



Legal pluralism, indigenous rights and the Inter-American *corpus iuris*

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ABSTRACT: The permeability between state, regional and universal legal systems for the protection of human rights is increasingly evident, materialising a trend of legal pluralism in a multilevel universe of human rights protection. Therefore, it is important to interpret the norms contained in national constitutions and international treaties – that is, the different systems for the protection of human rights – in light of the pro persona principle. In this context, the indigenous issue stands out for its complexity and urgent safeguard, given the past and current scenarios of numerous violations. The indigenous cosmovision must permeate any application of the mechanisms for protecting the human rights of indigenous peoples. In order to better understand this pluralism from the perspective of safeguarding indigenous rights, a brief study was carried out on the constitutionalization of these rights in Latin America and their interpretation in the Inter-American system for the protection of human rights. The question is: what are the main indigenous rights contained in Latin American constitutions? How does the Inter-American system interpret these rights in light of the American Declaration and Convention? What are the protective standards for indigenous rights in the region? For that, the method of approach used was the deductive one and the methodological procedures were in the juridical and systematic dogmatic study. As a result of this research, it was found that there is an entire Inter-American corpus iuris that must be protected, based on the duty of harmonisation imposed by the American Convention, and carried out through the control of conventionality.

KEYWORDS: Inter-American corpus iuris – Inter-American System for the protection of Human Rights – legal pluralism – indigenous rights.

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1. Introduction

In the current moment, it is important to rethink the pre-existing concepts in light of legal pluralism, under the perspective of a multi-level system, marked by the permeability of the universal, regional, and state orders capable of fostering dialogues, tensions, interactions, incidences, and mutual and reciprocal impacts. The established legal pluralism promotes the idea that there is an interaction between different legal systems, without implying a strict separation between domestic and international legal regimes.¹ In fact, “*post-modernity has brought global and scientific-technological challenges that demand bolder solutions – given that the new risks facing society know no borders and jeopardize the very survival of humanity*”.²

All these interactions are immersed within a pluralistic view of law, representative of contemporary legal reality, composed of a tangle of legal systems that have different solutions for common problems.³

In an environment composed of constitutional plurality, the state is immersed in the internationalisation of law-making processes. Latin American countries are no exception, since it is unquestionable that international law is increasingly being received in their domestic law.⁴ It is necessary to recognise that current societies are complex, plural, diverse, and this diversity and complexity is projected in their legal systems.⁵

The legal system is not exclusively composed of norms. It incorporates binding material content, such as values, objectives and jurisprudential criteria that constitute the foundation and limits to the application and interpretation of the law.⁶

As Carbonell adds: “*Nor is there a single norm-producing center, not a single legislative, not a single executive, not a single judicial body. In this sense, the central organizations of the state, through constitutional provisions radically transform the state structure and functioning.*”⁷

Thus, the state legal system is integrated with regional and universal human rights protection systems that are projected simultaneously in the same territory, all together forming a potentially integrated system, with gears that enable interconnection, communication and joint operation.⁸ Consequently, legal pluralism calls into question the monopoly of state institutions as the only ones authorised to create law and judge it, as it recognises other sources that create law and other jurisdictional authorities in charge of its application.⁹

¹ Armin von Bogdandy, “Configurar la relación entre el derecho constitucional y el derecho internacional público”, 2008, 283–306, www.juridicas.unam.mx.

² Alessandra Silveira, “Tocqueville e a indesejável obstinação pelos ‘destroços à margem’. Contributos para uma teoria da democracia constitucional europeia”, Instituto Jurídico Interdisciplinar da Faculdade de Direito da Universidade do Porto, Porto, 2008.

³ María Díaz Crego, “Diálogo judicial”, *Eunomía. Revista en Cultura de la Legalidad*, no. 09 (2015/2016): 289–299, <https://e-revistas.uc3m.es/index.php/EUNOM/article/.../1524>.

⁴ Mariela Morales Antoniazzi, “El nuevo paradigma de la apertura de los órdenes constitucionales: una perspectiva sudamericana”, Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM, 2014, <https://www.unam.mx/>.

⁵ José Carlos Remotti Carbonell, “Sistema Jurídico, Democracia y Constitucionalismo multinivel”, in: *Interconstitucionalidade e Interdisciplinariedade: desafios, âmbitos e níveis de interação no mundo global*, Alexandre Walmott Borges and Saulo de Oliveira Pinto Coelho (Uberlândia: Edição Laboratório Americano de Estudos Constitucionais Comparado, 2015), 213.

⁶ *Id.*

⁷ Carbonell, *op. cit.*, 214.

⁸ Carbonell, *op. cit.*, 219.

⁹ Ecuadorian Constitutional Court, Sentence no. 113-14-SEP-CC, case no. 0731-10-EP.

Here we find the indigenous issue, “*the way in which the indigenous peoples of America conceive the community, the relationship with nature, knowledge, historical experience, memory, time and space*”.¹⁰ Such a cosmivision needs to be analysed in its complexity, in order to offer a rich multicultural dialogue that effectively protects the human rights of indigenous peoples.

As Boaventura clarifies: “*what truly distinguishes indigenous struggles from other social struggles on the American continent is that they claim a historical precedence and cultural autonomy that defy the entire legal and political edifice of the modern colonial state.*”¹¹

In this sense, this paper proposes to briefly address the evolution of indigenous rights in Latin American national constitutions and in the jurisprudence of the Inter-American system, and then reflect on the imperative of protecting the Inter-American *corpus iuris* in this matter, applying the so-called control of conventionality.

2. Indigenous rights in Latin American constitutions

The recognition of the rights of indigenous peoples in the different systems of protection and in the various national constitutions is the result of long and intense struggles. It took several decades, different movements and historical and political conjunctures for these rights to be slowly and gradually recognised by the states, both internationally and constitutionally.¹²

Such recognition comes from a region that has 826 indigenous peoples, for an estimated total of 58 million people, representing 9.8% of the total population of the Latin American region.¹³ The Economic Commission for Latin America estimates that there are still 200 other indigenous peoples in voluntary isolation. Brazil is the country with the greatest diversity of indigenous peoples, followed by Colombia, Peru, Mexico and Bolivia.¹⁴ However, nowadays it is the country with the lowest proportion of indigenous peoples in Latin America, despite the fact that before the Portuguese invasion and conquest, at the beginning of the 16th century, it had a native population of around 5 million inhabitants.¹⁵

¹⁰ Boaventura de Sousa Santos and João Arriscado Nunes, “Introdução: para ampliar o cânone do reconhecimento, da diferença e da igualdade”, in *Reconhecer para libertar: os caminhos do cosmopolitismo multicultural*, org. Boaventura de Sousa Santos (Rio de Janeiro: Civilização Brasileira, 2003), 60.

¹¹ Boaventura de Sousa Santos, “Cuando los excluidos tienen Deracho: justicia indígena, plurinacionalidad e interculturalidad”, in *Justicia indígena, plurinacionalidad e interculturalidad en Bolivia*, 1ª ed., Boaventura de Sousa Santos and José Luis Exeni Rodríguez (Quito: Fundación Rosa Luxemburg/AbyaYala, 2012), 12.

¹² Karla Quintana Osuma and Juan Jesús Górgora Maas, “Los Derechos de los pueblos indígenas y tribales en los sistemas de derechos humanos”, in *Colección Estándares del Sistema Interamericano de Derechos Humanos: miradas complementarias desde la academia* (México: Universidad Autónoma de México, 2017), 01.

¹³ ECLAC, Economic Commission for Latin America and the Caribbean, “El impacto del Covid-19 en los pueblos indígenas de América Latina”, Abya Yala, 2020, 13, <https://www.ECLAC.org/es/publicaciones/46543-impacto-covid-19-pueblos-indigenas-america-latina-abya-yala-la-invisibilizacion>.

¹⁴ ECLAC, Economic Commission for Latin America and the Caribbean, *Pueblos indígenas y afrodescendientes de América Latina y el Caribe: información sociodemográfica para políticas y programas* (Santiago: ONU, 2006).

¹⁵ Cletus Gregor Barié, *Pueblos Indígenas y derechos constitucionales: un panorama*, 2a edición actualizada y aumentada [Bolivia: Instituto Indigenista Interamericano e Instituto Nacional Indigenista de México, Instituto Indigenista Interamericano (México), Comisión Nacional para el Desarrollo de los Pueblos Indígenas (México) y Editorial Abya-Yala (Ecuador), 2003], 87.

In this scenario, it was only at the beginning of the 20th century that the first indigenous rights were ensured through the new constitutions. Throughout the 20th century, different agrarian reform programmes were implemented in the region, which sought to achieve a fairer distribution of land ownership. Demands for land and territory, as well as self-government, persist to this day.¹⁶ These new constitutions boosted legislation, creation of ministries, state bodies, indigenous defenders and specialised commissions in indigenous affairs, enabling a more adequate approach to the rights to health, education, lands and territories, access to and management of natural resources, among others.¹⁷

In this slow recognition process, it is possible to visualise three groups of countries. The first formed by Belize, Chile, French Guiana, Suriname and Uruguay that did not expressly enshrine indigenous rights in their constitutions. Costa Rica, El Salvador, Guyana and Honduras form the second group, with some specific indigenous protection. In a third group there are countries with extensive indigenous legislation in their constitutions, such as Argentina, Bolivia, Brazil, Colombia, Ecuador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru and Venezuela.¹⁸

The latter group includes constitutions that take responsibility for guaranteeing indigenous rights, establishing protective norms for cultural survival and the protection of indigenous lands. This constitutional multiculturalism is a recent phenomenon that began in 1986 with the enactment of the Guatemalan and Nicaraguan Constitutions,¹⁹ which have catalysed important constitutional reforms.

In view of this, an analysis of the constitutions belonging to this third group is essential for a study of the indigenous issue. Beginning with the Argentine Constitution, reformed in 1994, which in its Article 75, section 17, brings the competence of the national congress to recognise the ethnic and cultural pre-existence of the Argentine indigenous peoples, guaranteeing respect for their identity, the right to a bilingual and intercultural education, with recognition of the legal personality of these communities, the possession and communal ownership of the lands traditionally occupied, and the guarantee of consultation about the management of their natural resources.

The Bolivian Constitution of 2009 presents an inclusive language that is attentive to the global reality by enshrining that the essential purposes and functions of the State are the equal dignity of people, nations, peoples and communities, promoting mutual respect and intracultural, intercultural dialogue and multilingual (Article 9). In its first Article, it expresses its foundation in plurality, in political, economic, legal, cultural and linguistic pluralism, immersed in a process that integrates the country.

In general, the Bolivian Constitution, in several Articles, namely Articles 2, 30.2 (5) and (14), 119, 179, 190, 191, 192, 202.8 and 11, 265, 289, recognise indigenous institutions and authorities, equating indigenous jurisdictions and ordinary. For the resolution of possible conflicts between jurisdictions, it attributes such competence to the Plurinational Constitutional Court, indicating that to comply with decisions arising from indigenous jurisdiction, its authorities may request support from state agencies.

¹⁶ ECLAC, Economic Commission for Latin America and the Caribbean, *Los pueblos indígenas en América (Abya Yala) Desafíos para la igualdad en la diversidad* (Santiago: ONU, 2017), 28-29.

¹⁷ ECLAC, *op. cit.*, 2017, 43.

¹⁸ Barié, *op. cit.*, 2003, 87.

¹⁹ *Id.*

The Brazilian Constitution of 1988 ensures that the Federative Republic of Brazil is governed in its international relations, within other principles, by the prevalence of human rights and the self-determination of peoples (Article 4, item II and III). Despite having Portuguese as an official language, it assures indigenous communities the use of their mother tongues and their own learning processes (Article 210, § 2). Paragraph 1 of Article 215 imposes the State's duty to protect the manifestations of popular, indigenous and Afro-Brazilian cultures, and those of other groups participating in the national civilising process.

The recognition of the rights of indigenous peoples is broadly based, in an entire chapter dedicated to indigenous peoples (Article 231 and paragraphs). It recognises their social organisation, customs, languages, beliefs and traditions, as well as the right to the lands they traditionally occupy, including the exclusive usufruct of the riches of the soil, rivers and lakes existing therein. The Brazilian Constitution still asserts that indigenous lands are inalienable and unavailable, and the rights over them, indefinite.

The 1991 Colombian Constitution is no different in recognising and protecting the ethnic and cultural diversity of the Colombian nation, and obliging the state and its people to protect the country's cultural and natural wealth (Articles 7 and 8). It also emphasises that its official language is Castilian, but that all languages and dialects of ethnic groups are also official, guaranteeing bilingual education in communities with their own linguistic traditions (Article 10). It is interesting to highlight Article 96. 2, which guarantees Colombian nationality for members of indigenous peoples who share border territories, and an Article which enshrines the political representation of indigenous communities (Articles 171 and 176).

In addition, the Colombian Constitution in its Article 246 provides that the authorities of the indigenous peoples may exercise jurisdictional functions within their territorial ambit, in accordance with their own norms and procedures, as long as they are not contrary to their constitution and laws; and that the law will establish the forms of coordination of the indigenous jurisdiction as the national judicial system.

The Ecuadorian Constitution of 2008, already in its preamble, recognises the diversity of its regions, peoples and cultures, being a multicultural and multiethnic social state, respecting and encouraging the development of all ancestral languages of indigenous peoples (Article 1). The maximum Ecuadorian text rejects all forms of colonialism, neo-colonialism, discrimination or segregation, recognising the right of peoples to self-determination (Article 4, item 6). It also guarantees the naturalisation of ancestral peoples in the border region; education according to the country's diversity, guaranteed through a bilingual intercultural educational system (Articles 68 and 69).

Ecuador recognises in its Article 84, a wide range of collective indigenous rights relating to their identity and spiritual, cultural, linguistic, social, political and economic traditions, protection of indigenous lands, with participation in the use, administration and conservation of natural resources existing there. Respect for traditional medicine and representation in official bodies is also covered in the Article.

Articles 57 and 171 highlight the recognition and guarantee to indigenous peoples of the right to preserve and develop their own forms of coexistence and social organisation, and to exercise their authority. In this context, the Ecuadorian text states that indigenous communities will exercise jurisdictional functions, applying their own rules and procedures to resolve their internal conflicts, provided they

are not contrary to the constitution and human rights recognised in international instruments, and the law will establish mechanisms cooperation and coordination between indigenous jurisdictions.

Guatemala's 1986 Constitution imposes its protection of cultural identity by recognising individuals and communities with respect for their values, language and customs (Article 56). It dedicates space to the protection of ethnic groups, claiming to be constituted by various indigenous groups of Maya descent, thus ensuring their recognition, respect, and duty to promote their ways of life, traditions, forms of social organisation, languages and dialects (Article 66), including in the latter, bilingual education (Article 76) and the dissemination of the constitution itself in the native languages Quiché, Mam, Cakchiquel and Kekchí (Article 18 of the Transitory and Final Provisions). It also protects lands belonging to indigenous communities, through special programs and adequate legislation, for their full development (Articles 67 and 68).

Right from the start, the Mexican Constitution of 1917 declares itself to be of a pluricultural composition, originally supported by its indigenous peoples, with a very broad list of recognition of essential rights for its determination and autonomy. These are: a) the definition of their internal forms of coexistence and social, economic, political and cultural organisation, b) application of their own normative systems, political participation, preservation of their languages and all elements of their identity and culture; c) safeguarding their lands; d) access to justice; e) guarantee of bilingual education; f) consultation with indigenous peoples; g) access to health using traditional medicine; h) equality for indigenous women and; i) access to the means of communication (Articles 2, 27, 89, 115).

The 1987 Magna Carta of Nicaragua's Preamble evokes the struggle of its indigenous ancestors, constituting a state of multiethnic nature (Article 8) and recognising the existence of indigenous peoples, respect for their identity, culture, forms of social organisation, communal property of their lands, as well as their use and enjoyment (Article 5). It also assures indigenous peoples of their right to intercultural education in their mother tongue (Article 121).

The same recognition is seen in the 1972 Constitution of Panama by guaranteeing that Aboriginal languages will be the object of special study, conservation and dissemination, and it is the State's duty to promote them in bilingual literacy programmes in indigenous communities (Articles 84 and 104). Likewise, it also recognises and respects the ethnic identity of these communities, with the commitment to ensure the development of material, social and spiritual values specific to each culture (Articles 86 and 120), and also guaranteeing political participation (Article 141).

In the chapter dedicated to indigenous peoples, the 1992 Constitution of Paraguay recognises their existence (Article 62), guaranteeing their rights to ethnic identity, respect for their habitat, self-determination (Article 143), respect for their systems of political organisation, social, economic, cultural and religious, respect for customary indigenous law (Article 63), protection of communal property, prohibition of removal (Article 64), guarantee of the right to participate in the economic, social, political and cultural life of the country (Article 65), and the right to education in the mother tongue, including indigenous languages as its cultural heritage (Articles 77 and 140).

Respect for ethnic and cultural identity is also protected by the 1993 Peruvian Constitution, which guarantees the right of every Peruvian to use their own language with any authority (Article 2, subsection 19), promoting bilingual and intercultural education (Article 17), adopting as official languages Castilian, Quechua, Aymara and other aboriginal languages (Article 48). In this sense, it also protects indigenous lands, recognising the identity, legal personality and autonomy of native communities (Article 89), being able to practice jurisdictional functions within their territorial scope in accordance with customary law and in respect for human rights (Article 149).

Finally, the 1999 Constitution of Venezuela establishes a multi-ethnic and pluricultural society (Preamble), with respect for indigenous languages as part of the cultural heritage of the country and of humanity (Article 9). It lists in Chapter VIII various indigenous rights, with the recognition of indigenous peoples and communities, their organisation, culture, customs, languages, habitat, original rights and the use over lands, the right to consultation in possible exploitation of their lands, bilingual and intercultural education, respect for sacred places and their traditional medicine, protection of the collective intellectual property of indigenous peoples, political participation, among others (Articles 119 and following). It also provides in Article 260 that the authorities of indigenous peoples may exercise their jurisdiction, according to their own rules and procedures, which only affect their members, and provided that they are not contrary to the Constitution, laws and public order.

Despite the fact that this entire process of constitutionalisation of indigenous rights exists expressly in several Latin American constitutions, the effectiveness of this plural vision does not depend only on positivism in the legal systems.²⁰ This process of inclusion of the indigenous in national constitutions is experiencing constant contradictions and setbacks.²¹ The difficulties faced by indigenous individuals and peoples in exercising these rights are enormous.

The reasons for all this are historical, political, legal, sociological and economic, just remember that many of the indigenous peoples are being expelled from their territories, rich in natural resources to serve business interests, or statistically verifying that in the vast majority of Latin American countries, indigenous peoples are immersed in a context of structural discrimination that prevents or at least hinders the effective recognition of these rights.²²

Furthermore, the recent sanitary and socioeconomic crisis caused by the COVID -19 pandemic has intensely affected the countries of Latin America and exposed their deep inequalities. The historical exclusion, political and economic marginalisation of more than 800 indigenous peoples existing in the region, was marked due to insufficient state responses to the health crisis, in violation of constitutionally and conventionally guaranteed indigenous rights.

3. The Inter-American system the defense of indigenous rights

After the Second World War, the first international human rights instruments concerning indigenous rights had a Eurocentric vision. Gradually the recognition in

²⁰ Barié, *op. cit.*, 2003, 87.

²¹ ECLAC, *op. cit.*, 2017, 47.

²² Osuma and Maas, *op. cit.*, 2017, 01.

different international instruments together with the development of jurisprudence gave greater content and scope to these rights.²³

In this sense, we highlight Convention 169 of the International Labor Organization (“ILO”), which is a fundamental International Treaty for the recognition of the collective rights of indigenous peoples, and likewise the jurisprudence of the Inter-American System of Human Rights protection as an enormous regional and international contribution in this area.²⁴

The Organization of American States (“OAS”) has played a leading role in indigenous rights, first in the 1980s with the first decisions of the Inter-American Commission on Human Rights and later, in the 1990s, with the jurisprudential development of the Inter-American Court of Human Rights.²⁵

In 1990, the Inter-American Commission on Human Rights created the Rapporteurship on the Rights of Indigenous Peoples; in 1997 it presented a draft Declaration on the Rights of Indigenous Peoples to the OAS Permanent Council, and in 2016, after extensive debates and obstacles, the Member States approved the American Declaration on the Rights of Indigenous Peoples at the OAS General Assembly, enshrining the first instrument of the history of the OAS that promotes and protects the rights of the indigenous peoples of Americas.²⁶

Thus, both the reports of the Inter-American Commission and the decisions of the Inter-American Court, added to the American Convention on Human Rights, the ILO Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples, and the American Declaration on the Rights of Indigenous Peoples. These clarify the existence of a *corpus iuris* on indigenous issues. Indeed, the *Saramaka v Suriname* case in the Inter-American Court was the first judgment at the international level to expressly refer to the right to consultation, triggering important impacts on other regional systems and international organisations.²⁷

In fact, the Inter-American System has repeatedly recognised numerous indigenous rights, which we will discuss:

a) the right to communal property of indigenous peoples over their traditional territories, such a concept of property emanates from a progressive interpretation taken from Article 21 of the American Convention on Human Rights, recognised as a collective right, the exercise of which will correspond to the community as a whole, and at the same time, each individual belonging to the community will be the final beneficiaries.

To the Inter-American Court: *“among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a*

²³ *Id.*

²⁴ Osuma and Maas, *op. cit.*, 2017, 01-02.

²⁵ ECLAC, *op. cit.*, 2017, 30.

²⁶ *Id.*

²⁷ Osuma and Maas, *op. cit.*, 2017, 01-02.

*material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations”.*²⁸

b) the obligation of sanitation, understood by the Court as: *“the State’s obligation to ensure the effective use and enjoyment of the right to indigenous and tribal property. To this end, it may adopt different measures including, clearing the title. For the purposes of this case, the Court understands that clearing the title or freeing the land of encumbrances consists of a process that results in the State’s obligation to remove any type of interference on the territory in question”.*²⁹

c) the right to prior consultation, by which indigenous peoples must express their opinion on issues that affect them. In this sense the Court interprets that: *“when large-scale development or investment projects could affect the integrity of the Saramaka people’s lands and natural resources, the State has a duty not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent in accordance with their customs and traditions”.*³⁰

d) the right to a dignified life, based on Article 4 of the American Convention, in view of the situation of extreme and special vulnerability in which they find themselves in the Latin American region. According to the Court: *“lack of access to their territories may prevent indigenous communities from using and enjoying the natural resources necessary to ensure their survival, through their traditional activities; or from having access to their traditional health systems and other socio-cultural functions, thereby exposing them to poor or inhuman living conditions and to increased vulnerability to diseases and epidemics, and subjecting them to situations of extreme vulnerability that can lead to the violation of various human rights, as well as causing them suffering and jeopardising the preservation of their way of life, customs and language”.*³¹

Regarding the protection of life, another sentence that stands out is on the case of the *Xákmok Kásek Indigenous Community v Paraguay*, in which for the first time at the international level, the issue of maternal mortality due to extreme poverty and a lack of adequate medical care and whether the State has a duty to offer adequate public health policies to indigenous women are addressed.³²

e) the right to non-discrimination, whereby States may not subject indigenous peoples to any type of discrimination, and must guarantee access to all fundamental rights. In the meantime, the Court in the *Xákmok kásek Indigenous Community Case v. Paraguay* noted that: *“the situation of extreme and special vulnerability of the members of the Community is due, inter alia, to the lack of adequate and effective remedies that protect the rights of the indigenous peoples in practice and not just formally; the limited presence of the State institutions that are obliged to provide supplies and services to the members of the Community, particularly food, water, health care and education, and the prevalence of a vision of property that grants greater protection to the private owners over the indigenous peoples’ territorial claims, thus failing to recognize their cultural identity and threatening their physical subsistence. In addition, it*

²⁸ IACHR, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment of August 31, 2001, Series C no. 79, paragraph 149.

²⁹ IACHR, Case of the Garífuna Punta Piedra Community and its members v. Honduras, Preliminary Objections, Merits, Reparations and Costs, Judgment of October 8, 2015, Series C no. 304, paragraph 181.

³⁰ IACHR, Case of the Saramaka People v. Suriname, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs, Judgment of August 12, 2008, Series C no. 185, paragraph 17.

³¹ IACHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment of June 27, 2012, Series C no. 245, paragraph 147.

³² IACHR, Case of the Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment of August 24, 2010, Series C no. 214, paragraph 233.

has been proved that the declaration of a private nature reserve on part of the land reclaimed by the Community did not take into account its territorial claim and it was not consulted about this declaration”.³³

f) the right to freedom of conscience and religion. Indigenous peoples possess the right to culture and their cultural identity (Articles 12 and 13 of the American Convention), and consequently the preservation of their beliefs and sacred places. The Court recalls in the *Case of Massacres of Río Negro v. Guatemala* that: “the special relationship of the indigenous peoples with their ancestral lands is not merely because they constitute their main means of subsistence, but also because they are an integral part of their cosmovision, religious beliefs and, consequently, their cultural identity or integrity, which is a fundamental and collect right of the indigenous communities that must be respected in a multicultural, pluralist, and democratic society”.³⁴

g) the right to political participation (Article 23 of the American Convention), establishes indigenous peoples’ guaranteed participation in decision-making processes regarding development and other issues that affect them or impact their cultural survival. In the most representative case, *Yatama v. Nicaragua*, the Court recognised the right of indigenous peoples to participate directly and proportionately in the direction of the country’s public affairs.

According to the Court: “the State should adopt all necessary measures to ensure that the members of the indigenous and ethnic communities of the Atlantic Coast of Nicaragua can participate, in equal conditions, in decision-making on matters and policies that affect or could affect their rights and the development of these communities, so that they can incorporate State institutions and bodies and participate directly and proportionately to their population in the conduct of public affairs, and also do this from within their own institutions and according to their values, practices, customs and forms of organization, provided these are compatible with the human rights embodied in the Convention”.³⁵

h) the prohibition of forced displacement ensures indigenous peoples continue to have the right to remain in their ancestral territories. The relationship between indigenous people and their territory is essential to maintain their cultural structures and their ethnic and material survival: “the forced displacement of indigenous peoples outside their community or way from its members, can place them in a situation of special vulnerability, which “owing to its destructive effects on the ethnic and cultural fabric [...], generates a clear risk of the cultural or physical extinction of the indigenous peoples”. Hence, it is essential that the States adopt specific measures of protection considering the particular characteristics of the indigenous peoples, as well as their customary law, values, practices and customs to prevent and reverse the effects of that situation”.³⁶

i) the right to legal personality of indigenous members and peoples, based on Article 3 of the American Convention, is essentially recognised by the Court when considering indigenous communities collectively to exercise their collective rights and to be classified as victims of human rights violations.

In the case of the *Saramaka People v. Suriname*, the Court clarifies this understanding: “the members of the Saramaka people form a distinct tribal community in a situation of vulnerability,

³³ IACHR, *Case of the Xákmok Kásek Indigenous Community*, *op. cit.*, paragraph 273.

³⁴ IACHR, *Case of the Río Negro Massacres v. Guatemala*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of September 4, 2012, Series C no. 250, paragraph 160.

³⁵ IACHR, *Case of Yatama v. Nicaragua*, Preliminary Objections, Merits, Reparations and Costs, Judgment of June 23, 2005, Series C no. 127, paragraph 225.

³⁶ IACHR, *Case of the Río Negro Massacres*, *op. cit.*, paragraph 177.

*both as regards the State as well as private third parties, insofar as they lack the juridical capacity to collectively enjoy the right to property and to challenge before domestic courts alleged violations of such right. The Court considers that the State must recognize the juridical capacity of the members of the Saramaka people to fully exercise these rights in a collective manner”.*³⁷

These rights, drawn from the jurisprudence of the Inter-American Court, are added to the resolutions of the Inter-American Commission and the rights enshrined in Latin American constitutions, as well as International Treaties protecting the rights of indigenous peoples to consolidate an Inter-American *corpus iuris* in indigenous matters.

Also considering the context of the COVID-19 pandemic, the Inter-American system has issued the following resolutions: (i) No. 01/2020 Pandemic and Human Rights in the Americas; (ii) No. 04/2020 Rights of people with COVID-19; (iii) No. 01 2021 Vaccines against COVID-19 in the Framework of Inter-American Human Rights Obligations;³⁸ and (iv) the Declaration No. 1 2020 of the Inter-American Court, also related to COVID-19 and Human Rights.³⁹

In these documents, it is possible to extract important protective standards for application to indigenous peoples, deriving from this *corpus iuris*, among them are: (i) the right to information about the pandemic in their traditional language; (ii) unrestricted respect for the non-contact with indigenous peoples in voluntary isolation; (iii) the right to receive health care with cultural relevance, which takes into account preventive care, curative practices and traditional medicines; (iv) the right to receive priority vaccines in their territories, given the situation of extreme vulnerability; and (v) guaranteeing the participation of its representative entities, leaders and traditional authorities throughout this process of combating the pandemic in order to ensure the effectiveness and cultural adequacy of the measures, with respect for their territories and their free determination.

In this regard, the Commission stated that: *“historically, indigenous and tribal peoples have been subject to conditions of marginalization and discrimination, which is why it reiterates that within international law in general and inter-American law specifically, special protection is necessary for indigenous peoples to exercise their rights fully and equitably, with the rest of the population. In addition, it may be necessary to establish special protective measures for indigenous peoples in order to guarantee their physical and cultural survival – a right protected in various international instruments and conventions”*.⁴⁰

These are, to date, the main contributions of the Inter-American System to the indigenous question. This entire legal framework, added to this rich jurisprudence, has an interrelationship with state, regional and international instruments for the protection of the rights of indigenous peoples and represent minimum protection standards that cannot be violated or suffer any kind of setback.

4. Conventional control in the Inter-American System

Each day, a dialogue between jurisdictions in the inter-American context takes place. This dialogue presents specificities that make the Americas *“the most open continent*

³⁷ IACHR, Case of the Saramaka People, *op. cit.*, paragraph 174.

³⁸ CIDH, SACROI-COVID19, Rapid and Integrated Response Coordination Unit, https://www.oas.org/es/CIDH/jsForm/?File=/es/cidh/sacroi_covid19/default.asp_

³⁹ IACHR, Information Center COVID-19 and Human Rights, <https://www.corteidh.or.cr/tablas/centro-covid/index.html>.

⁴⁰ CIDH Resolution no. 35/20 PM 563-20 - Members of the Yanomami and Ye'kwana Indigenous Peoples, Brazil. July 17, 2020. paragraph 40.

to international human rights law”,⁴¹ where the interrelationship between human rights and the Constitution is unique in the world. Fundamental Rights “appear clearly shaped in their attributes and guarantees by both the constitutional source and the sources of international law”.⁴² It constitutes a true fusion into a single system of rights with an internal and international source.⁴³

The Latin American national constitutions included clauses opening up human rights in their redemocratisation processes. The origin of these clauses comes from the text of Amendment IX⁴⁴ of the U.S. Constitution of 1791, which states: “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”. In this way, it exposes the non-exhaustibility of the rights expressed in the Constitution, guaranteeing the connection between constitutional law and International Human Rights law.

In addition to this openness to International Human Rights law by the Latin American legal systems, Article 2 of the American Convention adds to the obligation to adapt and harmonise the legal systems of the States Parties by adopting legislative or other measures, including, if necessary, constitutional reforms, or through the duty of the courts or any state authorities within their jurisdiction, to respect and guarantee the rights conventionally guaranteed, as well as to comply with the judgments and respect the case law issued by the Inter-American Court, in its contentious and advisory role.⁴⁵

The combination of these elements makes rights assume two levels of protection: constitutional and conventional, national and international, leading national and inter-American judges to move in the same direction. A dialogic perspective of coordinated and constructive cooperation is built. There is a double movement of constitutionalisation of the rights guaranteed by the inter-American system, and at the same time the internationalisation of constitutional law.⁴⁶

Such intertwining was agreed upon by the ratification of the American Convention, and with that, the States Parties sovereignly accepted the construction of this dialogue. Developed in an environment orchestrated by the American Convention, the dialogue is manifested in the constant search for harmonisation of the internal regulations with the Inter-American system.

It is noteworthy that the Inter-American system is not restricted to the Convention, but expands to the Court’s jurisprudence and to other international documents for the protection of human rights, conforming the block of conventionality, even reaching an entire Inter-American *corpus iuris* to be projected into national constitutions.

In turn, domestic jurisdictions are constituted by the incorporation of conventional law to domestic law. National judges must apply and interpret the American Convention on Human Rights, the Convention Block and the Inter-American *corpus iuris*. In order to achieve this harmonisation, it is essential to dialogue with the Court, as well as respect the authentic interpretation attributed by it, in

⁴¹ Laurence Burgorgue-Larsen, *El diálogo judicial: máximo desafío de los tiempos jurídicos modernos* (Porrúa: México, 2013), 218.

⁴² Humberto Nogueira Alcalá, “El uso de las comunicaciones transjudiciales por parte de las jurisdicciones constitucionales en el derecho comparado y chileno”, *Estudios Constitucionales*, issue 9, no. 2 (2011): 21, <http://www.scielo.cl/pdf/estconst/v9n2/art02.pdf>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Alcalá, *op. cit.*, 2011, 21.

addition to being fundamental to monitor the dynamics of such interpretations over time.⁴⁷

In its interpretations, the Inter-American Court establishes the minimum standard, promoting a permanent dialogue between internal and inter-American jurisdictions in the search for increasingly higher standards of protection. Therefore, dialogue in the region is absolutely essential for the proper functioning of both national legal systems and the inter-American system for the protection of human rights.⁴⁸

In this way, the control of conventionality in the Inter-American System, exercised by the Inter-American Court, with international jurisdiction binding on the States Parties, as well as domestic jurisdictions, practiced by national judges empowered as decentralised judges of the inter-American system in the defense of human rights in the domestic sphere. Both will not apply norms and/or interpretations of domestic law that conflict with the conventionality block, always seeking to implement the principles of progressivity and *pro persona*.⁴⁹

The conventionality control “...requires that inter-American and national judges, in addition to the latter’s traditional control of constitutionality, examine the compatibility of national norms and practices with the American Convention on Human Rights...”,⁵⁰ and related Inter-American jurisprudence.

The analysis of conventionality has two meanings. On the one hand, it can be exercised by the Inter-American Court, as the highest body of the conventional Human Rights system, in a concentrated control, extending in the same way to national judges and any state public authority, in a control diffuse of conventionality. On the other hand, it seeks to invalidate norms, acts and interpretations contrary to the conventional system and make them operate in accordance with it,⁵¹ “naturally, with respect for the national or international law that is most favorable to the human being”.⁵²

5. The *pro personae* principle

Emanating from the object and purpose of International Treaties that ensure and guarantee human rights is the structuring principle of *pro persona*. This principle determines that the interpretation must optimise a guarantee, effectiveness and enjoyment of human rights as a whole, always giving preference to the interpretation that most strongly implements its legal effectiveness, as well as the one that protects such rights with greater scope.⁵³

Therefore, when there are different possible interpretations of a legal norm, the most protective of the holder of a human right must be chosen, or even, when in a specific case two or more norms can be applied, the interpreter must also choose the most protective.⁵⁴

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Ariel E. Dulitzky, “El impacto del control de convencionalidad. un cambio de paradigma en el sistema interamericano de derechos humanos”, 533, <https://law.utexas.edu/faculty/adulitzky/67-Impacto-del-Control-de-Convencionalidad.pdf>.

⁵⁰ Dulitzky, *op. cit.*

⁵¹ *Id.*

⁵² Néstor Pedro Sagués, “El “Control de Convencionalidad” en el sistema interamericano, y sus anticipos en el ámbito de los derechos económicos-sociales: Concordancias y diferencias con el sistema europeo” (México: UNAM, 2010), 414, <https://www.juridicas.unam.mx>.

⁵³ Dulitzky, *op. cit.*, 533.

⁵⁴ *Id.*

Moreover, the *pro persona* principle is a hermeneutic criterion that guides the application of all human rights. In the recognition of protected rights, the broadest norm or the most extensive interpretation should be used. When it comes to rules that imply permanent restrictions on the exercise of rights or their extraordinary suspension, the most restrictive interpretation must be chosen, so that there is no expansion of the established restrictions.⁵⁵ The principle *pro persona* “...coincides with the fundamental characteristic of human rights, which is to always be in favor of the human being”.⁵⁶

It's important to point out that the constitutionalisation of International Human Rights law through hermeneutical principles and criteria has materialised in national Constitutions the *pro persona* and *pro libertatis* principles, recognised for example in Article 29 of the American Convention on Human Rights, or at least, being used by national jurisprudence.⁵⁷

Hence, it is possible to affirm that all States Parties to the Inter-American System are bound by the *pro persona* principle by virtue of the specific rule in Article 29(b)⁵⁸ of the American Convention, reinforced by Article 5 of the International Covenant on Civil and Political Rights and by the United Nations International Covenant on Economic, Social and Cultural Rights.⁵⁹

In the Inter-American System, the *pro persona* principle gradually takes on a guise aimed at strengthening the competences of the Inter-American Court and the institutions of the regional system to better protect human rights, becoming a methodological rule to guide the choice of norms and interpretations that protect groups in situation of vulnerability against state arbitrariness.⁶⁰

In short, the *pro persona* principle as the essence of all exegesis of International Human Rights law,⁶¹ implies recognising the superiority of human rights norms, and in its interpretation of the specific case, in the requirement to adopt the interpretation that gives a more favorable position to the human being.⁶²

So much so that the International Human Rights Treaties and the national Constitutions form a unit capable of achieving an integrated, harmonious cosmopolitan interpretation of the norms, using the *pro persona* principle for this, in the search for the highest level of protection.⁶³

Nevertheless, the transcendence of this principle goes beyond being an interpretation criterion, constituting a true guarantee of constitutional interpretation

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Eduardo Ferrer Mac-Gregor, “El Control difuso de convencionalidad en el Estado Constitucional”, 172, <https://archivos.juridicas.unam.mx/www/bjv/libros/6/2873/9.pdf>.

⁵⁸ No provision of this Convention shall be interpreted as: b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.

⁵⁹ Article 5: 1. No provision of the present Covenant may be interpreted as recognizing in any State, group or individual any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized in the present Covenant or at their limitation to a greater extent than is provided for therein. 2. No restriction upon or suspension of any of the fundamental human rights.

⁶⁰ Siddharta Legale and Cláudio Cerqueira Bastos Netto, “O princípio *pro persona* na Corte Interamericana de Direitos Humanos: um enigmático desconhecido”, in *Tribunais Internacionais: extensão e limite de sua jurisdição*, org. Wagner Menezes (Belo Horizonte: Arraes, 2018), 415.

⁶¹ Dulitzky, *op. cit.*, 533.

⁶² *Id.*

⁶³ Dulitzky, *op. cit.*, 533.

of the fundamental rights enshrined in the Constitution, by enabling the greatest possible protection, while allowing human rights to permeate and shine through the entire legal system.⁶⁴

Linked to the *pro persona* principle is the principle of the primacy of the most favorable rule, which states that in the event of conflict between the international rule and the national rule, the more beneficial one should be chosen.

In this logic, Minister Celso de Mello explains that “*the magistrates and courts, in the exercise of their interpretive activity, especially within the scope of international human rights treaties, must observe a basic hermeneutical principle (...) consisting in giving primacy to the norm that proves most favorable to the human person, in order to provide you with the most extensive legal protection*”.⁶⁵

Most Human Rights Treaties include a clause according to which no conventional provision can undermine the broader protection offered by other norms of domestic law and international law.⁶⁶ The Inter-American Court has already stated that, “*if the American Convention and another international treaty are applicable to the same situation, the norm most favorable to human beings must prevail*”.⁶⁷

6. Conclusions

In light of this, it is possible to establish a connection between the national constitutions that consecrate the rights of indigenous peoples and the entire Inter-American legal framework on indigenous issues. It is so that the American Convention, in its block of conventionality, is intertwined with the norms of ILO Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples, as well as the rights recognised by the states in their national constitutions, internal laws, and other international instruments and decisions, forming an entire *corpus iuris* that defines the obligations of the States Parties to the American Convention. Since 2016, this *corpus iuris* has been strengthened by the approval of the American Declaration on the Rights of Indigenous Peoples.⁶⁸

The *corpus iuris* in indigenous matters is clarified by successive decisions of the Inter-American Court, involving Guatemala (Rio Negro Massacres; Chitay Nech; Tiu Tojín; Plan de Sánchez Massacre; Bámaca Velázquez); Suriname (Aloeboetoe; Moiwana; Saramaka), Paraguay (Yakye Axa; Sawhoyamaxa; Xákmok Kasek), Mexico (Rosendo Cantú; Fernández Ortega), Nicaragua (Mayagna (Sumo) Awas Tingni; Yatama), Honduras (López Álvarez), Colombia (Escué Zapata), Peru (Cayara), Ecuador (Kichwa de Sarayaku), and Brazil (Xucuru and its members).

What is sought with the *corpus iuris* is to have it as part of a cultural process, which is inserted in constitutions, and is compatible with the structural elements of the constitutional state, such as human dignity, democracy, division of powers, pluralist society, without, however, also disregarding the particularities of each of

⁶⁴ *Id.*

⁶⁵ FCJ - Federal Court of Justice, Brazil Federal Court, HC 91.361, Rel. Min. Celso de Mello, Judgment of 23 September 2008, 2nd Chamber.

⁶⁶ *Id.*

⁶⁷ IACHR, Compulsory membership in an association prescribed by law for the practice of journalism (arts. 13 and 29 American Convention on human rights), Advisory Opinion oc-5/85 of November 13, 1985. paragraph. 52.

⁶⁸ IACHR, Compulsory membership in an association prescribed by law for the practice of journalism, *op. cit.*

the nations, as an important part of a living cultural diversity. It represents the link between the “suggestive” force of transforming Latin American constitutional texts, with the “productive” force of the processes developed by their interpreters, to allow the future development of the constitutional and conventional state as the work of each and every people.⁶⁹

Hence the duty to harmonise all these different national and international legal documents, through the control of conventionality, imposed on States Parties by Article 1.1 and 2 of the American Convention on Human Rights.

The *corpus iuris* resulting from the internal-Inter-American dialogue sets minimum standards, not maximum protection. States can and must guarantee increasingly higher levels of protection for the people subject to their jurisdiction. Therefore, the purpose of the control of conventionality is not to impose a homogeneous vision of human rights in the Inter-American system, but to boost the levels of human rights protection.

Facing this reality, it seems certain and inexorable to verify the existence of several political decision centers that transcend the State and that end up binding both the public powers and the citizens; and that legal pluralism establishes the need to analyse the several existing normative devices, whether national or international, to reach the norm or interpretation of the law that best guarantees the effectiveness of human rights.

The legal protection of indigenous peoples requires a multilevel perspective of protection, without implying a strict separation between domestic and international legal regimes. The constitution law must now intertwine with texts and customs of a global and regional aspect, in a process of coupling legal orders. New multilevel guardianship models are unveiled and strengthened in an interesting dialogic articulation between constitutional law and International Human Rights law.

It cannot be disregarded that the subject of indigenous rights demands a complex study, a deep examination of indigenous cosmovision, and a constant intercultural dialogue. The American Convention, like the constitutions, or even the customs, are alive and, therefore, subject to change for their necessary development in light of present times. Thus, with the exception of indigenous communities in isolation, all peoples are directly and indirectly influenced and experience interrelationships.

When analysing the ordinary jurisdiction, there is greater clarity between what the rights and duties are, since it belongs to the same cultural universe to which the constitution, the convention and the International Human Rights Treaties belong, which facilitates its legal interpretation and adjudication. In the case of indigenous jurisdiction, the complexity is infinitely greater, as it belongs to a totally or partially distinct cultural universe, hence a politically correct subordination of indigenous justice to the Constitution, the convention and the International Human Rights Treaties, which suggests an intercultural approach is needed.⁷⁰

It is considered opportune to recall that, pursuant to Articles 24 (equality before the law) and 1.1 (obligation to respect rights) of the American Convention, states must guarantee, on equal terms, the full exercise and enjoyment of the rights

⁶⁹ *Id.*

⁷⁰ Boaventura de Sousa Santos, “Cuando los excluidos tienen Derecho: justicia indígena, plurinacionalidad e interculturalidad”, in *Justicia indígena, plurinacionalidad e interculturalidad en Ecuador*, Boaventura de Sousa Santos and Agustín Grijalva Jiménez (La Paz: Ediciones Abya Yala, 2012).

of indigenous people. However, in order to effectively guarantee these rights, when interpreting and applying domestic regulations, States must take into account the specific characteristics that differentiate members of indigenous peoples from the population in general, and that make up their cultural identity.

Last but not least, the rights of indigenous peoples impose a set of positive and negative obligations on States. Among the positive obligations are: (i) the identification and preservation of indigenous territories; (ii) the delimitation and demarcation of lands; (iii) the adoption of legislative or other necessary measures for the recognition, protection, guarantee and effectiveness of indigenous rights; and (iv) judicial guarantees that may be necessary to verify the violation and eventual reparation of these rights. With regard to negative obligations, the duty of States to refrain from carrying out acts that affect the existence of indigenous culture and identity is highlighted.