

The Right to Free, Prior, and Informed Consultation in Colombia: Advances and Setbacks

By: César Rodríguez Garavito and Carlos Andrés Baquero Díaz

The right to free, prior, and informed consultation has changed the way in which the rights of indigenous and Afro-descendant peoples in Colombia are understood and practiced. Since the constitutional reform in 1991 and the ratification of International Labor Organization (ILO) Convention 169, ethnic group mobilization has emphasized the right to unify and articulate actions to defend their lives and territories. Following the changes and advances in law, we have witnessed how the state, civil society organizations, and private actors have understood and implemented these rights.

In this chapter, we analyze the role played by the right to free, prior, and informed consultation (FPIC) in the legal and political debates in Colombia. First, we will concentrate on FPIC in the context of a debate on the expansion of democracy in Colombia and its relationship with other mechanisms of participation that were also promoted at the beginning of the 1990s. Following this process of broadening the forms of participation in Colombia, we present an overview of the ensuing constitutional reform and its relations to the “multicultural” turn in Latin American law (Sieder 2015).

In the second part of the chapter, we analyze the Colombian debate on the regulation of FPIC, which echoes the experiences of other countries in the region as studied in this book. Lastly, we discuss the effects of FPIC in practice based on previous theoretical and empirical works (Rodríguez Garavito 2012; Rodríguez Garavito y Baquero, forthcoming). From a socio-legal perspective, FPIC has not only had impacts on the legal world but also has directly impacted the lives of communities and organizations that invoke it within their political strategies. As we will see, the effects of the use of the FPIC have been quite profound and diverse, even if ambiguous in some incidences.

We close the chapter by formulating some ideas and lessons for research and activism on FPIC, with a view not only to future debates in Colombia but also to other countries where this is currently on the agenda, including Ecuador, Peru, Brazil, and Mexico. Our prospective view is based on a reading of the Colombian case that highlights both its achievements and limitations. As we have seen over many years, through academic events, field work, litigation, and activism in various Latin American countries, the Colombian case is often seen as a successful history of the protection of FPIC. Through a combination of the Constitutional Court’s jurisprudence and ethnic movements’ and social organizations’ insightful political and legal use of FPIC, Colombia is often considered a model to emulate how to regulate, litigate, and claim this right. Although these are notable and well-known advances, in this chapter we also want to highlight the swings, uncertainties, gaps, and tensions in the application of FPIC in the country so that the comparison with other national cases is more fruitful and accurate.

I. The Roots of Consultation: ILO Convention 169 and the 1991 Constitution

As we have demonstrated in other texts, the origins of the legal and activist framework around FPIC are situated within the broader process of globalizing the rights of indigenous peoples (Rodríguez Garavito 2012; Rodríguez Garavito and Baquero, forthcoming). As indigenous peoples and human rights organizations wove transnational networks of advocacy for indigenous rights, intergovernmental human rights bodies took steps towards building international standards in the field. The first measure was the 1971 decision by the UN Commission on Human Rights, which instructed one of its subsidiary organs to carry out a study on discrimination against indigenous peoples. The document that emerged from this mandate (the “Martínez Cobo report”) led to the

creation of the UN Working Group on Indigenous Populations (1982), which would coordinate the process of creating the Declaration of Rights of Indigenous Peoples, adopted twenty-five years later in 2007 by the UN.

The seminal instrument for this wave of international law on indigenous peoples was Convention 169 of the International Labor Organization, adopted in 1989. Convention 169 is the centerpiece of the international history of FPIC in Latin America generally, and in Colombia particularly. The relationship went in both directions. On the one hand, the Convention became the essential source of constitutional norms that recognized the right to FPIC in several Latin American constitutions since the beginning of the 1990s. On the other hand, the Latin American states were decisive promoters of the Convention in the ILO and, above all, still constitute the vast majority of states that have ratified it.¹

The Colombian case illustrates the close relationship between these two symbiotic processes. In 1991, the new Constitution explicitly accepted FPIC in terms similar to those of Convention 169, and Colombia ratified the Convention that same year. The Constitution of 1991 arose from the National Constituent Assembly (ANC), established on February 4, 1991 as a result of student and citizen mobilization for demands to expand political participation and strengthen human rights. The exceptional political moment of 1991 was reflected in the inclusion of particular social sectors that had previously little representation in the ANC. In the case of ethnic peoples, “[t]he election of two [indigenous] constituents, when the movement appeared to be divided into two opposite sides—which would have diminished its changes of success—surprised everybody...”² (Gros, 1993, 9).

The two indigenous representatives in the ANC were Francisco Rojas Birry and Lorenzo Muelas. Rojas Birry, an indigenous leader of the Embera-Wounnan (PGN 2004), was elected by the list presented by the National Indigenous Organization of Colombia (ONIC). Rojas Birry studied law and became one of the most visible indigenous leaders in the country. In addition to being an ANC member, other positions he has held included: two periods in the Council of Bogotá (1992-1994 and 1995-1997) and one in the Senate of the Republic between 1998 and 2002 (Congreso Visible, n.d.). According to Muyuy, Rojas Birry was in charge of presenting the agenda of the Afro-Descendant community within the ANC, because “...ONIC has more open packages, for example, I have environmental issues, judicial issues, there is a package of integral proposals for Colombia and specific cases, in that sense Rojas Birry voiced other social, cultural sectors such as Afros...” (Muyuy 2008).

The second indigenous representative was Lorenzo Muelas, elected by the list of Indigenous Authorities of Southwest Colombia (AISO)—currently known as the Indigenous Authorities of Colombia (AICO)—who would later be elected as a Senator of the Republic (1994-1998). Muelas had an extensive career in the indigenous movement as he had founded the Regional Indigenous Committee of Cauca (CRIC) on February 24, 1971. For Muyuy, the participation of Muelas was different from that of Rojas Birry since “...he has always been distinguished for defending the indigenous position from the beginning of traditional authorities, that has been his philosophy...the philosophy of AISO, and today, AICO, has been more of this same indigenous authority, that is a political issue” (Muyuy 2008). Muelas’ proposal sought the formation of a heterogeneous

¹ By April 2017, ILO Convention 169 had been ratified by twenty-two states. This figure, which is not necessarily high in comparison with other instrumental instruments, hides a very important fact of the Latin American context. Of all the state ratifications, fifteen belong to Central and South America, accounting for 68 percent of all countries that ratified the Convention. It can thus be affirmed that the Convention is a highly used instrument in the region, and therefore the study of its implementation in Latin America should be privileged.

² The footnotes that were originally written in Spanish were translated into English.

constitutional regime based on the premise that indigenous peoples were different from the rest of the Colombian population and should thus be subjected to a differentiated regime (Ariza 2009).

As for the black communities, although they failed to create their own list for the elections to the Constituent Assembly, the effort “gave rise to other subsequent meetings, including another National Congress in May 1991 to support the collective actions that were pressing the inclusion of the rights of blacks in the Constituent Assembly” (Lemaitre 2009, 361).

The lack of representation of the black communities in the drafting process of the new Constitution led to the creation of a linkage between the representatives of the indigenous peoples and the leaders of the Afro-Descendant communities. For Jaime Arocha, the ANC was the opportunity to broaden the discourse and activism against ethnic-racial discrimination, given that “...as blacks did not choose anyone. Then you had to talk to the indigenous...In addition to the indigenous, [the constituents] Orlando Fals and Gustavo Zafra were very important in promoting the afros” (Arocha 2008).

The indigenous representatives thus became the mechanism for including the demands of black communities within ANC discussions. The work of the indigenous constituents was supported by the collective work of Afro-Colombian leaders and organizations in the Working Table Assembly convened by the ACIA, ACABA, ACADESAN, OBAPO, Cimarrón, and other Pacific organizations. The Working Group promoted an initiative called “The Black Telegram” in which they were invited to “address the Assembly claiming ‘the inclusion of blacks, as an ethnic reality, within the constitutional reform’” (Sánchez et al. 1993, 185). The general campaign was titled “Black People Exist” and was supported by nearly ten thousand signatures. The telegrams were sent to the constituents to recognize the communities and the Afro-Descendant population as an ethnic group in the Constitution (CEPAC 2003). Additionally, direct actions were taken, such as the occupation of the Haitian Embassy in Bogotá, the Cathedral, and the INCORA offices in Qubidó. The Afro-Colombian organizations relied on constituents Rojas Birry, Fals Borda, Jaime Ortiz, and Gustavo Zafra to execute these plans (Sánchez et al. 1993).

For the first time in Colombian history, the 1991 Constitution recognized the multicultural and multiethnic nature of the nation. The Constitution introduced several legal mechanisms that took up the claims of ethnic peoples and collected central elements of the global wave of legalization of ethnic rights. Article Ten, for example, which dictated the official languages and dialects of peoples in their territories, changed to modify the mechanism of national unity based on language, and demonstrated that Colombia is defined by its multilingualism. Therefore, any person belonging to an ethnic group “has the right of respect of their language, and can use it in school, the hospital, the court, and in every public institution. Furthermore, the same article makes bilingual education a constitutional obligation” (Gros 1993, 12). Articles 286 and 330 of the Constitution recognized a greater degree of political autonomy of the Colombian people, giving them powers of self-government in their territories.

The right to FPIC was another fundamental advance of the 1991 Constitution; the Constitution not only recognized it but the Constitutional Court also extended it to both indigenous peoples and black communities through its jurisprudence. Although the Constitution, in comparative terms, did not recognize the right to FPIC as much as subsequent constitutions did in Ecuador (2008) or Bolivia (2009), it indeed marked a historic milestone that opened the way for other constitutions in the region to deepen the recognition of the right to differentiated participation of indigenous peoples and Afro-Descendants in Central and South America.

However, the Colombian Constitution did link a special right of participation of indigenous peoples with decisions regarding the activities and impacts allowed in their territories. Article 330 of the Constitution defined that “the exploitation of natural resources in indigenous territories shall be done without prejudice to the cultural, social, and economic integrity of indigenous communities. In

adopted decisions regarding this exploitation, the Government will encourage the participation of the representatives of the respective communities.” This article has been one of the central drivers of the demand of the ethnic movement and its allies for the right to participation in decisions that affect their communities. Furthermore, this article recognized that indigenous territories would be governed according to the peoples’ customs and practices, thereby guaranteeing the right to autonomy in making decisions (including participation in situations in which the state intends to implement a measure that affects them).

Finally, the key advance in recognizing the right to FPIC in Colombia was the coincidental timing between the promulgation of the new constitution and the ratification of Convention 169. The mobilization of ethnic organizations, especially the indigenous movement, led to Colombia’s rapid implementation of the right to FPIC, becoming the third country in the world to ratify the Convention following Norway and Mexico. In fact, Colombia temporarily promulgated the Constitution and a few days later ratified the international instrument.

In a comparative Latin American context, the guarantee of ethnic rights to the Afro-Descendant population was an important novelty of Colombian constitutionalism. Although the Constitution itself did not include this guarantee, it left the door open through the transitory Article 55, which ordered the issuance of a law guaranteeing and regulating the collective rights of black communities over their territories. The inclusion of AT-55 was the result of influence of the aforementioned coalition between indigenous constituents and allies within the Constituent Assembly and the indigenous and Afro-Colombian social movements. According to Lorenzo Muelas, the AT-55 was written by Orlando Fals Borda, a well-known sociologist and public intellectual who had been elected as a constituent member of the AD M-19 Party. “Orlando Fals Borda stopped there, three hours before the end of the constituent assembly, to close already; he wrote [AT-55] and we supported him,” Muelas told us (Muelas 2008). According to Gabriel Muyuy, the article was written at the end of the Constituent Assembly and Rojas Birry presented it to the plenary.

As in any political action, if you look at when the article was approved, including, because you realize that it was not [approved] at the beginning, not even in the middle, it was near the end, it was like what happened in the Congress of the Republic...we managed to include it in the middle of the debate, because strategically we were able to include it, of course Article 55 was not a random matter but it did enter near the end...and was included due to constituent Rojas Birry and was of course supported (Muyuy 2008).

Based on transitory Article 55, Law 70 of 1993 was issued two years later, which recognized territorial and ethnic rights to “black communities that have traditional production practices in other areas of the country and meet the established requirements in this law” (Article 1). The law collected the demands of the Afro-Colombian organizations of the Pacific, which had proposed the collective titling of the territories they inhabit, as a form of historical reparation and reaffirmation of their collective cultural, economic, political, and social aspirations.

In addition to recognition of territorial and related rights of Afro-descendant communities, Law 70 has been the key instrument for Afro-Descendant communities to request the protection of the right to FPIC. When we have participated with the Afro-Descendant movement we repeatedly find that the movement’s demands are anchored within the two legal instruments: Law 70 and Convention 169. The movement’s main argument is that the right to FPIC will only be guaranteed if Law 70 is fully implemented alongside its corresponding constitutional obligations, because only the communities themselves know their objectives and how they want to develop their collective projects. For example, the law was very clear in Article 22 that a community’s right to FPIC would

be guaranteed whenever plans were formulated in black communities that overlapped with protected areas.

A similar order is found in Article 38 of a law that delineates the state's obligation of consultation on higher education training programs that Afro-Descendant communities can participate in. The law defined that all the programs created for black communities, and the curriculum that made up its content, should be consulted on before they are implemented. Finally, a similar obligation was included in the creation of state investment funds for Afro-Descendant communities in Article 58. Similar to the obligations in creating education programs, the formulation of these policies requires prior consultation with Afro-Descendant communities to ensure it reflects their interests. While Law 70 therefore opened the way for the recognition of the right to FPIC of black communities, the final seal of explicit recognition came with Constitutional Court jurisprudence. In a pioneering maneuver, the Constitutional Court included the black population within the protections granted by ILO Convention 169. We will explore this last point in detail in the next section of the chapter.

II. The Evolution of the Right to Consultation: The Swings and Disputes Over the Rules of Consultation in Colombia

The 1991 Constitution inaugurated an era of creativity and progress in respect to the scope and effects of constitutional rights that continues to this day. For a quarter-century, social movements, academia, human rights NGOs, public interest litigants, and citizens themselves have mobilized Constitutional tools to broaden the space and deepen the avenues of their social and legal battles. On the side of the state, the development of constitutional rights has been driven primarily by the Constitutional Court, whose decisions materialized many of the promises of the Constitution. The activism and guarantees of the Court have been highlighted both in a Latin American and global context (Rodríguez Garavito and Rodríguez Franco 2015). The government and the Congress, meanwhile, have been quite timid, if not overtly hostile, to the fulfillment of these promises.

These features of Colombian constitutionalism are reflected in the evolution of the right to FPIC. On the one hand, the government and Congress have tended to be reluctant to apply this guarantee, demonstrated by the fact that there are no laws regulating FPIC to this day. As with other issues, this gap has been filled by a proactive and abundant jurisprudence by the Constitutional Court, which has set the general standards that apply to FPIC and protected the right in numerous cases. In this section we probe these two processes, beginning with the swings of regulation and ending with a balance in jurisprudence.

2.1 The Swings and the (Absence of) Regulation of Consultation

Although there is currently immense debate about the promulgation of FPIC norms, this is one moment in a long continuum of history debating state actions to regulate the rights of ethnic peoples. Before the current debate in Colombia, the right to FPIC had been mainly regulated through two presidential decrees and Constitutional Court jurisprudence. In the regulatory sphere, the state has made two attempts. The first regulated the processes of prior consultation in cases of exploitation of natural resources. However, Decree 1320 of 1998 was criticized by national indigenous and Afro-Colombian organizations for violating their right to FPIC by establishing fixed times for consultation processes and not respecting their right to consent.

The decree was also criticized by the Committee of Experts of the ILO and the Colombian Constitutional Court. They claimed that it went against Convention 169 and asked the Government to modify the decree by guaranteeing the participation of indigenous peoples. The Constitutional

Court also recommended that it not be applied because it ended up harming ethnic peoples. This decision was taken, for example, in the case of the Embera-Katio indigenous people who opposed the construction of the Urrá dam because it was carried out in violation of their right to FPIC (Rodríguez and Orduz, 2012).

In 2013, the national government again promulgated another decree that sought to regulate this right, this time assigning different tasks to state entities to develop the consultation processes. This national measure repeated the history of Decree 1320 as its content went against the right to FPIC and was promulgated without having first consulted indigenous peoples. For example, the decree only protected ethnic communities that lived in titled territories.

Despite the lack of protection promoted by the executive branch, the Constitutional Court has been a key actor in protecting the rights of ethnic peoples. For example, the Court has declared laws unconstitutional that have been promulgated without prior consultation of ethnic peoples (e.g. the General Forestry Law that regulated the exploitation of wood). Secondly, the Court has also incorporated within its jurisprudence the strongest standards of protection established, for example those in the United Nations Declaration on the rights of Indigenous Peoples (UNDRIP).

In this last section, we will focus on the most current challenges facing the right to FPIC in Colombia. We will present the most pressing agenda items that highlight the challenges and difficulties in implementing the rights of indigenous and Afro-Descendant peoples.

The central aspect of this public debate, currently looming as we write this chapter, is the Colombian government's intention to enact a law about the right to free, prior, and informed consultation. Following a regional trend and based on the norms that already exist nationally, the government wants to consult with the Permanent Roundtable³ on a text that regulates how the processes of prior consultation with indigenous and Afro-Descendant peoples should be carried out. The main problem with this bill is that, following historical trends, it could decrease the level of protection of the rights of communities.

This project, presented in October 2016 to the Technical Secretariat of the Permanent Coordination Bureau (MPC), was highly criticized in the International Forum held by the indigenous movement in February 2017. In a unified manner, the indigenous movement declared that “the Fundamental Right to Prior, Free and Informed Consultation and Consent is intended to be regulated by Statutory Law, and we therefore demand the immediate withdrawal of the bill draft filed before the Technical Secretariat of the Permanent Coordination (MPC). Likewise, we denounce it as unconstitutional, inconvenient, and unfair to process this regulation through the expedited mechanism Fast Track, and we therefore do not accept this route.”⁴ Following the movement's denouncement, there was no possibility for the government to issue a rule on the right to FPIC. As we note further on, this dispute lies within a broader historical context of indigenous peoples dealing with state rules that define how their participation should be defined.

In general terms, the debate between ethnic communities and the State to regulate FPIC has been hinged on four central themes.

³ The Permanent Roundtable is a central instrument of indigenous politics in Colombia. This is the space in which indigenous movement organizations consult with the national government on the administrative or legislative measures that affect them. This space was created by Decree 1397 of 1997, and its central functions are “to arrange between [the indigenous peoples] and the State all the administrative and legislative decisions that may affect them, to evaluate the execution of the State's indigenous policy, without prejudice of the functions of the State, and to follow-up on compliance with the agreements reached there.”

⁴ “Political positioning of indigenous peoples, organizations, and authorities of Colombia, participants in the International Forum on the fundamental right to free, prior, and informed consultation and consent” **Permanent Roundtable Agreement**, February 27, 2017.

Table 1. Arguments in the Debate on Issuing a National Standard

In favor of issuing a national standard	Against issuing a national standard
Lack of precision of Convention 169	Existence of national and international standards
Difficulties in the application of Convention 169	Respect for the agreements reached by the parties
Protection of the right to equality	Protection of the right to autonomy and cultural differences
Judicial order	Inequality of the parties in the field

In Colombia, following the framework presented in Table 1, the national government and companies have been the main stakeholders interested in continuing the process of regulating the right to FPIC in a national standard. Every so often, the debate is resumed, with the last one occurring at the end of 2016. On the other hand, the ethnic movement—including indigenous and Afro-Descendant peoples—has been against the need to enact a norm that governs their right to FPIC. One of their central concerns is the forces and powers at play in this discussion and process. Subjecting the guarantee of the right to FPIC to a space that may jeopardize their achievements is a risk they are unwilling to take.

Those in favor of issuing a new national standard have four primary arguments. Firstly, there is no clarity in the norms of the agreement to undertake consultation processes. The Convention only established a general right to FPIC, but did not detail how they should be implemented, which generates many difficulties in the realization of these processes.

Secondly, and related to the previous argument, this side argues that the lack of clarity about the general methodology of these processes leads to errors. In this sense, the issuance of a specific and detailed standard would provide a roadmap of how these processes should be carried out and would lessen the difficulties of implementation.

Thirdly, those who are in favor of the norm construct a constitutional argument that this right would minimize the violations of the rights of some people. They demonstrate that it is necessary to pass this norm because otherwise the right to equality is violated, as some people acquire a particular form of protection with the right to FPIC, while other groups (who tend to be weaker in organizational terms) obtain other levels of protection. Although this idea may sound like an advance for ethnic peoples at first, in practice it recognizes the state's selectivity in endowing the protection of the right to FPIC to certain groups; stronger groups receive a higher level of protection, while weaker ones are left with a lower level.

Finally, some statements in international law are used to present the enactment of a new norm as an obligation to clarify how FPIC processes should be carried out in Colombia. For example, citing the case of the Sarayaku people in Ecuador, these people argue that within international law there is a state obligation to enact a new national norm that specifies the way in which the right to FPIC should be applied.

The other side of the coin is represented by the ethnic peoples who, historically, have opposed the creation of norms that regulate the implementation of the right to FPIC. Their positions, like those of their antagonists, are also based on four central ideas. First, ethnic peoples argue that it is not necessary to create a norm that regulates the right to FPIC because international and national standards already have sufficient precision about the content of the law and how it should be developed. For ethnic peoples, the consultation processes are governed by the advances made in the courts and international organizations that have explained the contents of the law.

Therefore, although the Convention's formulation can be considered quite broad, the comprehensive reading of the standards provides a sufficient level of detail to know how the processes should be carried out.

Second, ethnic peoples argue that one of the central rules in consultation processes is compliance with the agreements reached by the parties. In this sense, there should not be confusion of what the steps are if they are defined within the process itself. For a process to be satisfactory, they argue, agreements must be respected and fulfilled. Rather than the idea that a general methodology should be created, they argue that each process should depend on the construction of the specific agreements of each particular consultation.

Essentially, confronted with the idea that there is a single way to protect the right to equality, they argue that diversity is instead the true guarantor of equality between peoples. As we mentioned in the first part of the chapter, the right to FPIC is based on the existence of cultural differences between ethnic peoples and the majority of society and within the ethnic groups themselves. This is why the only way to guarantee the cultural and physical protection of the peoples is to recognize that the FPIC processes must adapt to the cultural differences between peoples. In this sense, the right to equality is not achieved with the enactment of a single consultation mechanism, but rather with a specific regulation for each group that takes into account the particular circumstances.

Finally, with respect to the idea of an international obligation, ethnic peoples argue that various ethnic bodies have already spoken on this front. The Sarayaku case, for example, is most frequently cited, showing an order that only involves Ecuador.

This last argument of ethnic peoples addresses the last piece of the Colombian debate on promulgating a new norm. With ethnic groups opposing the creation of a congressional law, the realization of the project has three potential outcomes. Each of these possibilities, more or less, benefits one of the parties and negatively affects the other. The potential outcomes are the creation of a national law, the promulgation of a decree law, and the promulgation of protocols.

The idea of a congressional law is based on the fact that this is the body authorized to enact laws that regulate the fundamental rights of ethnic peoples. In practice, ethnic peoples would come to Congress, where they are a minority, to discuss the protection of their fundamental rights to private actors who may have other intentions in the creation of this standard. The political capacity of the ethnic movement would be tested in this space.

The intermediate result is a governmental decree. In comparison to the enactment of a law, this scenario is more favorable to ethnic peoples because they would only have to debate the executive branch. From previous experiences, ethnic peoples know how to better negotiate with the executive, which would lessen the ability of other actors to influence the decisions (Rodríguez and Orduz 2012). Those who oppose this path argue that rights cannot be regulated in this manner, as the promulgation of the norm is not the exclusive interest of the ethnic movement but rather a national concern, and as such should go through the representative body of the political interests of the voters.

Lastly, many ethnic groups argue that autonomous protocols for carrying out FPIC processes should be created instead. The idea is to attain a political agreement between the people and the state so that when an FPIC process is taking place with a specific community, the agreements reached must be implemented. As an example, the process that the indigenous people of the Sierra Nevada de Santa Marta have been developing sheds some light on how this procedure might be implemented. Although by the time we have finished writing this text no decision will have been made on which of these instruments will be utilized, the presentation of the problem shows the politicization of the debate, which not only includes discussions on interpretations of norms and standards but also on the political effects of making a decision that impacts the lives of ethnic peoples.

2.2 The Jurisprudence of the Constitutional Court: A Step-by-step Construction of a Strong Right

The Constitutional Court has been one of the most important actors for the implementation of the right to FPIC for indigenous and Afro-descendant communities in Colombia. It has been this Court that has advanced the guarantee of the right through the definition of its legal elements. What in social movements and the language of the state are known as standards of law, the fact that the consultation must be prior, free, informed, respectful of the right, and in good faith is with the intention of reaching an agreement to implement the right to consent (Dejusticia 2012). The Court has meticulously defined each of these elements and has explained in each of its reviewed cases how these have or have not been met. Given that there is already a chapter in this book detailing jurisprudential progress, we will highlight three central points of jurisprudence that have propelled the right to FPIC in Colombia.

Firstly, as discussed in the previous section, the Court has been in charge of guaranteeing the right to FPIC in Afro-Descendant communities. Although Law 70 already included the obligations of consultation for these groups, it was the Court that solidified and provided the communities with this right. The Court constructed a jurisprudence that in general terms carried out two examinations. On the one hand, it used the right to equality as a mechanism to equalize indigenous and Afro-Descendant communities. Given that indigenous communities are explicitly mentioned in Convention 169, the Court found that it would be a violation of the right to equality not to give that same right to Afro-Descendant communities. Secondly, and relatedly, the Court assessed that Afro-Descendant communities met the objective criteria of tribal community found in Convention 169. With this assessment of compliance with these elements, the Court consequently granted the right of consultation to these communities.

With the recognition of this right, Afro-Descendant communities became recognized as collective subjects that could request the protection of this right. This jurisprudential and political path has been credited to the Court's decisions, but should also be credited to the mobilization of Afro-Descendant communities that have included within their mobilization repertoire the necessity of respecting and guaranteeing this right. This was demonstrated by judgment Sentence C-169 in 2001, wherein the Court mentioned that Afro-Descendant communities "have been recognized by the legislator as a special ethnic group. This recognition generates, as an immediate consequence, that black communities acquire the ownership of collective rights similar to those of indigenous communities, with the differences imposed by their cultural specificities and their own legal regime. More importantly, they are entitled to the rights enshrined in Convention 169 of the O.I.T."

Secondly, the Court has also been a pioneer in stating that the right to FPIC falls on both administrative and legislative measures. That is, it is not only the duty of the executive to guarantee the right to FPIC, but also that of the legislative branch to guarantee the right of consultation. In both cases, the measure must be put before ethnic peoples before the decision is made. In most of the jurisprudence, cases of legislative measures have been declared unconstitutional for having been promulgated without first consulting the communities—for example, laws of land organization or extraction of natural resources, such as the Forestry Law and the Mining Code (Andrade 2009; de la Rosa 2010). In the case of administrative measures, the decisions of the Court have been more varied but generally have bent towards decisions against extractive industries and infrastructure projects. Ethnic communities in Colombia have opposed these measures in cases where they have been launched without prior consultation. Through this route, the Court has suspended exploitation licenses, construction of ports, or ordered reparation programs for the communities that have been affected.

Finally, and most strongly, the Court has been instrumental in recognizing the right to free, prior, and informed consent of the ethnic peoples of Colombia. Following the international line of recognition spearheaded by the United Nations Declaration on the Rights of Indigenous Peoples and the jurisprudence and decisions of the Inter-American system, the Colombian Court has recognized that ethnic groups in Colombia have the right to free, prior, and informed consent. Specifically, in the case of the safeguards of Chidima and Pescadito—who opposed the construction of a highway, an electrical interconnection project, and a mine until there was adequate consultation—the Court ordered the implementation of a consent standard for consultation on the displaced, where toxic waste will be stored, and the potential high social, cultural, and environmental impacts that could jeopardize the existence of the community. As delineated in international law, the state must not only comply with consultation but with consent; unsurprisingly, states have historically opposed this vision as it gives more power to the people. Colombia has, of course, been no exception, and in many of the meetings we have attended, state representatives argue that the communities do not have veto power and therefore their objection to a consulted measure is not binding.

III. Consultation in Practice: The Consultation Processes and Their Effects on Rights and Indigenous Peoples⁵

Beyond the waves of regulation and jurisprudence, how has FPIC actually worked in practice? The first interesting finding is that a very considerable number of consultations have been carried out since 1991. As of 2012, for example, 156 consultation processes with indigenous peoples for environmental licenses and permits were reported (Rodríguez 2014). A considerable number of consultations were also presented by Orduz (2014), thus permitting an evaluation of the processes of consultation in Colombia. For example, among the consultations governed by protocols between 2010 and 2013, more than eight hundred consultations on administrative measures and more than seven hundred on hydrocarbons were reported. The mining and research sector also contributed more than one hundred. These numbers, without necessarily showing good implementation of the right to FPIC, demonstrate the extent of inclusion of this law within the logic of state bureaucracies and communities. Without a doubt, this makes Colombia number one in the world in the realization of consultation processes. For example, in countries such as Peru, where the discussions have been more intense, it is impossible to count more than a dozen processes related to administrative measures.

The construction of a new Constitution, which protected the rights of ethnic communities, and the inclusion of FPIC (based on ILO Convention 169) in Colombian law were the central elements guiding the political and legal mobilization of indigenous and Afro-Colombian peoples since the 1990s. The general strategy of the mobilization has had two essential elements. On the one hand, they have used the right to formally request the completion of prior consultation processes throughout the county. Part of this strategy's impact is demonstrated by the significant increase in consultation processes that have taken place in Colombia. For example, between 2010 and May 2013, more than eight hundred consultations were recorded for public administration measures and more than seven hundred hydrocarbon projects were reported (Orduz 2014). This increase in consultations is one of the most profound effects of the mobilization of communities who have increasingly fought for the right to consultation on measures that affect them.

⁵ This section brings up discussions already addressed by the authors in (Rodríguez Garavito 2012) and (Rodríguez and Baquero, forthcoming).

The combination of legal uncertainty (due to lack of legal regulation) and the abundance of consultations implies that the consultations differ greatly from one another in practice. The procedures vary depending on: the institutional strength of the community consulted, the presence or absence of a community's national organization or allies, the economic interests at stake, media visibility of the case, the existence of related legal action, the priorities of the governing officials, and the zone where the proceeding is to take place, among many other factors. It is thus difficult to draw precise conclusions about the specific procedures of the consultation. Beyond the particularities of the cases, we are interested in highlighting the general effects that the role of FPIC has had on activism and the right of ethnic peoples. Based on previous work, we distinguish four central effects: the displacement effect, the misunderstanding effect, the domination effect, and the emancipation effect (Rodríguez Garavito 2012).

3.1 The Displacement Effect

The procedural steps of the consultation tend to displace, and sometimes, replace or postpone substantive conflicts. Despite the fact that the disagreements have to do with the most vital convictions and interests of the parties involved (the company, the state, and the indigenous community), oftentimes the conversation ends up being dominated by the formalities of deadlines, legal resources, notifications, legal representation certifications etc. How can this be when it is known that the implementation of the specific measure can be a matter of life or death for the communities consulted?

The global dissemination of the consultation and its leading role in “ethnicity.gov” is precisely due to this displacement effect: its power to transform substance into form; its ability to offer a point of contact between actors, possibly antagonistic ones, who defend very different positions (Rodríguez Garavito 2012). That capacity becomes more vivid, and the transactional nature of the consultation more useful, when the differences between the parties are deeper and potentially explosive (figuratively and literally as in the case of mining zones). It is here where the role of law as a mediator between these differences operates more clearly, which Comaroff and Comaroff allude to:

In cases of rupture of the national narrative, situations in which the world is constructed from seemingly irreducible differences, the language of law offers an apparently neutral middle ground, so that people who have many differences among themselves—different cultural worlds, social resources, material circumstances, identity constructions—can make claims to each other, enter into contractual relationships, make transactions, and deal with their conflicts. In achieving all this, the law creates the impression of consonance in the midst of discord, of the existence of universal standards, like money, that facilitate the negotiation of incommensurables and overcome barriers that would otherwise be insurmountable (Comaroff and Comaroff 2009, 39).

The empirical evidence of FPIC enables us to comment on this insightful observation, which helps clarify the role and meaning of the consultation. First, although it is true that law can generally fulfill this function of mediation, it is procedural law that does this in a paradigmatic way. The appearance of legal neutrality in this process is taken to the extreme because its rules have to do precisely with the instruments of universal measurement: time, money, and space. Apparently devoid of any link with the substance of conflicts, the procedural rules express those instruments in pure legal form. In the field of consultations, these forms are the deadlines, schedules, costs, and venues of the consultation. These are rules that allow communication between incommensurables.

Second, it is possible to go beyond the allusion to Simmel's concept of money (1977) as an instrument of equating what is different and its functional similarity with the law. In fact, the allusion confirms the parallel between "ethnicity.inc" and "ethnicity.gov": while in his allusion the fundamental medium of exchange is money, in this it is the procedural right. More so, speaking of these two processes in parallel is too ambiguous given the affinity between the two, as in practice, they are consistently intertwined. This is shown by the leading role of compensation in the consultation between the state, business, and indigenous peoples. Much of the consultation process consists of calculating the environmental and cultural damage that an economic project can cause and agreeing on a form of compensation for the people who have suffered. The same applies to the many disputes arising from inadequate consultations or the absence of them altogether. Given that the damage has already been done once these cases are amidst litigation, the work of the courts consists primarily of determining the mode and amount of compensation. In some cases, however, the adopted remedy is not monetary but pecuniary. In the latter, money and law are merged into a single entity.

In many cases, the compensation illustrates, in a vivid and painful way, the displacement effect generated by the consultation and its overlap with the commodification of culture. As one Embera leader put it, many communities that were previously self-sufficient with a river economy and culture are now entirely dependent on the survivor's compensation that was given to them after a judicial process.⁶ In other words, their collective identity has been transformed within a decade and is today defined by the role of the Embera as individual consumers in a market economy due to the precarious but essential compensation funds. This process of commodification, individualization, and impoverishment of the identity has been accompanied by the legal displacement effect. In fact, the dependence and concern regarding compensation is such that the Embera political leadership believes that the main threat to the cultural survival of their people against the company's plans to expand the dam is that many communities accept the inevitable flood in their territory in exchange for the extension of the period of compensation, once the current one established by the Constitutional Court has been exhausted.⁷

In short, the procedural aspect of FPIC allows substantive communication between incommensurables, with the former displacing the latter. This powerful communication tool of consultation has costs, however. And when it operates under volatile circumstances, can be highly imperfect, as we shall see shortly.

2.2 The Misunderstanding Effect

Anyone who attends the negotiations and discussions of a consultation process realizes that something strange occurs. When one has the impression that a point on the agenda has been agreed upon or exhausted in discussion—for example, when information about the project to be carried out in the indigenous territory has been disseminated or consensus has been reached—it is common in later meetings for the conversation to return to these action items and even start from scratch. Therefore, except when they are front-end proceedings or imposed under duress or coercion (not uncommon), consultations tend to follow a non-linear path, in which delays, repetitions, and misunderstandings are endemic.

How do such misunderstandings occur? What are the reasons for these recurrent misunderstandings, which tend to generate constant lack of communication between the parties and

⁶ Interview with the legal advisor of the Embera-Katío people in Tierralta, Colombia (November 14, 2009).

⁷ Interview with the leader of the Embera people in Zambudó, Embera-Katío People's Reserve, Colombia (June 13, 2010).

long periods of standstill in the consultation processes? A first reason is that the consultations embody a true discursive short-circuit, in which knowledge and claims of radically different epistemological roots routinely confront each other. The consultations combine “premodern” indigenous claims, extractive economies typical of “modern” capitalism, and forms of “postmodern” global governance,” all of which are fused together in a melting pot of modern legal forms par excellence: due process and contractual freedom.

A second reason for these misconceptions is the same displacement effect postulated above. The displacement of the substance by the form is partial and temporary. The underlying disagreements reappear in each step of the consultation, and the procedural language is insufficient to express them. Hence, on many occasions, the allusions to the process (the deadlines, the schedule, the agreements of the meetings etc.) are only indirect ways of talking about what is really at stake. A leader of the Kankuamo people and a lawyer at ONIC said, “the real issue of consultation is life”: the life of the people involved, the physical survival of its members, the survival of the extractive industries, the biodiversity at stake, and the life and death of the illegal armed groups that swarm the minefields (Ochoa 2009).

This is why, by nature, consultation meetings incorporate distinct topics and why the agenda is in constant flux. While state officials and company representatives seek to limit themselves to the immediate procedural issues (the protocol of the agreements, the certification of the list of attendees, the details of compensation), the indigenous representatives constantly return to issues of the sacredness of the earth and resources, the collective history, and the denouncement of the surrounding violence. It is not surprising, then, that delays are frequent and misunderstandings endemic.

Not all misunderstandings are involuntary, however. Companies, state agencies, and indigenous peoples make strategic use of the laws, judgments, and legal resources at their disposal to defend their own interests. The companies and state agencies use an army of advisors (lawyers, anthropologists, engineers, social workers, etc.) for this purpose. But indigenous peoples and their allies have also exploited the opportunities offered by demanding interpretations of the requirements of consultation in national courts and mobilizing the support of international organizations, such as the ILO and the UN Rapporteur on Indigenous Rights (Rodríguez and Orduz 2012). In the process of consultation, then, the struggle for the application and interpretation of procedural norms becomes an extension of the political struggle—the struggle for territory, self-determination, and resources.

2.3 The Domination Effect

Contrary to the supposition of equality between the parties, this legal struggle is highly asymmetric. In fact, the experience of consultations illustrates the limitations of the governance paradigm, amplified in mining contexts, wherein actors endowed with drastically different levels of power coexist. Instead of the ideal communication conditions postulated by theorists of governance, the reality of consultation tends to be more like a private act of negotiation than a deliberately public one. And like the contractual act, the process reproduces and legitimizes the structural differences of power between the parties. In this sense, the consultation reinforces the relations of domination between companies, the state, and indigenous peoples.

The domination effect takes multiple forms. To begin with, consultation processes tend to be privatized operations. De facto when no de jure, the consultations are administered, financed, and controlled by the company interested in operating in the indigenous territory. In the enclaves of extractive economies where many consultations take place, the company, for all practical purposes,

is the state: regulating access to the region; determining local authorities; and subordinating large segments of the population through labor relations or indirect economic dependence.

The effect of domination takes a violent turn in contexts of armed conflict, where the operations of the company depend on some form of protection by legal or illegal armed groups. Violence and intimidation against leaders is common to many other cases of consultation that occur primarily in mining regions. A common practice in Colombia is that the illegal armed groups interested in the entry of the company into the territory intimidate and violate the representatives of the community that are going to be consulted in order to provoke their displacement. When the consultation then takes place, it is done with the members of the community that have been left behind and in conditions of extreme coercion that do not even come close to those of private negotiation. As one ONIC lawyer mentioned in our interview when referring to this practice, “there is no negotiation when you have a revolver to your head.”⁸

Even when they do not enforce physical coercion, the relations of domination between the parties operate as a result of the profound economic inequalities that the consultation leaves intact. In the case of the Urrá dam, and in other parts of the country, the extreme conditions of poverty and social disintegration of the indigenous people impede a free and informed participation in the consultation, not to mention a genuine consent (Rodríguez and Orduz 2012). Even while these asymmetries of power are somewhat alleviated when national and international activist coalitions intervene in support of the indigenous, they are nonetheless endemic even in cases with causes that have become nationally and internationally visible.

The asymmetry of power between the company and the community is accentuated by the fact that the state tends to have an official witness role in the consultation, rather than as a regulator or guarantor. This is shown by the laws and practices of the Latin American countries studied. In this sense, the domination of the company over the community is rarely mitigated, or even mediated, by the state apparatus. As expressed by a former official of the Colombian Ministry of the Environment, who participated in consultations for several years, “the accompaniment of the State is minimal, it is protocol. Often it is based on second-hand information provided by the company...[For example], environmental impact studies are done by anthropologists paid by the companies.”⁹ A former head of the Colombian government unit in charge of consultations at the national level candidly recognized that “we do the coordination, we summon the parties, we mediate, we direct the meeting, but whoever consults [the company] must take all the logistical support to be able to summon the community, as we do not do that part, it is done by whoever consults” (Cáceres 2009). The one consulting is the company. The one consulted is the indigenous community. And the state merely stamps the official seal on the agreement.

Beyond physical or economic coercion, the domination effect operates through subtler, indirect channels. The mere participation in consultations, or in related litigation, inserts the indigenous claims into a procedural logic that has costs, insofar as it limits what can be said, demanded, and achieved. While substantive claims reappear in the course of negotiations and judicial processes, to be effective they have to do so within the limits of the language and the procedural rules of international and national law of FPIC. The result is a dissolution, at least partially, of politics in law: the conversion of strong political claims (related to self-determination, consent, etc.) into weaker claims (related to participation, the requirements of consultation, etc.). Along the way, indigenous political subjectivity is transformed. Rather than the characteristic protestor of the indigenous movements, the consultation requires a docile, conversational subject.

⁸ Interview with the leader of ONIC in Valledupar, Colombia on June 15, 2010.

⁹ Interview with a former staff member of the Colombian Ministry of the Environment in Bogotá, Colombia on October 17, 2009.

This domestication of indigenous demands can operate even in successful cases of defense of the right to consultation before governments, courts, or international human rights organizations; this is Hale's conclusion after analyzing the consequences of the legal victory of the Mayagna indigenous people in the founding case of *Awas Tingni v. Nicaragua* before the Inter-American Court of Human Rights (Hale 2005; Inter-American Court of Human Rights 2001). For the Mayagna, the cost of several years of paperwork and negotiations with the state, the World Bank, and other actors that participated in the demarcation of indigenous territory ordered by the Court, was "a deeper interweaving...the grid of intelligibility of neoliberalism" that is, "an unprecedented involvement of the State and the neoliberal developmental institutions in the internal affairs of the community: in the regulation of the details of the claim, in the configuration of political subjectivities, and in the reconfiguration of internal relations" (Hale 2005, 15-16).

The last incarnation of the domination effect, is not between the companies and the indigenous communities, but between the communities and their own allies in the consultation. As is generally the case with the use of law by social movements, the risk of displacement to the legal field is the transfer of power from the subjects of the struggles (in this case, the indigenous peoples involved in the consultations) to its legal advisors (NGOs, international organizations on indigenous rights, etc.) (McCann 1994). As we will see below, this displacement also has an emancipatory effect, insofar as it mitigates the power differences between companies and communities.

2.4 The Emancipation Effect

Opposite from the domination effect are the emancipatory possibilities opened by the consultation processes. In practice, consultation is at the same time a means to perpetuate and challenge deep inequalities among the actors in these processes. While diluting indigenous political claims, the procedural rules create precious spaces and tools—sometimes the only ones available—to halt, or at least postpone, the irreversible cultural and environmental damage and to incite or reignite collective mobilization processes.

Ethnographic evidence shows that the emancipatory effect of the consultation can be direct or indirect. It is direct when the subaltern actors—the indigenous communities and their allies—demand compliance with the procedural rules and propose interpretations that mitigate the asymmetry of power in the face of dominant actors. The procedure itself has an emancipatory potential, insofar as it establishes demanding requirements that reduce the gap between the real conditions of the consultations, on the one hand, and the conditions required for a genuine deliberation, on the other hand.

As it turns out, the procedural regulations are not irrelevant. Once staged, they make a difference and can sometimes be the difference between life and death. The survival of a people may depend, for example, on the possibility that the consultation may give a voice not only to the community, but to national indigenous organizations that, by having legal knowledge and experience in other consultations, can serve as a counterbalancing power. Or, as the UN Rapporteur and the Inter-American Court of Human Rights have recognized, the fact that the standard of consultation or the standard of consent is applied may define the fate of a people affected by a large-scale economic project.

Hence, a large part of consultation proceedings consists of debates about whether the requirements of the national law, Convention 169, and other legal instruments are being met. Were the affected communities informed promptly and in good faith? Is there legal representation of the indigenous peoples in these consultations? Who should cover the costs of the interpreter who translates between Spanish and the indigenous language? Should the meeting schedule be extended to allow more assistance? Who has the obligation to finance the transportation of members of the

most remote communities? Each of these questions opens a judicial controversy that can slow down the frenetic pace of the development of economic projects in indigenous territories; in practice, this can oftentimes be the only barrier against the flooding of an indigenous land in Belo Monte, or the entrance of engineers, settlers, and armed groups to oil territories like the Sarayaku.

The emancipatory effect also operates through multiple indirect ways beyond the formal meetings of the consultation. In societies in Latin America where multicultural constitutionalism of the 1990s arrived when indigenous peoples were in a precarious situation of organizational revitalization and potential collective extermination, the rules of Convention 169 and other legal instruments opened up additional resistance and political mobilization. In these circumstances, with economies focused on exploitation of natural resources, the consultation has been accepted as an instrument to slow down the avalanche of mining and extractive projects that loom over indigenous communities. This explains why, as we have witnessed in meetings with indigenous organizations, cases and technical legal discussions on FPIC have a privileged platform in the agendas of national indigenous organizations (Andrade 2009; de la Rosa 2010). In the Colombian context, for example, FPIC has become an effective card that the indigenous movement can wield in negotiations and litigation against the state and companies. The effectiveness of this charter is demonstrated by the several Colombian laws that regulated vital issues for companies and indigenous peoples (such as the use of forests or the exploitation of hydrocarbons)¹⁰ being declared unconstitutional by national courts for violating Convention 169.

On the transnational level, FPIC has also opened spaces for a counterhegemonic use of the law. At the Inter-American level, it has allowed indigenous organizations and human rights NGOs to expand the interpretation of international law to create hybrid versions that combine the standards of consultation and consent. On a global scale, it has offered a unique space for collaboration between the trade union movement and the indigenous movement, with regard to the multiple episodes in which the ILO has endorsed indigenous complaints on the violations of Convention 169, as has happened in the cases of the Urrá dam or the regulation of the right to FPIC in Chile.

In this sense, the procedural rules of consultation create spaces for the advancement of demanding versions of participation, which incorporate elements of counterhegemonic multiculturalism, can revitalize the process of reinvention of collective identity, and strengthen the organizational capacity in negotiations with the companies and the state (Rodríguez Garavito and Arenas 2005).

IV. Conclusion

What have twenty-six years of the implementation of the right to FPIC in Colombia left us? As we demonstrated throughout the chapter, on balance, the result is more mixed than what was anticipated when the state ratified ILO Convention 169. To conclude, we will mention the three central points of discussion that we have proposed in this chapter.

In the first place, free, prior, and informed consultation and consent were included within the measures to broaden democracy promulgated within the 1991 Constitution. The Constitution

¹⁰ See, for example: Constitutional Court of Colombia Sentence C-030/2008 (January 23, 2008), which declared the unconstitutionality of the Forestry Law due to the omission of prior consultation with indigenous and Afro-Colombian communities; and Constitutional Court of Colombia Sentence C-175/2009 (March 18, 2009), which declared the unconstitutionality of the Rural Development Statute for the omission of prior consultation with indigenous and Afro-Colombian communities.

was established at the same moment the state ratified ILO Convention 169, and with this the legal bases for the guarantee of the right to FPIC were solidified.

As we showed in the first section, the inclusion of the right to FPIC was a political process in which the ethnic movement, especially indigenous leaders, were key to achieving the inclusion of their rights within the constitutional text. The second effect that marked the history of the ethnic peoples was the inclusion of the rights of Afro-Descendant communities. The new Constitution and the representation of leaders in the ANC opened the way for the legal framework of the rights of Afro-Descendant communities to be developed and equated with the rights of indigenous peoples.

Secondly, we found that Colombia has undertaken more consultation processes with indigenous and Afro-Descendant communities than any other country in the world. However, the routinization of the law has been challenged by the tension between the advance of rights in the jurisprudence of the Constitutional Court and the restrictive regulation of the Colombian executive. Within this context, social movements have promoted the guarantee of the right to be taken into account in decisions made by the state.

The response to the tension between jurisprudence and regulation is being partially addressed through the promotion of the creation of a new norm that regulates the right to FPIC. Not only has the content and legal form of this initiative been debated, but the mere proposal of the creation of the norm has been hotly contested. Those arguing in favor and against the regulation and its legal nature have been involved in the previous three national debates on the protection of the rights of ethnic peoples.

The enactment of national norms on the rights of ethnic peoples will remain a constant national debate. Although the idea of promulgating a norm on FPIC is being negotiated at this moment, the lack of regulation of the other rights will lead to new confrontations between ethnic organizations and peoples and the state. Social mobilization will continue to be responsible for pushing the project of translating the life goals and political projects of these peoples into norms that are included within the language of the state. If things continue along this current course, consultation processes in Colombia will continue to be carried out and the legal and political advances and setbacks of this strategy will continue to be felt in the territories.

Finally, upon analyzing the implementation of the right to FPIC, we find that its implementation has been the sum of achievements of social mobilization and various actors utilizing distinct tools, rather than an organized linear process. There are many perspectives and this plurality has been present from the moment of incorporation in the Constitution to the continued processes of implementation today.

We also see this plurality with the effects of the legal framework on the communities and the state. The consultation process has simultaneously strengthened social mobilization and been a form of control of the communities. Therefore, any evolution of the implementation of the right to FPIC must take into account the mixed impacts on ethnic peoples lives, the activities of the state bureaucracy, and the accommodation of private actors. It is thus necessary to carry out case studies that identify the characteristics of consultations that are determinative of who wins the implementation of a rule or decision, which and whose rights are protected, and who gains and loses power. Only with this evaluation of the norms in practice will it be possible to have a broad panorama of what the effects of the right to FPIC have been on indigenous and Afro-Descendant communities.

References

- Ariza, Libardo. (2009). *Derecho, saber e identidad indígena*. Ediciones Uniandes: Bogota.
- Comaroff, John and Jean Comaroff. 2009a. “Reflections on the Anthropology of Law, Governance and Sovereignty”. In Franz von Benda-Beckmann *et al.* (eds.). *Rules of Law and Laws of Ruling*. Farnham: Ashgate Publishing Limited.
- Comaroff, John and Jean Comaroff. 2009b. *Ethnicity, Inc.* Chicago: The University of Chicago Press.
- Colombia Constitutional Court. Ruling C- 169 de 2001. M.P. Carlos Gaviria Díaz.
- Dejusticia and ONIC (2012). *Tejiendo Derechos la Consulta previa y el consentimiento libre, previo e informado*. Bogota: Dejusticia.
- Gros, Christian (1993). “Derechos indígenas y nueva Constitución en Colombia”. In: *Análisis Político* (19). May/August. Bogotá: Instituto de Estudios Políticos y Relaciones Internacionales – IEPRI; Universidad Nacional de Colombia. pp. 1 – 20.
- Hale, Charles. 2005. *Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America*. Polar 28: 10-28.
- Lemaitre, Julieta (2009). *El derecho como conjuro*. Siglo del Hombre Editores: Bogota.
- McCann, Michael. 1994. *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: University of Chicago Press.
- Orduz Salinas, Natalia (2014). La consulta previa en Colombia. Documento de trabajo. Instituto de Investigación en Ciencias Sociales UDP. Available at: <http://www.icsoc.cl/wp-content/uploads/2014/07/La-Consulta-previa-en-Colombia-Natalia-Orduz.pdf>
- Procuraduría General de la Nación (2004). “Derecho de los pueblos indígenas”. In: Procuraduría General de la Nación. *La diversidad étnica en Colombia. Alcances y desarrollo*. Bogota: Procuraduría General de la Nación; Procuraduría Delegada para la Prevención en material de derechos humanos y asuntos étnicos; Canadian International Development Agency. pp. 265 – 383.
- Rodríguez Garavito, César and Baquero Díaz, Carlos Andrés. (Forthcoming). *De Belo Monte a Sarayaku: Capitalismo extractivista, conflictos ambientales y los derechos de los pueblos indígenas en los campos sociales minados*. Dejusticia: Bogota.
- Rodríguez Garavito, César and Rodríguez Franco, Diana. (2015). *Juicio a la exclusión. El impacto de los tribunales sobre los derechos sociales en el Sur Global*. Buenos Aires: Siglo Veintiuno Editores.
- Rodríguez Garavito, César and Orduz Salinas, Natalia (2012). *Adiós río. La disputa por la tierra, el agua y los derechos indígenas en torno a la represa de Urrá*. Bogota: Dejusticia.

Rodríguez Garavito, César. (2012). *Etnicidad.gov: Los recursos naturales, los pueblos indígenas y el derecho a la consulta previa en los campos sociales minados*. Dejusticia: Bogota.

Rodríguez, Gloria Amparo (2014). *De la consulta previa al consentimiento previo, libre e informado*. Bogota: Universidad del Rosario; Cooperación Alemana; GIZ.

Sánchez, Enrique; Roque Roldan and María Fernanda Sánchez (1993). *Derechos e identidad. Los pueblos indígenas y negros en la Constitución Política de Colombia de 1991*. Bogota: Coama; Union Europea; Disloque Editores.

Sieder, Rachel. (2014). Indigenous Peoples' Rights and Law in Latin America. In César Rodríguez Garavito (ed.) *Law and Society in Latin America: A New Map*. Routledge: New York: 143-157.