28 Constitutional Court of Colombia. Ruling T-349/96.

29 Constitutional Court of Colombia. Ruling T-349/96.

delimitation, and resolution of possible jurisdictional and substantive law conflicts”.<sup>30</sup> Notwithstanding the above, the potential risks of coordination mechanisms are what is called danger of “*forum shopping*” or “forum of convenience”,<sup>31</sup> which implies that if individuals can back out of Indigenous jurisdiction according to their convenience, the result would inevitably lead to a weakening of community cohesion and Indigenous autonomy. These risks must be foreseen and regulated by coordination laws, whose ultimate goal should be the establishment of a pluralist legal system, where both Indigenous and state justice are guarantors of comprehensive, plural, and intercultural justice.

### 3 Scope of constitutional recognition of legal pluralism

The recognition of differentiated citizenship that provides constitutional rights to Indigenous peoples dates, as we have pointed out, from the constitutional reform processes that took place in the region after the dictatorial governments; concerning legal pluralism, these moved from a weak recognition to a more solid one, as it happens with those constitutions that have consecrated a state of a plurinational character. This process expressed itself with differences in the various countries of the Americas but, with the sole exception of Chile, all were permeated by legal pluralism recognizing Indigenous peoples’ autonomous powers as far as the law was concerned.

The Constitution of Colombia (1991) recognizes and protects the ethnic and cultural diversity of the Colombian nation (Article 7) and explicitly recognizes legal pluralism by providing that the authorities of Indigenous peoples may exercise jurisdictional functions within their territorial scope, under their own rules and procedures, provided that these are not contrary to the constitution and laws of the Republic (Article 246). It provides that international treaties ratified by Colombia constitute the normative framework for the interpretation of the rights and duties enshrined in the constitution (Article 93).

In various articles the 1994 Constitution of Peru “recognizes and protects the ethnic and cultural plurality of the nation” (Article 2, number 19); it establishes the right to the cultural identity of the peasant and Native com-

30 PADILLA RUBIANO (2012).

31 REINOSO BARBERO (2009); COHEN (2010).

munities, and to their legal existence, legal status, and autonomy within the law (Article 89). Concerning legal pluralism, it provides that the authorities of the peasant and Native communities, with the support of the Peasant Patrols, may exercise jurisdictional functions within their territory under customary law, provided that they do not violate fundamental human rights (Article 149); and finally, it enshrines a rule similar to that established in the Constitution of Colombia, in that it provides that “the rules relating to the rights and freedoms recognized by the Constitution shall be interpreted following the Universal Declaration of Human Rights and with the international treaties and agreements on the same matters ratified by Peru.”

In Ecuador, the constitution adopted in 2008 reconfigures the State as a constitutional state of rights, of a unitary, intercultural, and plurinational type (Article 1). It recognizes – among others – the rights of Indigenous peoples to freely maintain, develop, and strengthen their identity, sense of belonging, ancestral traditions, and forms of social organization; their generation and exercise of authority, in their legally recognized territories and community lands of ancestral possession; their ability to create, develop, apply, and practice their own or customary law (Article 57 numbers 1, 9, and 10). Article 171 on legal pluralism recognizes that the authorities of Indigenous communities, peoples, and nationalities shall exercise jurisdictional functions, based on their ancestral traditions and their rights, within their territories, with guarantees of participation and decision-making by women. These authorities shall apply their own rules and procedures for the settlement of their internal disputes, provided that they do not violate the constitution and the human rights recognized in international instruments. The State shall guarantee that public institutions and authorities respect the decisions of the Indigenous jurisdiction. Such decisions, like state decisions, shall be subject to the control of constitutionality. The law shall establish mechanisms for coordination and cooperation between the Indigenous jurisdiction and ordinary jurisdiction. It establishes that individuals, communities, peoples, nationalities, and groups are holders and shall enjoy the rights guaranteed by the constitution and international instruments (Article 10).

In Bolivia, the Constitution of 2009 declares that Bolivia is constituted as a Unitary Social State of Plurinational Community Law based on political, economic, legal, cultural, and linguistic pluralism and plurality, within the integration process of the country (Article 1). It recognizes Indigenous peoples’ right to autonomy, self-government, culture, recognition of their insti-

tutions, and consolidation of their territorial entities, under the constitution and the law (Article 2). It establishes that one of the essential purposes and functions of the State is to reaffirm and consolidate plurinational diversity (Article 9, No. 3). Legal pluralism is enshrined in Articles 190 and subsequent articles in the following terms. Article 190 recognizes legal pluralism, providing that Indigenous Native peasant nations and peoples shall exercise their jurisdictional and competent functions through their authorities, and shall apply their principles, cultural values, norms, and procedures. The Native Indigenous peasant jurisdiction respects the right to life, the right to defense and other rights, and guarantees established in this constitution. In this connection, Article 191 provides that the Indigenous and Native peasant jurisdiction is based on a special bond between the people who are members of the respective Indigenous and Native peasant nation or people.

The Native Indigenous peasant jurisdiction exercises its authority in the personal, material, and territorial sphere: members of the Native Indigenous peasant nation or people are subject to this jurisdiction, whether they act as actors or defendants, complainants or plaintiffs, accused or defendants, appellants or respondents. This jurisdiction deals with Indigenous Native peasant issues under the provisions of a Jurisdictional Boundary Act. This jurisdiction applies to the legal relations and events that take place or whose effects occur within the jurisdiction of Indigenous Native peasant people (Article 192). Any public authority or person shall abide by the decisions of the Native Indigenous peasant jurisdiction. In order to comply with the decisions of the Indigenous Native peasant jurisdiction, its authorities may request the support from the competent state bodies. The State shall promote and strengthen Indigenous Native peasant justice. The constitution instructs a Jurisdictional Boundary Act to determine the mechanisms for coordination and cooperation between the Indigenous Native peasant jurisdiction with the ordinary jurisdiction and the agri-environmental jurisdiction and all constitutionally recognized jurisdictions. The Constitution of Bolivia requires respect for and compliance with the mandates established in the treaties and conventions ratified by the Plurinational Legislative Assembly, as well as the interpretation of the duties and rights enshrined in the constitution according to these normative instruments (Article 12 No. IV).

In the case of Brazil, the constitution has been a precursor in recognition of Indigenous rights. The rights of Indigenous peoples are outlined in a specific chapter of the 1988 Charter, title VIII, "Of the Social Order", chapter VIII, "Of

the Indians”. According to Article 231 of the constitution, “Indigenous peoples are recognized as having their social organization, customs, languages, beliefs and traditions, and the original rights to the lands they traditionally occupy, and it is incumbent upon the Union to delimit them, protect them and ensure respect for all their property.” I will specifically focus on the analysis of territorial rights, where the Brazilian Constitution has the most significant innovations. The new constitution recognizes the rights of Indigenous peoples to the lands they traditionally occupy, explaining that these are native, i. e. pre-existed at the formation of the State itself and that they existed independently of any official recognition.

Article 231, paragraph 1, of the constitution itself defines the concept of Indigenous lands and gives it constitutional protection:

“The lands traditionally occupied by the Indigenous people are those inhabited by them permanently, those used for their productive activities, those essential for the preservation of the environmental resources necessary for their well-being and those necessary for their physical and cultural reproduction, according to their uses, customs, and traditions.”

As can be seen, the Brazilian Constitution recognizes territorial rights and confers validity on their Indigenous right as the basis for the constitution of such rights.

#### **4 Legal pluralism: the normative and interpretative framework provided by international human rights law with emphasis on territorial rights**

Convention 169 regulates the application and enforcement of Indigenous law itself in Articles 8 to 12. These rules impose an obligation on the state to respect Indigenous customary law, providing that Indigenous customs or customary law should be considered when applying national legislation. It also recognizes the right of Indigenous peoples to retain their customs and institutions, provided that these are not incompatible with human rights as defined in national and international legal systems. Faced with potential legal conflicts arising from the rules and principles overlapping in a context of legal pluralism, the obligation to establish procedures for resolving conflicts arises, a question which, as we shall see below, is mostly about the pre-eminence of Indigenous own or customary law.

Concerning the administration of Indigenous justice in the area of sanctions, Convention 169 provides that, to the extent that this is compatible with the national legal system and internationally recognized human rights, the methods traditionally used by Indigenous peoples for the repression of crimes committed by their members should be respected. On the other hand, state authorities and courts called upon to rule on criminal matters involving people of Indigenous origin must consider their economic, social, and cultural characteristics.

The law itself also operates as a normative basis for the recognition of Indigenous property and possession rights over the lands they traditionally occupy, and incorporates the notion of Indigenous ownership according to the epistemological paradigms proper to it. Thus, it is established in Articles 13 to 19 of Convention 169, which impose on states the obligation to institute appropriate procedures within the national legal system to resolve land claims made by the peoples concerned, safeguarding the special relationship of Indigenous peoples with their lands and territories, which constitute the basis of their ethnic identity.

Article 14 of Convention 169 explicitly recognizes the property and possession rights over the lands traditionally occupied by Indigenous peoples. The interpretation that the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has made of Article 14 of Convention 169 mentioned in the previous paragraph and which has legal force conferred on it by the fact that it configures the reliable treaty interpretation, has determined that the property and possession rights this article deals with not only refer to those lands on which Indigenous peoples have legal ownership, but also to those of ancestral property, even if they do not have title to them.

Indeed, the CEACR ruled that the basis for the establishment of Indigenous peoples' land rights is traditional occupation and use, and not the eventual official legal recognition or registration of land ownership by states, arguing that traditional occupation confers the "right to land under the Convention whether or not such a right has been recognized [by the state]".<sup>32</sup>

Similarly, the CEACR established that the right through the occupation of land is a guiding principle of the Convention, which recognizes that ancestral

32 International Labour Conference, CEACR 2003, 73rd session, Observation, Peru: paragraph 7.

occupation is the source of Indigenous peoples' property rights and imposes an obligation on states to generate adequate procedures for its implementation. The CEACR comments on this matter in the following terms:

"If Indigenous peoples were unable to assert traditional occupation as a source of property and possession rights, Article 14 of the Convention would be emptied of its content [...]. The Commission is aware of the complexity of implementing this principle in legislation, as well as designing appropriate procedures. However, it stresses at the same time that the recognition of traditional occupation as a source of property rights and possession through an appropriate procedure is the cornerstone of the land law system established by the Convention. The concept of traditional occupation could reflect in different ways in national legislation, but it must be applied."<sup>33</sup>

The concept behind these regulations, as noted by UN rapporteur James Anaya, is that Indigenous peoples "have the right to an ongoing relationship with the lands and natural resources following their traditional patterns of use and occupation".<sup>34</sup> Such occupation must be related to the present in order to confer the right of ownership and possession. However, this relation implies keeping a link even with those lost lands, or in other words lands from which Indigenous people have been displaced, as long as a continuous cultural relationship is maintained with them, especially if they have been removed from the Indigenous domain in recent times.<sup>35</sup> The obligation imposed on states to implement appropriate procedures within the national legal system to resolve Indigenous peoples' land claims is timeless and therefore applicable to claims arising from the remote past.<sup>36</sup>

In line with the ILO's interpretation, the Universal Declaration on the Rights of Indigenous Peoples explicitly recognizes the right to own, use, develop, and control not only the lands but also the territories and resources they possess because of traditional ownership and other traditional occupations.<sup>37</sup> Furthermore, it establishes that Indigenous peoples have the right to have the lands, territories, and natural resources that they traditionally owned or occupied returned to them and/or compensated when they are confiscated or taken without their consent.<sup>38</sup>

33 International Labour Conference, CEACR 2009, 742.

34 ANAYA (2005).

35 ANAYA (2005).

36 ANAYA (2005).

37 Article 26.1, United Nations Declaration on the Rights of Indigenous Peoples.

38 AYLWIN et al. (2014).

The IACHR has consolidated its jurisprudence in this area, following the reliable interpretation formulated by the bodies implementing Convention 169, as well as those of the provisions of the United Nations Declaration on the Rights of Indigenous Peoples, by recognizing that the right of ancestral communal property of Indigenous peoples over their lands confers full ownership. This is an evolutionary interpretation of the right to private property enshrined in the American Declaration and Convention, under Indigenous epistemology in the area of property. Thus, in the case of *Awas Tingni v. Nicaragua* (2001), the IACHR recognized, in light of Article 21 of the American Convention, the communal property rights of Indigenous peoples over land.<sup>39</sup> It also recognized the validity of land tenure based on Indigenous custom as a basis for ownership, even in the absence of a title, and the need for the close relationship that Indigenous people have with their lands to be recognized and understood as the fundamental basis of their cultures, spiritual life, integrity, and economic survival.<sup>40</sup> The court extended property protection based on Article 21 of the American Convention on Human Rights to occupation based on Indigenous customary law.<sup>41</sup>

Concerning the validity of customary law, the IACHR notes “[the] customary law of Indigenous peoples must be especially taken into account for the purposes in question. As a result of tradition, possession of land should be sufficient for Indigenous communities without real title to land to obtain official recognition of their ownership and registration.”<sup>42</sup> Thus, the Inter-American Human Rights System recognizes property derived from traditional or customary patterns of use and possession, generated by Indigenous peoples themselves.<sup>43</sup>

39 IACHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, 148–149.

40 IACHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001, 151.

41 IACHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001, 149; IACHR, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 118, and *Case of the Saramaka People*. Suriname, para. 90. *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, 88.

42 IACHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001, 151.

43 ANAYA (2005) 204.

In subsequent years, the IACHR has confirmed its interpretation on the matter in several judgments. It is worth noting the jurisprudence of the IACHR that recognizes the communal rights over their ancestral lands of the Yakye Axa, Sawhoyamaka, and Xákmok Kásek communities in Paraguay.<sup>44</sup> The IACHR accepted the claim of these communities for the violation of ancestral collective property rights based on Article 21 of the American Convention (in addition to the violation of the right to life, personal integrity, the rights of the child, judicial protection, and juridical personality). It also expressed its opinion on the persistence over time of property rights over the ancestral lands of Indigenous peoples when they have lost possession of these lands because they were displaced from their ancestral territories without their consent or against their freely expressed will.

In its judgment in the Sawhoyamaka case, the IACHR held that the right to claim ancestral lands claimed by Indigenous peoples did not extinguish as long as they maintained their relationship with those lands, whether material or spiritual.<sup>45</sup>

In recent judgments, the IACHR has ruled on the case that Indigenous peoples have involuntarily lost possession of their lands, recognizing that they maintain the right of ownership, unless they have been transferred to third parties in good faith:

“(3) members of Indigenous peoples who have left or lost possession of their traditional lands through no fault of their own maintain the right of ownership over those lands, even in the absence of a legal title, except where the lands have been legitimately transferred to third parties in good faith, and 4) members of Indigenous peoples who have involuntarily lost possession of their lands, and these lands have been legitimately transferred to innocent third parties, have the right to recover these lands or to obtain other lands of equal size and quality.”<sup>46</sup>

If the Indigenous peoples are in full possession of their territory, the standards set by the IACHR are: “in the case of *Mayagna (Sumo) Awas Tingni v. Nicaragua*, the court noted that states must guarantee the effective owner-

44 IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125; IACHR, *Sawhoyamaka v. Paraguay*, 2006; IACHR, *Xákmok Kásek v. Paraguay*, 2010.

45 Thus the court states that “as long as this relationship exists, the right to claim will remain in force.” IACHR, *Case of Sawhoyamaka v. Paraguay*, 2006, 131.

46 IACHR, *Case of the Garifuna Community of Punta Piedra and its Members with Honduras*, 2015, 172.

ship of Indigenous peoples and refrain from acts that could lead agents of the state itself, or third parties acting with their acquiescence or tolerance, to affect the existence, value, use, or enjoyment of their territory. In the case of the *Saramaka People v. Suriname*, it stated that states must guarantee the right of Indigenous peoples to effectively control and own their territory without any external interference from third parties.

In the *Sarayaku Case of the Indigenous Kichwa People of Sarayaku v. Ecuador*, it ruled that states must guarantee the right of Indigenous peoples to control and use their territory and natural resources.<sup>47</sup>

Along these lines, the IACHR has ruled that the administrative processes of delimitation, demarcation, titling, and sanitation of Indigenous territories are mechanisms that guarantee legal security and effective protection of the right to property. However, if this process results in a collision of rights between the territorial rights of Indigenous peoples and third parties, to clarify the state's obligation the IACHR has established criteria for the assessment of rights,<sup>48</sup> an obligation that otherwise corresponds exclusively to the state as a guarantor of the right.<sup>49</sup>

In 2018 in a case involving Brazil, the court noted that:

“when there are conflicts of interest in Indigenous claims, or when the right to collective Indigenous property and private property enter into real or apparent contradictions, one must assess on a case-by-case basis the legality, necessity, proportionality, and the achievement of a legitimate objective in a democratic society (for the public utility and social interest), to restrict the right to private property, on the one hand, or the right to traditional lands, on the other, without limiting the latter or implying of the latter a denial of its subsistence as a people.”<sup>50</sup>

In order to adequately carry out the assessment considering the specificities of Indigenous rights concerning their territories, two additional standards are provided that the state should take into consideration when fulfilling this

47 IACHR, *Case of the Garifuna Community of Punta Piedra and its Members with Honduras*, 2015, 172.

48 IACHR, *Case of the Yakye Axa Indigenous Community with Paraguay*, 144, 146; IACHR, *Case of the Kaliña and Lokono Peoples v. Suriname. Merits, Reparations and Costs. Judgment of November 25, 2015. Series C No. 309*, 155.

49 IACHR, *Case of the Sawhoyamaya Indigenous Community with Paraguay*, Judgment, 2007, 136; IACHR, *Case of the Kaliña and Lokono Peoples with Suriname*, 156.

50 IACHR, *Case of the Xucuru Indigenous People and their members v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of February 5, 2018. Series C No. 346*, 125.

obligation: first, the special relationship that Indigenous peoples have with their lands;<sup>51</sup> second, that any limitation on the right of Indigenous peoples to their traditional lands shall not imply the denial of their subsistence as peoples.<sup>52</sup>

It should be noted that this assessment judgment<sup>53</sup> was considered necessary and useful in the process of recognition, demarcation, and titling of Indigenous peoples' territorial rights except when domestic law established the pre-eminence of the right to Indigenous collective property over private property. In the case we analyzed involving the state of Brazil with the Xucuru people and its members, it provided that the assessment is not necessary when domestic law gives pre-eminence to the right to collective property over the right to private property, making the rights of Indigenous peoples prevail over bona fide third parties and non-Indigenous occupants. Moreover, the state has imposed on itself the constitutional duty to protect Indigenous lands.<sup>54</sup>

In a recent ruling, the IACHR explained that "Indigenous peoples have the right to own their territory without any external interference from third parties."<sup>55</sup> It specifies that titling and demarcation must involve the peaceful use and enjoyment of property,<sup>56</sup> which implies that the right to Indigenous collective property must be free from interference from the state and third parties, including bona fide third parties, even when they belong to vulnerable groups that depend on the land for their subsistence.

51 IACHR, *Case of the Yakye Axa Indigenous Community with Paraguay*, 2005, 146; IACHR, *Case of the Kaliña and Lokono Peoples with Suriname*, 2015, 156.

52 IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, 2005, 143; IACHR, *Case of the Kaliña and Lokono Peoples with Suriname*, 2015, 155; IACHR, *Case of the Xucuru Indigenous People and their Members with Brazil*, 2018, 125.

53 IACHR, *Case of Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008. Series C No. 177, 51; IACHR, *Case of Mémoli v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 22, 2013. Series C No. 265, 127.

54 IACHR, *Case of the Xucuru Indigenous People and their Members with Brazil*, 2018, 127.

55 IACHR, *Case of the Indigenous Communities Members of the Lhaka Honhat Association v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 6, 2020, 98.

56 IACHR, *Case of the Indigenous Communities Members of the Lhaka Honhat Association v. Argentina*, 96.

## 5 Conclusions

Legal pluralism as a result of the *juridification* of Indigenous demands in Latin America, expressed in the development of international law in the field of Indigenous rights and constitutional reforms, has implied the pre-eminence of Indigenous customary or own law as the basis for the exercise of their rights.

Customary law and the empowerment of Indigenous authorities to exercise jurisdiction over territories has allowed them to not only resolve their internal disputes according to their own normative and conflict resolution orders, but also to resolve conflicts with the state or with third parties such as land and territory disputes, rethinking the epistemological bases of property law, which is fully reflected in the jurisprudence of the IACHR, including for the case of Brazil.

I agree with the author that this progressive process of implementing legal guarantees not only has positive dimensions but also presents challenges and obstacles that are difficult to overcome. These obstacles are expressed in the persistence of power asymmetry in which Indigenous peoples find themselves concerning the state and national and transnational interest groups and the unresolved colonialism in the region. However, the dispute for the right expressed in the pre-eminence of Indigenous law itself and the judicialization of these disputes has opened a counter-hegemonic path for Indigenous claims that relativizes the statements contained in the paper that *juridification* only creates negative effects for the Indigenous cause. The *juridification* of Indigenous rights in Latin America reveals tremendously diverse and complex political and legal processes where Indigenous peoples have used the state legal order for counter-hegemonic purposes by fighting for the deconstruction of the hegemonic legal system and its institutions – even bringing into the constitutional debate the re-founding of the state-nation and its replacement by a plurinational state.

Finally, it seems important to me to specify that, as we have sustained in this document, the *juridification* of Indigenous rights has not necessarily resulted in the imposition of a state legal order; on the contrary, it has meant the validation of Indigenous law itself as a rule for the adjudication of rights. Indeed, it has generated a trend – with nuances, of course – that seeks to replace legal monism with legal pluralism. In the case of Brazil, this has been clearly stated in the cases analyzed in this article in which the state has been

condemned by the IACHR and has been required to recognize Indigenous ancestral property, and guarantee the territorial rights of these peoples following the American Convention on Human Rights provisions, and at the domestic level in Article 231 of the constitution.

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