SOCIAL MOVEMENTS AS SOURCE OF CONSTITUTIONAL LAW: THE CASE OF THE INDIGENOUS MOVEMENT IN PLURINATIONAL STATE OF ECUADOR

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ABSTRACT

In 2008, a new Constitution of Ecuador was enacted with a novel definition of the state as “plurinational.” The plurinational state is a concept created and widely discussed inside the CONAIE (the most prominent indigenous peoples social movement); one of the most successful social movement in Latin America in conventional and contentious politics. This dissertation is a demosprudential study of the plurinational state for it underlines how the modern Ecuadorian indigenous social movements were sources of the Constitution and the law.

This dissertation tries to answer why one of the most successful social movement in Latin America (regarding legal reform) has not achieved significant effectiveness in the implementation of their interpretations of the law? To achieve that goal, the first part will show how autonomy and self-determination has been the interpretation of justice if indigenous peoples in Ecuador since the clash with the Spaniards colonizers, how that interpretation took the form of the idea of the plurinational state, and the way that that concept followed from the movement to the text of the Constitution. The second part will show the contesting interpretations of the Plurinational State from the State’s branches,

and how mestizo politicians and authorities' narrative is setting back the transit of the concept to the idea of the law and the Constitution. Four relevant variables intervene in the formation of such idea: ethno-racial policy, reception of the international law, social movements activity, and legal system. The study of the decade in which Rafael Correa was President of the Republic (2007-2017) shows how the variables manifested in cases regarding prior consultation, indigenous law and the protection of the indigenous peoples living in voluntary isolation (Tagaeri and Taromenane). After the analysis of the Ecuadorian case and the relevant literature on the matter, the study shows that there is an idea of what is the law (of what is the Constitution) that excludes the collective rights of the indigenous peoples and their interpretations of the law that is holding the legal changes to become social changes.

BIOGRAPHICAL SKETCH

David A. Cordero-Heredia was born in Quito, Ecuador. David joined the Cornell Law School J.S.D. program in 2014 with the Cornell Law School Graduate Fellowship. Prior to his admission, he graduated from the Cornell Law School LL.M. program. He also holds an LL.B. from the Pontifical Catholic University of Ecuador (PUCE), and an M.A. in Constitutional Law from the Universidad Andina Simón Bolívar (UASB), Ecuador.

After completion of his studies, he worked for the Ecumenical Human Rights Commission (CEDHU), the Ecological Defense of the Intag Valley (DECOIN) and the Regional Foundation on Human Rights Advisory (INREDH). He was served as a member of the board of directors of the Ecuadorian Coordinator of NGO's for Defense of Nature and the Environment (CEDENMA), the Inter-American Human Rights Moot Court Competition Participant Association, the PUCE Law School, and the INREDH (Chairman in 2011). He has been a petitioner on several cases in the Inter-American Human Rights Commission and two in the Inter-American Court of Human Rights. His primary academic and advocate interests are Indigenous People's Rights, Constitutional Law, International Human Rights Law, and Social Movements and the Law

In 2010, he was tenured as Assistant Professor and Coordinator of the Human Rights Center of the PUCE. Currently, he is an Associate Professor in leave of absence of the PUCE. At Cornell University, David Cordero-Heredia was Fulbright Fellow, Graduate Fellow of the Latin American Studies Program, and Teaching Fellow on the Human Rights Clinic: Policy Advocacy.

For the co-author of the greatest works of my life, including this dissertation, Ana C. Navas, thank you for believing in me, especially when I do not. For my beloved Supay Antonio and Yaku Julia that always give the straight to keep dreaming in a better world for them. For Albita, thanks for so much love, you should have been here.

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Pieces of the final documents were discussed in the Second Conference of the Stanford Program in Law and Society (SPLS) at Stanford Law School (2015), 12th Annual Inter-University Graduate Conference at Cornell Law School (2016), the joint faculty workshop of the PUCE and the San Francisco de Quito University (2016), the Cornell Latin American Conference (2016), and the First Conference on Law and Society at UASB (2016), and the Conference on Dialogues of Northen and Southen Constitutionalism organized by UASB, Los Andes University, and Yale Law School (2017).

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1. INTRODUCTION

> "In these hard and unpredictable times in which poverty, misery, and exploitation grow and neoliberalism plunders the natural resources; the CONAIE calls to all man and woman that fight against social injustice, economic exploitation, racial discrimination, human rights violations, destruction of nature, environmental pollution, et al., to make this "political project" its own. The Project aims to the construction of a new model of state and nation: The Plurinational Nation".[1]

Indigenous Peoples in Ecuador have been living enormous changes in the last forty years of the country's history. Those changes are reflected in their influence in conventional and contesting politics that could be seen in their relevant involvement in the drafting of two constitutions and three coups. For Indigenous Peoples, after almost five centuries of being ignored by the mestizo society, what boosted these changes was their organization as social movements. Furthermore, the literature on social movements almost unanimously agreed on the success of the Ecuadorian Indigenous Movement (EIM). Deborah Yashar, for example, considers the EIM as the most influential indigenous movement in Latin America due to the impact that it has had in

[1] (CONAIE 1994, 1)

bringing about legal change via national politics.[2] The last two Constitutions of Ecuador are the best example. The 1997-1998 and 2007-2008 Constitutional Assemblies included the claims of the movement in several articles. The influence of the EIM left a distinct mark in the highest law of the land.

Although there are some indigenous and peasant's movements in Ecuador, the CONAIE is the one that presented ethnicity in the center of their organizational efforts and political claims. It is also the only organization with a peoples-based structure, for their board of directors is integrated by representatives of different indigenous nationalities. CONAIE is also the only indigenous movement that manages to create a political party and be a group to consider for alliances and governability. CONAIE has put the self-determination and autonomy in the focus of their claims, and the plurinational state was the concept that guaranty those aims.

However, autonomy and self-determination are not new claims, for those could be traced from the arrival of the Europeans to the Americas. For indigenous peoples in America, the violent clash with the western world and the means of exploitation that endure for five centuries. The history of indigenous peoples in the Americas has been one of resistance to extermination and cultural assimilation. If the law is intended to be a social pact of the society members that look to control the power of the state and protect fundamental rights, then when Ecuadorian indigenous peoples pretend to integrate society

[2] (Yashar 2005, 85)

that means to negotiate the meaning of the law and justice to maintain and protect their autonomy and self-determination.

The plurinational state was the interpretation of the law and justice that the CONAIE offered to the hegemonic culture. The Ecuadorian indigenous movements' activity occurred in a moment of the development of the International Public Law that boosted a worldwide recognition of specific rights to indigenous peoples both in domestic jurisdictions and international treaties. This context helped CONAIE to include a law-changing agenda that resulted in the ratification of the Convention 169 of the International Labor Organization in 1998, and the inclusion, the same year, of a catalog of specific rights in the new Constitution of Ecuador. The scope of the plurinational state was discussed widely inside the Indigenous Movements over the years; especially inside the CONAIE.

CONAIE became an interpretation community that moves the plurinational state to the text of the Constitution of 2008. However, the lack of implementation of the indigenous peoples' rights under the interpretation of the plurinational state shows how CONAIE's idea of the law has not become the one recognized in the culture. The appearance of contending interpretations from the state branches is a thermometer of how contested the concept is and how there is still a long pending discussion about the matter.

This dissertation is a demosprudential study of the plurinational state,[3] for it underlines how social movements are material sources of the law. They organize, mobilize, content and become authoritative interpretation communities. They relate with politicians and present their own, and as a political force they became constituencies of accountability beyond, and finally, they use the legal-change as a tool of law-change (the change of the idea of the law and justice at a cultural level). The first two stages happened in the political field; the last one offers a complex interaction among the society, the political field, and the legal field.[4] Following the theory of Bourdieu on social fields and capital, the plurinational state was included in the Constitution of 2008 because CONAIE earned enough political capital to impact in a classic product of that field: legislation. However, the passing of the interpretation of the Indigenous Movement to the official interpretation is a contention that is still going on in the legal field, where different rules apply and CONAIE has not yet achieve to intervene successfully.

This dissertation tries to answer why one of the most successful social movement in Latin America (regarding legal reform) has not achieved significant effectiveness in the implementation of their interpretations of the law? To achieve that goal, the first part will show how autonomy and self-determination has been the interpretation of justice if indigenous peoples in Ecuador since the clash with the Spaniards colonizers, how that interpretation took the form of the

[3] (Guinier and Torres, Changing the wind: notes towards a demosprudence of law and social movements 2014)
[4] (Bourdieu 1987)

idea of the plurinational state, and the way that that concept followed from the movement to the text of the Constitution. The second part will show the contesting interpretations of the Plurinational State from the State's branches, and how mestizo politicians and authorities' narrative is setting back the transit of the concept to the idea of the law and the Constitution. After the analysis of the Ecuadorian case and the relevant literature on the matter, the study shows that There is an idea of what is the law (of what is the Constitution) that excludes the collective rights of the indigenous peoples and its interpretation of the law. Four relevant variables intervene in the formation of such idea: ethno-racial policy, reception of the international law, social movements activity, and legal system. Chapter 2 offers a discussion on why these variables are relevant and the methodological and theoretical approach of the dissertation.

1.1. Social Movements Achieving Legal Change

The first part of this dissertation tells a story that has already been told several times, but from a different angle. It presents the development of the indigenous social movement with emphasis on its influence on the law. Even though the story will be narrow concerning the modern social movement, only comprehensive analysis of the legal evolution since the foundation of the Ecuadorian State can show how it was only with the increased activity of the EIM that there was an exponential increase in recognition of ethnic rights in the last 40 years.

One of the reasons is because legal change became part of the movement's agenda starting in the 1970s. The EIM demanded not only to

expand the land reform but also the amendment of the constitution to include specific rights and the inception of the plurinational state. The plurinational state is a core concept in this period, for it allows us to understand the real scope of the demanded specific rights that go beyond other social groups' specific human rights. Plurinational means self-determination. While other social movements (such as feminists, African descendants, or LGBT movements) were (or are) trying to expand the notion of human being into the ruling culture in a form that could include them, the indigenous peoples in Ecuador think of equality as the opportunity to keep living under their vision of the world, preventing the imposition of the hegemonic culture, the mestizo culture.

The plurinational state concept was part of a very successful agenda of bringing about legal change in 1998. The specific rights included in that agenda were being discussed at the international level at the same time. In 1998, the Ecuadorian Congress ratified Covenant 169 of the International Labor Organization, and some days later, the Constitutional Assembly introduced most of its norms in the brand-new Constitution of 1998. In fact, all this agenda was taken into reckoning, except the part regarding the inception of the plurinational state. The EIM had to wait ten more years for the inclusion of the plurinational state into the constitution, which finally occurred in 2008.

The argument of this part is that the core ideas of the plurinational state (autonomy and self-determination) were part of the claims of indigenous peoples over five years of resistance to disappearance and assimilation. The plurinational state was an interpretation of the law, and the constitution that

appeared in the CONAIE and its presence in the Constitution of 2008 could not be explained without studying the social movement behind.

This part is divided into two chapters offering a historical perspective of the relationship of the mestizo/white state and the indigenous peoples and their social movements. Chapter 3 covers the invasion and conquest of Spain over the American Indigenous Peoples, the American revolutions, and the first decades of the new Republic of Ecuador. Chapter 4 analyses the forming of the indigenous social movements and their impact in the drafting of the Constitutions of 1998 and 2008.

1.2. Legal Change is not Social Change

The second part of this dissertation shows the effect generated by the first part's conclusion. Using case studies, this dissertation attempts to illustrate how the three branches of the state have, since the adoption of the Constitution of 2008, been interpreting the indigenous peoples' rights in a manner very different from the idea of the self-determination of the plurinational state. To make a comparison, the CONAIE consistent interpretation of the plurinational state is tracked through documents that covered almost 30 years of its public activity.

Regarding the official interpretation, the analysis will cover the three branches of government. In the executive branch's case, the data includes mapping of the 395 "sabatinas"[5] of President Rafael Correa (of 530 that his government produces) that shows the dual narrative regarding indigenous

[5] Weekly addresses of the President that were broadcasted every single week. They were broadcasted every Saturday for up to 3 hours.

peoples: the “good savage” and the “bad savage.” For Correa, the noble savage is the poor indigenous person who needs specific rights to achieve mestizo culture’s idea of success. Conversely, Correa built a narrative of the bad savage: the indigenous person carrying the burden of his/her wild customs and deceived by foreign ecologists, who struggles against integration to maintain his/her ignorance and development lag. In neither narrative is the indigenous person treated as a complete and responsible human being who can make his/her own development choices

For example, Correa interpreted the right to prior consultation[6] as a procedure to inform communities of the economic benefits that they could gain if they did not oppose the will of the President. Correa’s government firmly rejected the idea that opposition from the communities would be considered as binding. The duty to consult from the perspective of the self-determination of the plurinational state could only be interpreted as the duty of the state to achieve the consent of the community to move ahead with the project.

Regarding the judicial branch, the case of the “La Cocha” community presents another threat to the self-determination of the Indigenous Peoples. In La Cocha, an indigenous community adjudicated a murder case that involved members of the community. The jurisdiction of the community was challenged in the Constitutional Court. The Court decided that the community, during its adjudication process, was trying to reestablish harmony among its members,

[6] This is the right of indigenous peoples to be consulted about the state plans tan could affect their territory. An extend analysis of this right is present in the Chapter 5 of this dissertation.

but it was not considering individual rights or trying to redress the victims. Therefore, the mestizo criminal justice system should rule in the case, leading to the only adequate remedy: jail.

In consequence, the mestizo criminal justice system had to retry the case to impose an adequate decision to protect the human rights of the victims. Therefore, another branch of the State imposed their liberal perspective over the indigenous peoples' right to keep, develop and apply indigenous law, thereby limiting it in accordance with the cultural superiority of mestizo society. From the CONAIE perspective of the plurinational state, only the indigenous nationalities could establish their jurisdiction. Since the La Cocha decision, the indigenous law was not permitted to be applied to murder cases.

As for the legislative branch, its interpretation on the plurinational state was manifest in the treatment of the oil exploitation in the Yasuni National Park. Although there is an explicit prohibition in the Constitution to engage in natural resources exploitation in the indigenous peoples living in voluntary isolation´s territory (IPLVI - Tagaeri and Taromenane), the National Assembly authorized oil activities by declaring the project of national interest. From the liberal mestizo perspective, the rights of the Tagaeri and Taromenane are limited by the concept of the western common good; and the Assembly used this excuse to authorize an oil exploitation project. From the perspective of the plurinational state, the decision of the Tagaeri and Taromenane Peoples to distance themselves from the mestizo culture should have been respected. Moreover, the violent attacks of the Waorani to the Tagaeri and Taromenane have put

these peoples' challenges their survival and their physical existence after several massacres that put these peoples at the verge of destruction.

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The dissertation concludes with an analysis on how the proposed variables affected the capacity of the CONAIE to the successfully intervene in the legal field, and, in doing so, in changing the cultural idea of the Constitution and the law that the society has.

The dissertation shows how CONAIE had a direct impact on legal change. The previous actions of Ecuadorian indigenous peoples and in the modern indigenous movements, autonomy, and self-determination were always in the center of their claims. In contentious politics social movements tend to direct their collective actions to dispute symbolic meanings of the culture “framing” the accepted social phenomena into stories of the moral obligation of pursuing change. At their beginning, the Ecuadorian indigenous movements framed their situation as the consequence of historical injustice. It was a story of displacement, dispossession, and suffering that began with the arrival of the Spanish to America. Without any legal recognition as a group and any legal support to their claims, injustice is the only path to build meanings inside the movement that could be introduced to the greater society. Several social movements in history have had to frame their aspirations in this way because of the lack of legal protection, and, consequently, they adopt legal change as one of their main goals to have the chance to gain the protection of the state.

As we have seen, the idea of social justice from the perspective of the historical exclusion of the indigenous peoples was central in the claims and the organizing of the Ecuadorian indigenous movements in the 1970s, 1980, and 1990s. However, starting in the nineties, the indigenous peoples' concepts were gradually incorporated into the law; but the concepts were emptied of all meaning. As a result, these ideas, which were once a moral frame, became a weak legal frame in which the understandings of the indigenous peoples were again excluded.

After the adoption of the Constitution of 1998, the CONAIE has been trying to frame its claims using "rights discourse." Instead of their traditional "injustice discourse," but with scarce effectiveness to truly engage the discussion on the meanings of the legal frame by having access to the institutions that have the power to provide authoritative interpretations of the law. This process joined an international movement of recognition of the indigenous peoples' rights in the International Law. In the Ecuadorian case, the development of International Law in the subject matter always comes before the domestic one.

The concept of plurinational state seemed to be the solution. It was the only component of the 1990 uprising's demands that was left out of the Constitution of 1998. However, after twenty years of the CONAIE's pressure, it was finally included in the Constitution of 2008. To the CONAIE's understanding of the plurinational state is the antonym of the national state, that is, the idea of the necessary concordance between one culture and one nation. Different

cultures imply different ways to understand the world, different priorities, different ideas of what development means. For the EIM, the only way to effectively overcome exclusion and discrimination against the indigenous peoples was to put all the cultures at the same level; and that means that one cannot be imposed over the others. In other words: self-determination. Therefore, indigenous peoples should retain the power to interpret the plurinational state provision and their specific rights. For the EIM, legal change sometimes turned into a threat to themselves, because significant resources were spent on unfruitful litigation, and more importantly, it surrendered the framing of their grievances to the state and international organisms.[7]

These threats are especially crucial in context as the Ecuadorian in which the ethno-racial policy of the state has always been the assimilation of the indigenous cultures to the mestizo society. The dissertation shows how this policy (in latent or manifest ways) has been the same in over five centuries of the white/mestizo state ruling over the indigenous peoples.

The Ecuadorian legal system has shown incapable to adopt the new institutions of the Constitution of 2008. Among some of the work on the sociology of such authors as Weber, Luhmann, and Habermas, the power of lawyer's rests in the formality and procedural rites. From the perspective of legal positivism, lawyers create a discourse independent from other fields of society, such as the political field. Lawyers tend to hide behind a veil of certainty about the law, pretending that interpretation is a technical exercise that lawyers are

[7] See (Ramos 2002)

trained to perform. However, they know that interpretation allows a wide range of opportunities to make the law say what they want. They must uphold the infallibility of the law to maintain their social capital.

Even though lawyers participate in all the spaces of law-making and law-applying in society, the judiciary is the branch of the state in which they have lost power. Why, then, are lawyers not the defenders of the indigenous peoples' rights and the plurinational state? The answer is the legal narratives according to which the discourse of the law is something technical, in which lawyers can claim to have the savvy to define what can and cannot be done according to law. However, even if lawyers do not agree with the text of the law, they cannot pose themselves directly against the law because their power comes from the social idea of the law as something whose meaning cannot be contested. These legal narratives are discourses created and reproduced in law schools, and it is usually found not in legislation but in law books. It is in the classes of the law schools and in the law books, where law students learn concepts such as rights and obligations, which are so embedded in the liberal legal tradition. When lawyers are trained to believe that rights only allow individuals to demand states to respect their liberty, then collective rights are outside elements in the system. These failures, of course, must be explained in a manner that does not appear to be lawyers rebelling against the law. This explains why social, cultural and

economic rights, for example, have historically been lofty principles, but not as real and fully enforceable rights.[8]

Moreover, in the liberal legal tradition, all rights can be limited by the common good; no right is absolute. In the Civil law countries, the interpretation of the common good, in other words, the limitation to rights, is almost exclusively a competence of the legislative branch. This means that majorities decide what limits rights should have. Under this narrative, indigenous peoples should only demand the protection of the law when: (i) they are acting as subjects (or as a group of subjects) rejecting the interference of the state in their space of autonomy; and, (ii) they are framing that interference as something that goes beyond what the state could legitimately restrict in the liberty of any member of society. However, the possibility of a subject (or a group of subjects) arguing that they are entitled to a right that goes against the interest of most of the population (e.g., the Tagaeri and Taromenane People) would again be a failure of the legal system. How could a group of fewer than two hundred people believe that they could impose their will to live as their ancestors in the jungle upon millions of people who need the natural resources present in that jungle?

The bare concept alone of indigenous people is something that fails to comply with this legal narrative. Groups of people have been traditionally demanding rights. Corporations and associations, among others, constitute ways in which individuals create a new “person” who can be entitled by legal

[8] See for example (Tomasevski 1995) (Abramovich and Courtis 2014) (Alston and Goodman 2013)

rights. However, people in indigenous terms goes beyond that. People are the living, the dead and the unborn. Their rights do not belong only to the group that currently are part of the community.

The mainstream legal narrative considers these rights, including such new features of the 2008 Constitution as the Sumak Kawsay (Kichwa words for “the good way of living”) regimen, the rights of the Pachamama (Kichwa deity, its translation is “mother earth”), or the plurinational state, as something absurd and impossible to implement, something that doesn’t belong to the law. Law professors repeat these ideas in the law schools, and practice lawyers apply them as attorneys and judges. The destiny of all this “novelty” will be their final expulsion from the text of the law, and the return of the refined and technical civil code. Lawyers do not lose their social capital when they resist implementing these new norms and concepts; conversely, they show their power when they impose their knowledge of what the law should be when framing the rights of indigenous peoples, or the plurinational state as ultimately impossible to implement. Consequently, in all the opportunities that Ecuadorian Constitutional Court had to interpret the plurinational state concept, they decide against autonomy and self-determination.

The history of the social movements has shown that text-change does not imply law-change, because of the polysemic nature of language and legal narrative. Legal narrative creates concepts and theories to restrict the authoritative interpretation of the law to the legal field, and it gives the players in that field a wide range of possibilities for the interpretation of legal texts

without a constituency of accountability in the society. Under Bourdieu's model, those whose legal capital surpasses that of their contenders in the legal field could use the symbolic power of the law to impose upon others their interpretation of the law. Legal capital is not different to other kinds of social capital (e.g., in the legal field, electoral politics, business practices); and social movements are outsiders to of all of them. However, social movements have shown their capacity to mobilize resources, take advantage of opportunities, and reframe cultural meanings of society that could lead to essential victories in social-change.

In the case of the CONAIE, the movement did not include a legal strategy beyond text-changing. That strategy should include and go beyond strategic litigation. Mobilizing resources should be directed to impact legal narratives, changing the conceptual/educational constraints of lawyers to implement the idea of the plurinational state and indigenous peoples' rights. It should start recovering the discussion of justice and how the law should reflect it, and that means to do not let state institutions to interpret the law without the peoples. Extending the metaphor of Professors Guinier and Torres, it is not only politicians who raise their fingers trying to identify the direction of the wind, but also judges, public employees, secretaries of state, law professors, and everyone in a position of power.

This Second Part is divided into three chapters. Chapter 5 offers a comparative perspective of the interpretations of the plurinational state. Chapter 6 presents the policy of former President Rafael Correa as a source of

institutional interpretation that influences the decisions of the other branches of the state. In particular, this chapter studies the case of the XI Oil Binding Round, the limitations to the enforcement of indigenous law, and the enacting of statutes without consultation to the indigenous peoples. Chapter 7 is about the case of the Tagaeri and Taromenane, indigenous peoples living in voluntary isolation whose right to do not been contacted is a thread by a series of institutional decisions that put in hazard their self-determination and their bare existence.

It can take decades more to achieve the social-change that indigenous peoples have been looking for. In some cases, movements had found in the lack of implementation or result of an apparent victory a cause if demobilization. Nevertheless, the CONAIE's structure offers more opportunities to the movement to endure and persist until they achieve social change. The former presidents of the CONAIE returned to the grassroots. They do not act as if they have turned into an elite of the movement, so the constituency of accountability of these leaders remains. CONAIE's leaders are elected every two years. Before the CONAIE, indigenous leaders had risen from the communities and generally returned to them. This makes the enormous grassroots of the EIM persist over time.

Historical evidence shows the persistence of the Indigenous Peoples. Indigenous peoples in the Americas have remained fighting against their disappearance for more than five hundred years. If it is a social movement that can prevail, they are the ones.

Chapter 2

2. THE HYPOTHESIS

President Lenin Moreno took the chair of President of the Republic of Ecuador on May of 2017 after 10 years of ruling controversial Rafael Correa Delgado's rule. They belonged to the same party; however, Moreno has tried to put some distance between him and Correa since the beginning of his term. In these times of change, something unusual has happened: The President's cabinet called for a meeting to the President of the Confederation of Ecuadorian Indigenous Nationalities (also known as CONAIE[9] for its abbreviation in Spanish), Jorge Herrera, to "construct a space of dialogue among comrades". The meeting took place in the Politics Coordinator Secretary's office on July 17th of 2017. The summit brought together, for the first time in years, the leaders of the CONAIE, their lawyers and high-ranking state officials, from ministries such as the Ministry of Social and Economical Inclusion, the Secretary Politics Coordinator and legal advisors of the President himself.

It was an awkward moment for all the attendants. There was much tension among the parties. Almost all the government representatives were part of Correa's team, so they actively participated in his policy of permanent confrontation with the CONAIE. One of the points of most tension was the when

[9] CONAIE is most representative organization in the modern indigenous movement. It is meant to be a government of the indigenous peoples, so it is integrated by the communities, nationalities, and regional indigenous organizations. In 2011 of approximately 5000 communities in Ecuador, 4600 were affiliated to the CONAIE, approximately 250 to the FEINE, 200 to the FENOCIN, and 2 to the FEI. See (Schavelzon 2015, 145).

Correa attempted to evict CONAIE from a state-owned building that was loaned to CONAIE to be used for their headquarters for 100 years in the 90's. Meanwhile, Jorge Herrera was among the public figures notoriously critical of Correa's economic model based on the extraction of natural resources; most of them lay on Indigenous Territory.

The peace offering was to galvanize the loan agreement, so that the CONAIE could be sure that the new government or future governments would not have the power that Correa had tried to use in the CONAIE headquarters case. The former agreement established that the CONAIE could use the building if they fulfilled their goal of advancing the rights of indigenous peoples. Correa argued that CONAIE was using the building to organize demonstrations against the government, and for him those were political aims unrelated to the goal of advancing the rights of indigenous peoples that the indigenous organization has. The building was given to the CONAIE as part of the conquests that the Indigenous Social Movement gained in the 1990 historical uprising.

The indigenous leaders were cautious. They thought the meeting would tell them how the relationship with the new office would be. If they could solve the dispute about the building, it would be a very important achievement; however, to know what intentions the new President had regarding racial policy would be more important. Would Moreno open a channel of dialogue? Would he keep the confrontational style of Correa? Does he believe in the richness of

diversity and the plurinational state? Does he want to patronize the indigenous peoples and tell them how their future must be?

After a warm welcome from the Secretary of Politics, Paola Pabón, she introduced the members of the government present in the room. She started with a speech on how the indigenous movement (meaning the CONAIE) and the “citizen revolution” (as Alianza Pais members call the political changes implemented by them) should have never been apart. For her CONAIE and Alianza Pais had always shared the same aims, and it was a pity that comrades of the political left had had several years of bad relationships. The Ministry of Social and Economic Inclusion, Ivan Espinel, echoed the welcome speech. Their discourse was about reconciliation, about a new era, a new way to handle the interaction with the social movements. The President asked their representatives to solve the dispute about the building immediately.

One of the lawyers present in the room identified himself as one of the President Moreno’s legal advisors, Gustavo Bedón. He presented the President’s proposal that was to sign a new loan agreement regarding the CONAIE’s headquarters building for their use for perpetuity and without conditions, so “nobody ever in the future could deny the historic importance of the indigenous movement”.

The CONAIE presented a counterproposal. Jorge Herrera started his intervention saying that “we are in a plurinational state, the mestizo nationality has thousands of buildings all over the country. Isn’t it fair that the organization that represents the other thirteen nationalities owns one building?” The reaction

was disappointing but meaningful. The legal advisor of the President replied: “That is impossible. There is no a statute or regulation that allows the donation of public goods to a private organization. Imagine the results. After this all the NGOs will be demanding buildings from the State”. One of the CONAIE’s Lawyers argued: “Perhaps there is no statute or regulation, but we have the Constitution, and the Constitution is above all the other regulations. There is a constitutional principle of direct application, the lack of statutes cannot stop the implementation of the highest law”.

After some minutes of this legal debate, suddenly the President’s advisor stopped addressing the indigenous leaders and their lawyers and talked to me directly. He was my professor at the law School, and I think he recognized me as his former pupil from the beginning of the meeting. He told me: “You know that what CONAIE is asking is impossible. We cannot do something against the statutes and the administrative regulations. We could be held accountable for bad use of public goods if we do something like that”. The moment was tense. It felt like only lawyers, and lawyers from the same “top” law School could understand how unlawful the request was. Only “we” talked the language of the law.

Pabón and Espinel changed the direction of the conversation by presenting also political concerns. Pabón said that the loan for perpetuity was the only decision that President Moreno was able to take by himself. Another indigenous leader replied: “then the answer is that the President should send a bill to the National Assembly”. For Pabón it was not the “political moment” to do

that. For them, the fact that Moreno's cabinet members were having conversations with the CONAIE was not popular among their own party. If a statute or a decision of the National Assembly would be needed to decide the donation of the building, they were not sure of having the support of the "correistas" because of Correa's antagonism with the CONAIE. That meeting was called a "betrayal" by some followers of former president Correa.

The outcome of the long meeting was the compromise to draft the new loan agreement, and to think in the future of a way to make the donation (something that all the attendants knew never would happen). The indigenous leaders took the result without enthusiasm. It was not a surprise. For them, after more than 500 years resisting their disappearance and more than 30 years as social movements playing in the national political arena, they have learned to be patient: to keep in mind their idea of justice and take small steps towards that aim.

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In their article "Changing the Wind" professors Lani Guinier and Gerald Torres propose a methodology to study how social movements interact with the law. For the authors, social movements are able to create authoritative interpretative communities that create new ways of framing the justice and the law that eventually will be accepted by the society. The nature of this process has at least three important consequences: i) constituting social movements in potential sources of law; ii) allowing multi-level legal change, not only textual-change, but law-change, i.e. they could affect the cultural concept of law and

the justice; and, iii) making the always present possibility of a backlash more difficult. The introduction of the plurinational state and the rights of indigenous peoples is not a complete process. As will be defended in this dissertation, the ideas of plurinationality and indigenous rights have gone through several stages in more than five centuries of history among colonizers and indigenous peoples. However, the resistance of cultural assimilation, and the defense of their ancestral customs have made indigenous peoples' claims for respect and autonomy be seen as the "Indian problem" -something that the mestizo culture has not solved yet. Since the emergence of the modern Ecuadorian indigenous peoples' movement (the CONAIE and his three regional branches), the solution to how to integrate indigenous peoples and how to deal with the historic debt to them has been developed by the movement itself.

This dissertation accepts the challenge of Professor Guinier and Torres, and, in doing so, it will make an argument on how the CONAIE, and its predecessors, created an authoritative interpretative community that challenged the liberal concept of justice based on individualism, the unity of the state, the positivist theory of the law, and even the model of economic development of the Ecuadorian society, and, as a consequence, they have succeeded in intervening directly in the last two Constitutional texts. However, the changing of the idea of the law (or legal narrative) at a cultural level is still awaiting.

The following pages are devoted to analyzing how their legal-change strategy success has interacted with the society and the state institutions in order to obtain social-change. Diverse political agents have had claim to share

CONAIE's goals (even Rafael Correa), and sometimes those goals overlaps. However, the political proposal of the CONAIE do not belong ideologically to the left or the right; their claim is their right to self-determination through the plurinational state. The plurinational state was included in the Constitution in 2008. Ten years later, their proponents believe that the plurinational state has not even started to be implemented.

2.1. The problem

In 2008, a new Constitution of the State of Ecuador was enacted. This event has triggered a regional debate on constitutional reforms (Bolivia 2009) about the relationship between the States and indigenous peoples. The Plurinational State was the response proposed by the indigenous movement of Ecuador to overcome colonialism and paternalism that has defined the status of indigenous peoples in America for more than five centuries. Article 1 of the Ecuadorian Constitution states that Ecuador is a plurinational state, in opposition to the traditional view of the national-state that dominated the political theory and practice for the last three hundred years.

After decades of struggle, indigenous peoples have succeeded to include the plurinational state in the political agenda. Nevertheless, the practical consequences of the introduction of this concept in the Constitution were unknown. Was the Plurinational State just a claim for cultural recognition or for a different kind of political structure?

The content of the 2008 Constitution apparently supports the latter view. It recognizes the protection of indigenous territory, the right to self-government,

the use of their own law,[10] and the right to free, informed and prior consultation on matters that can affect their rights. Indigenous Peoples and some scholars agree with this interpretation, so they are trying to push for theoretical and political changes in the relations between indigenous peoples and the central state, with a post-colonialist future in mind, with very little success.

On the other hand, traditional political parties and movements, economic groups and transnational corporations choose the first interpretation. Using a refined discourse that includes social rights and investment in the indigenous communities, they proclaim that the Plurinational state is a recognition of cultural diversity and that its effect is merely to grant some cultural rights to the indigenous peoples. Their position is based on their political and economic power and supported by liberal approaches on accommodating minority rights in universal individual liberties and political rights fashion.

The new *magna carta*[11] that the people of the Republic of Ecuador dictated in the form of a new Constitution approved by referendum in 2008 is a document that was created through numerous public debates in the Constitutional Assembly, and it includes several social claims from different political actors, social groups, and other stakeholders.

One of the most important contributors in this process was the indigenous movement that gained much support from left wing parties (such as the

[10] Henceforth, I will use the term “indigenous law”.

[11] In Latin-America, *magna carta* is used as a synonymous of Constitution. Furthermore, the metaphor is useful in the context of this paper because of the limitation of the hegemonic power of the *mestizo* culture in the society that comes with the Plurinational State.

president Correas's Party Alianza País) that wanted to detach themselves from the traditional political parties. As a result, the new Constitution of the Republic of Ecuador starts, in its preamble, with the recognition of the multiculturalism of the society; the mention of the *Pacha Mama* (divinity of the *Kichwa* nationality, textually meaning Mother Earth) as a part of the existence of the society; the recognition of the struggles against colonialism; calling to the wisdom of all cultures; and, stating the *Sumak Kawsay* (textually meaning a good way to live, a *Kichwa* concept that includes the relations between the people and nature) as a principle of public coexistence.[12]

The first article of the Constitution of 2008 states that Ecuador is a plurinational state.[13] The "Plurinational State" is a political claim of the Indigenous movement that was conceived as an alternative to the national state paradigm of the modern industrial societies. The national state is linked to the idea of a nation as a cultural homogeneous group of people sharing the same history, cultural symbols, past, customs, language, identity and settled for generations in a geographical space.[14] History shows that national state theories tend to reject multiculturalism in a society, and its policies aimed to eliminate the differences to obtain a homogeneous society.[15]

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[12] Constitution of the State of Ecuador, 2008, Preamble.
[13] Constitution of the State of Ecuador, 2008, art. 1.
[14] Cf., (Kennedy 1997, 553)
[15] There are several examples of these policies. In United States, the initial relation between Federal State and Indian Tribes were based in the idea of the assimilation of the Indians (Anderson, et al. 2010), quoting George Washington and Thomas Jefferson). In Latin-America, Spanish colonists apply an evangelization and civilization policies in the form of forcing the adoption of a religion and a foreign language. In Spain,

The Ecuadorian Plurinational State starts with the recognition that its society is multicultural and that the different political groups, or nations, coexist in the same space, under the same state sovereignty, in equal conditions as a matter of respect to the right to self-determination.[16] As a consequence of this new paradigm of the relationship between the *mestizo* culture and the indigenous nationalities, these nations should play an active role in decision-making processes of the State. Furthermore, the Ecuadorian Constitution of 2008 establishes four mechanisms for the operation of the plurinational state: (i) protection of a national[17] communitarian territory;[18] (ii) self-government;[19] (iii) application of their own customary law;[20] and (iv) the right to free, informed and

Dictator Franco forbade Spanish nationalities from speaking their own languages. Also see (Taylor 1994)

[16] See (Bautista S. 2010).

[17] The indigenous territory differs from other forms of collective property because the owner is the nation not the sum of its members.

[18] Indigenous communes, communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments, the following collective rights: […] To keep ownership, without subject to a statute of limitations, of their community lands, which shall be unalienable, immune from seizure and indivisible. These lands shall be exempt from paying fees or taxes. (Constitution of the State of Ecuador, 2008, art. 57.4)

[19] Indigenous communes, communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments, the following collective rights: […] To build and uphold organizations that represent them, in a context of pluralism and cultural, political, and organizational diversity. The State shall recognize and promote all forms of expression and organization. (Constitution of the State of Ecuador, 2008, art. 57.15).

[20] Indigenous communes, communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments, the following collective rights: […] To create, develop, apply and practice their own legal system or common law, which cannot infringe constitutional rights, especially those of women, children and adolescents. (Constitution of the State of Ecuador, 2008, art. 57.10).

prior consultation.[21] The plurinational state has different interpretations, e.g. for Alberto Acosta, it seeks to achieve a double goal: first, to protect and respect cultural diversity; and, second, to ensure the participation of the indigenous nationalities on the State decisions that will affect their territories or their culture.[22] Other scholars, such as Boaventura de Sousa Santos and Ramiro Ávila Santamaría, go further, defending the plurinational state as an alternative for the Indigenous Peoples to the global crisis generated by neoliberalism in the national state's paradigm.[23] However, there is not one single definition of the plurinational state that exists. Even inside CONAIE, both their historical[24] and new leaders[25] recognize that plurinationality is a theory to be constructed, but all the versions of plurinationality aim for self-determination as the key stone of it.

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[21] Indigenous communes, communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments, the following collective rights: […]To free prior informed consultation, within a reasonable period of time, on the plans and programs for prospecting, producing and marketing nonrenewable resources located on their lands and which could have an environmental or cultural impact on them; to participate in the profits earned from these projects and to receive compensation for social, cultural and environmental damages caused to them. The consultation that must be conducted by the competent authorities shall be mandatory and in due time. If consent of the consulted community is not obtained, steps provided for by the Constitution and the law shall be taken. [And], to be consulted before the adoption of a legislative measure that might affect any of their collective rights (Constitution of the State of Ecuador, 2008, art. 57.7 and 57.17).

[22] (Acosta and Martinez, Plurinacionalidad 2009, 15-21) Alberto Acosta was the President of Ecuadorian Constitutional Assembly that drafted the Constitution of 2008. There is an intense academic and social debate around the plurinational state in Ecuador and Bolivia, but there is not a consensus about this issue. A good example of this debate is gathered in the book "Plurinationality" of the Salesian Polytechnic University.

[23] (Acosta and Martinez, Plurinacionalidad 2009, 26). Also, (R. Ávila Santamaría 2011)

[24] (Pacari, Interview to Nina Pacari 2015)

[25] See (Simbaña n.d.) and (Chuji 2016)

In the interpretation of the plurinational state lies its social-change potential. Under the idea of plurinationality as multiculturalism, the Constitution of 2008 is just ratifying the indigenous peoples' rights as ethnic minorities' rights in the context of the liberal idea of liberties and rights. Nevertheless, if the society follows the interpretation of the CONAIE as it was the community that created and bolstered the concept, then the plurinational state implies limits to the power of the state and private institutions over the decisions that each nationality takes about their development and even the conservation of nature. The self-determination as the base of the plurinational state is the result of a history of indigenous peoples that started with the arrival of the European settlers and that is continuing today. This history, as it will be shown in the Chapters 2 and 3, is a continuous struggle to defend their territories, their language, their customs, their world view, and finally their ability to take decisions regarding their future. The plurinational state is a legal concept that came from a process of 500 years, and it is probably the oldest demosprudential case in Ecuador.

The indigenous movement in Ecuador is a plurality of actors. This research will be focused in the CONAIE because it has been the most plurinational (the board of the directors of CONAIE is formed by representatives of all the nationalities), contesting (it was principally responsible for the 1990 uprising), and innovative (other smaller or local organizations struggle for land access and they have not focused on claims of self-determination or cultural rights). Most of the work on indigenous people's movements coincide in pointing

out CONAIE as the most influential organization of the indigenous movement.[26] Other important organizations such as the FEINE,[27] the FEI,[28] and the FENOCIN[29] do not generally use the plurinational state concept as a claim or critique of the state.

After almost 10 years of the recognition of the Ecuador as a plurinational state, the institutional interpretation of the plurinational state (as it will be discussed in Chapters 5 and 6) has not been directed to recognize the self-determination of the indigenous peoples. This fact has diminished the social-change potential of the legal-change achieved by the national indigenous peoples' movement (CONAIE).[30]

2.2. A four-prong approach

In law in social movements literature there is a constant contrast between legal-change and social-change. A third category should be included and that is law-change. The law is more than the texts of the norms, the judicial decisions or other textual containers of norms. The law is also theory, and even more importantly, is an idea that it is important in the legal field,[31] but also in the society. It is the idea of the law what societies dispute in key moments of their history, to widen or narrow concepts such as liberty, freedom, or justice. It is the

[26] (Becker, ¡Pachakutik! Indigenous movements and electoral politics in Ecuador 2011, 25), also, (Selverston 1994, 133).
[27] Council of Evangelic Indigenous People and Organization of Ecuador.
[28] Ecuadorian Federation of Indians.
[29] National Confederation of Peasants, Indigenous and Black's Organizations.
[30] For a further discussion on how constitutional change in Bolivia and Ecuador did not impacted the reality of the indigenous peoples, see (Verdesoto Custode 2007, 107)
[31] As defined by (Bourdieu 1987).

area of the discussion of what those concepts mean and how people interpret them and come up with proposals that social movements push for until they become legal texts. The idea of law is a frame that limits how we think about what is and what is not possible to do regarding legal-change; therefore, it has the power to even stop the implementation of new pieces of legislation under the idea that those are not compatible with the law.

To explain the first relation this work uses the theory of legal field of Pierre Bourdieu. Bourdieu states that the legal field is a closed social space where the agents dispute legal capital. Legal capital is the power to say what the law said, or in "other words", the capacity to impose the interpretation of the legal text on the other agents in the field. The idea of the law in Bourdieu's work is a highly contested space where the idea of the legal profession as a technical activity governs by rules that impose limits on the agents disappears.[32] The differences of the legal field and the other social fields is the consequences of the victory of some agents over the others, for the law entitled to the winner the power to summit the violence of the state to impose their victory. Therefore, the dispute over the legal capital is a dispute over a symbolic and violent power that will certainly have the potential to change society. This doesn't mind that the changes will be the ones that the triumphant agents were looking for.

In the analysis of the relation between legal-change and social change, sometimes the importance of the legal agents as intermediaries between the legal text and its implementation is neglected. Social movements, such as the

[32] See (Bourdieu 1987)

civil rights movements in the United States found high resistance to the implementation of both supreme court decisions and new legislation regarding them overcoming the segregation. Not only did some conservative people resist the application of this norms, but so did federal and state agents. However, the law is not only in dispute among experts because lawyers' legal capital who not always transcend outside the legal field. The social and institutional capital that lawyers has is important, but the only part of the equation. Jack Baltkin when talking about popular constitutionalism, said that the constitution is what the people believe, so even and interpretation of the law fully charged by legal capital could be rejected by the society if the interpreters don't persuade the public with their interpretation. In other words, the agents of the legal field will pay attention to what is happening in the society because a triumph in a legal field without social legitimacy could mean for them an important loss of their privileged status in the society.

In analyzing the keys of the Ecuadorian indigenous movement, the lack of implementation of the constitutional text addressing indigenous people's rights could be seen as the strength of the movement to influence elites (represented by traditional political parties and economic groups) to reform the legal text in order to recognize their claims. Nevertheless, there was a witness in their capacity of engaging in the dispute of the meaning of those texts in the legal field.

Consequently, the lack of implementation of the constitutional provisions of the indigenous people (i.e. the size of the gap between legal-change and

social-change) will be analyzed from the perspective of the demos prudence. Demos prudence methodology offers the possibility of studying the involvement of the social movements in shaping the law - there is a story of the success of the Ecuadorian indigenous movement in changing the texts of two constitutions. Those texts included concept that used to have a defined meaning for indigenous people but when they were adopted by all politicians, who only took the words without their meanings. The EIM constitutes an authoritative community of interpretation of justice that frames their claims for legal change as historically and morally the only option to overcome centuries of abuse and violence against the indigenous population. Those interpretations became constitutional text; however, they didn't create constituencies of accountability of the people with the institutional power to interpret those new norms. By reviewing the key moments in history in which the Ecuadorian indigenous movement has had a chance to intervene in the law will also reveal why those interventions could not be sustained in time. Demosprudence[33] methodology allows not only to present legal change because of the actions of the society, but it helps to draw a map that could guide future attempts of achieving social change for any social movement.

The possibility of using legal change to achieve social change depends on several factors according to the literature, for this dissertation I have gathered those explanations into four categories. The first one addresses the legacy of

[33] (Guinier and Torres, Changing the wind: notes towards a demosprudence of law and social movements 2014)

the racial policy implemented by the Spanish conquerors and the mestizo states that arose after the independence whose consequences in the legal status of the indigenous people still lingers in the modern legal systems. The second one deals with the impossibility of the liberal legal tradition to accommodate the collective nature of the indigenous people's claims. The third one analyses the effectiveness of the social movements to impact politics as the result of a set of opportunities, threats and cycles. The last one talks about the impact of the development of the international law regarding indigenous people rights into the domestic legal systems.

2.2.1. Social movements

Literature on Latin American social movements, and on indigenous movements, recognizes the importance that the Ecuadorian indigenous movement has had in the region. Debora Yashar, for example, recognizes Ecuador's indigenous movement as the strongest movement in Latin America and gives it all the positive values of the system of variables in her research to justify this assertion. Trans-community networks, political associational space, changing citizenship regimes for challenging local autonomy.[34]

The Ecuadorian indigenous movement had an incentive to seek autonomy, both for the indigenous people of the highlands and the indigenous people of the Amazon, and they both achieved recognition of their territory and local governments. Thanks to the churches and other organizations that were subsequently involved, the indigenous movement had the capacity to generate

[34] See (Yashar 2005, 56)

inter-community networks that went beyond the local networks and even transcended the movements and organizations on which they relied.

The regime changes helped with this process of building the Indigenous Social Movements. Starting with the corporatist regime that helped to generate intercommunity networks and internal organizational processes and then the change to a neoliberal policy that, on the other hand, allowed them access to freedoms such as freedom of association and helped with its success.[35] This success is measured, among other ways, by the capacity it has had to influence the moments of constitution creation of Ecuador.[36]

As will be shown in the following chapters, there is a clear influence on the increase in recognition of indigenous peoples that overlaps the years of activism of the Ecuadorian indigenous movement.[37]

Although some political actors claimed that in 1998 (the year in which the constituent assembly was held and the constitution was approved) the recognition of the rights of indigenous peoples was a purely ethical and political issue in which all parties were in agreement given the historical exclusion, nothing justifies that this recognition coincided with the moment of greatest mobilization, taking into account that the debate about the situation of

[35] See (de la Rosa Quiñones 2010)
[36] See (Patiño 1996)
[37] See (Pachano 1996) were he discusses how the legal changes of this time were only possible because of the collective actions of the movement.

indigenous peoples that has been present since the beginning of republican history in the political discourse.

It is then the social movements that begins to promote several legal-changes. Authors such as Madrid[38] and Becker[39], on the other hand, also highlight certain collective actions or strategic decisions taken by certain indigenous movements from a comparative perspective.

Madrid says that one of the forms taken by the Ecuadorian indigenous movement was the activation of a political arm or a political party called Pachakutik. Thanks to the emergence of Pachakutik, indigenous movements had the opportunity to participate in both conventional and contentious politics.

While they were in the streets carrying out multitudinous demonstrations, possibly the most important of the time when the constitution of 1998 was carried out and they had their voice heard in the constituent assembly and in the parliament.

They did not have a very large bench, but it was the coordinated action of these two capacities: social movements and political parties that helped to impact in these moments of normative creation such as the constitutional assemblies and later in parliament.

Madrid and Becker also relate how complex the action of a social movement becomes when it has this double dimension of party and movement,

[38] See (Madrid 2012)
[39] See (M. Becker, Pachakutik! 2015)

considering that some of the alliances that the Ecuadorian indigenous movement made, for example in the presidency of Lucio Gutierrez, when it undermined its social legitimacy and put them in a very difficult moment.

The distrust they felt after having faced the results of allying with uncomfortable partners somehow explains the subsequent decisions CONAIE would make about not directly supporting or being on President Rafael Correa's campaign platform.

Here the change of the idea of law is visible in the process of formation of these legal changes. The indigenous movement has constructed a narrative of what historical justice meant that was different from the idea of justice that the people who initially supported its formation had.

It was influenced by the left-wing movements of the time, especially the Communist Party and the Socialist Party, which had principles of justice based on the distribution of ownership of the means of production.

In other words, what the Ecuadorian indigenous movement achieved is what in the words of Lani Guinier and Gerald Torres is called authoritative interpretative community. Thus, they took the idea of law and began by discussing what the idea of justice is, and by disputing the meaning of that notion, they sought to change not only the text of the law but also the very form in which society considered it acceptable to organize itself.

Success in legal change is contradictory, or contrasts with little success in generating change in the idea of law. As will be analyzed in this work, the

cycles of protest of the indigenous movement coincide with the moments of influence they had throughout these forty years of existence and show how the movement has been in the places it had to be to achieve legal-change.

However, the spaces where ideas of law are changed, or the spaces where norms are interpreted, have not necessarily been spaces of influence of the Ecuadorian indigenous movement. It is surprising, for example, that there was a lack of a strategic litigation strategy to capitalize on the legal reforms introduced in the two constitutions. This is not only due to a miscalculation as part of the movement, but it is more precisely explained by the mistrust that the indigenous movement has in letting its rights rest, or the construction of a discourse such as the plurinational state in mestizo institutions.[40] For example, the judicial branch.

As will be discussed later, especially in the second part of the dissertation, these fears are not unfounded. Several decisions taken by Ecuador's constitutional court have been restrictive of the rights of indigenous peoples, and in all the cases to be analyzed, there was application of the 2008 constitution and there will be brief references to the decisions of the constitutional court between 1998 and 2008.

The three options that have been mentioned about indigenous people's self-determination are: empower autonomy, deny autonomy or restrict the autonomy of indigenous peoples and nationalities. The courts have always

[40] See (Chuji 2016)

decided to restrict autonomy. In other words, to go against the original meaning of the institution.

This contradiction occurs despite being created by the indigenous peoples themselves, rejected in 1998 and created in the 2008 constitution. During this dissertation it will be seen how the indigenous movement has been an important force in the generation of legal-change in the last forty years of Ecuador's political history.

The indigenous movement in Ecuador has become one of the most important subjects in Social Movements Analysis in Latin-America. For Kenneth Jameson, for example, “[t]he indigenous movement in Ecuador has been among the most successful new social movements in Latin America since the late 1980s. Its success may be attributed to its formulation and persistent advocacy of an alternative to the changing manifestations of the capitalist order—the “plurinational state”.[41] Sidney Tarrow also underlines the importance of the indigenous movement in Ecuador as a part of the regional resistance to neoliberal initiatives in Latin-America.[42] Most of the material on the Ecuadorian Indigenous Movement is on its origins, structure, collective actions, and achievements.

1972 is a key point for the development of the indigenous movement in Ecuador. On the one hand, a Military Junta took power in Ecuador with an

[41] (K. P. Jameson 2011, 63)
[42] (Tarrow, Power in Movement: Social Movements and Contentious Politics 2011, xvi)

agenda of modernization of the agrarian sector in contrast of the claims of social distribution from the socialist and communist groups.[43] On the other hand, oil extraction started in the Amazon region. The main victims of the agrarian sector actions were the indigenous peoples from the highlands linked for centuries to the work in the *haciendas* in conditions close to slavery.[44] As for the oil extraction, indigenous peoples living in the Amazon forest, who had no contact (or just primary contact) with the *mestizo* culture, suffered violence, pollution of their lands and even extinction. Both groups had and have different claims, one for farming lands, and the others for territory.[45]

From 1972 to the "indigenous uprising" of 1990, the indigenous movement took shape into different organizations both nationally and locally; however, the most influential one was the Confederation of Indigenous Nationalities of Ecuador (CONAIE). The CONAIE is the merger of two regional organizations: the ECUARUNARI (*Ecuador Runakunapak Rikcharimuy* which means Indigenous Movement of Ecuador, now the Confederation of Kichwa Nationality of Ecuador), and the CONFENIAE (the Confederation of Indigenous Nationalities of the Ecuadorian Amazon Region).[46]

The indigenous uprising of 1990 was a coordinated non-violent action where members of the CONAIE systematically closed the highways of the whole

[43] (Bonilla 2000)
[44] (Valarezo 1993)
[45] (Black 1999, 17)
[46] *Id.*, p. 23.

country.[47] After some days of a virtual closure of the commercial activities in the country, the Ecuadorian Government was ready to negotiate.[48] Since then, the indigenous peoples have gained strength from the unity of their grassroots, and their impact on national politics have grown. In 1996, PACHAKUTIK (Plurinational Unity Movement) appeared as an alliance between the indigenous movement and progressive leftist *mestizos* with the goal to promote self-determination of the indigenous peoples and intercultural dialogue.[49] Even though the election success of PACHAKUTIK was modest, their power to negotiate inside legislative institutions (Congresses and Constitutional Assemblies) was strong because of their nature as a party-social movement. Furthermore, in the constitutional reform process of 1997 and 2007, the indigenous movement was granted support for its claims by the inclusion of specific rights, the recognition of the cultural pluralism of the society (multiculturality) and the addition of political pluralism (Plurinational State).[50]

While the bibliography on the Ecuadorian Indigenous Movement is extensive and detailed, it does not analyze the meaning and scope of the Plurinational State claim. Nevertheless, indigenous leaders who were active in the eighties remember several meetings and discussions on the topic, and it is still a field of discussion inside the movement. This narrative, about the ideas of

[47] (Andolina 1999)
[48] (K. Jameson 2010)
[49] (Becker, ¡Pachakutik! Indigenous movements and electoral politics in Ecuador 2011, 43)
[50] (Guerrero Cazar and Ospina Peralta 2003)

a new state with a different power distribution and respect for the diversity, should be considering to understand the Constitution of 2008.

2.2.2. Ethno-racial policy

The importance of ethno-racial policy analysis lies in the fact that it shows us what the objective pursued by a regime is, beyond the legal texts. A State could have a legal system that recognizes the rights of indigenous peoples and ethnic minorities but does so under the understanding that these are measures that these groups must move towards to reach the goal of assimilation into the hegemonic culture of society.

An example of this can be seen, for example, in the documents of politicians at the time of independence. President Thomas Jefferson, for example argued that the autonomy of Native American peoples should be respected as a measure of temporary protection, until their members become an integral part of American society.[51]

In other words, the integration sought in this case is based on the disappearance of cultural diversity. In other cases, laws to maintain the autonomy and diversity of a group may be created because the government -or the hegemonic society- benefits from the exclusion of certain members, and even generate spaces of autonomy for these groups to minimize the need for attention that the State could provide.

[51] (Anderson, et al. 2010) quoting a letter from President Jefferson to Indiana Governor William Henry Harrison originally publish at (Miller 2006).

For example, in the case of apartheid in South Africa, Albie Sachs states that the recognition of the ancestral authorities and their territory was intended to use tribal leaders as a mechanism for enforcing apartheid.[52] The racial policy, which could be seen as a system that sought to enhance diversity, sought to negate the State's obligations to members of communities.

A very similar example, as will be analyzed in the next chapter, occurred in the case of the hacienda systems in America, where respect for community authorities, as well as giving a certain degree of autonomy for the communities, did not have an appreciation of cultural diversity behind it, but was indispensable for the system which exploited the work of the indigenous people in order to function more efficiently. This happened by allowing peoples to resolve certain internal conflicts, without the State having to worry about it.

As Debora Yashar says, until well into the twentieth century this disinterest of the State to expand into the territories of the peoples allowed them to maintain their culture and their traditional form.[53] This lack of interest on the part of the State lasted almost five hundred years and ended because the needs of the State also changed with the change in the productive model. With respect to this factor we will study, above all, the discourses that the State has maintained with respect to cultural diversity and identity and ethnic politics within the periods studied.

[52] (Sachs n.d.)
[53] (Yashar 2005)

Contemporary approaches to constitutional law address the cultural pluralism issue by putting forth proposals for institutional and legal development. Boaventura de Sousa restates topics from Marx and Foucault, by discussing cultural diversity, especially in Latin-America. In his book *El Milenio Huerfano,*[54] de Sousa defines two historical assimilation techniques in multicultural societies: subordination and exclusion. Subordination occurs when a less powerful culture is used for labor, and it allows members of the dominant culture to accumulate goods (step down). Exclusion means that the less powerful culture is criminalized by, and excluded from, society (step outside).[55] De Sousa defends a "real" policy of cultural equality as expressed in the following statement: "people have the right to be treated equally if being different makes them inferior, and they have the right to be treated differently if equality forces them to lose their cultural characteristics".[56] Moreover, his theory boils down the implementation of constitutional change as enabling indigenous peoples to enjoy the benefits of being part of the main culture (political participation, access to economic development, and so on) without cultural assimilation.

Along the same lines, James Tully argues that multicultural societies need to rethink the concept of a state, starting with its constitution.[57] A constitution must be the instrument that establishes the rules of relationships

[54] The Orphan Millennium, no translation to English available.
[55] (Santos, El milenio huérfano. Ensayos para una nueva cultura política 2005, 133-147)
[56] Original text in Spanish: "tenemos derecho a ser iguales cada vez que la diferencia nos inferioriza; tenemos derecho a ser diferentes cuando la igualdad nos descaracteriza". (Santos, La caída del Angelus Novus: Ensayos para una nueva teoría social y una nueva práctica política 2003, 154)
[57] (Tully 1995)

among cultures. To enable a constitutional change, participation and dialogue are the most important factors. Both Tully's and de Sousa's theories look at the political will of the hegemonic culture to allow others to participate in the design of a new constitution, and this is not easy to address. This opportunity arose in Ecuador between 2007 and 2008; a new Constitution was enacted and includes several provisions about multiculturalism.

To analyze ethno-racial policy, it is not enough to rest in the text of the norms, but into how interpretation made by state official shape the impact that those have in the social-change.

2.2.3. Legal systems

A legal system is composed not only of the positive rules of the system, but also of certain unwritten rules which, reproduced by the agents of the system regulate what can be done within the legal field.

When Bourdieu speaks of his theory of the juridical field, he mentions that there would be certain theories and discourses that identify those who are participants in the specific field. Within his theory he calls this "habitus".[58]

Within this discourse, to justify restriction, ideas such as judicial interpretation as scientific process or what would or would not be possible to do within the field are reproduced. This normative goal contains conceptions that frame the analysis made by members of the legal field and has the potential to render reforms to national legislation ineffective.

[58] See (Bourdieu 1987)

Liberal theories support the idea that democracy is dominated by majorities in terms of decision making; therefore, the rights for people that are excluded from the majority are called "minority rights."[59] Based on liberal theory,[60] minority rights function as individual human rights and are designed to allow groups to keep their culture or achieve equality. Nonetheless, this vision does not address the importance of the collectiveness and the uniqueness of indigenous peoples. Collectiveness means a way of thinking about society as a life entity formed by ancestors, and the current and future generations; as a result, all rights get a different perspective. Kymlicka's work could be seen as applying liberal theories for recognizing special rights of cultural minorities. In his book *Politics in the Vernacular*,[61] Kymlicka proposes the concept of liberal culturalism, which enables groups to be entitled to special cultural rights. The most important aspect of his theory is the preservation of the culture of the minorities, so they can continue to use their language, religion, traditional dress, and so forth. For him, self-government should be permitted for "issues that are crucial to the reproduction of their language and culture."[62] In another book, *Multicultural Citizenship*,[63] Kymlicka presents a theory to resolve the supposed contradiction between minority rights and liberal tradition and to explain the

[59] (Chapman y Wertheimer 1990)
[60] (Raz 1994)
[61] (Kymlicka, Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship 2001)
[62] *Id*., 39.
[63] (Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights 1995)

debates between collectivists and individualists[64] regarding minority rights.[65] Nevertheless, he fails to take an explicit stance about this issue and instead argues how liberal institutions could include the two perspectives.

Legal liberal theories rest in the idea of a certain number of liberties of each individual that restricts the possible ways of action of the state. Those limits are always permeable, for the common good or the liberties of another member of the society could allow the state to trespass those limits. Following the due process, even life is something that is not untouchable. Freeman tries to reconcile multiculturalism and liberalism saying that liberalism do not look for "meld all cultures into a distinct pattern" because it respects individual identity, but "what liberalism refuses to do is to ensure a culture´s survival by enforcing politically the practices of any particular cultural group."[66] What Freeman and most liberal theorist do not take into account is that hegemonic cultures do not need to forbit other cultural practices in order to make other disappear, for they can change the conditions of living of indigenous peoples in a way that made the reproduction of their culture impossible (i.e. when they evict them from or pollute their territories) or undesirable (i.e. when racism made them to success in the wider society impossible). For indigenous peoples, some fundamental rights could only be understood as collective, and a number of those are

[64] Collectivists defend the idea of the necessity of recognition of collective ways to protect minorities' rights. Individualists state that minorities' rights are as enforceable as any other liberal right.
[65] (Kymlicka, The Rights of Minority Cultures 1995, 47)
[66] (Freeman 2002)

ethnically consider untouchable (i.e. the right to territory), so excluded from the market and the competence of the state to declare eminent domain.

For the purposes of this dissertation, indigenous peoples' claims concerning the recognition of collective rights and global identity are important in the process of recognizing their right of self-determination; consequently, a liberal perspective of the relation between states and indigenous peoples would not be appropriate. However, it is the main theory in Latin-American States, including Ecuador. When the idea of the law is discussed, the legal theories that frame the sight of the legal operators will limit the answers that they can provide both to the exclusion based on ethnicity and the implementation of new law that deal with diversity outside the liberal paradigm.

2.2.4. Reception of the International law

The last parameter to be analyzed in this study is the reception of international law in national systems. Authors such as James Anaya defend the importance that the development of international law has had for the recognition of the rights of indigenous peoples.

In his book *Indigenous Peoples in International law*,[67] James Anaya builds his theory about Indigenous Peoples' Rights on the foundation of the right of self-determination as conceived in international law and political theory.

[67] (J. Anaya, Indigenous Peoples in International Law 2004)

Anaya stresses that this right is recognized in the UN Charter,[68] the International Covenant on Civil and Political Rights,[69] and the International Covenant on Economic, Social, and Cultural Rights;[70] historically, however, these covenants were created to ensure recognition of peoples under colonial or racist regimes and were intended to gain the support of the international community in their sovereignty claims. As may be appreciated from literature on self-determination and minority rights,[71] one of the main concerns of states is the potential of this claim ending up as an attempt to secede. Even though indigenous peoples (especially in Latin-America) do not have the capacity to fight states for the secession of their territories, politically speaking they do have self-determination as the foundation of their claims for rights could not be strategic. In fact, Anaya himself suggests in a different paper that, "International law […] can best accommodate ethnic autonomy claims if they are justified on human rights grounds and avoid absolutist assertions of independence statehood."[72]

[68] Article 1. The Purposes of the United Nations are: […] 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.
[69] Article 1. 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
[70] Article 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
[71] (Kymlicka, The Rights of Minority Cultures 1995). See also, (Weller 2010); and (Chapman y Wertheimer 1990)
[72] (J. Anaya, The capacity of International Law to advance Ethnic or national rights claims 1995, 321), see also (Stavenhagen, Los Derechos Indígenas un Nuevo enfoque del sistema internacional 1990)

In his book "Indigenous Peoples in International law," Anaya argues that the debates and work produced around the status of indigenous peoples in the colonial period (whether they could be enslaved) or their legal capacity (whether they owned their territories) were part of the birth of public international law. Authors such as Fray Bartolome de Las casas, De Vittoria, Francisco Suarez defended the respect of the life of indigenous peoples and the recognition of their right of ownership over their territories from arguments of people's rights.

Since then, international law has been at the forefront of regulatory reform.[73] For example, the first international treaties to recognize the right to self-determination of peoples are the two international covenants on economic, social and cultural rights and civil and political rights of 1966.

Subsequently, Conventions 107 and 169 of the International Labor Organization are the first treaties to recognize the specific rights of indigenous peoples and nationalities. In countries such as Colombia and Ecuador, the inclusion of these rights in local constitutions, in the 1991 and 1998 constitutions, respectively, is due to this implementation of international norms. International law, especially the ILO 169 Convention, was influential for the domestic recognition of indigenous peoples' rights in several countries of Latin America.[74] For example, she highlights that by the year 2000 six Latin American

[73] In the 90's several international organizations put into their agendas the respect of diversity and the rejection to the cultural assimilation, see (Albo 2008).
[74] See (Stavenhagen, Indigenous People and State in Latin America: an ongoing debate 2002)

states recognized the right to enforce indigenous law through their constitution, by statute or the direct application of the ratification of ILO 169 Convention.[75]

The same could be said of the bodies responsible for monitoring compliance with international treaties, and the Committee against Racial Discrimination's observation was the first document to recognize the right to free and informed prior consultation. For its part, the Inter-American Court established in a series of rulings the right to property as a right that had to be interpreted from the ownership of cultures present in the Americas, including that of indigenous peoples and nationalities.

The court further held that there is a spiritual bond between indigenous peoples and their territory (Aguas Tingui), which should exist over the obligation of states to conduct prior consultations (Sarayaku case) and the obligation that these consultations should result in community consent when dealing with projects that cause serious damage to the territory of the people (Saramaka case).

The way in which States receive these decisions has proven to be of great help in the development of the rights of indigenous peoples, especially because of the internal resistance that in some countries, such as Ecuador, has existed to develop them at an infra-constitutional level.

[75] (Van Cott, The friendly liquidation of the past. The politics of diversity in Latin America 2000, 271). See (CONAIE 2011).

In addition, international law has served indigenous movements yet another tool to place in legal language their demands for recognition and protection of their fundamental rights.

2.3. The data

This study is based in multiple sources. The historical background will be based in bibliographic information. The discuss of the Rafael Correa will be taken from his 3-hour-long addresses to the nation that happen almost every Saturday for his 10 years in office. The acts of the Constitutional Assemblies of 1998 and 2008 will provide the data for topic analysis that allow us to identify how important was the discussion on indigenous peoples. Judicial decisions and official documents helped to show what was the official treatment of pluractionality after 2008 by the branches of the state.

Although this is not at ethnographic project, some ethnographic notes taken by the author during his field work will illustrate the tensions among the indigenous movement and the state. Interviews with politicians provide insights on the period of Rafael Correa's rule and the origins of the plurinational state as a concept, and what was the intention to receive this proposal by the elites with factual political powers to approve the new constitutions.

Press notes provide a glimpse on how visible the indigenous are for the mestizo society. This visibility becomes more salient in a political context. Finally, interviews with indigenous peoples' leaders will provide a narrative not only about the origins of the plurinationality but of the process of interpreting the

concepts of justice and law to produce a suitable legal proposal that considers their self-determination claims.

This research is not impartial. It begins with the conviction that indigenous peoples in Ecuador and in the rest of the world suffer poverty, exclusion, and discrimination. Moreover, it acknowledges the necessity of changes in different aspects of the society (among them the law) to improve their situation. These concerns are not new in research on indigenous peoples´ issues. Numerous theories put indigenous necessities and agendas at the center of indigenous research.[76] Following this line, different authors address methodological problems such as the traditional use of indigenous peoples as objects of study,[77] the ethical commitment of the scholarship for an advance in the indigenous peoples' rights,[78] the necessity of overcoming some western conceptions (especially the capitalist paradigm) to understand indigenous peoples' worldview,[79] and undertaking research with indigenous peoples as a collaborative process (something should be left for the community),[80] among other topics.

One of the most interesting approaches is the self-construction of the indigenous peoples' narrative from the community's perspective and cultural interpretation in a way that the researcher allows indigenous peoples to write

[76] (Denzin, Lincoln y Tuhiwai Smith 2008)
[77] (Swadener and Mutua 2008)
[78] (Ladson-Billings and Donnor 2008)
[79] (Giroux and Giroux 2008)
[80] (Jones and Jenkins 2008)

their own narrative and incorporate it in the research.[81] Letting indigenous peoples talk and explain their philosophy is a way to overcome colonialism in science as a way to help overcome colonialism in politics. Tomson and Mayer's project on rewriting the work from indigenous scholars on the conception of indigenous rights is an example of how to present a picture of the indigenous world respecting the cultural diversity.[82]

Charles Ragin works on the methodology of research will be useful to achieve this task. Ragin, in his book *Constructing social research*, states that a qualitative method is adequate to give voice to "marginalized groups […] who are outside of society's mainstream",[83] to interpret historically or culturally significant phenomena[84] and to advance theory[85] in a new perspective of social science "committed to the quality of human life".[86] Fontana, Frey and Borer have developed a theoretical framework for conducting interviews for social science committed to social and political goals and suitable for human rights research, whose goal is to contribute to the recognition of these rights and improve the living conditions of indigenous peoples.[87]

All these works have had influence, in some extent, on the present dissertation. The answers to the question of why the legal-change achieved by the most important Indigenous Peoples Movement of Ecuador (CONAIE) has

[81] (Tomaselli, Dyll and Francis 2008)
[82] (Tomsons and Lorraine 2013)
[83] (Ragin, Constructing social research 1994, 83)
[84] Cf., *Id.*, p. 83-84.
[85] Cf. (Ragin, The comparative method 1987, 44)Ragin, 1987, p. 44.
[86] (Ragin, Constructing social research 1994, 166)
[87] Cf. (Fontana and Frey 2005). Also (Borer and Fontana 2012)

not produced the social-change expected, look not only to fill an academic interest, but also to give some ideas that help to overcome the obstacles of the plurinational state.

FIRST PART – SOCIAL MOVEMENTS ACHIEVING LEGAL CHANGE

Chapter 3.

3. THE PATH OF THE PLURINATIONAL STATE: A SOCIAL MOVEMENTS IDEA THAT FORMALLY REINVENTED THE STATE

The 2017 meeting, which was described in Chapter One, is an example of how the relationship between the State and the Indigenous Movements has been framed, starting with the Spanish conquest: the dispossession of ancestral lands, labor exploitation, lack of civil recognition, no access to political participation, and a constant condescending discourse of the need to help indigenous peoples to become modern and civilized. For more than 500 years, Spanish and mestizo politicians tried to convert indigenous peoples from savages to productive members of the feudalist and the capitalist societies.

This first part of the dissertation (divided into two chapters) shows what the nature of these relationships was. Chapter 2 makes (i) a brief reference to the legal recognition given to indigenous peoples during the Spain colony era y and the way in which the collective actions of indigenous peoples influenced the direction and speed with which such recognition evolved, and (ii) an analysis of the long period of transition between the mestizo independence revolution of 1824 and the first attempts to change the mestizo paradigm with these relationships whose effects began to become apparent in the middle of the 20th century. Chapter 3 describes how the organization of the modern indigenous social movement started: voting rights were given to illiterate people, the influence of a progressive faction of the Catholic Church was involved in organizing a national movement, left wing political parties politicized indigenous

peoples with the discourse of the exploited peasantry, there was the entrance of indigenous social movements that made ethnicity salient and achieved an increased recognition of indigenous peoples in the second half of the 20th century, until the adoption of the Constitution of 1998, and the decade between 1998 and 2008 when formally all the claims of the Ecuadorian indigenous movement were included in the Constitution of 2008, starting with the definition the State of Ecuador as a Plurinational State.

3.1. The conquerors' arrival and legal status of the indigenous population in the Spanish-America

In 1531, the Spanish colonizers arrived at the territory where today stands the Republic of Ecuador. This land was part of the Inca Empire. The Incas, in a matter of about fifty years (starting in 1492 or 1493)[88] of their arrival from Peru, had unified the different cultures, established a government and promoted the use of a common language: Kichwa. They also imposed their laws and institutions using methods such as the forced displacement of entire villages within their large territories which comprised what is now the north of Chile, Peru, Bolivia, Ecuador and the south of Colombia.

The settlements of the Inca Empire were built mostly in the highlands, with just a few settlements in the coastal region of these countries. The Inca Empire was mainly dedicated to agriculture. Its incursions into the Amazon territories were rare, and this allowed indigenous peoples living in those

[88] (Ayala Mora 1989, 145)

territories to keep their cultures with virtually external influence; in some cases, this did not change until late 20th century.[89] Nowadays, the Amazon forest is still the territory of a number of Indigenous Peoples Living in Voluntary Isolation.[90]

Pizarro, and the other Spanish conquerors who came to these lands, took control of the territory of the ancient Inca Empire establishing a regimen of exploitation of the communities of the Kichwa speakers; these communities are known today as the Kichwa Nationality of the highlands.

The term nationality was adopted by the indigenous people's movement in Ecuador as a broader concept of "people" that is used in international law to describe a group of people that share unique cultural characteristics. Nationality holds a political sense; it implies not only an ethnic recognition, but also the recognition of the self-determination of these groups.[91] This terminology was also adopted by the Indigenous Peoples in Bolivia.

The other thirteen indigenous nationalities currently recognized in Ecuador, correspond to communities that live in forested areas on the coast or in the Amazon forest. Each group speaks their own language and share other distinctive features. The groups are: Épera, Chachis, Tsáchila, Awa, Cofán, Waorani, Shuar, Achuar, Shiwiar, Andoa, Zapara, Siona, and Secoya.[92]

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[89] (Ayala Mora 1989, 147)
[90] (Stavenhagen, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples (A/HRC/4/32) 2007, parr 42-48)
[91] (Pacari, Interview to Nina Pacari 2015)
[92] (Ministerio Coordinador de Desarrollo Social n.d.)

These communities, who, despite having lost their ancestral language as a product of the Inca policy of cultural assimilation, maintain characteristics distinctive of other communities and retain some of their ancestral customs are called “peoples” (in Spanish *pueblos*). There are nineteen “pueblos” in the Kichwa nationality: Amazon Kichwa, Mantas, Chibuleo, Ka;ari, Karanki, Kayambi, Kisapincha, Kiru Kara, Palta, Panzaleos, Natabuela, Pasto, Puruwa, Otavalo, Saraguro, Salasaka, Tomabela, Huankavilka, and Waranka. Ecuador hosts more than thirty different cultures including also African descendants and the hegemonic mestizos.[93]

The legal recognition of the indigenous peoples as subjects and their rights under the Spanish conquerors’ regime is not easy to follow. This is especially true regarding the way that the ownership of the land passed from the indigenous peoples to the Spanish Crown. Unlike the process of the British empire’s colonization in North America where the Crown signed treaties with indigenous peoples, which implies the recognition of certain legal capacity, Spanish colonization started with the dispossession of land from the indigenous peoples. The legal arguments by which the property of the indigenous territories was transferred to Spanish hands was the right to evangelize, which was granted by Pope Alejandro VI to the Catholic Kings with four Bulls – the Alexandrian bulls.

These bulls, issued in 1493, gave the Kings the obligation to govern and deliver the material and spiritual salvation of those who lived in the conquered

[93] (Porras Velasco 2005, 83)

territories. This bull was signed on May 4, 1493, and it was followed by another three in the following two years.[94]

"[...] We donate, perpetually grant, and assign to you and to your heirs and successors in the kingdoms of Castilla and Leon, each and every one of the islands and lands foretold and unknown until now have been found by your shipments, and cities are in the future and today. They are not in the domain of any other Christian lord, together with all their domains, cities, fortresses, places and villages, with all the rights, corresponding jurisdictions and with all their belongings. ; and to those and your partners heirs and successors with them and we make, constitute and depend on the same persons with full, free and omnipotent authority, authority and competence. Declaring that this donation, concession, assignment and investment does not have to be extinguished or removed in any way by another Cristian prince".[95]

By the time these bulls were issued by the Pope, the Catholic Kings had already forcefully taken possession of these territories. Spain and Portugal started disputes over the way to treat indigenous peoples and borders. Similar disputes over African colonies were solved by Papal bulls, so it had previously

[94] (García Gallo 1958, 18)

[95] Inter caetedra, Quinto Nonna, Alexander VI, 1493: […] os donamos concedemos y asignamos perpetuamente, a vosotros y a vuestros herederos y sucesores en los reinos de Castilla y León, todas y cada una de las islas y tierras predichas y desconocidas que hasta el momento han sido halladas por vuestros enviados, y las que se encontrasen en el futuro y que en la actualidad no se encuentren bajo el dominio de ningún otro señor cristiano, junto con todos sus dominios, ciudades, fortalezas, lugares y villas, con todos sus derechos, jurisdicciones correspondientes y con todas sus pertenencias; y a vosotros y a vuestros herederos y sucesores os investimos con ellas y os hacemos, constituimos y deputamos señores de las mismas con plena, libre y omnímoda potestad, autoridad y jurisdicción. Declarando que por esta donación, concesión, asignación e investidura nuestra no debe considerarse extinguido o quitado de ningún modo ningún derecho adquirido por algún príncipe Cristiano".

been shown to be an effective mechanism. However, they had no effect regarding the efforts of colonization of other European monarchies because Britain, France, and Germany did not recognize the authority of the Pope to set limits among reigns. The bulls were instruments to legitimize the invasion of the Americas, but not a way of acquiring land that was at least recognized by the other European States. For that reason, some jurists argued that those documents were not necessary:

"Although for the possession that the Admiral had taken of those New Lands, and for many other reasons, there were great lawyers, who had an opinion, that confirmation was not necessary, nor a donation from the Pontiff to possess just that New Orb, still the Catholics Kings, as obedient of the Holy See, and pious Princes, sent the same Ambassador, who begged his Holiness, to be used to send grace to the Crown of Castile, and Leon, of those lands discovered, and to be discovered in advance, I issue your Bulls about it."[96]

Nevertheless, the bulls are the only document that provide a legal explanation of why the indigenous lands passed to the ownership of the Crowns of Spain and Portugal. Since the proclamation of the crusades, the Pope claimed for himself the right to declare the Holy War and patronage. In other words, the right to submit by force the infidels and to take possession of their

[96] (De Herrera, 1730, pp. 40-41):."i aunque por la posesión que de aquellas Nuevas Tierras havia tomado el Almirante, i por otras muchas causas, huvo grandes Letrados, que tuvieron opinión, que no era necesaria la confirmación, ni donación del Pontífice para poseer justamente aquel Nuevo Orbe, todavia los Reies Catolicos, como obedientisimos de la Santa Sede, i piadosos Principes, mandaron al mismo Embaxador, que suplicase á su Santidad fuese servido de mandar hacer gracia á la Corona de Castilla, i de Leon, de aquellas Tierras descubiertas, i que se descubrieren adelante, i expedir sus Bulas acerca de ello."

possessions and to become the regent of their lives to protect their spiritual health. Therefore, these Bulls had another effect: to grant lawful possession of the lands that were forcefully taken away from the indigenous peoples. The Catholic Kings got a patronage that later become Vicariate, meaning that the Spanish Crown were the representatives of the Pope in America; this was the first title of the Kings of Spain over the occupied America. The discussion over the legitimization of the conquest included what was the legal status of the indigenous peoples. James Anaya identifies in this discussion one of the moments of birth of the International law.[97] Some voices claimed that indigenous peoples should not be considered slaves -i.e. Fray Bartolome de las Cases argued that indigenous peoples must be considered subjects of protection of the Crown, he talked about the injustices committed by the conquerors, and argued that indigenous peoples are entitled to fundamental rights.

"La causa por que han muerto y destruído tantas y tales e tan infinito número de ánimas los cristianos ha sido solamente por tener por su fin último el oro y henchirse de riquezas en muy breves días e subir a estados muy altos e sin proporción de sus personas (conviene a saber): por la insaciable codicia e ambición que han tenido, que ha sido mayor que en el mundo ser pudo, por ser aquellas tierras tan felices e tan ricas, e las gentes tan humildes, tan pacientes y tan fáciles a sujetarlas; a las cuales no han tenido más respecto ni dellas han hecho más cuenta ni estima (hablo con verdad por lo que sé y he

[97] (J. Anaya, Indigenous Peoples in International Law 2004)

visto todo el dicho tiempo), no digo que de bestias (porque pluguiera a Dios que como a bestias las hubieran tractado y estimado), pero como y menos que estiércol de las plazas. Y así han curado de sus vidas y de sus ánimas, e por esto todos los números e cuentos dichos han muerto sin fee, sin sacramentos. Y esta es una muy notoria y averiguada verdad, que todos, aunque sean los tiranos y matadores, la saben e la confiesan: que nunca los indios de todas las Indias hicieron mal alguno a cristianos, antes los tuvieron por venidos del cielo, hasta que, primero, muchas veces hubieron recebido ellos o sus vecinos muchos males, robos, muertes, violencias y vejaciones dellos mesmos".[98]

The occupation of other European powers in America and these allegations force to doubt the legitimacy of the authority of Emperor Charles over the "indias", and the authority of the Pope on border matters. The Emperor formed a Commission of several jurists and theologists to elaborate an argument on the matter with the Dominican Priest de Vitoria who wrote one the first works on international law dealing with the right of indigenous peoples "In Indiae". The book argues that indigenous peoples are the owners of the land, that they should have religious freedom, and even the right to govern themselves. Indigenous Peoples should be persuaded of the benefits of being vassals of a Christian prince.

In 1511, Carlos V sanctioned and published the "Laws of Indias" a body of regulations that established the foundations of the "derecho indiano". The

[98] (de las Casas 2011)

derecho indiano contained the administrative rules of America and its incorporation to the Kingdom of Castilla. This formalizes the appropriation of America by the Kings of Spain. Even though the Crown recognized a kind of ownership of the indigenous peoples over their lands, the law established that indigenous peoples' lack of the capacity to govern themselves and their matters because they were acting against the natural law. This thesis was developed by Martín Fernández de Enciso who indicates that Divine Providence had permitted the discovery of America, ergo, God wanted Spain to govern America. It was not just a right, it was a duty.

"Hay otras causas de justa guerra menos claras y menos frecuentes, pero no por eso menos justas ni menos fundadas en el derecho natural y divino; y una de ellas es el someter con las armas, si por otro camino no es posible, á aquellos que por condición natural deben obedecer á otros y rehusan su imperio. Los filósofos más grandes declaran que esta guerra es justa por ley de naturaleza.

(…)Tales son las gentes bárbaras é inhumanas, ajenas á la vida civil y á las costumbres pacíficas. Y será siempre justo y conforme al derecho natural que tales gentes se sometan al imperio de príncipes y naciones más cultas y humanas, para que merced á sus virtudes y á la prudencia de sus leyes, depongan la barbarie y se reduzcan á vida más humana y al culto de la virtud.

Y si rechazan tal imperio se les puede imponer por medio de las armas, y tal guerra será justa según el derecho natural lo declara" [99]

Therefore, the legitimacy of the rule of the Spaniards over the Indians was the lack of capacity; theoretically they were free human beings, but in practice unable to govern themselves. This legal statute was the vassalage. The Indians were second-class citizens whose only difference with slave status was that their masters did not have the right to kill them.

Under these conditions, the material development of the indigenous peoples could only be achieved by adopting the hegemonic culture; which meant abandoning their ancestral customs and their way of life including migration to urban areas. However, these options were not always possible. The indigenous populations who remained in their ancestral territories and dedicated to agricultural activities were integrated into the exploitative system of the territories ruled by Spain: the "haciendas". Haciendas are still part of the production of several countries in Latin America. For most of the indigenous population the haciendas were not spaces of escape. The haciendas system is a way of production where indigenous peoples do not have ownership of the land in which they live and work, and the land owner receives the benefits of production without having to pay for the work of the indigenous people. Even though they were not forced to remain on the haciendas, working for the

[99] (Sepúlveda and and Losada 1951)

landowner was the only option if they wanted to stay with their community in their ancestral lands.

This system allowed some degree of autonomy. While the Haciendas were productive, neither the landowners nor the regional governments were interested in being involved in the indigenous population's business. The governments were not interested either in extending social services to these communities. It was allowed, for example, to resolve disputes among indigenous peoples according to their own customs, keeping to some degree the transmission of knowledge (i.e. language), and even to some extent their own authorities and representatives if these did not breach to the interests of the owners of the haciendas or the government and the social or religious norms.

Debora Yashar argues that this legal pluralism is maintained in Latin America by the need for States to hold a corporatist citizenship that privileged collective bargaining with leaders of groups such as indigenous peoples.[100] The regional governments and the states later did not require the indigenous people to be culturally assimilated with the mestizo society. This need appeared later with the advent of the neo-liberal governments and new forms of production in the 1970s when states' economic revenues came from commodities (i.e. oil and minerals) rather than farming.

[100] (Yashar 2005, 60)

3.2. Contested relationship. Collective actions in the colony

The dispossession of land, forced work, and involuntary displacement suffered by indigenous peoples in the Colonial and Republican eras did not achieve the total assimilation of the indigenous population to the mestizo culture, nor did it even achieve a pacific recognition of the authority of the Spanish colonizers.

Several uprisings occurred during this period. Segundo Moreno (quoted by Angélica Porras in *Tierra de indios*)[101] identifies three distinct periods in the uprisings of indigenous peoples: First, there were clashes for the expansion and consolidation of the Spanish colonies. They were not proper uprisings, but part of the efforts of the Spanish campaign to pacify the land and suffocate the last resistance forces. Most of this first period occurred in the 16th century.[102]

The second period occurred in the 17th century. The uprisings of that time were local and at the borders of the cities founded by the Spaniards. At that time, the Spanish domain had settled, and most indigenous population accepted colonial authority and their institutions. Uprisings were provoked by the injustice of the conquerors´ institutions, against the foremen, owners of the factories, and even against the community leaders who collaborated with the Spanish Government. Some communities withdrew into the jungle or subtropical territories to continue living under their own rules and customs.

[101] (Porras Velasco 2005)
[102] (Moreno Yánez and Figueroa, El levantamiento indígena del Inti raymi de 1990 1992)

Hacienda owners carried out raids to return to “outlaw” indigenous population when they tried to flee to the cities or to the communities at the borders.[103]

The third period is marked by the rebellion of Tupac Amarú in Peru, in the 18th century. Although this rebellion occurred in the South of Peru, it raised awareness among indigenous peoples of the potential strength of indigenous peoples if they acted together and in a coordinated way at a regional level.[104]

On the other hand, the Spanish created a system of racialization, where the castes included indigenous, mestizos, and criollos. These categories grouped the indigenous into a single class, creating the idea of belonging to a common group. This external identification aided the consolidation of an indigenous identity that later resulted in the political organization of this group of peoples.[105]

TABLE 3.1. Collective actions by indigenous population in the Colonial Period[106]

Action	Reason	Against	Region	Year	Group
Pomallacta Rising	A census was introduced which sought to impose higher taxes	Owners of haciendas and delegates of the	Riobamba	1730	Group of Indigenous from Riobamba. Caught by

[103] (Moreno Yánez and Figueroa, El levantamiento indígena del Inti raymi de 1990 1992)
[104] (Serulnikov 2013) (Moreno Yánez and Figueroa, El levantamiento indígena del Inti raymi de 1990 1992)
[105] ANGELICA PORRAS; Tiempo de INDIOS, pag 83, Abya Yala 2005
[106] Source for the table: (Moreno Yánez, Sublevaciones indígenas en la Audiencia de Quito. Desde comienzos del siglo XVIII hasta finales de la Colonia 2014)

	on Indian population and imposed mandatory mining work	"corregidor"[107] in Riobamba			the "corregidors"
Alausi Rising	Tomás Asitimbay was arrested for a dispute with the parish priest of Guasuntos and sought refuge in Alausí	Parish priest of Guasuntos and ecclesiastical authorities	Chimborazo	1760	Indigenous community of Alausi
Revolt of the foreigners	The attempt to capture and impose "forced work on mines" to "foreigners" or indigenous persons that left the communities and the taking of Riobamba	Spanish autorities.	Riobamba	1764-1765	Foreign indigenous persons and from the communities of Riobamba

[107] Corregidor was an administrative/judicial position under the Spanish Empire. Corregidores were judges and regional governor.

San Miguel of Mollembato Riot	The Indians killed four tax collectors	Army and collectors of taxes in Cotopaxi	Salcedo	1766	Indigenous of Cotopaxi
San Idelfonso Factory Riot	Flogging and death of indigenous persons, including elderly women at San Idelfonso after demonstration	Landowners of the city of Ambato	Ambato	1768	Indigenous people from the Treasury of San Idelfonso
San Felipe Rising	The Indians heard about the rumor of a plan to take away their children to be sent to be haciendas in Ambato	Owners of hacienda, priests of Cotopaxi	Cotopaxi	1771	Indigenous of Cotopaxi
Otavalo Rising	By way of a new census it was feared that new taxes and forced labor would be introduced. The city of	Land owners of Otavalo	Otavalo y Cayambe	1777	Indigenous people of Otavalo, Cotacachi y Cayambe

	Otavalo was taken				
Census and Riots at Quizapincha	In response to the same Census and the capture of indigenous persons who had gone to cities	Land owners of Tungurahua and Cotopaxi	Tungurahua	1778-1779	Indigenous peoples of Tungurahua
Female Riots of Baños	(It is mentioned in different sources, but no details were found)		Baños	1780	
Riots of Guasuntos	(It is mentioned in different sources, but no details were found)		Guasuntos	1797	
Riots against the construction of the Guamote Bridge	(It is mentioned in different sources, but no details were found)		Guamote	1797	
Columbe Rising	(It is mentioned in		Guamote y Columbe	1803	

	different sources, but no details were found)				
Raising of Julian Quito	The chieftains and landowners sought that the indigenous population were led by local chiefs appointed by them	Mestizos of Riobamba government	Riobamba	1809	Indigenous people of Otavalo and Cotacachi

The collective actions of indigenous peoples in the colonial period did not imply the existence of social movements. Using McCann's perspective[108] on social movements, the groups (i) should aim for a broader scope of social transformation, (ii) should engage in collective actions as "symbolic" tactics, and (iii) its members are non-elites, mostly consisting of excluded people. The riots and uprising of this period lacked long-term objectives and symbolic tactics, and thus they did not have the kind of organization that allowed them to last a significant amount of time.

[108] (McCann 2004) quoted by (Sarat and Scheingold 2006)

The ethnic policy was to sustain the haciendas' production, so indigenous peoples were to stay in their traditional land working as farmworkers. It was not unusual to sell a hacienda with the "Indians included"[109]. The Spanish language was not taught, and the communities maintained a good extent of autonomy in their internal matters.

Indigenous peoples were not recognized as capable persons. The owners of the haciendas in some cases, and priests in others, were guardians of the indigenous population. Finally, international law, by that time, allowed indigenous peoples to not be treated as property of the colonizers.

3.3. New masters, same regime. First steps towards a national indigenous movement

On August 10th of 1809, in the city of Quito, an uprising took place. On this day, the rebels signed the Declaration of Independence of the "Real Audiencia de Quito" and its associated territories. The mestizos of the Ecuador, led by two Indians who had changed their names and their racial status, Eugenio and Manuela Espejo (originally Chusig), overthrew the Spanish authorities.[110] Mestizos seized the territory's government. However, the living conditions of the indigenous peoples did not change radically, nor did their communitarian way of living. Despite the participation of some mestizos of indigenous lineage in the revolutionary process, they later merged into the elites and the city's society.

[109] (Oberem 1978)
[110] (Pareja Diezcanseco 1992, 148)

The first movements for independence in the Ecuador arose using the Government of José Bonaparte in Spain as an excuse. The criollos (Spanish decedents born in America) declared that they were only subjects of the legitimate King of Spain, so they did not recognize the new dynasty as legitimate rulers. They used the legal resources of the “possession of the Indians” to say that only the catholic monarchs and their descendants had the right to govern the territory of the colonies.[111]

«El actual estado de incertidumbre en que está sumida la España, el total anonadamiento de todas las autoridades legalmente constituidas, y los peligros a que están expuestas la persona y posesiones de nuestro muy amado Fernando VII de caer bajo el poder del tirano de Europa, han determinado a nuestros hermanos de la presidencia a formar gobiernos provisionales para su seguridad personal, para librarse de las maquinaciones de algunos de sus pérfidos compatriotas indignos del nombre español, y para defenderse del enemigo común. Los leales habitantes de Quito, imitando su ejemplo y resueltos a conservar para su Rey legítimo y soberano señor esta parte de su reino, han establecido también una *Junta Soberana* en esta ciudad de San Francisco de Quito, a cuyo nombre y por orden de S. E. el Presidente, tengo a honra el comunicar a US. que han cesado las funciones de los miembros del antiguo gobierno.- Dios, etc.- Sala de la Junta en Quito, a 10 de agosto de 1809.- *Juan de Dios Morales*, Secretario de lo Interior».[112]

[111] (Pareja Diezcanseco 1992, 154)
[112] (P. F. Cevallos 1960)

The rebels justified their actions to the heirs of both the indigenous peoples and the Spanish loyal to the Crown. They alleged in principle the right to disobey the Bonapartes' government in Spain, as other courts of Castile in Europe did. Once the monarchy of the Bourbons in Spain was restored, they looked at "American courts" as a threat and ordered their incarceration after stating that the European courts do not have the same power that the American courts.[113]

Subsequently the ideas of Simón Bolivar and other liberal revolutionary leaders that admired the process of independence of the United States, returned to South America and gained followers – amongst them landlords and more educated mestizos. They restated the arguments that the Kings of Spain had no right to govern indigenous territories and claim themselves as heirs and owners of this land. Some key intellectuals of that time, such as Simón Rodriguez, suggested the necessity of learning from indigenous peoples' customs, that Kichwa must be taught in schools for everybody, and to create mechanisms for education and for the recognition of the indigenous peoples' lands[114] For some intellectuals, the South American revolutions were the opportunity to amend the historic injustices committed against the indigenous peoples, but, for politicians, the discourse was of the origin of their rights based on the idea of the indigenous peoples' legitimate possession of the land prior to the arrival of the Spanish conqueror. However, in practice, the new

[113] (P. F. Cevallos 1960)
[114] (Rodríguez 1954, 633)

governments kept the caste system, so indigenous peoples were recognized as subjects, so they could be taxed by the new Republic. The indigenous peoples were considered as a "innocent, abject and miserable"[115] race under the pupilage of the catholic priests.

"Nosotros ni aún conservamos los vestigios de lo que fue en otro tiempo; no somos europeos, no somos indios, sino una especie media entre los aborígenes y los españoles. Americanos por nacimiento y europeos por derechos, nos hallamos en el conflicto de disputar a los naturales los títulos de posesión y de mantenernos en el país que nos vio nacer, contra la oposición de los invasores; así nuestro caso es el más extraordinario y complicado (…) La mayor parte del indígena se ha aniquilado, el europeo se ha mezclado con el americano y con el africano, y éste se ha mezclado con el indio y con el europeo" (Bolívar 1819)[116]

Simón Rodríguez, the mentor of Simón Bolívar, suggested to take some measures regarding identity and racial politics, such as learning to use the Kichwa language and study the ways of life of indigenous peoples. Under Rodríguez' influence, Bolívar revoked the exceptional taxes imposed on the indigenous peoples, and he recognized them as owners of American soil. However, he didn´t think that they should be kept as autonomous groups, for they were not included in any way within the Government. In the same letter to

[115] Constitution of the State of Ecuador of 1830, art. 68.
[116] Inaugural speech of Simón Bolívar to the Congress of Angostura on February 15° of 1819

the Congress of Gran Colombia[117] he proposed that the representatives of the people, a sort of new aristocratic Government, must be the liberators, and the rulers of the new states, in accordance with the British parliamentary model.

"Todas las tierras reservadas en propiedad a los indios deberán ser devueltas a ellos como legítimos dueños que son de éstas"; el 12-II-1821: "La restauración a los indios del goce de todas las tierras reservadas a las cuales tienen derecho, sin tomar en cuenta quién es el dueño actual… de manera que ellos puedan tener tanto terreno como puedan cultivar, pudiendo escapar a la miserable condición a la cual habían sido reducidos". [118]

However, he sees them from a very one-sided point of view. In his letters, Bolivar manifests that "everything that is not Spanish in America, that what is not European, is barbarian. His speech shows his intention to save the natives through integration into modern life". [119] Some authors, such as the former president of Ecuador Rodrigo Borja in his *Encyclopedia of Politics* go even further and claim that the personal position of Bolivar and the other leaders of the independence was of contempt for the natives and their customs[120].

After the cessation of Gran Colombia, the leaders of the new Republic were recognized heirs and avengers of the great indigenous civilizations of America, such as the Incas, but they did not have a connection with the

[117] The Gran Colombia was an State formed in 1819 after the triumph of the American revolutionaries over the Spanish Crown. The State was form by the current states of Panama, Venezuela, Colombia, and Ecuador, and included territories that nowadays belong to Brazil, Guyana, and Peru. It collapsed in 1830.
[118] Executive Order of July of 1845 known as "Decreto del Cuzco"
[119] (Rodríguez Caguana 2017, 32)
[120] See "Indios" in (Borja, Enciclopedia de la política 2012)

indigenous people of their time. So, they kept indigenous peoples without any citizenship rights and subject to extraordinary taxes and forced labor and forced military service.

The first Constitution of Ecuador, enacted by Juan José Flores in 1830, one of Bolivar's generals, limited the political rights to only white, wealthy and educated men. The only reference to indigenous peoples was to point to them as a "clase inocente, abyecta y miserable",[121] and to put them under the guardianship of the church. Moreover, with the formation of Ecuador as a Republic, the emergence of indigenous ethnic conciseness was a threat to democratic institutions.

When Ecuador was part of the Spanish Empire, the central government was something distant, and therefore unable to control the daily life of the colonies. This was especially true regarding the communitarian practices of the indigenous peoples. The feudal system used to leave the vassal certain space of autonomy for their personal lives. The American colonies were not different in that aspect. While the exploitation of labor, poverty, and poor production conditions for the indigenous in the haciendas continued, the Crown was almost not interested in intervening in the communities. Even indigenous authorities, such as the "caciques" entered into the production system of the feudal economy. Some feudal lords, such as Leandro Sepa y Oro, obtained a "cacique" title to gain authority amongst the indigenous peoples. [122]

[121] In English: "an inocent, abject and miserable class" Constitution of 1830.
[122] (Morales 2000)

However, during the Republic, the State sought to show themselves as modern and forward thinking, with a single language (Spanish) and an illustrated political base of liberalism and democracy. The customs of indigenous peoples were against that vision of modernity. The political elite of the first years of the Republic did not consider the indigenous people of their time as political entities. They remained as the mode of production of the haciendas, and the State often moved them around such that no hacienda was ever without a working force. Indians were considered as savages and retrograde. While the birth of archaeology and anthropology tried to reconfigure and recount the history and origin of indigenous peoples, what also had an influence on the literature was the recognition of the existence of complex culture and the unjust treatment that they had received from the colonizers, and that they were still considered as part of an early stage of the civilization.[123]

"los indios de la costa, de cuerpo mediano, bastante endebles, pero, sin embargo, valientes. Los salvajes de las tierras amazónicas son bien formados, ágiles, de mirada perspicaz y desconfiada, intrépidos, dados al descanso y la ociosidad, apenas cubiertos sus cuerpos, y durmiendo las más veces a cortinas verdes. (…) Los indios de las serranías son de color bronceado, facciones toscas, pelo negro, lizo y lustroso, de aspecto grave, casi melancólico y casi indiferentes al bien y al mal."[124]

[123] (Rodríguez Caguana 2017, 34)
[124] (P. F. Cevallos 1960, 51)

The successive Presidents of the Ecuador, generally *criollos*, were protagonists of the internal struggles among liberals and conservatives to gain the control of the state. However, regardless of their party, they kept the production model based on the haciendas. Indigenous peoples were still treated as second class citizens, without legal capacity, whose roles in the society were as the labor force and privates in the frequent armed clashes between the political parties.

In 1861 Ecuador faced a political situation which nearly led to its cessation: some provinces of the Ecuador were seeking to become independent States or to join other countries, or even seeking to establish a new monarchy. The political factions arrived at an agreement in the first term of the conservative president Gabriel García Moreno.[125] García Moreno was sponsored by the conservative military with a program of reconstruction and national unity. In his government he connected territories with new roads and oversaw the modernization of the education system. All this was done under the discourse of leading Ecuador to a modern era.

García Moreno sat in office for just two presidential terms; however, he had a long political influence that lasted fifteen years from 1860 to 1875. This conservative era marked a change in the relationship of central political power with the indigenous population. Moreno wanted to maintain the model of the farm production - Moreno himself was one of the landlords of the country – this

[125] (Moreno Yánez and Figueroa, El levantamiento indígena del Inti raymi de 1990 1992)

required extensive control of the indigenous peoples through suppressing the indigenous institutions. Indigenous institutions were considered both anti modern was considered dissenting of the central State. This Conservative Government marks a trend in the relationship of power with the indigenous peoples, since it sought on the one hand maintain the model of the farm production, (as García Moreno was himself one of the main landowners of the Ecuador), which requires maximum control over the indigenous people and at the same time sought to suppress all institutions which are not considered modern or those seen as a challenge to the authority of the central State.

Moreno established an alliance with the Church to suppress all the practices or customs of indigenous peoples, indigenous education, their ancestral languages and forms of community organization. He moved the influence limit of the state into the Amazon forest (that remained virtually untouched by the western cultures) with forced evangelization campaigns and the use of more severe methods of assimilation on the indigenous that didn't embrace the roles that the mestizo culture assigned them.[126] The economic policy of García Moreno destroyed the micro-economy of the small landholdings which were only owned by small groups of indigenous people, by taxing the production and selling of their products and introducing forced labor norms for the construction of the state's roads and other projects of the modernization of the State, thus taking their workers.

[126] (Pareja Diezcanseco 1992, 223)

These actions, especially the increase of taxes, led to a series of uprisings in the Cañar Province, in 1862, in Guano (Chimborazo Province) in 1868, and in Azuay in 1871. This year, the largest indigenous uprising of this period took part. The “Daquilema uprising” was led by Fernando Daquilema - an indigenous leader and farm worker of the Puruha Community who had settled in the Chimborazo Province. The Puruha community (known today as the Indigenous Kichwa People of Puruha, the second biggest group of indigenous people in Ecuador).[127]

On Monday December 18 of 1871, in an assembly convocated in Cacha (the most prominent indigenous “parroquia”[128] of the Ecuador) the attendants proclaimed Fernando Daquilema as King of the Puruha People. They addressed a crowning ceremony in which Daquilema received a Crown and a Cloak as symbols of his power (the crown and cloak were removed from a religious statute of a catholic church), and the indigenous Manuela Leon was named commander of the indigenous army. They sent the tax collectors back to Riobamba and called a rebellion. Among the goals of the Assembly was the search for freedom from the ruling of the white government and the return to communitarian forms of living.[129]

In December 19th, the battle of Punin took place with the victory of the rebels that advanced to the city of Yaruquies, some miles from Riobamba, one

[127] (Ministerio Coordinador de Patrimonio 2009, 10)
[128] Parroquia is the smallest political división of the state. It is close to the common law concept of county.
[129] (López-Ocón Cabrera 1986, 124)

of the biggest cities of that time. In the next battle, the Sicalpa battle, historians estimated that up to 3,000 indigenous people were involved.

By the end of the year, the leaders were sentenced to receive the death penalty. Considering this news and the imminent arrival of reinforcements for the state army, Daquilema's captains asked the president for mercy. Daquilema, betrayed by his campaigns, surrendered and turned to the state authorities and was executed. Daquilema's rebellion was controlled by the state.

This was certainly the most important indigenous collective action in the XIX century. The event is considered as a sign of the how leverage of ethnicity was always present in the communitarian political organization of the indigenous peoples. The indigenous population showed that they could be a challenge to the authority of the State. Daquilema and Manuela León are considered as heroes of the homeland and pioneers of the modern indigenous movement that flourished in the second half of the XX century.[130] The declaration of the National Assembly as heroes of the homeland condemned the "regicide" of Daquilema, so Ecuador recognizes him as the crowned king of the Puruhas.[131]

In the last years of the García Moreno's Conservative Government, Moreno had strong opposition and there were the demands of the elites with the introduction of new liberal political ideas from Europe. Liberals started attempts to overthrow Garcia Moreno's government - a young military man, Eloy Alfaro

[130] (Maggi 2017)
[131] (Ecuador 2010, 3)

was one of the people involved. Years after, in 1895, General Eloy Alfaro headed the so-called liberal revolution, that imposed on the conservative society of that time many modern ideas such as the separation of Church and State, and the incorporation of women to education and voting rights.[132]

During the presidencies of Alfaro and the influence of liberal politicians, between the years 1890 to 1900, mulattos and indigenous groups were involved in the revolutionary army, but they did not get any lasting benefit besides the suspension of the additional taxes to indigenous population. Indigenous peoples were freed from the “diezmos” or the duty to pay 10% of their income to the Catholic Church. There was a recoil of the expansion of the so-called border of evangelization in the Amazon forest due to the constant squabbles among the Church and the State. Alfaro decided to suspend the evangelization missions authorized by García Moreno in the Amazon region, mostly in the provinces of Napo and Pastaza. The method of agricultural production based on peasant and compulsory labor of indigenous peoples of the Sierra began to decline in favor of an incipient export business in the coastal region with the cacao production, which led to the reduction of power of the owners of the “haciendas”.

The liberal government sanctioned statutes that gave back the education of indigenous peoples from the Church. The statute imposed that landowners increase the attendance of indigenous children to the State’s schools or build their own schools in the haciendas. However, the new law impaired the level of education of indigenous peoples since the owners of the haciendas used it as

[132] (Pareja Diezcanseco 1992, 240)

an excuse to create low quality schools in the haciendas, and forbiting indigenous kids to attend serious schools. The humble efforts of certain catholic priests to overcome illiteracy suffered a backlash with this policy.

Indigenous communities preserved their structure and although living in conditions of oppression, poverty and no access to the property titles. The industrialization of major cities in Ecuador, especially Guayaquil, meant that several indigenous peoples started to abandon their communities and integrate into the cities.

The indigenous identity continued to be decisive in the way of life of the communities. After thirty years of optimism provoked by the failure of the Conservative Government, new political parties of the left-wing appeared. Several indigenous communities started to collaborate with these groups, but also, they kept themselves active with uprisings in the highlands and in the coast.

The Republican years were characterized by a racial-ethnic policy that tried to keep the indigenous population as servants in the haciendas. Even though several American states started with a discourse of overthrowing the Spanish invaders, the model of economic exploitation was maintained. Three tactics were used to implement this policy: i) restricting voting rights, ii) restricting legal capacity, iii) maintaining the ownership of the land in favor of a few Spanish descendants' families.

The new state, in this period, did not have indigenous social movements as we know them nowadays.: i) they did not have a network that allowed them

to organize themselves well, ii) they did not offer a long term challenge to the power of the state, iii) they mainly have local interests, so they were not trying to change the structure of power in the society as a whole, iv) they did not use collective actions to aimed to reframe cultural symbols of the society. Although, the rebellion of Daquilema was symbolically important, the Puruha revolution did not achieve the goals of the indigenous movements of the time: i) land ownership, ii) voting rights, and iii) autonomy.

The lack of recognition of legal status of indigenous peoples matched with the kind of law that the new states created. The law after the revolution was part of the development of the liberal theory in the XIX century that gave a central role in the positive law and in the concept of law to the civil code. The civil code did not recognize, for example, the ancestral possession of the land as a valid title or the collective ownership of the land. The legal liberal theory was individual and property protection oriented and allowed the diminishing the status of certain people that did not match the criteria of a full citizen. Like the feudal law, the liberal law of the time of the independence, was adopted to legitimize the state of the economy and the society.

In this period, the international law was devoted to developing commercial relationships (private international law), and in terms of foreign influence (international comparative law) the civil code was almost universally adopted in the former Spanish colonies. The code was not only a group of norms, it was a legal theory that rejected collectivism and legal pluralism. As

indigenous peoples managed to keep their own laws and practices, the only way to reconcile the code and the customary law was to outlaw the latter.

Chapter 4.

4. STRIVING FOR JUSTICE AND LAW-CHANGE. THE BIRTH OF THE ECUADORIAN INDIGENOUS MOVEMENT

4.1. Organizing and defining

The first Assembly of the Ecuadorian Socialist Party took place in Quito in 1926. Jesús Gualavisí, an indigenous leader of the municipality of Cayambe was present in the meeting. Gualavisí was able to persuade the assembly to incorporate in their political project the demands of the indigenous peoples, i.e. access to land, and abolition of forced labor. Gualavisí succeeded in his goals because he framed the exploitation of the indigenous peoples as a matter of class, so the Marxist ideology of the party was able to include the indigenous peoples' necessities.

In the same year, the first indigenous organization "El Sindicato Obrero Campesino Juán Montalvo" (The Peasants and Workers Union "Juan Montalvo") was founded. Jesús Gualavisí was one of its founders. The union gathered the communities of "El Inca", "El Pesillo" y "Pan y Tierra", all of them from the region of Cayambe. The workers of haciendas and small landowners created these organizations under secrecy, for these kinds of groups were outlawed in Ecuador.

Among the first collective actions of this groups were the occupation of the hacienda Changala. The hacienda owners decided to evict some indigenous peoples from the land. The indigenous community occupied the hacienda. The

displacement of the indigenous people was violent, and the leaders were beaten and incarcerated. Despite this, the organizational efforts continued with the support of the Communist Party.

In 1930, the Church owned hacienda “Pestillo” was confiscated, but instead of being returned to the indigenous population, as was the agreement between the indigenous and the government, it was donated to the Welfare Office of Ecuador. The donation included even the lands that the landlords recognized as owned by the indigenous. Therefore, the indigenous were forced to work to stay in their lands. The extreme labor conditions continued in most of the haciendas. These events fostered the idea of utilizing organizational efforts within the movement.

The indigenous communities of Cayambe organized the first regional strike of these new organizations. The head of the Public Assistance Office reported to the capital that the indigenous population of the region refused to work in the haciendas, and that they were causing disorder, manipulated and stirred up by Communists from Quito. He asked for the intervention of the police. The indigenous leaders were arrested, but finally the protesters reached an agreement with the state to improve the conditions of the workers. The state allowed the indigenous peoples to maintain their Union. Several historical leaders of the modern indigenous movement were part of these first actions

such as Ricardo Paredes, Ruben Rodriguez, Dolores Cacuango, and Tránsito Amaguaña.[133]

In 1931, the strike ended, and the organizers decided to call the first congress of the peasant organizations of the Ecuador. Cayambe received leaders from the highlands and the coastal region with more than 2,000 indigenous and peasant leaders representing more than one hundred thousand farm workers (most of them indigenous). Socialist leaders from Quito, Ibarra and Guayaquil also attended the meeting.[134]

The government felt threatened by this gathering and decided to issue arrest orders against the socialist leaders and the indigenous organizers from Cayambe. The police forced the indigenous to leave the congress and to return to their communities using physical force and making them sign agreements to not participate in activities against public order, such as strikes, in the future.

The media echoed the government's discourse, claiming that "nothing good could come from an illiterate mass" and treated indigenous peoples as easily driven children. The discourse maintained that there existed wicked interests of communist and foreigners who were pulling the strings in these actions, and the claim that the indigenous population was wild and ignorant. Despite the failure of this congress itself, it was a display of the level of organization and networks that indigenous peoples were starting to show. It also

[133] See also: (Yánez 1992).
[134] (M. Becker, Una revolución comunista indígena: movimientos de protesta rurales en Cayambe, Ecuador 1999, 61)

shows that at this stage of the movement, mestizo and indigenous peasants presented their claims in the same terms. It was a class struggle, so it fitted perfectly in the discourse of the left parties.

This public image towards the indigenous movements would became bound much more deeply with left-wing parties, and that strengthened institutional capacities to create networks (both the Socialist and the Communist parties operated on a national level). The left-wing parties also invested in the education of the indigenous leaders. However, this kind of public collaboration bolstered the idea of the indigenous population of being incompetent members of the society in the hands of the radical left; [135] this is a stigma that they have had to carry even in recent times.[136]

Dolores Cacuango was a famous indigenous leader who took a leading part in the 1931 strike as representative of the indigenous people in Cayambe; however, until the age of 42, she was illiterate.[137] Participating in these actions, and being a member of the Communist Party, gave her a sense of the importance of education and how illiteracy is an obstacle for the participation and achievement of the rights of indigenous peoples. Cacuango met Luisa Gomez, a teacher and member of the Communist Party, and started a clandestine indigenous school for adults and children. Her son, Louis, was one

[135] (M. Becker, Una revolución comunista indígena: movimientos de protesta rurales en Cayambe, Ecuador 1999, 58)
[136] See the discussion on the Rafael Correa's Sabatinas in the second part of the dissertation.
[137] (Becker, Indians and leftists in the making of Ecuador's modern indigenous movements 2008)

of the first indigenous teachers trained by instructors of the Socialist Party, with its own resources they founded popular schools, where indigenous population were taught formal Spanish, Kichwa, math, grammar, political studies, and ethnic awareness. The classes were also based on ancestral knowledge associated with the land and the care of nature. These schools were working despite the opposition and harassment of landlords and the non-recognition of the State.[138]

This political studies and basic education were essential for the recognition of indigenous peoples as a political force. The schools gave them a space to organize the movements and discuss their future.[139] Several sectors of the society started to recognize the importance (or the threat) of indigenous peoples as a political engine, at that time not as voters but as elements of mobilization that could influence the rejection or approval of the voters of seated officials in the small cities. [140]

In 1935, these insurgent movements of indigenous people in the Region of the Andes in Ecuador gave rise to the first indigenous groups of political character and raised the public profile of indigenous leaders. The first groups did not use ethnicity as a central element, but instead used the exploitation of

[138] (Gonzales 2015). See the parallel discourses of Rafael Correa about the indigenous education.
[139] See (Pacari, Interview to Nina Pacari 2015)
[140] (Rodríguez Caguana 2017, 60)

the peasant class and their demands of holding communitarian titles over the land.[141]

In 1937, Ecuador enacted a statute that created the legal institution of the "comuna" which allowed the collective ownership of the lands. [142] The *comunas* were agriculture-based institutions, so the uniting factor of the group was not formally the ethnicity.[143] Most of the comunas were formed of the indigenous population; however, it was not a way of recognition of the indigenous peoples as collective entity due to ethnicity belonging was not a condition to create a comuna.[144] For the state the comunas respond to the will of farm neighbors to produce a bigger piece of land in order to increase its productivity. In some way, comunas were a way to move the indigenous population from their wild ways of living to a more civilized mestizo status as peasants. Also, the criteria to assign the land were the availability of free space, which in terms of the haciendas meant the less productive soil.[145]

Art 1. "Todo centro poblado que no tenga categoría de parroquia que exista en la actualidad o que se estableciere en el futuro y que es conocido con el nombre de Caserío, Anejo, Barrio, Partido, Comunidad, Parcialidad o cualquier otra designación, llevara el nombre de comuna, a más del nombre propio con el que se existiere o fundare. (…) Declarase que las comunidades

[141] (Ayala Mora 1989, 109)
[142] Statute for the Organization and Regulation of the Comunas, 1937.
[143] (J. Sánchez-Parga 1996)
[144] On the "comunas" as boosters of the modern indigenous movement see (Guerrero Cazar and Ospina Peralta 2003).
[145] Statute for the Organization and Regulation of the Comunas, 1937

campesinas tienen derecho a existir y a desenvolverse social y económicamente bajo el amparo y protección del Estado"[146]

One effect of the new comunas statute was the migration to the Amazon region of the country.[147] The promise to receive a title over the free land bolstered the expeditions of mestizos and some indigenous population to the territory of the indigenous peoples of the Amazon forest that had had a relative isolation status before the statute.

The indigenous movements of the time were settled mostly in the highlands, and their main demands were collective property and a land reform that could return to them their old territories that had been converted into haciendas since colonial times.[148] The comunas were a middle stage to the recognition of the indigenous territories. For the indigenous movement comunas were not the recognition of the ethnic diversity of the state, but it was a tool to achieve these short-term goals.

The ethnic aspect of these struggles is more present in the literature of that period[149] of a school of authors known as indigenists.[150] To spread the knowledge of the situation of the indigenous population to the mestizo society, there was also important early archaeological and anthropological work that

[146] Statute for the Organization and Regulation of the Comunas, 1937, Art 1
[147] See (Ministerio de Bienestar del Ecuador 1984)
[148] The land reform occurred in 1964 under the comunas statute and the land reform and colonization statute. See The later was enacted in 1964 under the ruling of a Military Junta of government by the executive order 1480.
[149] The first novels dealing with the conditions of the indigenous peoples were "*El Indio Ecuatoriano*" (The Ecuadorian Indian) by Pio Jaramillo Alvarado, and "Huasipungo" by Jorge Icaza that talks about the uprisings or farm strikes of 1930.
[150] (Ayala Mora 1989, 10)

recognized the value and legitimacy of the indigenous communities as original inhabitants of Ecuador through a narrative that connected the peoples that existed before the Spanish colonization and the peoples that still inhabit Ecuador.

These contributions had an impact on academics, but not politics. While other countries, like the United States, developed at least legal explanations that justified the transfer of the ownership of the indigenous lands first to the settlers and later to the current owners of indigenous lands[151]. However, in Ecuador there were no debates about the legitimacy of the creation of haciendas or the existence of pre-state right of ownership of indigenous peoples that allowed a comprehensive land reform that considered ancestral lands and stopped a new process of colonization of the Amazon region.

The indigenous social movements of the 1930s advance to the next decade with the necessity of articulating its efforts at a national level. One of the first attempts of trans-communitarian organization was the “Federación Ecuatoriana de Indios” (Federation of Ecuadorian Indians, or FEI for their Spanish abbreviation) that was founded in 1944.[152]

In 1945, the debate to give voting rights to the illiterate started. Indigenous peoples were in the center of the debate because in several communities Spanish was not fluently spoken, and for much of the indigenous

[151] See (Anderson, et al. 2010)
[152] (Ayala Mora 1989, 11)

population, Spanish was their second language. Illiteracy in the communities were bordering the 100%.[153] There were clashing interests in the debate. Even left-wing parties, that proposed universal voting rights, left aside the illiterate. In the same line, the sitting president, Velasco Ibarra, considered that the illiterate voters would be against the progress of the nation, and it made the indigenous population an easy prey to the interests of those who were opposed to the progress of the fatherland.[154]

This Constitution of 1945, which finally did not accept the vote of the illiterate or who do not speak Spanish, showed the lack of interest of political elites to allow indigenous peoples to increase their political power. Depriving them of political rights was a way to not recognize them as full citizens.

"De aceptarse esta disposición como está, el mayor número de esa clase quedaría al margen de los derechos políticos, pues los trabajadores en su mayor parte son indígenas o montubios que no saben leer ni escribir; mientras tanto, sí se les impone hacer el servicio de conscripción militar, el de pagos de impuestos, vialidad, y se les aleja del ejercicio de los derechos cívicos, lo que francamente repugna. No quiero que se trasplanten en esta Constitución los postulados de la Constitución rusa o soviética, ya que en ella sí se les da los derechos políticos a los analfabetos, pero sí quiero dejar constancia de mi modo de pensar sobre el alcance de este Art. Creo que la H. Comisión de Constitución ha debido hacer la clasificación de los derechos políticos para el efecto de

[153] (Mijeski y Beck 2011, 10)10-11
[154] (Rodríguez Caguana 2017, 51)

conceder el voto a esta mayoría de la población ecuatoriana” [155](Act 68, 24 of October of 1944).

However, the Constitution of 1945 stated the recognition of the ethnic diversity as a value through the recognition of the Kichwa and the other ancestral languages, and the indigenous customs as "Cultural Heritage of Ecuador".[156] The Constitution also stated that the State will promote their teaching in the schools of mostly indigenous population. The next year this disposition was cancelled by an Executive Order that considered that the bilingual education went against the unity and the sovereignty of the nation.[157]

In the decade of 1950 two streams that would be determinant in the formation and direction of the indigenous movement converged. One is the formation of parties of left and its internationalization, which allowed the indigenous to take a national political direction, articulate leadership with other indigenous peoples of the continent, and be considered as actors to be considered. Other parties and social sectors worried about the ideological direction that the indigenous groups were taken. Consequently, other actors soak to replace the left-wing parties in its role of organizational space to gain the support of the indigenous groups.

The second factor that defined the direction of the indigenous social movements was the relationship with religious groups. Traditionally the Catholic

[155] (Constitutional Assembly of 1944 1944)
[156] (Constitutional Assembly of 1944 1944)
[157] (Rodríguez Caguana 2017, 53)

Church was close to the indigenous population, but it was allied with the landowners and groups of power. Moreover, until the liberal revolution, the Church was one of the largest landowners of the Ecuador. After the liberal revolution this reality was reversed, but only regarding the ownership of the land, since the Church's influence and economic power continued.

In 1954, the bishopric of Bishop Leonidas Proaño started in Chimborazo, one of the provinces of Ecuador with most indigenous population. Monseñor Proaño would be called "the Bishop of the Indians".[158] He comes from a peasant family and as such knew Kichwa and the dynamics of many indigenous communities. Unlike priests who until then had worked mainly in the cities and close to levels of power, he moved near the camp. His humble origins were despised by sectors of traditional power; however, he was named Archbishop.

Proaño joined the "liberation theology", power of the Catholic Church which along with Leonardo Boff is inspired in the Second Vatican Council in 1965, based on the idea that the Church should align itself with the poor in a struggle for social justice. During the 60's his work was related and persecuted with several leftist movements. Proaño was highly controversial. In 1956, before the promulgation of the agrarian reform, he decided to distribute land belonging to the Church among the Indians who worked on them and to help them by formalizing community organization and insisting that the big landowners

[158] (Cachimuel 1992)

(Catholics) do the same and legitimize the claims of indigenous peoples on the land.

Monseñor Leonidas Proaño's action was considered crucial to the binding and awareness of the indigenous movement in its identification as a cultural group more than just identification as peasants.[159] Proaño, with a group of collaborators included leaders linked to the Communist Party, promoted conservation of the Kichwa language and cultural traditions of indigenous peoples, including traditional medicine, its organizational forms and their ancestral territories. This group created a model of education through radio broadcast for adults but especially for indigenous Kichwa speakers. These processes allowed an important sector of indigenous literacy and included the professionalization of the leaders which later enabled them to gain access to politics.

This process is known as the birthplace of the current indigenous movement, including demonstrations which prompted, such as in Riobamba where indigenous peoples began to protest within the cities to present their demands to the authorities. This process was known as the rebellion of "ponchos".[160]

In 1971, he was accused of being communist and to encouraging indigenous guerrillas, but the delegate of the Pope acquitted him. In 1976, he was imprisoned for attending a meeting with other sixteen bishops to discuss

[159] (Espinoza 1991)
[160] (Secretaría Nacional de Planificación y Desarrollo n.d.)

the lack of democracy and the violence in South America. In 1988, he promoted among indigenous communities the 500 years of campaigning and resistance that would conclude with the general indigenous uprising in the 1990s.[161]

Before his death in 1988 he met with President Rodrigo Borja to speak in favor of the demands of the indigenous people and urge him to continue with the educational process of the movement.[162] In the 1960s, Latin American Governments were influenced by development models promoted by international agencies, especially the Economic Committee for Latin America and the Caribbean, established in 1958 (CEPAL). [163]

This body has the manifest objective to achieve development in the industrialization and homogenization in the development of the economy, propose policies for incentive and economic integration of the peasants to the national productive activity. The tacit goal was to generate policies that improve the conditions of the farmers to reduce the danger of the accession of the peasants and indigenous to Communist movements and prevent the recurrence of the conditions that allowed the Cuban revolution.[164]

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[161] (Secretaría Nacional de Planificación y Desarrollo n.d.) /
[162] (Borja, Interview to Rodrigo Borja 2017)
[163] In 1940, another religious groups arrived at Ecuador. They settled primary in the Amazon forest. The most famous is the IVL (Summer Linguistic Institute) that established several schools and lived with the communities. They first contacted several communities. The IVL has been accused of been agents of oil companies to establish good relations with native population and of taking biological samples and archeologic remains. Moreover, they were accused of divide communities and deliberately change their customs. They were expelled from the country in 1981. (Chancoso 2003)
[164] See (Cueva 1981)

Based on these policies some factions of the indigenous movement formed the National Federation of peasant organizations (FENOC), identifying their first representatives and spokespersons in unions and certain sectors of the Church and raising the indigenous issues mediated by the equivalence between indigenous peoples and peasants.[165]

The growing presence of indigenous issues is evident in the 1967 Constitution. Three marginal mentions of the indigenous peoples' rights appeared for the first time in Ecuadorian Constitutional law: the recognition of the ethnic diversity of the country, the prohibition of discrimination on grounds of race and bilingual education. The latter can be considered the first recognized specific constitutional right of peoples and indigenous nationalities because of their cultures. However, there is no mention to the diversity of indigenous peoples or are granted specific collective rights. In the 1979 Constitution the same rights remained.

4.2. EIM starting to change wind. The 1990 uprising and the law-change agenda

The National Federation of Peasant Organization (Federación Nacional de Organizaciones Campesinas - FENOC) incorporated the word native in its denomination to respond to a growing demand for ethnic identification that exceeds the identity based solely on agricultural economic activity. In the 1990s, it added to its name to include the Afro-descendant peoples in this organization;

[165] See (Pacari, Interview to Nina Pacari 2015)

the current name is National Confederation of Peasant, Indigenous and Afro Descendants Organization (Confederación Nacional de Organizaciones Campesinas, Indígenas y Negras - FENOCIN).

In the 80's the Federation of indigenous Evangelical del Ecuador (FEINE) was founded as an organizational alternative for indigenous peoples who had gone through a process of Protestant evangelism and, therefore, had moved away from the organizational process of most of the indigenous peoples of the sierra, which was mainly conceived around progressive factions of the Catholic Church.

TABLE 4.1. Main National Indigenous Organizations[166]		
Organization	Year	Characteristics
The Shuar Federation (Federación Shuar)	1961	263 Shuar groups. The group came from the Salesian Missioners Centers, the first organization with an official proposal.
The ECUARUNARI - Awakening of the Ecuadorian Indians (Despertar de los Indios Ecuatorianos)	1972	It started as the branch of a progressive wing of the Church, initially as a grassroots organization of peasants from highlands provinces of the sierra partnering with left wing unions. The ECUARUNARI

[166] Sources (Maldonado, et al. 1989), (Becker, ¡Pachakutik! Indigenous movements and electoral politics in Ecuador 2011), and (Porras Velasco 2005).

		tried to secularize unions left to secularizing and to form a political organization
The Ecuadorian Confederation of Indigenous Nationalities of the Amazon -CONFENIAE (La Confederación de Nacionalidades Indígenas de la Amazonia Ecuatoriana)	1980	It was started as a set of provincial organizations of Sucumbíos and Napo, Pastaza and had the aims of achieving recognition of their territories
The Evangelical Indigenous Federation - FEINE (Federación de Indígenas Evangélicos)	1980	Indigenous population from provinces of the central highlands joined Evangelical religious organizations to initiate productive projects and to fundraise from local NGO, rather than making policy proposals and joined other organizations in massive demonstrations
The Confederation of Indigenous Nationalities of Ecuador – CONAIE (Confederación de Nacionalidades Indígenas del Ecuador)	1986	Born from the ECUARUNARI, it brings together the nationalities of the highlands and from the Amazon rain forest. It is the most inclusive organization of Ecuador. The diversity of interest and necessities of the members of the organization make

		CONAIE an organization with permanent internal debates.
Pachakutik	1993	A political party arising from a resolution of CONAIE to participate as a political arm of Indigenous Social Movement. It was open to the participation of the mestizos that share the goal of the Plurinational state.

Organizations such as the FEI and the FENOCIN were sponsored by political movements of the time and with a strong emphasis on the demands for land for agricultural activities, the identification of the indigenous peasants, in schools as being central community literacy frequented by Salesian priests immersed in the theology of liberation is brewing a new movement whose emphasis would be on ethnic identity

Several local and provincial organizational projects sought for their inclusion in the Ecuador Kichwa Llaktakunapak Jatun Tantanakui (the Confederation of Peoples of the Kichwa nationality of Ecuador – ECUARUNARI) in 1972. Since 1979 the growth of the indigenous movement began to take shape and passed through the experiences and contacts of its members with similar organizations in other countries. Meanwhile in the Amazon, a similar initiative was strengthened in 1980 with the creation of the

Confederation of Indigenous Nationalities of the Ecuadorian Amazon (CONFENIAE), created due to the need to resist the processes of colonization and extraction of natural in the region.[167]

The return to democracy with the Government of Jaime Roldós Aguilera in 1979 constitutes a milestone in the recognition of ethnic diversity by acknowledging speakers of Kichwa in a symbolic way.[168] The tacit recognition of Kichwa as an official language and the presence of indigenous peoples in national politics took place in the hands of the President before the National Congress on August 10, 1979. The President Roldós gave part of his speech in Kichwa. This gesture was considered at the time as a populist measure by Roldós. Jaime Roldós had come to the Presidency in place of his uncle (a politician) Assad Bucaram, (who was unable to run for president for not being Ecuadorian by birth). This meant that Roldós doubted his strength with the sectors of coastal workers, so at the stage of campaign he was looking for a connection with the left-wing parties close to the peasants of the sierra and the nascent indigenous.[169] Giving a speech in Kichwa was understood as a gesture of gratitude to the indigenous vote. In his Government, literacy, education and training of indigenous teachers increased, which strengthened the autonomy of the movements and the construction of joint projects of peoples.

[167] (M. Becker, Pachakutik! 2015, 5)
[168] (Guerrero Cazar and Ospina Peralta 2003, 172). See also, “Mensaje en Quechua del discurso presidencial en Agosto 10 de 1979” in Jaime Roldós Aguilera archives: https://youtu.be/_v_aO5DRSng.
[169] (Borja, Interview to Rodrigo Borja 2017)

In 1980 the indigenous movements were maintained in the light of the leftist movements but looked for a distance to create not only a political agenda but also an ethnic one[170]. Part of the process was the reconstruction of their identities, internal debate about their development prospects, the definition of its organizational structure and its political plan.[171]

The definition of a character of the Organization was vital, for which it was important to maintain and recognize "the double dimension of the problem that calls them", on the one hand members of classes and also members of the nationality.[172] Thus, CONAIE (Council of indigenous nationalities of the Ecuador) and CONFENIAE (Council of indigenous nationalities of the Ecuadorian Amazon) were founded. In the same year (1980), the two confederations created the National Coordination Council of indigenous nationalities (CONACNIE) that would be transformed in 1986[173] to the Confederation of indigenous nationalities of the Ecuador (CONAIE), an organization which would subsequently also incorporate indigenous nationalities of the coast.[174]

These organizations had difficulties to coordinate between 1980 and 1989, such as the different form of representation of certain peoples (such as

[170] (Porras Velasco 2005)
[171] (Moreno Yánez and Figueroa, El levantamiento indígena del Inti raymi de 1990 1992)
[172] This double strategy base on class struggle and ethnic claims is analyzed by anthropologist (Sánchez-Parga, El movimiento indígena ecuatoriano 2010). See also (Pacari, Interview to Nina Pacari 2015)
[173] On the importance of the CONAIE as the institution that represented the indigenous movement, see (Cruz Rodriguez 2012, 204) Also see (CONAIE 1999)
[174] See (Pacari, Interview to Nina Pacari 2015)

the fact that some nationalities did not accept representative democracy), the different number of people and their representatives (the Kichwa were the most numerous, however they did not have specific territories), the contradictions between ancient authorities and authorities of the communes, the existence of federations and similar organizations. In addition to these issues, they lacked official recognition.

This diversity has been a huge strength (no indigenous organization has the scope of the CONAIE) and weakness (Governments have tried to divide the organization trying to negotiate with the nationalities and peoples, creating unrest within the Organization).

In these organizations, especially in the CONAIE, it is important to consider this double dimension in their policies, which fail to summon specific issues relating to the peasantry and allowed to coordinate with other sectors such as indigenous residents in the cities, students with access to bilingual education, professionals, etc. They also aimed to start political alliances.[175]

After the death of Roldós, and subsequently the Government of Febres Cordero, the indigenous movement suffered a setback. Bilingual education programs were limited because the government considered it as space of organization of the movement. it pursues organizations. This is a period in which all Latin American States discourage the organizing of unions and movements.

[175] See (Pacari, Interview to Nina Pacari 2015)

Some leaders were even criminalized and accused of wanting to be subversive groups.[176]

Febres Cordero considered Indians as a force caught in the past which should move towards progress[177] to escape their past. He declared himself a "cowboy" and compared himself with Reagan. To be considered as a terrorist group by the government highly impact his legal recognition and their development as a political force.[178]

At the same time the persecution under the Government of Febres Cordero and the experience of other indigenous peoples in the continent which were practically decimated under dictatorships of the right and Governments make to talk within the indigenous movement the need to break the oppression that placed its own diversity as indigenous and spoke of a new objective "the transformation of the nature of the current power of the Uni-national State, hegemonic, exclusive and undemocratic and repressive society (...) and it seeks to build a new humanist society and Plurinational State."

These experiences are reflected in the change that occurred in 1990 during the time of President Rodrigo Borja. The need to express the repressed during a brutal Government, join the political opportunity to reactivate the indigenous movement, and the need to work together and take collective action.

[176] See (Santi 2011)
[177] (Febres Cordero 1984)
[178] (Tinel 2008, 374)

The agrarian reform and the literacy program, in both Spanish and Kichwa, "Monseñor Leonidas Proaño", drastically reduced illiteracy among adults, and other programs such as the creation of nurseries for children with limited resources or the creation of food and inclusion programs in schools in the cities for children of peasant migrants, were considered to be aimed at improving the living conditions of the indigenous people, although not as an ethnic group as a whole but rather as a means of improving their individual lives.[179]

In 1990 the Congress of Native Peoples was held, the name of the nationalities under which the peoples were grouped was defined, and under the figure of "indigenous uprising" in all parts of the country the indigenous people entered the cities, interrupted the roads and declared a national strike in most of the country's provinces. This uprising was called the Inty Raymi because it was organized at the time of the festivities celebrating the solstice.[180]

In August of 1990, the OPIP presented to President Borja a plan of self-determination of the Shuar, Achuar and Kichwa nationalities into their territories. This is que first official demand of territorial authority of the Indigenous peoples and provoked the rejection of the President, the media and the society. Borja said that the project was intended for crated a parallel state.

[179] See (Borja, Interview to Rodrigo Borja 2017)
[180] See (Becker, ¡Pachakutik! Indigenous movements and electoral politics in Ecuador 2011)

The indigenous movement initially participated in the literacy and bilingual education programs, as well as in a program that promised to bring about a real agrarian reform of the Borja government, which presented itself as leftist and progressive, even though Borja did not participate in the socialist movements of Ecuador in the 1960s ascribed to the international leftist movement.[181]

Borja organized the literacy program based on the teachings and life of Leonidas Proaño, a religious man whose thought and work were fundamental for the formation of the indigenous movements identified with the left and the Catholic Church, but he recognized that they did not have a pedagogical or political bias that would allow the development of the indigenous peoples themselves.

Disillusioned by the slow progress of agrarian reform and, in the case of the Amazonian nationalities, by the control still maintained by the Summer Institute of Linguistics and certain religious communities over Amazonian territories, they activated a series of collective actions at the national level, closing roads, and entering the cities to force the government to accept their demands. But the trigger for the action was the president's refusal to negotiate with the indigenous leadership on his demands of sixteen points, which as the goal demanded the declaration of the plurinational state.[182]

[181] See (Borja, Recovecos de la historia 2016)
[182] (Farah 1990)

On May 28, 1990, the indigenous people began their protest with the seizure of the church of Santo Domingo in Quito, located in the central square of Quito in front of the presidential palace. The association of "young Christians" with the help of the social ministry entered the church and stayed there for 12 days, waiting for the arrival of the groups of communities from other cities, mainly from the Sierra and the Amazon region.[183]

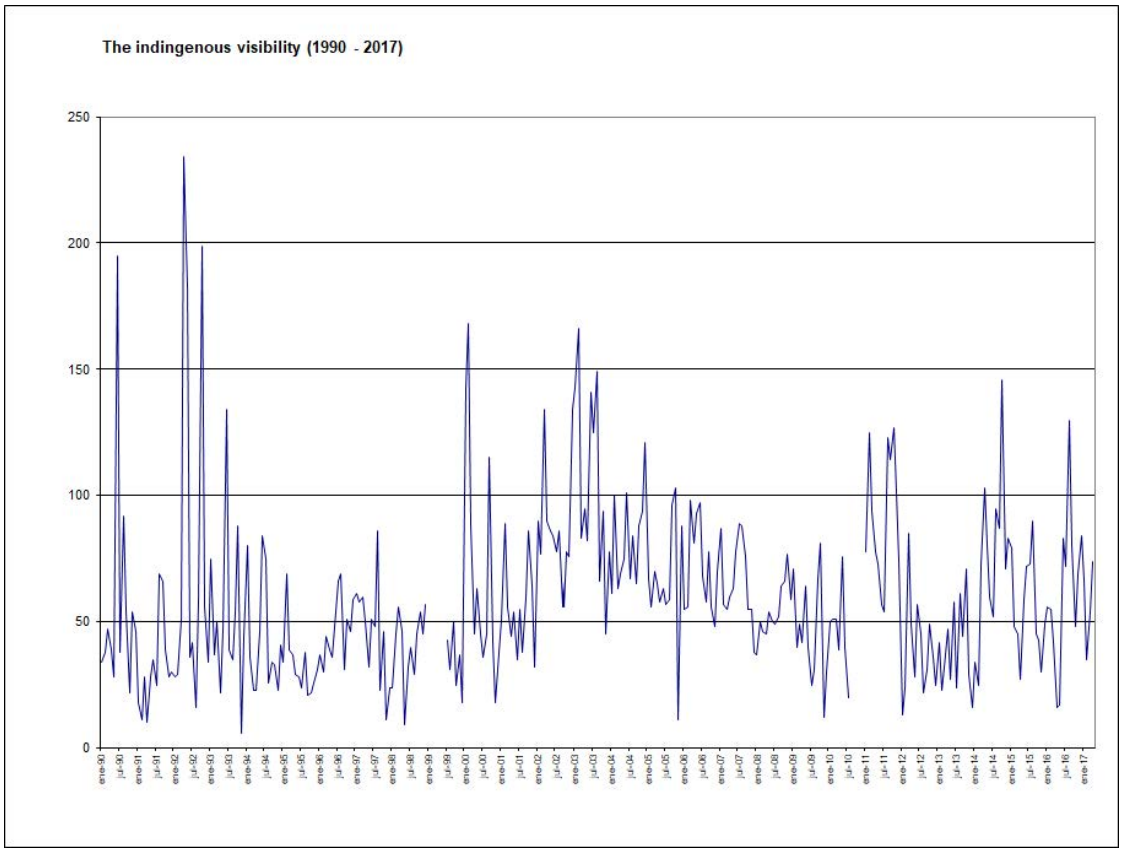

FIGURE 4.1. Presence of Indigenous Peoples in the Ecuadorian press. The source of was (Kipu 1990-2017). The table and graphic from 1990 to 2000 was made and published by (Guerrero Cazar and Ospina Peralta 2003). The author extended the information until 2017 using the same source and methodology.

[183] (Rosero 2010)

There is little, or nothing studied in the official history curriculum taught in schools and colleges about this indigenous uprising, despite it being a milestone in the relations between mestizos and indigenous nationalities and peoples. At the academic level, there are hundreds of books and articles that review the fact as one of the most important moments of the Ecuadorian indigenous movement and as an example of what organized social movements can achieve.

The Washington Post reported the fact in an article published in 1990[184] in one of three notes to be published by the Washington Post with his photograph during his term in office (the other two concerned the drug deals with the United States and his election as president). Although it is a fact that would mark Rodrigo Borja's presidency, nationally and internationally, he makes no reference to it in his memoir, from an epistemology of silence this omission could be interpreted in many ways, but if we add it to the silence of the history textbooks, they speak to us of a fact that for the mestizo world it turned out to be shameful. The "Indians" who until that moment in the popular imagination constituted an inferior class in every sense, looked at the face of the ruling classes, took over the cities and forced the society to accept their existence and their status as citizens with voice, force and rights.[185]

Borja affirms that the indigenous movement was not a protest against his government but a democratic demonstration of the indigenous peoples on the occasion of the 500 years of the discovery of America, possible thanks to the

[184] (Farah 1990)
[185] See (Tamayo 1992)

opening of his government.[186] At the time, he effectively met with the indigenous people who came to the capital "to visit the president", affirming that the media wanted to manipulate a certain section of the indigenous movements against him, when in reality "the true indigenous leaders recognized their work and even congratulated him for it when finishing the presidency".[187]

In 1992, the points of the plan presented were insisted on and an uprising was suggested which included in its demands the effective delivery of property titles to the indigenous communities of territories in the Amazon and the delimitation of their ancestral territory. These movements began in the province of Pastaza and turned into a march as a form of protest from the Puyo to Quito that lasted from April 11 to May 14. The entourage was made up of 2000 people, especially the Shuar, Achuar and Kichwa communities, who also asked for control over their lands and criticized the oil exploitation they considered irrational and a threat to their survival. They were joined by Salasaka from the south and other communities, and in the end more than 10,000 demonstrators arrived in Quito, who were joined by members of organizations that supported the proposals. President Borja agreed with the plan, explaining that he is "delighted to receive the visit of the communities" and welcomes them in the Plaza de San Francisco in the center of Quito.[188] The mayor of Quito, Rodrigo

[186] See (Borja, Interview to Rodrigo Borja 2017)
[187] See (Borja, Interview to Rodrigo Borja 2017)
[188] President Borja does not talk about the uprising in his memories, nor does he recognize its consequences. Borja talk about land titling for indigenous communities as a high point of his administration “we increased in 40% the redistribution of the farm land to peasants, indigenous and colonizers, […] Bilingual education for indigenous groups was better than ever” (Borja, Recovecos de la historia 2016, 375). He created

Paz, declared himself host of the indigenous brothers and offered them the land of the Ejido park for camping, as well as hygiene facilities and some resources.[189]

Subsequently, Borja tried to avoid the points of the surrender of territories and denounced the proposal of plurinationality as an attack on national sovereignty and unity. In the national congress, state and opposition ministers denounced the "danger of creating states within the state", especially on the border with Peru when there was a danger of border conflicts.

The indigenous movement had grown in number and organizational capacity, but the grassroots were struggling for direct action that would enable them to meet the expectations with which the organization had been formed.[190]

During Durán Ballén's administration, an Indigenous Affairs Advisor's Office was set up, headed by an indigenous person.[191] Although the political representation of the peoples was not taken into account for this purpose and the adviser did not even belong to any community or association in the country, this marked in a certain way the bias of the state discourse, where the indigenous movement was taken into account as a political force to be

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a Presidential Commission for Indigenous Peoples and gave title to several communities of the Amazon region lands for agriculture. He also created the Indigenous Education Direction under the control of indigenous directives in the highlands. (Borja, Mensaje de Decisión y Democracia. Informe al Congreso Nacional del Presidente de la República Dr. Rodrigo Borja 1989)

[189] (M. Becker, Pachakutik! 2015, 43)

[190] (Ayala Mora 1989, 170)

[191] (Galarza 1994)

considered for its number and organization, but which was not considered as politically responsible or capable of taking decisions regarding its own future.

4.3. Alliances and bitten experience in traditional politics

The uprisings were followed with indignation by a (failed) bill that was presented so that community properties and collective territory could be sold or mortgaged. The marches that followed, known as the "March for Life", generated strong national support and even halted law enforcement, but made no progress on proposals to strengthen community self-determination.[192]

The legislators of the time discussed with the delegates of the indigenous peoples the regulations requested by them and the indigenous organizations' political proposals were structured and discussed in the congress. In 1995, the need to have a constant presence in decision-making bodies led the indigenous movement to create the Plurinational Unity Movement (PACHAKUTIK) as the political party that would articulate CONAIE's proposals but at the same time seek alliances with mestizos who shared the proposal of a plurinational state.[193] In this way, PACHAKUTIK begins to outsource electoral candidates with lists made up of indigenous and mestizo people. [194]

In 1996, Abdala Bucaram assumed the presidency of the Republic but did not finish his term due to a coup d'état in 1997. Bucaram sought support

[192] See (Becker, ¡Pachakutik! Indigenous movements and electoral politics in Ecuador 2011)
[193] In
[194] See (Porras Velasco 2005)

from the indigenous movement and during his campaign he included Valerio Grefa[195], an important leader of the Amazonian peoples, to support his candidacy, and named Rafael Pandam[196] as minister of ethnic minorities. This ministry was also created and extinguished with his government, and even announced that within the indigenous movement not all people agreed with the support offered by PACHAKUTIK to the candidacy of Freddy Ehlers and the support that PACHAKUTIK gave to the candidacy of Bucaram.

In 1996 PACHAKUTIK obtained 8 seats, 6 of them for indigenous people from the CONAIE.[197] Luis Macas became the first indigenous man to be elected to parliament at the national level. The fall of Bucaram generated a crisis of succession. Fabián Alarcón, who at the time was acting as president of the National Congress, managed to have Congress unconstitutionally appoint him as president of the Republic over Vice President Rosalía Arteaga. His irregular ascent to power generated a great need for legitimacy, and for this reason he called for a popular consultation in which, in addition to asking for his appointment to be ratified, he proposed some constitutional reforms and called for the 1997 constituent assembly. In 1997, Fabian Alarcón created the Council for the Development of the Nationalities (CODENPE - Consejo de Desarrollo de las nacionalidades).

[195] See (Ortíz-T. 2016, 43) (Redacción Política 2010)
[196] (Redacción Política 2010)
[197] It was the fourth party in Congress representation in 1996 with the name of Movement for the Plurinational Unity Pachakutik-Nuevo País what was remarkable because those where their first participation in an election for Congress.

By 1997, when the Constitutional Assembly was set up to draft the new constitution of the republic, PACHAKUTIK had 7 of the 70 seats available. With that 10% of the Assembly, the PACHAKUTIK Assembly members achieved unanimous approval of the entire package of rights of indigenous peoples and nationalities, except for one thing.: the plurinational state.

It was the collective actions of the indigenous movement that gave these 7 assembly members the power to negotiate with the other political parties. There was a sense of ethical evolution in Ecuadorian society that would have led the Assembly members to recognize the historical exclusion of indigenous peoples and nationalities and, therefore, to recognize the justice of their demands for the recognition of specific rights even in the most conservative factions.[198]

However, for those who integrated the assembly, added to this ethical element was the fact that the CONAIE was in a constant state of mobilization, and that was something that should have been taken into account when negotiating and taking decisions in the Assembly.[199] However, within the Constituent Assembly it was clear that these new rights did not feed the idea of self-determination, such that their proposal of a plurinational state, understood as a way to increase the margin of decision of the indigenous peoples in their territories, was not accepted.

[198] See (Castro n.d.)
[199] See (Alcívar 2016)

In fact, the idea of plurinationality caused the indigenous movement's proposal to lose much of the support of citizens and political parties, as it was a project that fragmented and threatened national unity. For example, Osvaldo Hurtado, who although he supported the indigenous movement in many of their projects, expressed his opposition to the idea of plurinationality by speaking in the Constituent Assembly in the following way:

"I believe that in our country there is only one nation, that it is in the process of formation, that is in the process of development, that is in the process of expression, that expresses itself today mainly as a mestizo nation, and that should not express itself only in this way. I agree, and I have no doubt that this nation will emerge in all its greatness when this mestizo white dominant society ceases to be that.

However, Mr. President, there is a gap from that to establish in the constitution that the Ecuadorian State is Plurinational. There is no relation among this concept [plurinationality] and the fact that the Ecuadorian state is based on one nation, and that is the Ecuadorian nation. But there is also a risk, and the risk is obvious.

If there is one nation, if there is one territory within the Ecuadorian state, why shouldn't there be one state? What does it lack to be a state? Just an act of will, nothing more. and our friends and colleagues from the indigenous people can tell us that this is not their intention. Well, if it is not their intention, it may be the intention of their children on whose thinking, on whose will they are not able to decide. And this country, which has so many conflicts, so many problems that

it is getting out of hand, does not have the right to add one more conflict to all that we have." [200]

To strengthen the project of plurinationality, indigenous movements sought to allied themselves with other groups in this dual ethnic and class dimension. On the theoretical level, interculturality began to be discussed as the reality of the double dimension of the identity of indigenous peoples who "do not disassociate themselves from Ecuadorian nationality but depend on a double identity as Ecuadorian and Kichwa citizens"[201], for example. At the political level, there was talk of multiculturalism to accept the multiplicity proposed by the indigenous peoples without political consequences or in the State structure...

At that time, only the recognition of rights was achieved, and several rights were recognized in the 1998 Constitution, but also in the same year the ratification of ILO Convention 169 was obtained. Among the rights that were

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[200] "Yo creo que en nuestra patria hay una sola nación, que está en proceso de formación, que está en proceso de desarrollo, que está en proceso de expresión, que esa nación se expresa hoy principalmente como mestiza, y que no debe expresarse sólo así, estoy de acuerdo, y no me cabe ninguna duda de que esa nación aflorará con toda su grandeza cuando esta sociedad dominante blanco mestiza deje de ser eso.
Pero de allí, señor presidente, a consagrar en la constitución que el estado ecuatoriano es plurinacional hay una distancia. Hay una distancia con esta definición que acabo de hacer de que el estado ecuatoriano se sustenta en una nación que es la nación ecuatoriana. Pero también hay un riesgo, y el riesgo es obvio.
Si hay una nación, si hay un territorio dentro del estado ecuatoriano, ¿por qué no ha de haber un estado? ¿qué le falta para ser un estado? Simplemente un acto de voluntad, nada más. y bien pueden decirnos nuestros amigos y compañeros y colegas del pueblo indígena, que esa no es su intención. Bien, si no es su intención, puede ser la intención de sus hijos sobre cuyo pensamiento, sobre cuya voluntad no están ellos en capacidad de decidir. Y este país, que tiene tantos conflictos, tantos problemas que se nos va da las manos, no tiene derecho a sumar un conflicto más a todos los que tememos". (Constitutional Assembly 1997-1998, 23-24)

[201] (M. Becker, Pachakutik! 2015, 21)

recognized, perhaps most notably, were the right to free and informed prior consultation and the right to apply customary law within their jurisdictions, what the press called "indigenous justice", and the recognition of Kichwa, Shuar and other ancestral languages as official languages for indigenous peoples was ratified.[202]

In 1998, Jamil Mahuad became President of the Republic[203]. His government is remembered for the application of neoliberal policies. He introduced bank holidays, bank loans, bank bailouts, and dollarization, which led the left-wing social movements to initiate a series of collective actions.[204]

The indigenous movement played a leading role. One of the most symbolic collective actions was the arrival of thousands of indigenous people in Quito and the subsequent human encirclement around the National Congress.[205] In the year 2000 a military coup d'état ended with the presidency of Jamil Mahuad. The military coup plotters formed a Governing Board that included among its members Antonio Vargas, who at the time was president of CONAIE.[206]

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[202] (Constitution of the State of Ecuador 2008) Art. 1.
[203] (EFE 1998)
[204] Several authors recognize that the indigenous movement had a key role in postpone the neoliberal agenda of president Mahuad, see (Hidalgo 2001). Also see (Redacción Elcomercio.com 2016)
[205] (Dávalos 2001) presents this collective action as a “toma de la plaza” (takeover of the plaza) a traditional party of some Kichwa communities, but also a symbolic action of overcome domination.
[206]Ayala Mora Enrique, Resumen de Historia del Ecuador, 121. Regarding the internal discussion in the CONAIE to participate in the Board see (Pacari, Todo puede ocurrir 2007, 79)

Mahuad's successor, his vice-president Gustavo Noboa, had serious conflicts with indigenous communities, such as the protests of the indigenous communities of Coca, which paralyzed oil extraction. On November 22, 2001, to improve relations with CONAIE, he appointed Luis Maldonado as minister of social welfare, an indigenous man from Otavalo with a background in philosophy, who, having been a consultant to CONAIE and affiliated with the Pachakutik party until then, accepted the position in a clear break with the leadership of the movement.[207]

In 2003, Lucio Gutiérrez assumed the Presidency of the Republic, thanks to a pact with the indigenous movement and a left-wing and anti-elite discourse that attracted the sympathy of a society strongly affected by Mahuad's economic policies. Since the indigenous movement was part of the leftist platform with which Gutiérrez came to power, at the beginning of his government he complied with one of the pacts that was to include indigenous participation in the central government.[208]

For example, Nina Pacari was appointed Chancellor, the first indigenous woman to hold this position. This was an important moment for the social legitimacy of the indigenous movement, as Lucio Gutiérrez abandoned the left-wing politics with which he came to power in economic matters and showed little respect for democratic institutions. Although the indigenous leaders who participated in the Gutiérrez government resigned a few months after the regime

[207] (K. Lucas 2015, 52)
[208] (Ortíz-T. 2016) (Relea 2002)

began, they were socially criticized for their initial support for the ex-military man, in addition to being prey to the normal accusations faced by political parties due to public opinion.

When the indigenous movement changed political allegiances, it was persecuted in the wave of repression unleashed by Gutiérrez, and some leaders such as Leonidas Iza, president of CONAIE, and their families even suffered attempts on their life, which unleashed a series of mobilizations organized by the Indigenous Movement of Cotopaxi (MIC) and CONAIE, thus increasing the rejection of the regime. (Four family members of Leonidas Iza were injured in an incident[209] (February 3, 2004. EL UNIVERSO). Indigenous people from Cotopaxi were mobilized. (February 4, 2004. EL UNIVERSO). In the year 2005, Gutiérrez was overthrown by a new parliamentary coup d'état. A great urban mobilization in the city of Quito took place for months, and the constancy of the collective actions, their duration, originality, and capacity to convene, managed to erode the legitimacy of the president. This almost spontaneous mobilization was known as the movement of the outlaws, the slogan of the people who mobilized was "let them all go", in what constituted not only a criticism of Gutiérrez but also of the traditional political parties in general, which were blamed for the political crisis that had led Ecuador once again to a coup d'état.

The social mobilizations against Lucio Gutierrez, especially in the city of Quito, continued to increase in size, which led the president, on April 13, 2005,

[209] (M. Becker, Pachakutik! 2015, 101)

to demand from the high command of the police that street demonstrations be firmly repressed.

On April 15, 2005, Luis Macas, president of the Confederation of Indigenous Nationalities of Ecuador (CONAIE), expressed his solidarity with the protests in Quito and with his request for the president's resignation, stating that there was no agreement with Gutierrez, nor would any agreement be negotiated. The CONAIE demanded the fulfillment of the agenda they had agreed upon." Nosotros exigimos que el país suspenda las negociaciones del Tratado de Libre Comercio con Estados Unidos, cierre la base militar de Manta (cedida a las Fuerzas Armadas estadounidenses), y se oponga al involucramiento del país en el Plan Colombia, financiado por Washington, contra el narcotráfico y la guerrilla del país vecino", Macas said.[210]

On April 19, 2005 the general commander of the police, Jorge Poveda, made a public statement in which he affirmed that it was the job of the police to protect citizens and not to attack them; this meant that they stopped repressing them. This was the beginning of the end of Gutiérrez's presidency. Following this declaration, the Police and the Army decided to withdraw their obedience and support to the President of the Republic on April 20 of 2005.

After this statement by the police, the army did the same and withdrew its support for the president on Wednesday, April 20, 2005.

[210] (K. Lucas, Derrocado Lucio Gutiérrez 2005)

The events that followed precipitated the fall of Gutierrez, who fled the country, while most of the legislature was in session and maintained that the events were illegitimate. The minority was in session at CIESPAL (Centro Internacional de Estudios Superiores para la Comunicacion en América Latina) in Quito and would declare that Lucio Gutierrez had left the post of President of the Republic by repeatedly violating the Constitution and decided to remove him from office and open the presidential succession, and on April 21 Alfredo Palacio, the vice-president was to be installed as the new president of the Ecuador.

The deputies left CIESPAL and went to the crowd outside to announce what they had decided, hoping to receive recognition from the mobilized group. Instead of this, to the cry of: "Get out, all of you," the assembled people beat the deputies out of the CIESPAL building.

This confirmed the crisis of representativeness of the traditional political parties, which had governed the country for almost thirty years. These parties took a back seat in political events and electoral processes until today.

Finally, with the agreement of the police and army, in a climate of deep distrust, Alfredo Palacio was sworn in as president of Ecuador for the remainder of his term. He tried to govern by lowering the tone of confrontation with the groups that promoted the fall of Gutierrez. Palacio committed himself to re-establishing judicial independence and to building a government of consensus, for which he took a step backwards in his plans to sign free trade agreements with the United States and to promote some social changes. He put people of

different ideological tendencies in government positions, some of whom had gained notoriety in the mobilizations. With this measure, the conflict in the cities, especially in the capital, diminished, but the same was not happening in the country's oil zone.

In a period of approximately a year and a half of Palacio's government there was an escalation of socio-environmental conflicts on the oil frontier.

One of the most important conflicts was the bi-provincial strike on August 23, 2005 where Guadalupe Llori and Guillermo Muñoz from the provinces of Sucumbíos and Orellana were arrested. This strike led the president to decree a state of emergency and mobilize the army to confront the demonstrators, especially in the city of Dayuma.[211]

These mobilizations were called by local government authorities belonging to the Pachakutik party and resulted in a series of legal actions against the leaders of the province who were imprisoned and prosecuted. [212]

History repeated itself around the country in provinces such as Azuay, Imbabura, Loja, Zamora Chinchipe, Guayas and Esmeraldas where communities who demonstrated against extraction activities in their territory were repressed and even tried in court martial.

The escalation of socio-environmental conflicts was due to the uncertainty generated by companies and certain economic groups (such as the

[211] (Comité del Paro Amazónico 2005)
[212] (Redacción Ecuador Inmediato 2005)

army and mining and oil companies) by the change of government. In legal terms, there was a debate about the repeal of a series of norms that regulated matters of public contracting, mining and oil exploitation. These norms had been approved in the neoliberal governments of Sixto Duran Ballén and Jamil Mahuad, and they diminished social and environmental controls on extraction activities and facilitated the obtaining of concessions in unfavorable conditions for the State.

The mining law in force at the time[213] made it impossible for the State to reject a concession application that complied with the lax legal requirements. Thirty thousand concessions were granted during the period the law was in effect, but none of them were in the exploitation phase, despite the fact that such concessions had been granted for several years. These concessions had changed several times in short periods of time because they were negotiated on international markets, such that the business of this mining was based not on the exploitation or commercialization of minerals but on the speculation of mining titles. Episodes of violence intensified in 2006.

4.4. The rise of Rafael Correa Delgado and the 2007 Constitutional Assembly

In the presidential elections that followed, there were candidates representing the old political parties seeking to regain power, as well as new people who had

[213] (Environmental Governance Statute 1999)

the advantage of not having been mixed up in the political actions of the previous governments.[214]

One of the new names was the Minister of Economy appointed by Alfredo Palacios, Rafael Correa Delgado,[215] who in a matter of months gained notoriety by proposing an international economic policy. His proposed international economic policy was based on the idea of the illegitimate foreign debt, which he said should not be paid by the Ecuadorian people, or at the very least should be renegotiated in dignified terms, so he ordered the suspension of payments of the foreign debt. The international credit agencies rejected this proposal, which forced Palacio to withdraw quickly from this position and concluded with Rafael Correa's removal from office.

Correa's proposal failed but the public exposure of those months was enough to draw the attention of voters and political organizations that saw in the intelligent and charismatic Rafael Correa a leader who could summon parties and organizations of the left wing[216]. Rafael Correa Delgado went to the second round of elections for the presidency of the Republic, facing Alvaro Noboa, who many considered the richest man in Ecuador.[217]

While Rafael Correa was known as a 43-year-old Guayaquil economist, university professor in the city of Quito, he was linked to sectors of the Catholic

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[214] See (Redacción Ecuador Inmediato 2006)
[215] See (Redacción Economía 2005), also (Redacción BBC 2005).
[216] (Almeida, Arrobo Rodas and Ojeda Segovia 2005) https://www.eluniverso.com/2006/10/14/0001/8/BB6CBE78C66047B2A2E74827E5DBBAEB.html
[217] See (K. Roberts 2016)

Church that were considered progressive and linked to missionary work. Later Correa claimed to have participated in the political formation of CONAIE's leaders with the Salesian Order. He was affiliated with the Boy Scout group and close to Gustavo Noboa (former vice-president of Mahuad and former president). [218]

Correa was supported by a broad platform of political and social movements, including well-known environmentalists and former members of the Pachakutik party. These groups were opposed to the practice of metal mining and oil exploitation in the Amazon forest and were especially against the model of concession contracts in force at the time, which benefited the companies.

For some companies such as Ascendant Cooper, which operated in the Intag sector (province of Imbabura), the last days of the Palacio presidency were the last opportunity they had to take effective control of the territory on which their mining concession was based and the use of its influence in the administration of justice for the beginning of criminal trials against social leaders.

This company and others contracted paramilitary groups to forcibly enter and evict inhabitants of indigenous communities in the territory.[219] This was recorded in a documentary, in several press articles, and in the arbitration award

[218] (Redacción La República 2006) (Redacción Política 2006), also (Redacción El Universo 2006).
[219]

that the company obtained in its favor after being expelled from the country after these events.[220]

During this period, a series of contracts between army commanders and oil companies were made public, in which the military promised to provide private security to these companies in exchange for a certain economic investment in the infrastructure and equipment of the barracks, at least in writing. It was recorded that the use of helicopters and army vehicles were rented to these private companies to plan attacks on the population. [221]

Events of protest and resistance occurred in Ecuador based on the idea that the new government would bring the opportunity for a change in the management of the policy on the extraction of natural resources.[222] Most of these social movements opted for direct support for the movement that led Rafael Correa Delgado to the presidency: "country alliance", but the indigenous movement did not. [223]

According to Mark Becker, alliances with populist or left-wing groups in the previous elections had cost the indigenous movement a great deal of political capital, so the movement decided to run on its own in the presidential elections, presenting one of his most representative leaders, Luis Macas, as a candidate.

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[220] (Rogge 2008)
[221] (Redacción Imbabura 2006)/
[222] (Acosta, La maldición de la abundancia 2009)
[223] (Redacción El Universo 2006)

Mónica Chuji recalls that this decision was perceived as an error by several members, mainly non-indigenous members of Pachakutik,[224] who disaffiliated themselves from Pachakutik and joined the ranks of the Alianza Pais movement.

This weakened and relegated the indigenous movement as the party Alianza Pais went on to govern the country for the next ten years. But on the other hand, it marked a re-ethnicization of Pachakutik, a political movement that functioned autonomously with respect to the indigenous movement and that at times did not seem to coincide with the agenda of the movement that gave life to it.

After Macas' anticipated defeat in the first round of elections, some sectors sought the formal adhesion of the indigenous movement to Rafael Correa for the second round of elections, but the leadership of the movement did not decide favorably on this request[225].

Some people, who were close to Correa at the time, claimed that the candidate's egocentric and explosive personality, which would become public in the next few years, made him take this decision (of the indigenous movement to not support his party) personally.[226] In addition, the lack of support of the Ecuadorian indigenous movement to Correa was a flaw for its international image. CONAIE and Pachakutik have been iconic groups for the left-wing

[224] See (Chuji 2016)
[225] (EFE 2006)
[226] (Romo 2017)

parties. It was not flattering for Correa that the most successful indigenous movement in Latin America was not supporting his progressive project.

Rafael Correa lived in his youth as a volunteer of the Catholic Church in the community of Zumbahua and learned Kichwa. When he won the elections in 2006 he was invited to this community in the province of Cotopaxi to receive the command staff, an indigenous symbol of authority over their people.

The ceremony was not convened by CONAIE but by local indigenous authorities. The indigenous ceremony took place and so did a Catholic mass.

Some of the indigenous people of the region were present and Correa was accompanied by the president of Venezuela Hugo Chavez and the president of Bolivia Evo Morales, and images of this moment were all over international media.[227]

This tribute was rejected in 2011 by the leadership of CONAIE, through its president Marlon Santi. Santi made a statement that said, “a mestizo would never again govern indigenous peoples”.[228]

This, however, did not mean that the indigenous movement began in Correa's opposition, rather that they constantly stated that they were not to be part of the regime, which undermined relations between them. [229]

As soon as he became president. Correa appointed Alberto Acosta as Minister of Mines and Petroleum and Gustavo Larrea as Minister of the Interior.

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[227] (Redacción BBC Mundo 2007), also (Redacción Política 2007)
[228] (Redacción Política 2011)
[229] (Redacción Política 2009)

Both were known as people who were committed to the defense of human rights, indigenous peoples and nature and several other people known for these things were appointed in other strategic sectors of his government.

These appointments were understood as a declaration of their intention to resolve the socio-environmental conflicts inherited from previous administrations, of which indigenous nationalities and their territories were among the main protagonists.[230] Larrea promised to stop the repression of the communities. Acosta promised to review the oil concessions, stop the mining concessions and stop the exponential growth of these titles in recent years.[231]

Meanwhile the ground was being prepared for the Constituent Assembly. Taking the slogan "get out all of you" of the citizen's movement that had initiated the fall of Lucio Gutierrez, Alianza País, the governing party, did not present candidates for the National Congress, which was the legislative body of the time. Instead, Correa promised to convene a Constituent Assembly that would end the "long neoliberal night," so there was no need to participate in Congress.

In 2007, Correa sent a request to the Congress to call to a national referendum to establish a Constitutional Assembly that would draft a new Constitution.[232] The request did not have much chances to pass because Correa's parties strategy to do not present candidates to Congress. Moreover, although the high popularity among the public of the idea of a new Constitution,

[230] (La Hora 2007)
[231] (Acosta, Interview to Alberto Acosta 2017)
[232] (Europa Press 2007)l

traditional political parties were in a representation crisis[233] that could have affected their opportunities to participate in the Constitutional Assembly[234] – what finally did happen.

Congress sent the president's request to the Constitutional Court to decide on the constitutionality of President Correa's request. Meanwhile, the majority of MEPs stated, in public statements that they would not give way to this request. Faced with this response, Correa decided to send the Supreme Electoral Court (the highest electoral body at the time) a request to initiate a popular consultation for the Constituent Assembly, arguing that the Constitution empowered the president to do so without the need for the approval of the national congress.[235]

The Supreme Electoral Tribunal accepted the request and began preparations for the consultation. The constitutional court then rushed to take a decision declaring that the current constitution did not contemplate the figure of the Constituent Assembly and therefore the consultation would be unconstitutional.

Motions to prosecute politically and dismiss members of the Supreme Electoral Court were presented at the National Congress for initiating

[233] (K. M. Roberts 2014)
[234] (C. Montufar n.d.). For Montúfar, Constitutional Assemblies are seen in Ecuador as moments of redistribution of power among the elites. When traditional parties have few chances to have an important representation in those spaces, the cost of moving forward could be the demising of the power that they already have. Also see, (Sánchez 2017).
[235] (Chirinos 2007)

preparations for the popular consultation. In a totally unexpected reaction, the Supreme Electoral Tribunal reacted by applying an article of the electoral law in force at the time, which said that: At the time of the elections, the Supreme Electoral Tribunal was the highest authority of the State, empowered to dismiss any official who prevents or hinders the process of the elections.[236] So, it dismissed the members of the Constitutional Court and more than half of the National Assembly.[237]

One the spare congressman sited, there was no opposition to the Constitutional Assembly. The newly integrated Congress designated a new Constitutional Tribunal that approved the calling for a Constitutional Assembly. The consultation was approved and resulted in a call for elections for a Constituent Assembly.

Elections were broadly favorable to President Rafael Correa's party, which won more than 75 percent of the seats. Therefore, Alianza Pais did not need to make alliances with other parties to approve their decisions. Consequently, the debates on the texts of the new Constitution were reserved, as they took place within the political movement with a protagonist role of the President of the Republic and his legal team.[238]

The interventions of the Assembly members registered in the minutes of the Constituent Assembly on plurinationality and indigenous peoples' rights

[236] See (Drake y Hershberg 2006)
[237] See (C. Montufar, Interview to Cesar Montufar 2018)
[238] (Romo 2017), (Acosta, Interview to Alberto Acosta 2017), and (Chuji 2016)

were rhetorical as the texts were ready and negotiated in the parallel meetings to the Assembly held by the members of “Alianza País”.[239] This does not mean that the social movements did have incidence in the Assembly. A wide range of organizations went on daily bases to Montecristi, and several of their proposal were included in the Constitution. What was always out of discussion was the way in which the institutions of the State will be nominated in a matter that assures Correa’s party to be present in all the branches of the state.[240] Even the CONAIE, through their allies in Alianza Pais, manage to influence in some extend in the Constitution. The President of the Assembly, Alberto Acosta, was a lifelong ally of the indigenous movement, and he had an open doors policy to discuss the indigenous peoples’ proposals.[241]

Other people participated in these meetings, in addition to the assembly members, including President Rafael Correa himself. [242] This does not mean that there was an agreement within the ranks of the governing party. Mónica Chuji, who was assembly member, narrates that during the discussion of plurinationality and interculturality, there were heated debates about whether to support the proposal for an intercultural State of the FENOCIN (indigenous organization member of "Alianza Pais”), or whether the proposal for plurinationality coming from CONAIE should be approved.

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[239] (Chuji 2016)
[240] (C. Montufar, Interview to Cesar Montufar 2018)
[241] (Acosta, Interview to Alberto Acosta 2017) Acosta mentions that he used to have meetings with the leaders of the CONAIE very early in the morning before the activities of the Assembly started.
[242] (Romo 2017) and (Acosta, Interview to Alberto Acosta 2017)

According to María Paula Romo the decision to maintain the two concepts, that were antagonistic for some people, was not born with the intention of incorporating them into the new Constitution, but from the reading of political benefit that led to the two indigenous organizations that were being heard. These political calculations had to be made, as the Constituent Assembly would draft a Constitution to be adopted in general elections.[243]

For Monica Chuji,[244] the members of the governing party were not interested in knowing the implications that one or the other, or both, would have on the new constitutional regime. Rafael Correa would admit that he did not understand what they were about. However, the cluster of "Alianza País" voted in the assembly that: "Ecuador should be considered a plurinational and intercultural State."

Despite the apparent lack of pluralism in the Constituent Assembly due to the presence of a hegemonic party, the constituent process was a space that gave great openness to social movements. This is demonstrated in how the demands of various collectives became constitutional texts, for example the environmental and human rights movements obtained the approval of an amnesty for defenders of human rights and nature that had been criminalized especially in the governments of Lucio Gutierrez and Alfredo Palacios, for the defense of their territories, ways of life and right to prior consultation. Among those who benefited from the amnesty were several indigenous leaders or

[243] (Romo 2017)
[244] (Chuji 2016)

members of communities who were in prison or accused of crimes for their participation in collective actions.

The result of the draft 2008 Constitution contained a series of provisions that could be considered as progressive in relation to the rights of nature, collective rights, social rights and the rights of the entire population in general. However, politicians as Cesar Montúfar believes that:

“The Constitution of 1998 offered the opportunity of interpreting the constitution according with international treaties as the ILO 169 Convention. These treaties are more favorable to self-determination in interpreting collective rights. For example, in the prior consultation right, international law is moving to interpret the decision of the communities as binding. This possibility was closed with the Constitution of 2008”[245]

This generated mistaken political readings about the constitution as a reflection of the political ideology of the "Alianza País" party. The testimonies of the former members of the Constituent Assembly, as well as the subsequent public statements of President Rafael Correa himself, show that the content of the 2008 constitution was largely the result of an electoral calculation by which sufficient adherents were sought for the approval of the constitution. The Assembly members of Correa's party calculated that the more demands of social movements were represented in the text, the greater the level of popular support that they would have. However, there was no real political will to give

[245] (C. Montufar, Interview to Cesar Montufar 2018)

those provisions legal effect, let alone to act in accordance with them.[246] This is not the only example, in Ecuador and other countries[247], of legislation approved with no intention to be implemented, but with the only intention of pacify a group in the state that could challenge the authority of the central government.

The real interest of President Correa and the group that would accompany him until the end of his last presidential term would be the approval of a system of state organization that would allow them to establish an authoritarian model in which the president had direct interference in all the other functions of the State.

The above observation, which can be seen as a discrediting cause for the 2008 Constitution, from the perspective of the social movements, offers a different reading. For a party such as "Alianza País" the need to maintain coherence with the discourse of the left that brought Correa to power, added to the need for popular support for the 2008 constitution. The need for popular support for the first elections with the approval and validity of that constitution generated the opportunity to obtain concessions from the political elite.

The inclusion of plurinationality, which will be analyzed later, the rights of nature, the regime of good living and other innovations and recognition of historical struggles of various social movements included in the 2008 constitution, were, in turn, one of the moments of greatest historical influence of

[246] See Chapter 5 on Correa's ethno-racial discourse in the *sabatinas*.
[247] See for example (Torres and Milun 1995) on the reservation system in U.S. as a way to pacify indigenous peoples and not to compensate them for the damages suffered over the years.

the social movements in the legal change and the only truly revolutionary moment that the so-called citizen revolution of President Rafael Correa would have.

Other moments that allow us to dwell on this reflection are, for example, the situation of social protest in the Amazon population of Dayuma, province of Orellana.[248] In a government marked by repression and the criminalization of social protest, the events of 2007 were amnestied by the Constituent Assembly and no judicial process was initiated, although the lack of control of this situation would cost the position of Interior Minister Gustavo Larrea.[249]

Towards the end of the constituent assembly period the first schism within the Alianza Pais occurred, when Alberto Acosta, a leftist economist, who was one of the founders and main adherent of the party was asked to resign as president of the Assembly. As Correa himself would acknowledge years later when he spoke out against these constitutional norms, declaring that he had been "deceived by Acosta and the children's ecologists".”[250]

In conclusion, the constituent process of 2008 was a unique opportunity for social movements to engage in legal reform, leaving open the question of whether the interpretation of these texts would respect the meanings initially given to them by social movements. Although Pachakutik was a minority in the Assembly and it was not the best moment for the CONAIE in term of social

[248] See (Constitutional Assembly of 2007 2007-2008)
[249] (Reuters 2007)
[250] (Acosta, “A este Correa lo desconozco” 2011)

legitimacy and organization, they manage to influence the debates. Indigenous peoples' topic was among the 15 top topics discussed in the Assembly.

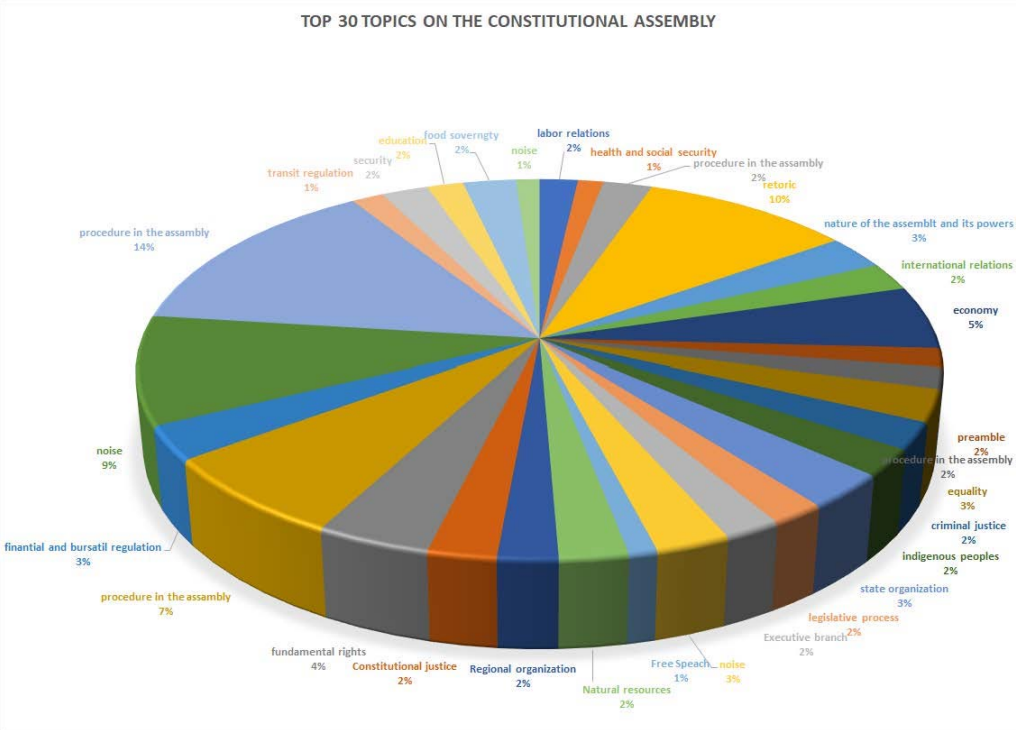

FIGURE 4.2. Top 30 topics discussed on the Constitutional Assembly (2006-2007). The topics were extracted using topic analysis in R. (Ortiz) was the author of code.

The indigenous social moments have an unquestionable influence in the drafting of the Constitutions of 1998 and 2008. Since the second half the twentieth century, the appearance of peasant/indigenous organizations (as FEI and FENOCIN), regional organizations (as ECUARUNARI and CONFENIAE) and the national organizations (as CONAIE and Pachakutik) overlaps not with the periods of the legal-change at constitutional level. Using topic modeling with

the texts of the twenty constitutions of Ecuador,[251] the text analysis shows not only the increasing of the discussion about indigenous peoples at a constitutional level, but also how the topics regarding diversity and indigenous peoples became one of the most salient in recent years.

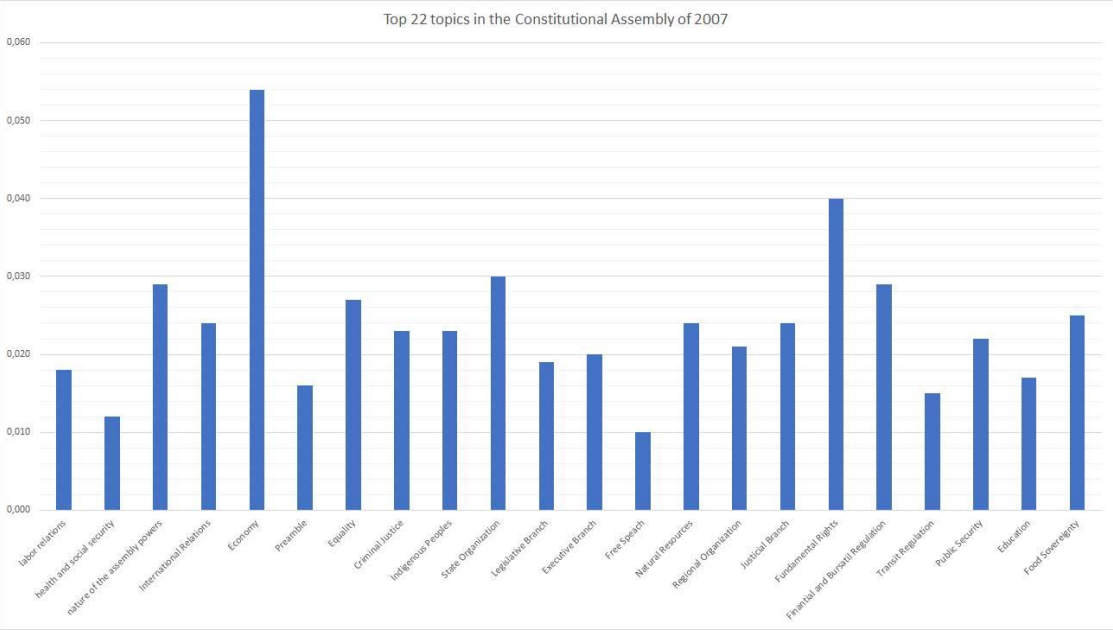

FIGURE 4.3. Top 22 topics discussed on the Constitutional Assembly (2006-2007). The topics were extracted using topic analysis in R. (Ortiz) was the author of code. In this graphic the topics related to the parliamentary discussion were erased leaving just the material issues.

[251] "We applied topic modeling for the (i.e. scientific articles, abstracts, and grey literature) using Latent Dirichlet Allocation in the R statistics software using the package "mallet", "dfrtopics" and "dfr-browser". The main assumption of LDA modeling considers that word order is unimportant to capture related word co-occurrences, since the words that make up any document arise from a variety of *topics* that have a multinomial distribution across the vocabulary. Topic modeling is widely used and has been rigorously tested in the computer sciences and digital humanities. Simple topic LDA models are a powerful statistical methods that allow us to discover and analyze the hidden themes of a large unstructured collection of documents by using single words of the original text as variables. The model starts by sampling topics from a Dirichlet distribution, then words are sampled from the topics resulting in a robust prediction of word association. For instance, this approach has been successfully implemented to distinguish trends over time of specific research interests in science" (Ortiz not published).

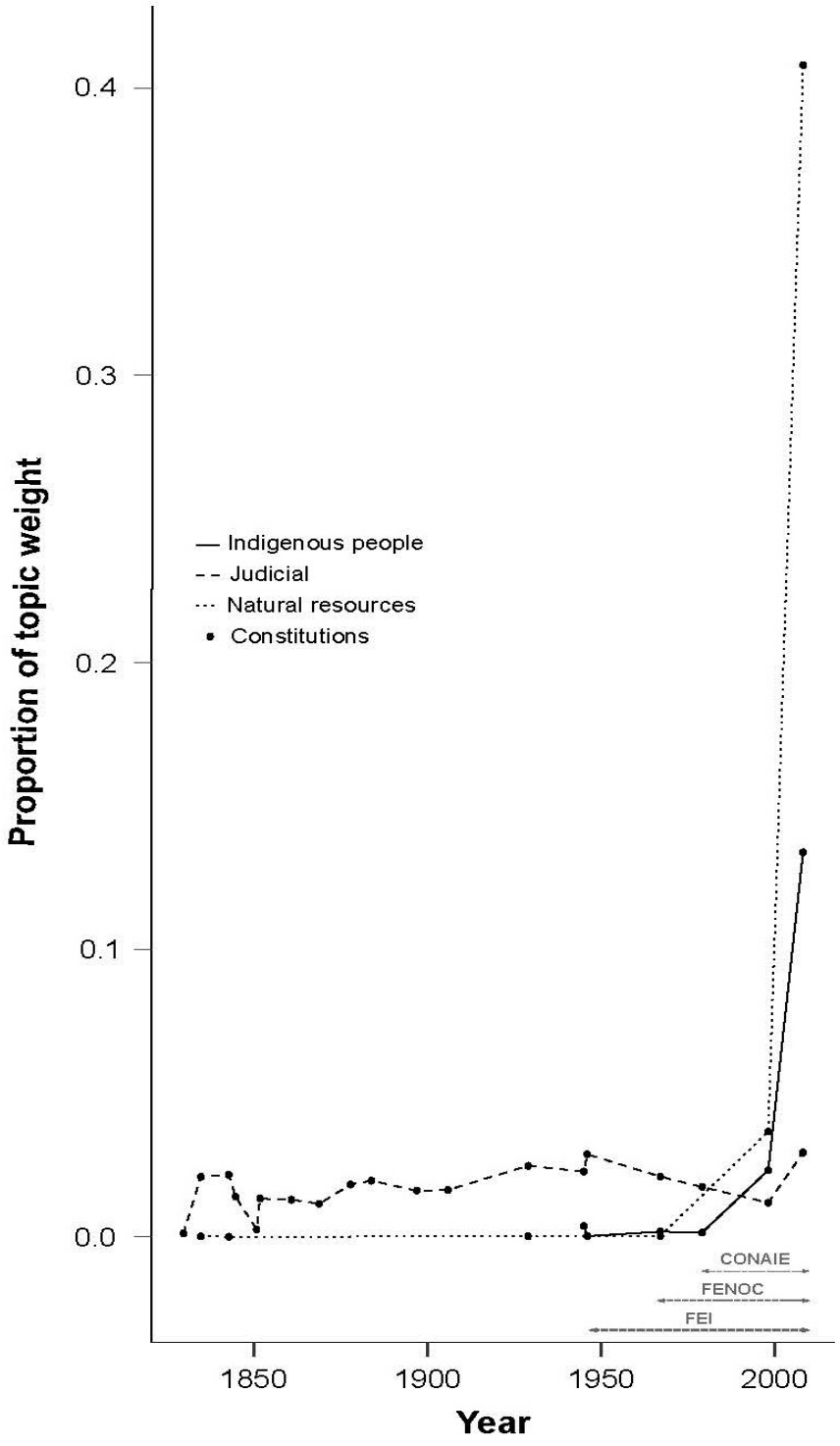

FIGURE 4.4. Development of the topics related with indigenous peoples, judicial branch and natural resources and the main indigenous movements. The topics were extracted using topic analysis in R. (Ortiz) was the author of code.

The years of activity of the indigenous social movements, especially the CONAIE, are also related with the increasing recognition of specific rights at constitutional level. The figure 4.4. shows how treatment to indigenous peoples moves from being considered abject and miserable to be the ones that define a new paradigm of State.

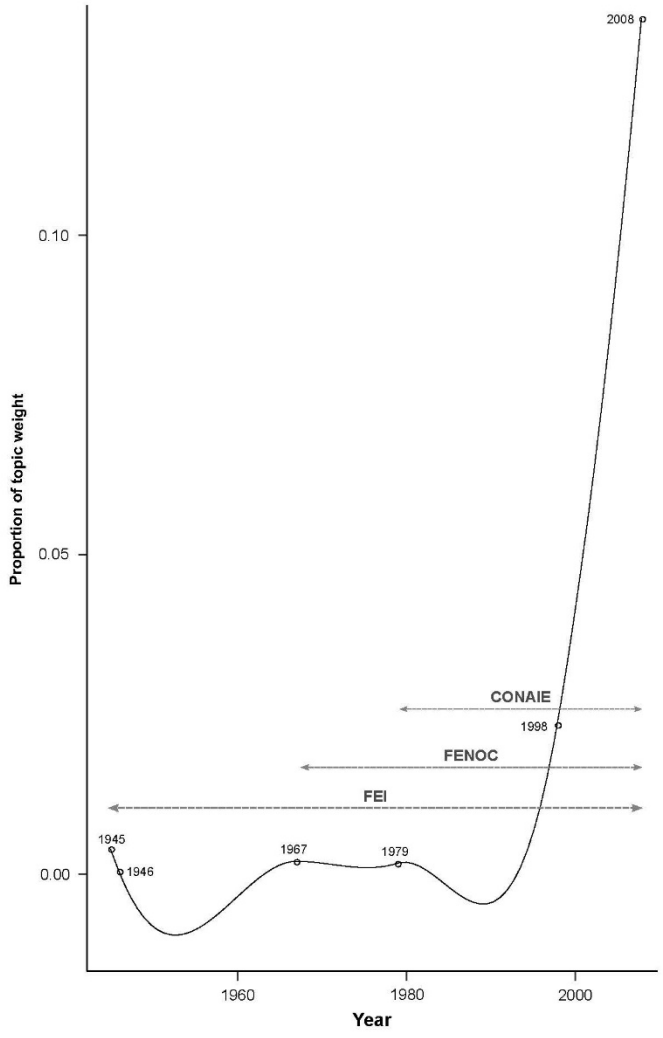

FIGURE 4.5. Development of the topic of indigenous peoples and the main indigenous movements. The topics were extracted using topic analysis in R. (Ortiz) was the author of code.

International law has a major effect in the twentieth century. The two international pacts recognize the right to self-determination of the peoples. The

drafters were thinking in the process of decolonization of the world, but no in all the peoples' territory the complete decolonization should have been possible. Thanks to the mestizaje and the resistance of the indigenous peoples of America to be assimilated, our Latin American countries should deal with several peoples with self-determination living in the same territory.

The signing of the 169 ILO Covenant put again the International law in charge of legal innovation. Countries as Colombia in 1991 or Ecuador in 1998 included a catalog of indigenous peoples' specific rights that respond to the duties acquired with the ratification of the treaty. Indigenous Movements used this covenant to foster constitutional change (as Nina Pacari said). The jurisprudence of the Inter-American Court on Human Rights regarding indigenous peoples expanded the conceptions of traditional rights and liberties -as property. The influential case Awa Tingi has been used by judges all over the continent to decide cases about indigenous peoples.

Ethno-racial policy changes during the time of activity of the indigenous peoples' movements. As Deborah Yashar define two types of "citizen regimes" that shows this variation.[252] For Yashar, while Ecuador kept agricultural business as the center of the economy, presidents and dictators had a corporativist regime that favored collective bargain with indigenous population, and the no interest to expand the services of the state into the communities allow indigenous peoples to easily continue practicing their traditions and preserving their cultures. With the change to the commodities as the center of

[252] (Yashar 2005, 55)

the economy and the global advance of neoliberalism also come a change of regime to a neo-liberal regime. Under this regime the ethno-racial policy moves to a recognition of the indigenous peoples as persons with equal rights, and even the support of the inclusion of specific rights in the constitutions of 1998 and 2008. The bargain with the peoples was not meant to collective anymore, the inclusion of the indigenous peoples in the logics of the legal liberal system opened the door for moving the interpretation of concepts like justice or equality in the rights of indigenous peoples to the judges. Decade of Rafael Correa was different two both periods. Correa sustained a “populist regime” that does not fit in any of Yashar’s categories. This new regime will be discussed in the next section of the dissertation.

Close related with the last argument. The legal system also influenced in the legal-change versus social-change effects of the constitutions of 1998 and 2008. The inclusion of indigenous peoples’ rights -that are collective- clashed with the idea of the law or legal narrative of the society. In a legal liberal logic, one person could not stop the state in advancing in any public policy project beyond demand a proper compensation. However, with the recognition of the special relationship that indigenous peoples have with their territory, indigenous peoples should be entitling to reject a State plan that affect their lands. Nevertheless, judges decided consistently in reject the claims of indigenous peoples. One of the most contested judicial issue was to decide if the plaintiffs were legitimate for two reasons: 1) who recognizes who is the legitimate representative of a community; and 2) who decided if the plaintiffs are

indigenous or not. The former Constitutional Tribunal applied traditional concepts that equalizes indigenous peoples and legal persons that need a representative recognized by the state. The impressive increase of recognition of the indigenous peoples' rights and legal-change in the last half of the twentieth century was stopped in the implementation of those rights among 1998 and 2008.

SECOND PART – LEGAL CHANGE IS NOT SOCIAL CHANGE

Chapter 5.

5. A CROSS-SECTION OF THE PLURINATIONALITY IN THE CONSTITUTION 2008

5.1. Formulation and Development of the Concept of Plurinationality for the Indigenous Movement in Ecuador.

The concept of the Plurinational State, from the indigenous movement, appears as a response to the Nation State. As was stated in the previous chapters, post-colonial forms of government allowed indigenous peoples to maintain to some extent their communal ways of life, their customs, and some autonomy in their internal management. Moreover, the hacienda system, through the system of concertation, penalized those indigenous people who tried to behave like mestizos, those who sought to deny their belonging to the community or even move without permission from the authorities of their place of origin.

Although it does not appear formally in the law, many communities in fact maintain their belonging to their ancestral territory, language and ways of life of their respective communities. This is why the first demands of the peoples were made in relation to the agrarian reform, or the possibility for the indigenous population of getting property titles of little fractions of their ancestral land.[253] Later on, it is recognized that the indigenous people surpass the property of

[253] In 1954 there were 19.654 registered “huasipungos” what constitutes the 22% of the rural population of the country. In some provinces, indigenous population is almost the 60% of the permanent population (Censo Agropecuario Nacional 1954)

land because they experience feelings of belonging to their territory as a place in the world for their culture to exist.

But there is also a question about statehood: The State as a structure and the idea of the Nation State to which indigenous peoples belonged territorially, but in which they were not considered. They had a different language, different customs, a different cultural past, although they did share a history in common. The indigenous people, the African descendant, and the other human groups with nonwestern idea of development (or ways of living) had been raised in the official and legal narrative as "the others", what it should be overcome. Therefore, for these peoples, integration in this nation represents a problem.

“With the concepts of nation and nationality were some of the western concepts of the Ecuadorian nation. There was an idea or a way of thinking of the Ecuadorian nation as a nation with one language, one way of thinking, with just one culture; no more than one. So, nationality is the belonging to that nation, we born as nation, then if we belonging to a nation, who are we? […] And this is how we assumed the appropriation of nationality from a content and a political vision that can exist because we have the same language and the same history, each one of us is a nationality, we are collective political entities beyond the physical space or the peasantry. Therefore, for us a nationality is a collective

historical entity that has its common history language customs, so from that angle we have defined ourselves as nationalities."[254]

This process, which is an ongoing cultural journey, and one of being valued and feeling belonging for these peoples has become evident to the surrounding society since the indigenous uprising of 1990. This journey had seemingly taken various steps backwards for many indigenous persons that returned from the path in which they had sought to insert themselves into the mestizo State:

"When the uprising arises, and the first voices begin to be heard, we make a total connection, a total agreement., (…) we're not white, we're discriminated against, we're called Indians for being peasants, but now we recognize ourselves. At the beginning it was not political, for the first thing was to recognize ourselves in the symbolic sense; spiritually we meet again, to recognize that we were born speaking Spanish, but we return to retake the voice that perhaps was very blurred in my generation."[255]

Plurinationality emerges as an alternative in what, until then, was the end of the State with respect to indigenous groups, their inclusion and their homogenization within society and the prevailing model of development presents a challenge in the need for change. For indigenous people they must no longer adapt to the demands of the monocultural state, but that the State

[254] (Pacari, Interview to Nina Pacari 2015)
[255] (Zimbaña 2017)

should be the one that must change to accommodate the nationalities that share their territory. Although they do not renounce being Ecuadorian, they want to see their identity reflected in the structural form of the State.[256]

The current political parties and political figures adopt a mixed position. Although several people from different political tendencies recognize the historical injustices committed against the rights of indigenous peoples, for few of them this represents a political problem of the structure of the State, but rather a problem of poverty and underdevelopment that should be dealt with by fighting against poverty and through cultural assimilation from the State, keeping only the folklore aspects of the indigenous cultures.

"The Ecuadorian Indian is demanding his space, he is demanding what he deserves. Traditionally Ecuador has belonged to the indigenous and, unfortunately, landowners, *gamonales* and oligarchic groups because of the great Spanish empire. (…) have been monopolizing decisions, taking the land (…) I believe that [CONAIE] is a social movement that is born out of the Indian's own need to survive as an Indian and I do not believe that there are political motivations behind the indigenous movement."[257] (Abdalá Bucaram, Former President of Ecuador, Roldosista Ecuadorian Party).

"No one denies colonization, it is in the history of Ecuador (...) incorporating the indigenous into society has nothing to do with disrespecting

[256] (Pacari, Interview to Nina Pacari 2015), (Chuji 2016), and see also (M. B. Cevallos 2008) quoting to indigenous leader Blanca Chancoso.
[257] Interview to Abdalá Bucaram in (Frank, Patiño y Rodríguez 1992, 30)

their tradition and customs. I think it can be done perfectly well (…) I do not find contradiction between progress, work, been a person that contribute to the nation's economy with maintaining the tradition and custom of a very respectable Ecuadorian race."[258] (Jaime Nebot, Christian Social Party (extreme right authoritarian party), four times congressman, four times the losing candidate for President and current Guayaquil Major).

" We believe that the problem of Ecuador is not of racial kind (...) consequently for us this Indian, white, black, mixed races stuff has no importance. What matters is that there are two classes here: on the one hand, the ruling class that has been controlling the country (...) and the oppressed sectors. Within these groups we must locate the indigenous comrades as well as other ethnic groups such as blacks…"[259] (Jaime Hurtado, Popular Democratic Movement (Public face of the Marxist Communist Party), three times the losing candidate for President)

The irruption of the indigenous people as political actors surprised the established power; to a greater or lesser extent it sought to portray the indigenous people as poor oppressed peasants, but it did not deal with their direct participation or their particularity. However, in addition to the specific demands for attention, basic services and land titling with which they began their demands, indigenous peoples have a clear objective in relation to the questioned concept of the Nation State.

[258] Interview to Jaime Nebot in (Frank, Patiño y Rodríguez 1992, 122)
[259] Interview to Jaime Hurtado in (Frank, Patiño y Rodríguez 1992)

“This is how the idea of nationality arises. We are nations. If we are nations, and of course we are, then the concept of nationality would also be the analyze. If they are assuming that there is only one nation, then they are wrong. Then the problem is who are the ones who are commanding us, and who are commanding how the statutes are made. What is the State, (…) how is possible that regarding of being divided (...) we have an Ecuadorian nation in which we are not even reflected. Therefore, what is at stake is whether the State and the nation that are making the decision now in Ecuador will include us, as indigenous nationalities. This must be with power, and it has to do with the structure of the State and with the fact that we are several nations. For us, it has to do with the main axes of the division of this diversity of nations into one State and the construction of the plurinational State.” [260]

These concepts were discussed in different assemblies of the CONAIE, and they were raised in meetings between indigenous organizations - even in international meetings. Finally, during the indigenous uprising of 1990, the need for this plurinational State was officially presented for the first time.

On April 25, 1990, in the National Assembly of Pujilí, in the province of Cotopaxi, the president in charge of CONAIE called for an indigenous uprising which the indigenous communities of the Sierra, the Amazon, some indigenous peoples from the coast, communal and peasant organizations, and several human rights organizations supported. In the 16 demands of the CONAIE there were certain ideas that dealt with price control of the basic goods and public

[260] (Pacari, Interview to Nina Pacari 2015)

infrastructure for the indigenous communities, but the core of the demands were the points that aimed to underline the necessity of self-determination of the indigenous peoples:[261]

- Declaration of Ecuador as a Plurinational State
- Transfer of Lands and Legalization of Community Territories
- Solution to water and irrigation problems
- Expulsion from the Summer Linguistic Institute of Ecuador
- Control and protection of archaeological sites in the hands of CONAIE
- Officialization and recognition of ancestral health practices
- Recognition and allocation of funds for bilingual education

Some demands from the indigenous were negotiated with the government with positive outcomes, such as funds being made available for bilingual education and the partial control over the education program was granted to the indigenous to organizations.[262]

Many of these spaces of autonomy were already in practice, managed by the peoples and nationalities, especially by the communes of the Sierra and the peoples of the Amazon not yet contacted or in the stages of initial contact. However, they demanded the official recognition of these spaces and their

[261] (Moreno Yánez and Figueroa, El levantamiento indígena del Inti raymi de 1990 1992)
[262] (Moreno Yánez y Figueroa, El levantamiento indígena del inti raymi de 1990 1992, 66)

interpretation within the plurinational State that delegated this power and not as a cultural omission.[263] Some of these parties sought to support this demand, and the others distanced themselves from what was the potential dissolution of the modern state. Rejection and sympathies did not depend on ideology.

“That really hurt us, that really surprised us. The same comrades of the left are the ones who denied plurinationality, after 25 years of being part of the same movement. (…), They told us we can't support you in that because you are going to split the country. Maybe not you yourselves, but what if your children take advantage of that to split us up?”[264]

In 1990, a bill on the recognition of indigenous peoples’ rights and the plurinational state was presented by Enrique Ayala Mora, a congressman from the Ecuadorian Socialist Party, a party close to the indigenous. Ayala Mora recalls the event:

"(...) The problem is more fundamental, of recognizing that the Indians are Ecuadorians, that they have different ways of being Ecuadorians, that they have not been integrated, that they do not want to be integrated, (...) in this sense what we should be looking for, are rather ways in which Ecuador can recognize itself as plurinational. “[265]

This initiative is presented, according to Ayala Mora, by collecting the approach of the indigenous people who demanded it in their negotiations and

[263] See also (Yumbay 2017)
[264] (Yumbay 2017)
[265] Interview to Enrique Ayala Mora in (Frank, Patiño y Rodríguez 1992)

putting a bill to Congress proposing Plurinationality. Sectors of the CONAIE at that time affirm that the Ayala Mora law project is a proposal that comes from its own leadership and is presented to the Socialist Party based on the objectives of conformation of the CONAIE and the indigenous movement[266]. In any case, the bill was presented to the National Congress, where congressman stated: "the Ecuadorian State becomes a Plurinational State with a new decentralized political and administrative structure that is culturally heterogeneous and open. Pursue the development of the country through decentralization, economic recovery, self-determination of self-defined territories such as nationalities and indigenous peoples and free exercise of authority. "[267]

The bill was presented, but was not approved or debated, because to implement it, it was necessary to change the Constitution, and thus Congress rejected it because it did not have the power to change the Constitution. Ayala Mora says:

"The bill exists because the indigenous nationalities requested it, (...) secondly because it is an invitation to debate in Ecuador. (…) The bill sets the conditions for what plurinational means for Ecuador and because of that it has an enormous resistance. (…) Plurinationality implies the problem of land ownership, but above all the problem of jurisdiction, of the capacity of certain

[266] (Zimbaña 2017)
[267] (CONAIE 1999, 52)

areas of Ecuadorian territories and communities that have jurisdictional forms that allow the expression and development of indigenous peoples."[268]

This bill did not influence in any way the legal change of the time, but it did remain a constant in the demands of indigenous peoples, although several sectors insisted on seeing them as regional manifestations of political manipulation without content.

During Borja's government and subsequent negotiations, actions were taken that favored specific indigenous groups or policies related to sectors with an indigenous majority. However, no progress was made toward plurinationality, in the sense that, as Borja himself recognizes, no indigenous authority was consulted about the application or scope of these measures.

Regarding plurinationality and the implementation of plurinationality, Ayala Mora stated that Borja himself spoke in his electoral campaign in favor of plurinationality,[269] but that he did so because he did not understand its implications, so he changed his version of it when faced with the demands of the indigenous movement[270].

Borja, however, affirms that in his government steps were taken towards plurinationality being understood as democratic participation.

"Plurinationality would be the participation of all nationalities, of all groups and cultures in the democratic State, who have the opportunity to participate as

[268] See Interview to Enrique Ayala Mora in (Frank, Patiño y Rodríguez 1992)
[269] For Borja plurinationality constitute a hazard for the state. (Cruz Rodriguez 2012, 216)
[270] Interview to Enrique Ayala Mora in (Frank, Patiño y Rodríguez 1992, 7)

part of a political process that guarantees that they are not excluded in their vision and in their interests. (…) I do not believe that we are ready for a divided State, a State with parallel governments; in Ecuador we cannot manage parallel processes - we are a very small country with a lot of diversity, but politically very undisciplined. An indigenous government, another central government, practically a state within the state would be a bad idea.

Plurinationality means that there are parties representing different cultures, as is the case in other countries with a real political culture. (…) my government promoted the right to participation in freedom of association of indigenous peoples, who have always recognized the contribution of participation, the recognition of the capacity of indigenous people as capable and responsible for being part of government positions. (…) "Izquierda Democratica" always had, considering that at the grassroots there were many communities, many indigenous people from all over the country and their needs were considered; we represented their interests. That is the basis of the State of participation of a plurinational State."[271]

In the following years, the indigenous movement managed to implement several of the specific demands insisted on in the manifesto delivered to the government in 1990 but failed in debating plurinationality. Although it continued to act as a social movement, it should have been considered more. In this regard

[271] (Borja, Interview to Rodrigo Borja 2017)

Orlando Alcivar, representative of the Christian Social Party and assemblyman affirms:

"I would say that the indigenous people were thought of as a sector that could create problems for calm governance and they were recognized as an important force that could cause problems. (…) it was not believed that it was necessary to incorporate them into the government as a formal force, at least I don't think so. Maybe someone can say that if falsely, but I put a hand on my heart and say that I did not want to incorporate them like that, at least in the terms in which it was done. We wanted to incorporate them into the civil part of the country, as part of this, recognized with their rights, as it should be. To incorporate them into the national culture, to give them all the opportunities (…) not necessarily as a party, as to say in the ministerial cabinet there must always be 3 indigenous ministers, which is not the same as taking them into account and consulting certain things that concern the indigenous especially"[272]

In 1998, after a political crisis that overthrew the government of Abdala Bucaram, and a coup d'état that overthrew the vice-president Rosalía Arteaga, the President of Congress Fabian Alarcón convened a Constituent Assembly, and the indigenous movement that at that time already had its political arm Pachakutik with six representatives proposed again the plurinationality and the content of several collective rights that concern it.

[272] (Alcívar 2016)

"the proposal carried by Pachakutik that in the assembly of ‘98 was approved unanimously, almost unanimously, but the plurinationality of the State was not approved. There was a generalized criterion (...) that plurinationality was still not defined clearly, and that this was going to divide the country and then that was the argument but it was not approved, all collective rights were approved, including indigenous justice that Dr. Orlando Alcivar of the Social Christians presented a proposal to limit the indigenous law, but it was not approved.”[273]

In the 2008 Assembly the concept of plurinationality is widely debated, it is proposed as an agenda for the representatives of Pachakutik, but it is also promoted by some assembly members of the very majority that formed the coalition of the government. Alberto Acosta, president of the assembly, says:

"The indigenous movement, in the process of drafting the 2008 constitution, is fundamental - even though it had just 5 representatives it was very important. Even though their representatives play a slightly lucid role, they have very poorly defined their mandate. In this group there were no actors who were able to propose to us what the plurinational state of Sumak Kawsay means, but what is interesting is that it is part of a process of collective resistance and presentation of alternatives, which crystallized in a country. You have people (...) who were in one way or another very in tune, I myself was a candidate for Pachakutik, (…) and specifically the indigenous people mobilized to help in the process, the groups of resistance to mining for example. (…) (...)

[273] (Chuji 2016)

the debates took place within ALIANZA PAIS. Not all of them had access, but the presidents of the CONAIE and the ECUARUNARI had a direct line with the president of the assembly to express their vision to me".[274]

Another of the assembly members related to the proposal of plurinationality. María Paula Romo, also explains the existing consensus around the issue.

“We were clear that plurinationality tries to recognize the existence of different nations, because the existence of different nationalities implies for us the question of recognizing what the relationship with the State is, not only in the human group with its characteristics, its rights, its own history, its own projections that would mean to accept that they are their own nations. It seems to me the obvious overcoming of the State-nation of the last century (…) as for the debate I think that it was much easier to lead, it was also one thing, with how many people you could have the opportunity to discuss with. It was at best with 10 and not with 90. At that time, they were no debates in which many people participated and in the Constituent Assembly I believe that there was a general agreement among all of us on the issue of plurinationality and then much resistance in the Executive, much resistance to pointing out to generate content to debate with other tendencies to propose specific topics (...).[275]

[274] (Acosta, Interview to Alberto Acosta 2017)
[275] (Romo 2017)

Finally, President Rafael Correa defines the plurinationality enshrined in the constitution as follows its approval on the initiative of his own political movement:

"We are going to define Ecuador as a unitary but plurinational state, that means that within the great Ecuadorian nation, other nationalities coexist, which is evident. Here there are 14, 15 or even 16 nationalities, and this does not have to frighten anyone. (...) this does not mean to be a State within the State, precisely that is the next step, to define adequately the scope of that plurinationality that basically is to recognize the different peoples, cultures, worldviews, etc. that coexist within the country and that all public policies on education, health, infrastructure and housing recognize this plurinational dimension.

For example, in housing, I cannot construct the same living space with state bonds for a citizen of a marginal neighborhood of Guayaquil, as for a Chachi, Tsáchila or Waorani; each one has their own culture and traditions, and we must take them into account. In Ecuador we are diverse, but not unequal. We must all have the same opportunities and we are a unitary state, but we are diverse, and that is part of our wealth, we are a place where several nationalities coexist. We know that there are some extremists, some fundamentalist visions, but we will not let them affect us." [276]

[276] (Correa, Enlace Ciudadano No 65 2008, min 8:30)

President Correa produced 523 *sabatinas* during his 10 years in office. For this dissertation were used 395 *sabatinas* (75,52%), and in 129 *sabatinas* (33,67%) Correa talk about indigenous peoples. Two kind discourses were the objective: i) the classification of the indigenous in the good and the bad savages depending on their political position; and, ii) his position regarding autonomy.

TABLE 5.1. Two narratives[277]

	The noble savage		Autonomy		
Number	The noble savage	The bad savage	Total autonomy	Limited autonomy	No autonomy
129	61	105	2	21	55

President Correa used *sabatinas* primarily to attack the indigenous persons that he considered “bad savages”, or the people that was against the progress that his government represented. The former president uses words as “agitators”, “traitors”, “mental handicapped”, “selfish”, “childish ecologists”, “puerile”, “poppets”, “ridicules”, “killers”, “retrogrades”, “violent”, “salvages”, “ponchos dorados”, “mestizos disguised of indigenous”, among others. His expressions were reactions to demonstrations, uprisings, or law suits against the government. The good savages were the indigenous peoples that wanted to integrate Correa’s policy, especially regarding the exploitation of natural

[277] For the full table see the Appendix

resources. Correa use “diverse”, “valuable”, “good”, “industrious”, “hospitable”, “hard worker”. Both discourses start with the premise of the indigenous peoples as a group that has been left behind in society’s development, poor, and ignorant.

The second analysis is about President Correa’s policies. In a plurinational state, indigenous nationalities should have more autonomy. If the president talks about a policy involving indigenous peoples that will be totally implemented by the central state, there is no autonomy. If there is space in the public policy for the indigenous peoples to take decisions, there is going to be limited autonomy. Finally, if the president accepts that indigenous peoples should have total control of the policy, then there is going to be autonomy recognition. President Correa recognize total autonomy of the indigenous peoples in 2 *sabatinas.* He coincided limited autonomy in 21 occasions and deny autonomy in 55 cases. A full detailed analysis of the *sabatinas* is annexed to this dissertation.

What finally arrives with the Constitution of 2008 was a way to interpret justice and law from the Indigenous Movement and it had been introduced to the text of the law. However, the institutional interpreters were ready to contest the meaning of the Plurinational State.

5.2. Plurinational State in the Constitution of 2008

Despite what several mestizo politics believe, the plurinational state is not an empty concept. It is a response to the historical exclusion of the indigenous

peoples. A kind of inclusion to the major society without losing their cultures, their world view, and their self-determination.

“Plurinationality advocates equality, unity, respect, reciprocity and solidarity of all the nations that make up Ecuador. It recognizes the right of the Nationalities to their territory and internal political-administrative autonomy i.e. the right to determine their own process of economic, social, cultural, scientific and technological development to guarantee the development of their Cultural and Political identity and therefore to guarantee the development of the Nation.”[278]

Therefore, the plurinational state a is way to organize the state that respects the autonomy of each culture, meaning that the central state can only regulate the spaces of interchange or clashing of cultures. The internal spaces would be shaped by the peoples or nationalities according to their traditions and institutions. Nevertheless, the central state should also change to include the voices of the indigenous peoples in the different forms that the state power takes. Plurinationality is a principle that should be transversal to all the institutions of the state. Moreover, there are proposals that go further and some presented ideas about the institutional design of the plurinational state:

“Plurinationality is to allow all peoples direct participation - not only majorities, not only some territories, but all the mestizos, the indigenous, the African descendants, the *montubios*, all of them. [...] A president wins the

[278] (CONAIE 1994, 12)

elections, but he is the vertical axis. However, in the horizontal axis, the cabinet must be plurinational - there must be indigenous representation. (...) We are organized as the Confederation of Indigenous Nationalities – CONAIE - is the government of the indigenous peoples, its authority. If I have a position in the state, I will serve, but my authority is the CONAIE. [...] In a plurinational state, the President should at least have dialogue with those authorities to listen to their ideas and integrate them into his/her cabinet. Because if not, what do we do with a parliament - no matter how diverse it may be - that does not answer to the peoples."[279]

This concept differs from the old concept of the existence of ethnic minorities or groups of priority attention in that these groups are not assumed to exist as marginal or subsidiary of the central State. Plurinationality implies that a State where several nationalities are assumed to exist is a State where the construction of society, institutions and the law does not start from the recognition of minorities, but from the acceptance that there are several nationalities that have the same importance for the State.

This implies, first, that there is no linear form of evolution that makes the worldview of indigenous nationalities inferior to that of mestizo society. This fact alone is opposed to ideas such as economics, development and the very right of mestizo culture. Culture that conceives nature and private property in an individualistic fashion that even when it tries to protect the rights of indigenous

[279] (Pacari, Interview to Nina Pacari 2015)

peoples it does so in a weak way and with little development in legislative and jurisprudential law.

"The problem of plurinationality is not only to put indigenous officials everywhere including places that we may not be able to, the problem is to get into their heads the idea of plurinationality, that there is another thing, that there are other people with another culture. The most difficult thing is to put plurinationality in their minds. (…) the problem is that they do not accept that there is not only one language, one religion, one State, one justice. Why they do not accept this? It's because they do not accept sharing their power with others, because plurinationality has to first change the racism, the rejection."[280]

Second, the plurinational State starts from the recognition that there is already an institutional capacity on the part of indigenous peoples and nationalities to govern and decide their development priorities, their rights and their own institutions.[281] This is important because the plurinational State, at least that of indigenous societies, not only creates something, but recognizes the existence of something.[282]

The struggle between the executive and the indigenous that occurred in the government of Rafael Correa is constantly reflected in the dispute over the legitimacy, opportunity and competence of the indigenous to act for self-government. One of the objectives of the central government was to capture

[280] (Yumbay 2017)
[281] See (CONAIE 1994)
[282] See interview to Enrique Ayala Mora in (Frank, Patiño y Rodríguez 1992, 6)

and preserve all possible spaces of power, and this was a legitim practice because they held much of the national vote, which repeatedly reminded the indigenous people in President Correa's constant speeches about their claims:

"There is a state and a head of state who must make decisions with democratic legitimacy for the common good. What CONAIE proposes is that negotiations begin there (...) Imagine the extortion capacity that they can have, if in these moments, without legal framework, they already want to change the infrastructure planning, block roads, they tell us how much to pay, they demand schools, etc. I would prefer to go resign than accept that. And if you want to, rise, rise comrades. Do it. However, if because of that, you destabilize the government, hopefully that will be the best. Hopefully that what you are looking for is the returning of the governments that have always mistreated and discriminated you."[283]

Third, the plurinational state includes the dynamism of the cultures, and it does not say that there is the possibility to only keep certain ancestral customs. Indigenous cultures evolve, and they do not have the duty to stay static in order to be recognized as indigenous peoples or nationalities, or to have the right to choose a different development path with respect to the hegemonic or mestizo culture.[284] This could only be possible if the hegemonic culture, that nowadays has the monopoly of the use of legitimate state violence, allows the indigenous peoples and nationalities to develop in their own ways.

[283] (Correa, Enlace Ciudadano No 69 2008, min 0:58)
[284] See (Esterman 1998)

Finally, the idea of the plurinational state is based on autonomy or self-government, and self-determination. These are rights recognized for all peoples in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights in their common article 1:

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

Self-government implies that each people or culture has the right to make decisions about where that society is headed, the institutions it creates, the values it defends, and the right it develops to achieve these goals.[285]

From these perspectives we can analyze that, beyond the little development of the concept of plurinationality contained in the Constitution, the Constitution itself develops some conditions on which this autonomy or self-government of each nationality will be based. To better understand this, the Constitution can be analyzed from the traditional division of the powers of liberal democracies from the description of the proposal presented by indigenous organizations. [286]

5.2.1. The Executive Branch

In the Constitution of 2008, article 57 number 9 gives indigenous peoples and nationalities the right to decide who their representatives and ancestral

[285] (CONAIE 2012, 35)
[286] (CONAIE 2007, 10)

authorities will be; this means that indigenous peoples and nationalities will be able to maintain the type of decision-making that they have developed over the centuries.

Indigenous peoples generally deploy a series of mechanisms to carry out inclusive consensus processes in which most of community members participate. These mechanisms are strange to the Western perspective where voting is understood as the main (sometimes the only) form of political participation. Some institutions such as the “elders” or the “shamans” get criticism from the Western perspective due to the appearance that they hold a no democratic power. However, the criticism is sustained in a monocultural reading of the indigenous procedures where communities create strong constituency of accountability of their leaders and the assembly is the forum to take the decisions.

“Peoples and nationalities have uses and customs for electing authorities and these authorities must be considered legitimate representatives of indigenous peoples and their election system cannot be dismissed because it does not conform to the conventional electoral mechanisms in use in the world. (…)”[287]

The inclusiveness or democratic nature of these processes cannot be judged absolutely from an external point of view. For example, ethnographers highlight the role of women in the apparent patriarchal Waorani society in

[287] (CONAIE 2007, 13)

deciding where to move or in initiating a war.[288] Some nationalities do not have women in their governing bodies, but they do actively participate in the assemblies. Nevertheless, it is important to consider that the processes in which the mestizo society has been expanding the participation in the vote to all members of society has not been immediate. To undertake their own processes of recognition and inclusion of all members of society is part of their right to self-determination.

The legitimacy of the indigenous authorities comes from the indigenous peoples and nationalities peoples themselves. That recognition is more important than the one that the central State assigns when they register the legal representatives of the communities for mestizo legal proposes.[289] It is necessary for the central state to understand that the mechanisms of decision-making the and representatives' designation do not obey western standards and will be different for each nationality. Under the plurinational state, the central administration cannot try to standardize the internal election procedures. To do so implies creating the risk of false representation from groups inside the communities that could respond to external interest with legal recognition but

[288] Rival even states that "Upon completing fieldwork among the Huaorani, I really felt that I had the privilege of documenting one of the few truly gender-equal societies on earth". (Rival 2016, 175)
[289] About the authorities in Kichwa communities see (Pacari, Todo puede ocurrir 2007, 250)

with no accountability to the community, and it is this that has created internal conflicts in the past.[290]

Correa used the mechanism of recognizing the factions in the communities that were eager to negotiate with the movement as the legitimate authorities of the communities, and disqualifying the authorities that were against his projects, characterizing them as misguided and badly organized groups:

"It is not true that permission has not been asked for, that there has not been a conversation, that prior consultation has not been undertaken, as some people are saying. There is fighting among the communities, so some say "why do you consult with them and not with me ". Now here comes the problem, they want us to negotiate with the community leader and not with the people who are affected by the project, so we have said to them, "you should arrive to an agreement and then we can talk", but many times it is the disunions of the community itself, chaotic processes that do not include the real interested parties, but those who live off [being leaders] (…)."[291]

This State intrusion was important for several reasons, for example for the signing of contracts and even the negotiation of prior consultation processes, so that, at least in appearance, the requirement of prior consultation

[290] This practice of giving legal representation to groups that does not have the support of the community but are more likely to sign agreements with the government was one of the issues discussed in the Shuar Case in the ILO committee. The Committee found that the state should respect the authorities of the community. (Report of the Committee in the case of the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL) v. Ecuador 2001)

[291] (Correa, Enlace Ciudadano No 90 2008, 53:50)

could be fulfilled in terms of carrying out the consultation using ancestral authorities, but in fact it was the government that represented both parties.

On the other hand, there is not a standard procedure to recognize an indigenous people or nationality. Ecuador is a signatory of several instruments of international law such as ILO Convention 169 and the judgments of the Inter-American Court of Human Rights which generate jurisprudence in this regard, where the fundamental issue for such a category of indigenous people is the self-recognition and self-definition as indigenous people as such and their characteristics of cultural identity and practices.

In this spirit, in the same year of the approval of the Constitution of 1998 and the ratification of the ILO Convention 169, the President of Ecuador Jamil Mahuad established the Council for the Development of the Nationalities and Peoples of Ecuador by Executive Order (CODENPE for its Spanish abbreviation), the body responsible for recognizing, protecting and promoting the development of the peoples of Ecuador.[292] It was composed of 26 members, one for each nationality, and one for each people within the Kichwa nationality. The representatives were elected by their communities using their own processes. It was the only truly plurinational body that has existed in the country.[293]

[292] (Presidente Constitucional de la República del Ecuador 1998)
[293] There is no other public institution in the history of Ecuador in which all the indigenous nationalities and peoples have representation.

The recognition of the legal personality depended upon the CODENPE. Also, the CODENPE worked as a registrar of the names of the authorities of each group so they could legally represent his/her group in the multicultural society. For years, the recognition of the CODENPE was enough to exercise the rights of the indigenous groups.

However, when natural resources extraction became an issue, the objection of the lack of legal capacity become a common objection to dismiss a case presented by an indigenous people without considering the merits of the case. In the Salango Case, the Constitutional Tribunal upheld that CODENPE's recognition of the Community of Salango as an indigenous community being part of the Huankavilka People was not sufficient to determine if they were indigenous or not. Finally, the Tribunal gave more weight to the decision of the State Attorney General's Office that declared that they were peasants and not indigenous and allowing the sale of part of their territory.[294]

After the Constitution of 2008 was enacted, the government planned the 1st Forum for the Construction of the Plurinational and Intercultural State. Even though the CONAIE was not invited, several indigenous and afro descendants attended the meeting. However, no panelist was indigenous, and most of them were foreigners. It was not a meeting to learn from the peoples, but a space to openly inform the ethno-racial policy of the government: plurinationality will be

[294] (Judgment No. 459-2003-RA 2003). See also the Asakik case when again the Constitutional Tribunal decided over the CODENPE decision that a group was an indigenous community (Judgement No. 1136-2009-RA 2009).

something that the government plan to give it a content that could be accommodate to their natural resources extraction policy.[295]

At the beginning of Rafael Correa's first term in power, the executive order that created the CODENPE, with some minimum additions like expanding the Council to 31 seats, turned into a bill approved by the Congress and sanctioned by Correa. It was enacted as the Organic Statute of Public Institutions of the Indigenous Peoples of Ecuador that Define Themselves as Nationalities with Ancestral Roots.[296] The conflicts between the CODENPE and Correa continued,[297] and, as a result, Correa and his party decided to eliminate it.

It happened in 2016, when the National Assembly approved the bill of the National Councils for Equality, institutions created in the Constitution of 2008 as "bodies responsible for ensuring the full observance and exercise of the rights enshrined in the Constitution and in international human rights instruments. The Councils shall exercise their attributions for the drafting, cross-cutting application, observance, follow-up and evaluation of public policies involving the issues of gender, ethnic groups, generations, inter-culturalism, and disabilities and human mobility, in accordance with the law."[298]

In 2016, they were integrated by state officials and voluntary members of civil society regulating the functions of the National Council for the Equality of

[295] (Secretaría de Pueblos, Movimientos Sociales y Participación Ciudadana 2009)
[296] (Congreso Nacional del Ecuador 2007)
[297] See the autobiography of Lourdes Tibán, The General Secretary of the CODENPE. (Tibán 2016, 142)
[298] Art. 156 of the Constitution of Ecuador.

Peoples and Nationalities that replaced the CODENPE. The new Council is made up of members designated by the President and the other half are members of the civil society. The Council is presided by a representative of the Executive. The organization which gave seats to all the peoples and nationalities was erased. The new body carries out deliberative and consultative functions on the implementation and monitoring of policies that promote diversity in Ecuador.[299]

The Constitutional Court that adopts the functions of the Constitutional Tribunal from 2008 onwards did not discuss the problem of recognition of the ancestral authorities of indigenous peoples in matters involving coordination between the central state and the nationalities.

5.2.2. The Legislative Branch

Regarding the legislative branch, article 57 number 10 recognizes the right of indigenous peoples and nationalities to create, develop, implement and practice their own law. This recognition is broader in content, both in the 1998 constitution and in the ILO Convention 169. These two instruments refer to a customary law, which could be interpreted as a law anchored in the past and in the ancestral customs of the peoples. Under this limited conception of the possibility for indigenous peoples to generate their own law, certain decisions taken by the community, in cases that have never been treated by it, would be illegitimate or could pass into mestizo jurisdiction.

[299] (Asamblea Nacional del Ecuador 2014)

However, the Constitution of 2008 does not have such limitation.[300] The Constitution recognizes the possibility of maintaining and creating law, allowing indigenous peoples to have a dynamic law, anchored in their worldview, but capable of adapting to the new challenges faced by communities.

The permeability of cultures would allow the new indigenous law to be influenced by mestizo law and customs or by the law and practice of other communities. This permeability is inevitable since these peoples, with the sole exception of peoples in voluntary isolation, are in contact with the western world.[301]

5.2.3. The Judicial Branch

The exercise of jurisdiction is also recognized in the constitution when it recognizes the right of indigenous peoples and nationalities to apply their own law. Indigenous justice is even included as part of the Ecuadorian justice system (art. 171). Here again there is a conflict with Western conceptions of justice. One of the mainstays of western human rights is the right to due process.[302]

These rights are not free from cultural influence, they respond to an idea of law and justice built from the western world's perspective. It is the opinion of

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[300] Article 57. Indigenous communes, communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments, the following collective rights: (…) 10. To create, develop, apply and practice their own legal system or common law, which cannot infringe constitutional rights, especially those of women, children and adolescents. (Georgetown University 2011)

[301] (Fiallo Monedero 2014) describes in her study the collective construction of Tsáchila Law. She said that the Law is created in assembly where all the community could participate. The author describes how recent issues have been discussed into the community to update some norms under the light of a new cases.

[302] See (Encuentro Continental de Pueblos Indígenas 1990).

several people that indigenous peoples' law offers standards that are unreasonable under the western values.

"Many judges ask us what use the ritual bath is within the sanction. They say that giving a bath is not justice, that there is no due process, that it matters who applies the punishment, that what use is it to advise as part of the purification, that what do the community authorities know of the law and how to carry out the investigation. (…), In other words, they do not understand that there can be another justice that is not just a way to do justice, that there is not just one way of correct justice."[303]

The imposition of the administration of Western justice is problematic, for the priority and values that many indigenous peoples try to maintain, into the commission of crimes, is the restitution of rights and the reintegration of the person into the community. Prison does not exist, reparation to victims is always the first step and there is a collective recognition that the infraction is a symptom of a problem that the whole of society has and not just a fault that the individual has.[304]

The principle of presumption of innocence, for example, is based on the idea of individual responsibility where a person (because of the severity of the penalty that he or she faces) is entitled to not be subjected to depravation of

[303] (Yumbay 2017)
[304] There is a recent wave of legal anthropology studying the indigenous peoples' legal systems beyond the Kichwa nationality. For example, the work of (Fiallo Monedero 2014) study the law of Tsáchila Nationality finding common elements with the Kichwa Law.

liberty, until a process has been carried out in which his or her participation and responsibility in the crime have been proven. In a culture where the most important thing is to repair the victims' rights, these types of rules can possibly be considered flexible.[305]

There are many questions about how it will be applied. How long should it be able to last? What are the consequences of the idea that the whole community is responsible? Someone will be responsible when the law of the community is violated and, even more importantly, when a member of the community is harmed. Moreover, not only one person or the individual affected will be victims of a crime, but the entire community is affected. This is not the case of the western justice.

Serious limitations to the indigenous law were introduced by the judiciary in Ecuador. In "la Cocha" case, for example, the constitutional court determined that indigenous communities only seek to restore harmony within the community, and not to protect individual rights.

It points out that justice is not applicable in all criminal cases since their processes do not meet the standards of western justice, where the rights of the victims would be protected. Therefore, especially in the case of murder, indigenous peoples and nationalities would not be able to judge issues of attempts against life based on this resolution of the constitutional court, which will be analyzed later.

[305] (Yumbay 2017)

These three aspects of the self-determination of indigenous peoples and nationalities are not novelties, but it is the recognition of a reality that was latent. As we analyzed in the first part of this paper, for centuries indigenous peoples (including during colonial rule and the first republican governments) were able to maintain high levels of autonomy with respect to solving their internal problems, maintaining their ancestral authorities, and creating and reproducing their own law.[306] Constitutional recognition would only have sought to give legal protection to this reality.

This recognition is also necessary at a coordination level among nationalities themselves and with the central State. This is achieved only through the conformation of national institutions, not mestizo institutions, but plurinational institutions. This vision implies that the legislature must abstain from generating legislation that would overcome the possibility that indigenous peoples could have their own law, and the same is true of the executive and the judiciary. The mechanisms for this will be analyzed in the following section.

5.3. Specific Rights of Indigenous Peoples

Each of the above-mentioned characteristics of the plurinational State are entitled to a series of rights that are also recognized by the Constitution and that seek to guarantee the autonomy and self-determination of indigenous peoples and nationalities. These rights can be, and have been, generally recognized as

[306] There are studies that show that in all the Andean region indigenous law has been used for centuries for the indigenous to solve their internal affairs, and these institutions have the potential to solve the lack of access to mestizo justice. See (Almeida, Arrobo Rodas and Ojeda Segovia 2005) .

liberal rights that correspond to an ethnic minority or priority attention group with specific rights.

The rights of indigenous peoples in a plurinational state must be understood in accordance with the historical development of the concept of plurinationality since it was formulated by the Ecuadorian indigenous movement. The interpretation of plurinationality is the real possibility that the cosmovision of indigenous peoples and nationalities may coexist with the cosmovision and vision of development of the mestizo State, with the mestizo nationality being just one more nationality within a group of nationalities where neither should prevail over the other. The central State is only an arbiter of the interests that each nationality may try to impose on the others and the one in charge of resolving any conflicts that may exist between them.

The executive of the central State or of the plurinational State, if it requires a decision to be taken, for example about large-scale projects that may endanger the natural resources of several nationalities, cannot do it without free, prior and informed consultation. The characteristics of such consultation will be described in the next chapter.

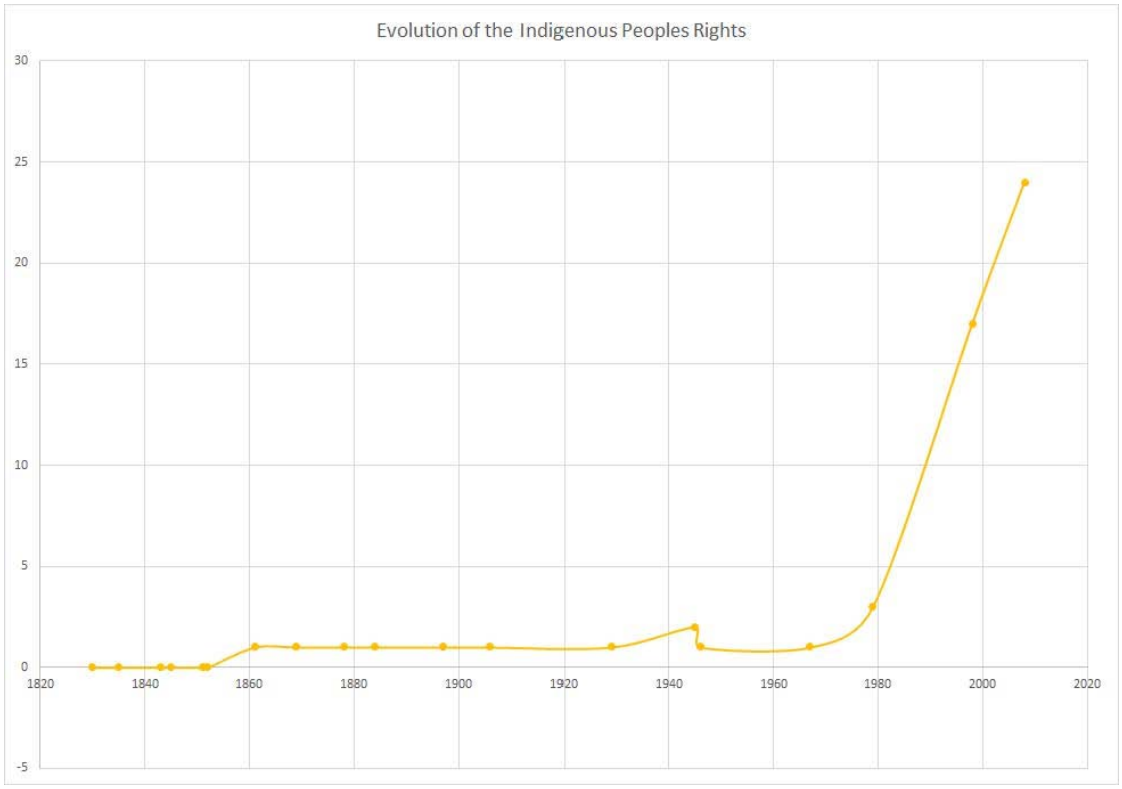

FIGURE 5.1. Evolution of the Indigenous Peoples Rights in the Ecuadorian Constitutions. The source were the texts of the Constitutions.

This consultation must be considered beyond a simple collection of the opinion of indigenous peoples and nationalities. In the context of the possibility of these peoples having their own law, the scope of the national law that is created must be considered because the legislature should not contravene the indigenous law. The National Assembly is the legislator of the mestizo nationality but should also respect the self-determination of the indigenous nationalities; thus, their statutes should include exclusion norms that void their application for indigenous peoples and nationalities. This formula was used by the Constitutional Court in the mining statute case that will be analyzed in the next chapter.

TABLE 5.2. Evolution of the Indigenous Peoples Rights in the Ecuadorian Constitutions

Year	Formal voting rights	Material voting rights	Property	Literacy	Education	Notes	Legal Personality	Bilingual Education	Other Specific Rights
1830	yes	no	x	x	x		no	no	no
1835	yes	no	x	x	x		no	no	no
1843	yes	no	x	x	x		no	no	no
1845	yes	no	x	x	x		no	no	no
1851	yes	no	x	x	x		no	no	no
1852	yes	no	x	x	x		no	no	no
1861	yes	no		x			yes	no	no
1869	yes	no		x		only catholic	yes	no	no
1878	yes	no		x			yes	no	no
1884	yes	no		x		only man	yes	no	no
1897	yes	no		x			yes	no	no
1906	yes	no		x			yes	no	no
1929	yes	no		x		woman specifically no	yes	no	no
1945	yes	no		x		woman specifically no	yes	yes	no

1946	yes	no		x		woman specifically no	yes	no	no
1967	yes	no		x			yes	no	no
1979	yes	yes					yes	yes	no
1998	yes	yes					yes	yes	14
2008	yes	yes					yes	yes	21

These spaces of power, however, were never recognized by the government, which always expressed them as anti-democratic attempts to divide the state:

“It is very difficult to deal with these people, because they are fanatics, fundamentalists, there is no reasoning with them. Carlos Perez said that ECUARUNARI can give visas, because that is what many of these people believe and that is their objective, they have told me, to create another Tahuantinsuyo; it is not a plurinational and pluricultural state, it is a parallel state, where they could govern even if they get 3% at the polls. Let's not deceive ourselves, we are fighting against that.”[307]

This practice should resemble in some way the federal states where federal legislation basically seeks to regulate the state, resolve conflicts that

[307] (Correa, Enlace Ciudadano No 440 2015, min 2:33)

may exist between the states parties and above all respect the areas of legislative autonomy of each state. In this case, autonomy is an autonomy of each indigenous people or nationality. This demand was present since the first days of the CONAIE, as Luis Macas explains in 1991:

"The state has excluded our specific rights, so it is necessary that our world, law and customs should be self-administrated by us. The right to self-determination that we demand consists of creating a regime (self-government) that allows us to have legal competence over the administration of the internal affairs of our communities, within the framework of the National State, without this meaning creating a State within the current State."[308]

As for the judiciary, there are already several cases where they have discussed how an effective coordination between the indigenous justice system and the plurinational State system should be carried out. Again, it is necessary to consider which are the cases in which the central State should intervene in the administration of indigenous justice in the case of conflicts between nationalities, conflicts of competence based on persons, or the cases in which a non-indigenous person can be submitted. Also, is necessary to stablish in which cases the application of indigenous law will have a personal application or a territorial application, and how these conflicts will be resolved.

This point, despite being controversial, is one of those in which there is a clearer rule, at least with respect to the criminal law. Article 345 of the Organic

[308] (Macas, El levantamiento indígena visto por sus protagonistas 1991, 11)

Code of the Judicial Branch, states that now if an authority of the central State or of the ordinary justice knows that the case has been previously known by an indigenous authority, they should decline de competence immediately.[309]

Until the case of "la Cocha", this article was being respected, applied and ratified by the National Court of Justice, regardless of whether it was a criminal case. The Constitutional Court stated, in this case, that indigenous peoples and nationalities, or the form of punishment of indigenous peoples and nationalities, had not been adequate, basically by not punishing with imprisonment the person who had been found responsible for a homicide.

Another important point on the subject is what could be the material control with respect to the rules applied by indigenous justice, which is superimposed on the previous discussion with respect to autonomy in legislative matters. There are limits or no limits to the content of the norms created by indigenous peoples and nationalities.

In this sense, the sentence of the case "la Cocha 2" was paradigmatic, where, after a group of people were subjected to a ritual of purification and that would be taken to the ordinary justice and later to the constitutional court, a

[309] Art. 345.- DECLINATION OF COMPETENCE. - Judges who know of the existence of a process submitted to the knowledge of the indigenous authorities, will decline their jurisdiction, whenever there is a request from the indigenous authority in that sense. For this purpose, a three-day probationary period will be opened, in which the relevance of such an invocation will be demonstrated summarily, under the oath of the indigenous authority to be such. Once the allegation is accepted, the judge or the judge will order the case file and will forward the process to the indigenous jurisdiction. (Asamblea Nacional de Ecuador 2009)

process began for injuries against the indigenous authorities for having applied a physical punishment as part of the ritual of purification. The Constitutional Court decided that, while it is true that indigenous peoples and nationalities could not decide on criminal matters where an attack on life is being studied, they could not be held responsible for applying their law, which would resemble the principle of legitimacy of norms that has been applied in ordinary law and which implies that no person could be responsible for a fact that has been permitted by law, even though that statute has subsequently been declared unconstitutional.

Certain material limits to what indigenous peoples can say would be the same as those in force for all nationalities; for example, by international human rights treaties Ecuador does not allow the death penalty. This is an extreme case of vigilance by the National State over the application of penalties.

On the same subject of material control of the rules, it should be mentioned that the law of jurisdictional guarantees and constitutional control[310] creates the power of the constitutional court to review the jurisprudence or decisions of the communities' indigenous authorities. The scope of this power of the constitutional court is very controversial since it would imply, that the human rights that have liberal and western implications could be applied, not only in terms of principles, but also in terms of the rules that could stand against the indigenous, substantially limiting the creative potential of these norms.

[310] (Asamblea Nacional del Ecuador 2009)

5.4. The Indigenous ideas beyond the specific rights: the Sumak Kawsay and the Rights of Nature

Finally, the Constitution of 2008 shows that its understanding of the rights of indigenous peoples exceeds the liberal recognition of diversity through the conformation of a new form of State. There are two big elements that come from the indigenous worldview and should impact the central state. The first is the Sumak Kawsay and the second is the rights of nature.

The Constitution contains a classification of economic, social and cultural rights that was traditionally referred as the rights of Sumak Kawsay or good living. The concept of Sumak Kawsay comes from Andean indigenous philosophy and literally means the way to live well.

“The Sumak Kawsay is a philosophical principle proper to the cosmovision of the Kichwa peoples which in its literal translation means "To live well" (...) It is a permanent dynamic process of life that develops in the bowels of the community life system (...) it is also a model of life whose purpose is to propose an alternative model to capitalism. (...)it is articulated with others of the worldviews of native peoples and nations that refer to the earth, without evil, with high diversity, and with spiritual beings (supay) and free from pollution.”[311]

The idea of the interdependence of fundamental rights and, above all, of economic, social and cultural rights, in which the application of these rights must be seen in terms of the general welfare of society, implies a significant restriction

[311] (CONAIE 2012, 40)

to rights that could lead to inequality, i.e. the right to property. Therefore, activities that create economic revenues for a group of the population and create disbalances in nature, or in the capacity of the Other to achieve a Sumak Kawsay should be controlled and restricted by the plurinational state. This is especially true regarding the extractive projects conducted in indigenous territories. This limitation could not be just formal, for self-determination implies the right to reject those activities that put in danger their way of living and their development.[312]

This means that, in the application of each fundamental right, the whole, and not only the benefits of the individuals that are within the society must be valued. This vision is different from a traditional socialist vision because it is not based on, or is not a criticism of, the private appropriation of the means of production; rather it is a perspective from which society must be seen as a living entity, in which certain effects of the acts of the members of the society that generate illness or pain among members of the community have to be corrected. Poverty is obviously one of them, but also environmental deterioration. Therefore, the rights of the Sumak Kawsay are not qualitatively the same as economic, social and cultural rights.

[312] There is a growing consensus on how the capitalism based extrativism is model of production that does not allow alternative options to function. Promoters of this model are constantly using a narrative of the inevitable of it. For a discussion of the alternative models of indigenous peoples and how they are limited by the extrativist discourse, see (Hardt y Mezzadra 2013)

"The good way of life is presented from the western view as equivalent with human welfare; which is a simplification of philosophical conceptions and original principles."[313]

Indigenous practices are being studying for academics[314] as examples to be apply in areas where western systems have shown inefficient as criminal law and participative democracy. Van Cott highlights the good experiences in Ecuador and Bolivia when indigenous that are elected as authorities in local administrations bring with them the collective practices on decision-making process that make all the community participate, and, in doing so, they creates what she called radical democracy.[315] regarding the possibility With regard to the last aspect, i.e. the rights of nature and the Pachamama, this recognition constitutes a fundamental pillar of the plurinational State, since it accepts the world view of several indigenous peoples in the sense that human beings cannot be understood outside their natural environment.

In his book of "Wild law", Cullinan states that the way nature has been abused as solely a source of goods and natural resources has brought the earth to the point of one of its most important massive extinctions in history.[316] The only way to prevent this from happening is to first accept that there is a problem with the way humans produce; secondly to accept that the only way to avoid the extinction of the species of the planet and of humans is to stop this form of

[313] Propuesta desde la visión de la conaie 2012, pag 39
[314] See for example (R. F. Ávila Santamaría 2018) on the lessons that could learn the wester criminal law system form the Kichwa indigenous law.
[315] See (Van Cott, Radical democracy in the Andes 2008)
[316] (Cullinan 2011)

exploitation of the land; and thirdly, to recover what has been damaged, it is necessary to revert and reinvent the productive processes so that the land can sustain or re-sustain the life of all the species that exist in it including human beings. For Cullinan, the law is a force that must change to stop the destruction of the planet.

The rights of nature recover the cosmovision of nature not only in its characteristic of being a deity, as it was at one time, but as a living space of human beings and other species whose conservation has to be a priority for the State.[317] As recognize by (Gómez Berrenchea 2012), indigenous peoples are inspiring environmental movements. And this is where the ways in which indigenous peoples and nationalities relate to nature give us a path as to how we should live and how we should regulate relationships between human beings and nature, especially those activities that can cause the most harm.

This vision of nature, which must be preserved for its intrinsic value, and not only in terms of the economic value given to it by the human being, is a concept that has to do with the plurinational State. This is because the indigenous peoples who originally inhabited Ecuador already had, and have, ways of exploiting nature that include ideas such as not wearing down the soil, hunting and fishing practices that do not lead to the decimation of fish or animals, and a relationship of taking what is necessary without the intention of accumulation.

[317] See (Zaffaroni 2011)

Likewise, the indigenous peoples and nationalities had the possibility of extracting minerals and did not do so with the destructive efficiency with which western civilization or the mestizo world has done it, for example in terms of oil extraction in the Ecuadorian Amazon.[318] This is not only due to a lack of technological resources, but above all because of the vision of nature. This vision, however, is not shared by the government, which clearly affirms that it had had enough of indigenism and children's environmentalism.[319]

"Every human work has an impact on nature, but we must see if the benefit impact is greater. ”[320]

If several worldviews are to remain in force within the same territorial space called Ecuador, the worldviews of the different indigenous peoples and nationalities must somehow share the space with the western worldview. However, that does not just mean reducing the exploitation of natural resources to areas inhabited by mestizo populations, but also by elevating the worldview of the rights of nature to a constitutional level means that the imposition of just one worldview over the others should be forbidden. Moreover, some restrictions to the implementation of all worldviews should be considered to do not interfere with the realization of the other. In this sense, the protection of nature is a basic condition to the existence of all the worldviews of the peoples and nationalities of Ecuador.

[318] (Morales P. 2007)
[319] (Redacción Política 2010)
[320] (Correa, Enlace Ciudadano No 332 2013, min 58 20)

However, these notions, which governed the entire national plan and constitution, were not fulfilled and adopted a completely different tone, as the president and several government officials explained and consequently repeatedly acted upon. The same would happen with respect to rights of nature, where the idea that the preservation of the natural cycles of the ecosystem and the possibility of them being affected in some way would be a limit in the decisions that other groups and nationalities make on the development of productive relations.

Although these conceptions have been applauded by the left and ecological sectors it contains in itself an idea that does not correspond to a particular political ideology, but instead corresponds to the respect of each nationality to be able to take its decisions to maintain its autonomy and to respect a common space that in that case would be nature, for those decisions to be feasible.

That is to say that if one of these nationalities, in this case the mestizos, decides that for its development it must extract great quantities of petroleum, implying the contamination of the Amazon and the displacement of the indigenous peoples, then that decision is not solely an ecological decision, it is a decision that significantly restricts the possibility of other nationalities to make their own decisions regarding their way of life. That is the limit offered by plurinationality over an ideological position of left or right.

5.5. Conclusions

As mentioned above, this idea of plurinationality that is similar in some points with some discourses of the left and some ecological groups, does not belong to any of those groups. This fact has generated diverse frictions, for example with governments self-identified as progressive leftists in Latin America.

As we will analyze in the following chapter in Ecuador, President Rafael Correa, who promoted precisely the Plurinational State, starting from the entry into force of the Constitution, took a series of decisions that went against the principles that have just been mentioned.

As Rafael Correa said on several occasions:

“we will always consult the communities, because that is what the Constitution says. However, some sectors of the indigenous are asking for other things, and they are not even talking for most of the indigenous population. There are so many that talk just for themselves, and not for everyone else. 20 families opposing a hydroelectric plant that will benefit 13 million Ecuadorians, we cannot allow that. It is necessary to give compensation, the Constitution says, in non-renewable resources, like the oil, mining, etc. project is, the first to benefit are those communities. In fact, there is already the draft mining statute that establishes that up to 3% of royalties on total production income, not just profits, go to local governments and communities affected by that mining

project, but prior consent would have been to block the development of the country, and let's not fool ourselves, it's not that easy."[321]

For Rafael Correa, the indigenous peoples in Ecuador lead to a development delay regarding the mestizo society, and this delay could be solved with the western conceptions of overcoming poverty: more education, better health, even the possibility that more and more members of the indigenous communities' study at university to be western prepared professionals. The problem is not the idea of more state investment in the communities, but the idea of that the underdevelopment came from a western perspective. Thus, development means to move to the western way of living, maintaining some ethnic characteristics that do not threaten the central state 's plans of natural resource exploitation.

"Nobody has done so much for the indigenous peoples as we have. The first problem of the indigenous is poverty. First, let's overcome poverty, then the other things. Do not argue with me about folklore, poverty is not part of it."[322]

This is not bad per se, but it starts from the conception again that there would be an adequate form of development, and that indigenous communities that decide to maintain another type of value, such as ancestral education or practical education that a culture requires to reproduce are not valued or are considered inferior or underdeveloped by President Rafael Correa. Indigenous peoples and nationalities were opposed to their policies, especially to the

[321] (Correa, Enlace Ciudadano No 25 2008, min 1:41:40)
[322] (Correa, Enlace Ciudadano No 337 2013, min 1:55:20)

extraction of natural resources from their territories. Even though the CONAIE was not opposed in principle to the increasing of social investment, they opposed to the way that the government tried to standardize health, education and housing policies without taking into consideration the particularities of the indigenous peoples and the political gains that they achieved in the past, like the bilingual education system. The opposition to both the natural extraction and the mono-cultural social investment projects put them as contenders to Correa's power. Because Correa labelled himself as a progressive leftist, in his narrative everyone against him was anti-revolutionary opponents of the State and supporters of the right wing.

"No, what happens is that we are not listening to them, for they want to impose their agenda. You must be certain that those people who don't want mining in Ecuador don't want it because of very particular visions. (...) I ratify the political will of the national government, to develop the mining sector, but a responsible mining sector, socially, economically and environmentally; but it seems irresponsible to us to live over the greatest world wealth, such as gold, copper, silver and because of the protestations of a few, leave them in the subsoil. When those resources can serve for the development of the country."[323]

This is the origin of the conflict that lasted from 2008 to 2017, when Rafael Correa ended his third constitutional mandate.

[323] (Correa, Enlace ciudadano No 94 2008, min 54:08)

Chapter 6

6. DISMANTLING THE PLURINATIONAL STATE ACT 1. THE HIGHEST RIGHT OF THE LAND IS THE STATE'S RIGHT TO DECIDE OVER THE PEOPLES[324]

It was November 26, 2015. We were in the courtroom of the highest court in the land, the Constitutional Court of Ecuador. We had filed an action for failure to comply with the ruling on the unconstitutionality of the mining statute[325], which established the obligation of the legislature to enact a statute regulating the exercise of prior consultation for indigenous peoples in matters of legislative process as well as a law regulating the exercise of prior consultation for administrative decisions.

Such actions are simple. If it can be established that there is a clear order from the Constitutional Court that was not executed, the Court can order measures to guarantee that their order is carried out. Nevertheless, the issue was political. When the lawyers of Jorge Herrera, president of CONAIE, presented their case they talked about how, in the mining law decision, the Constitutional Court opted for the least possible protection of the rights of indigenous peoples. Due to the lack of a statute developing the constitutional

[324] Part of this chapter was published in the article "The Right to Prior Consultation in the Construction of the Plurinational State of Ecuador" in the Revue Juridique Themis. (Cordero-Heredia, The Right to Prior Consultation in the Construction of the Plurinational State of Ecuador 2016)
[325] (Judgment No. 001-10-SIN-CC 2010)

rights, the Court just ordered the Assembly to enact statutes to make this right to consultation fully applicable.

The reaction of the President's lawyer was astonishing. The lawyer broke the Court's protocol by angrily addressing Jorge Herrera directly during his response. He began his arguments speaking to the Court and stating that prior consultation was a discriminatory right, that everyone in the country had to decide what to do about oil, thus for what reason would a minority have the right to stop the development of all Ecuadorians.

The lawyer was getting louder and louder. While addressing Jorge Herrera the lawyer became aggressive and at the same time condescending: "What do you know, who are you to decide on the future of an entire country?" The lawyer, nevertheless, was treated with great deference by the court. There was never an interruption by the panel; no matter that he was in clear contempt of the procedural and ethical norms, and the energetic protests of the CONAIE's lawyers.

The State's attorney did not argue about why the action of noncompliance by the Constitutional Court was not appropriate, nor did he argue whether the ruling of the Constitutional Court whose compliance was demanded in this hearing was legitimate or illegitimate. He stressed that both the rights of indigenous peoples and nationalities and their visions of development were opposed to those that were imposed by the national Government of Rafael Correa and were incompatible with Correa's vision. The lack of self-control, and the hatred shown by the lawyer made evident his unwillingness to be there. That

was not his place; he was in the legal team of the most powerful person in the country; he did not have time to listen to nonsense from the savages.

This simple procedure was initiated with the presentation of the lawsuit on 9th July 2013.[326] At the date of presentation of this dissertation, there was no decision of the Constitutional Court.

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As discussed in the first part of this paper, the autonomy of indigenous peoples is both a reality and an aspiration for these groups of people. It is a reality because during the colonial period and the first republican period of Ecuador, the ethno-racial policy was of exploitation of indigenous peoples, but at the same time of minimal intervention by the State in the communities.

Autonomy was preserved because, as explained earlier, at some level the foundations of the indigenous cultures were not altered. Legal norms, participation methods and customs were preserved for centuries thanks to the lack of interest from the State in pushing these people towards assimilation in terms of political and legal culture.

Subsequently, with the advent of the neoliberal era, and the new large-scale natural resource extraction activities and large transnational companies in the agricultural area, this autonomy was put at risk. Autonomy that the indigenous peoples had known for centuries and wanted to be respected.

[326] (Lawsuit presented by CONAIE 2013)

Constitutional recognition of this autonomy, through the creation of the plurinational State, offered indigenous peoples the opportunity to be considered in national legislature and in central government decision-making. However, the period following the approval of the new constitution in 2008 shows that there was a new period that differs from what Yashar defines as the corporatist period and the neoliberal period in terms of how it intends to relate to civil society, as well as the type of challenges they pose to the autonomy of indigenous peoples and nationalities. It was also a period in which the interpretation of the plurinational state moved to the institutions of the central state.[327]

For this period the citizenship regime is hard to categorize, because it shares characteristics of the two regimes; this regime differs from the neoliberal regime especially in the economic sphere within countries and therefore the deregulation of the economy by the State.[328] But on the contrary, it generates a larger, more bureaucratic and more regulated State in order to implement its influence in sectors that are considered strategic, such as health, economy and infrastructure. However, it does not differ from the neoliberal State regime with regards to the exploitation of natural resources to help achieve its aims.

These natural resources are extracted mainly in States such as Ecuador from the territories of indigenous peoples and nationalities (in 2008, 61 percent of the territories of indigenous peoples and nationalities were affected by oil exploitation in the Amazon, 5 percent by mining activity, and 7 percent were

[327] (Resina de la Fuente 2012, 106)
[328] (Yashar 2005)

affected by projects or activities related to such activities.)[329]. Their self-determination should be expressed both in their participation in the elaboration of the Statute and in the fact that the Statute guarantees self-determination each time it is applied in the territory of indigenous peoples and nationalities.

The following two chapters will show how the characteristics presented in this period inhibited the capacity of legal-change to become social-change, regarding the respect of the self-determination and the specific rights of the indigenous peoples in Ecuador. Such characteristics are the lack of a racial ethnic policy in line with the plurinational state, the minimum impact of legal reforms for the absence of changing of the concept of law within society, as well as the weakening of international influence for the populist regimes discourse of the returning to states with strong sovereignty.[330] And finally, the possibility social movements having any significant influence was weakened by the restriction of both freedom of association and freedom of expression in the populist regime, a characteristic that it shares with the corporatist regime.[331]

These restrictions are the criminalization of social protest[332], excessive controls and attempts to close non-governmental organizations affiliated with the indigenous movement, administrative obstacles and even judicial disputes to ignore the legal status of the leaders of indigenous peoples[333] and

[329] (García Serrano 2014)
[330] (Redacción Noticias 2014)
[331] See (Enlace ciudadano No. 268 2012)
[332] (INREDH 2015)
[333] (Observatorio (FIDH/OMCT) 2014, 64)

nationalities, as well as the actions of repression on the collective protests of the indigenous peoples during all these years.

The impact of the populist regime of Rafael Correa on the plurinational state and the rights of indigenous peoples are evident in cases regarding prior consultation and the application of indigenous law. The indigenous peoples' rights to prior consultation and to apply their own "indigenous law" have been part, formally speaking, of the Ecuadorian legal system since June 27, 1989, when Ecuador signed the Convention concerning Indigenous and Tribal Peoples in Independent Countries of the International Labor Organization (Convention No. 169). On April 30, 1998 the President passed Executive Directive 1787[334] with the prior approval of Congress,[335] ratifying Convention No. 169. In that same year, the process to reform the Constitution ended with a referendum approving the Political Constitution of the Republic of Ecuador of 1998 (the 1998 Constitution) that entered into force as of its publication in National Registry No. 1 on August 11, 1998. These two documents established the right to a prior, free, and informed consultation and the right to keep and apply the indigenous law. Moreover, these rights are also present in the new Constitution of the Republic of Ecuador of 2008 (the 2008 Constitution).[336]

Since 1989, the implementation of these rights in practice, jurisprudence, and secondary regulations has been limited. First, there is no statute

[334] (Executive Directive No. 1387 1998, 3)
[335] (Parlimentary Resolution 1998, 2)
[336] The Constitution of 2008 was published in the Official Registry No. 449 of October 20, 2008.

contributing to the application of such rights, even though Congress has the constitutional duty to develop them, legislatively speaking. Second, administrative regulations (*reglamentos*) failed to respond to the international standards of the right to prior consultation. Finally, the decisions of the lower courts and the Constitutional Court (formerly the Constitutional Tribunal) have neither ascribed an *effet utile* to Convention No. 169 nor have they applied the direct effects of the new Ecuadorian constitutions.

Two important features of the plurinational state are the possibility of coordination (not imposition) among the central state and each Nationality, and the possibility of self-determination. Both the right to prior consultation and the right to keep, apply and develop indigenous law work on those two levels. The right to prior consultation allows the central State to acknowledge what decisions of a community are to be consulted by them to adjust their decisions to that peoples' will. The right to indigenous law implies the respect of the authority of the community leaders when they decide a case and coordinating with the ordinary (or central) justice to avoid double trials (ne bis in idem). In this chapter, the implementation of these rights by the branches of the Ecuadorian State after the Constitution of 2018 will be addressed.

6.1. Ethno-racial policies in the government of Rafael Correa Delgado

As mentioned in chapter 3, the relationship between Rafael Correa Delgado and the indigenous peoples was not peaceful.[337] This relationship was initially marked by the lack of direct support from CONAIE and its Pachakutik party in the presidential elections as it did not become part of the platform of Rafael Correa's governing party, Alianza País, and by the constant conflicts during Rafael Correa's 10-year government over the exploitation of natural resources.

"It's a pity that the indigenous comrades so thoughtlessly supported Lucio Gutiérrez, and his patriotic government, of the left, of change, they declare an "open opposition" and an "uprising," because we do not listen to their demands. Demands that were the campaign offerings of the candidate of the CONAIE-PACHAKUTIK, a great candidate, a great person- Luis Macas, but do you know how many votes I get? 2% and that's the political program that they want to forcibly impose on us. Como on, give it a break!"[338]

This section analyses, among other elements, the "sabatinas" or "enlaces ciudadanos", as instruments for analyzing Rafael Correa's policy on ethno-racial matters. The "sabatinas" were messages publicly broadcasted using public and private media, informing the nation of their activities, and they occurred every Saturday for 3 hours, and were delivered by President Rafael Correa or his vice president.[339] There are 523 *sabatinas* that occurred

[337] (Chuji 2016)
[338] (Correa, Enlace Ciudadano No 69 2008, 01:02:37)
[339] The topics of the *Sabatinas* set the agenda of the public media, but also of the opposition that should respond to the comments of the president Correa (C. Montufar, El argumento correista 2017)

uninterruptedly throughout Correa's presidency, including during the electoral period. They took place in different cities in Ecuador or abroad, with the presence of all the ministers of state, the heads of the armed forces and the police, most of Alianza País Assembly members and local officials related to the regime. In these programs, lasting approximately three hours, a detailed report was given of each activity carried out by Correa during the whole week, hour by hour. Correa described things ranging from the meals he had made, the songs he had listened to, the results of football matches he had seen, to his domestic and foreign policy guidelines. He explained macroeconomics, geopolitics, ordered the construction of infrastructure, and produced the guidelines of internal public policy and planning in absolutely all subjects.

It was also a space for Correa to give orders to Ministers and all public officials, dismiss or hire civil servants, criticize his opponents and direct the legislature on the creation of laws and indicate to the judges what the outcome of the trials presented should be and that they were of interest to him. The relationship that exists between the opinions expressed by Correa in the *sabatinas* and the result of the laws that were approved by the legislature, the opinions that were poured into the public media and even the result of the sentences given by all judicial and administrative bodies is surprisingly high.[340] This is why they are important instruments of analysis with the laws issued, the public policies implemented and the actions of the different State functions and agencies that we will observe below.

[340] (Guerrero Salgado 2018)

First, the influence of the international instruments in State decisions were affected by the President's policy. Instruments like treaties, declarations, judgements, and decisions of the organisms in charge of the supervision of the treaties, were important sources for domestic judges and for the design and implementation of public policy before 2018. Regarding indigenous peoples in Ecuador, these instruments were the guide for the indigenous social movements, but also the only source to give content to the general constitutional principles. However, after the Constitution of 2008, they were not integrated into practice regarding the State's regulations or administration decisions. The main obstacle for the direct application of international law was the negative position of the ethno-racial policy sustained for the last 30 years towards the recognition of the self-determination and autonomy.

For example, the ruling in the Sarayaku case[341] seriously limited the possibilities of the Ecuadorian State to treat prior consultation with indigenous peoples and nationalities as a mere formality. This decision, in addition to the decision to issue precautionary measures in favor of the Tagaeri and Taromenane indigenous peoples,[342] was a nuisance to the State's policies on the extraction of natural resources.

The same interpretation of the Sarayaku case was problematic for the State in the sense that the decisions of the Inter-American Court would not only influence the case, but also it would have an effect on the country's legal system

[341] (Case of Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Merits, and Reparations 2012)
[342] (Inter-American Commission on Human Rights 2007, parr. 25)

in a way that effectively changes the policies of the State with respect to their extractive policies.

“Complying with a judgment of the Inter-American Court; remember, there are two things at the Inter-American system, the Inter-American Commission, the famous IACHR (…) headquarters in Washington where they people go to show themselves to then go on to study at American universities (*universidades gringas*); and the Inter-American Court that has its headquarters in San José, Costa Rica, which is made up of judges. Then Sarayaku, a community of Pastaza, that have also committed some abuses (…) Sarayaku had to be compensated, 1 million dollars I think was paid to the community and the Court ruled that the Ecuadorian state apologize to the Sarayaku community, but the State at the moment is now under the *revolución ciudadana* government, so in order to comply with this sentence, on Thursday [a group of state high officials] went to apologize to the Sarayaku community in the name of the Ecuadorian state for the abuse of letting an oil company enter the area without consulting the community. That was undoubtedly done badly, but that does not give them the right to veto the State’s decisions, that is the mistake that is always made, as they were victims of one injustice they do not have the right to commit other injustices. That’s absurd. (…) That is illegal; to believe that we must ask them for permission to put political bosses when that is the constitutional right of the executive; it gives them no arguments whatsoever, no right, no solvency for these things. Sarayaku has done many things wrong; they have politicized a very just cause, (…) Now they say: "No to oil exploitation",

they have no right to that, the constitution gives me the right to decide on the policy of non-renewable natural resources; then that is the mistake that is always made, they believe that, being victims, first they are right in everything, and that they have the right to commit the same or more injustices than the injustices to which they suffered."[343]

Although the Inter-American Court declared that the Indigenous People of Sarayaku were not previously consulted about the oil extraction in their territory, the State was convinced that to pay them the damages was enough. After that, the state can conduct a new consultation without any guarantee of good faith, because Correa stated that the oil extraction will continue no matter the position of the indigenous peoples.

This is what the president himself said when he took over his second term in 2013 when he said that "Seeking to overcome the extractive economy with the childishness of not extracting oil is equivalent to overcoming the agriculture-based exporting economy by ceasing to export bananas. Surely the only thing that would be achieved is more misery. On social participation, certain groups seek not the prior consultation established by international treaties and our Constitution, but the prior consent, which in practice takes us from the democracy of the majorities to the veto capacity for certain groups, which develops corruption and would make our countries ungovernable. (…)

[343] (Correa, Enlace Ciudadano No 378 2014, min 2:10:14)

All this nonsense is sustained in the name of a new environmentalist and indigenous left. It is necessary for the Latin American and world left to make a clear pronouncement on the use of natural resources and prior consent, since, I insist, with so much novelty and lightness, there will be no viable political project".[344]

In the same speech, he stressed that the political project would be for the majority and that it would not allow the agenda of a few who did not want to "overcome the poverty and backwardness in which our own brothers and sisters of the ancestral peoples live" to be imposed."[345]

Therefore, to minimize the impact that the sentences and pronouncements of International Organizations could have, Rafael Correa initiated a smear campaign against these institutions. The campaign strongly criticized the Inter-American Commission for having its headquarters in Washington and described it as a tool of the American empire to attack the progressive governments of Latin America. It built legal arguments against the lack of competence of the Inter-American Commission to issue interim measures. This was something that had never happened in previous governments with serious accusations of human rights violations.

"How is it possible that the headquarters of the Inter-American Commission on Human Rights (IACHR) is in a country that is not a State party to the Inter-American System of Human Rights, and that has not ratified any of

[344] (R. Correa, Third Inaguration Adress to the Nation 2013)
[345] (R. Correa, Third Inaguration Adress to the Nation 2013)

the Inter-American instruments on Human Rights? The Commission undoubtedly played a historic role of immense value in the investigation, documentation, systematization of archives and documents, testimonies and material evidence against the despotic processes of Latin America, mainly in the military dictatorships. However, now that our countries are, to a large extent, led by governments of enormous legitimacy, now that there is a real change of era in Latin America, those democratic governments are often treated worse than the dictatorial regimes, and, paradoxically, they are accused and denigrated by the groups that once, in a veiled or public manner, underpinned those dictatorships that had no respect for human rights."[346]

To show the State policies on this point, the government of Rafael Correa stopped sending State representatives to the hearings in the Inter-American Commission on Human Rights and ignored the measures dictated by that body. The judiciary followed the same path.

Second, the influence on what we have called the liberal legal system or more broadly the "understanding, creation, and interpretation of the law" was also strongly influenced by Rafael Correa Delgado.[347] Although the judiciary system in Ecuador should in principal be independent of the Executive, as established in the Constitution, this has never been completely true. The political parties and other powers, especially the Executive, have in various

[346] (R. Correa, Third Inaguration Adress to the Nation 2013)
[347] (Redacción 2010)

ways influenced all levels of the judiciary, even on various occasions deposing the highest courts of the country as a whole.[348]

The changes that were made to the Constitution during the government of Rafael Correa increased the means of interference in the judiciary system. Correa himself supported a referendum to change the constitution in order to, in his own words, "get your hands-on justice."[349] The process of "judicial reform" was highly criticized by the Ecuadorian civil society and international experts. Luis Pásara, for example, wrote a report for the NGO Due Process of law Foundation in which he concluded that:

"The government of the "Citizen Revolution" has established goals for its policies, and, in doing so, it has obtained and unquestionable support of most of the population. However, the use the judicial Branch to protect those policies and to criminalize whoever opposes them has put the judicial independence in danger and has put the rule of law in doubt, because of the lack of separation of branches."[350]

Thus, for example, the National Council of the Judiciary[351], the administrative and disciplinary body of the judicial branch, applied measures to

[348] See (Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Judgment on Preliminary Objections, Merits, Reparations and Costs 2013) and (Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Judgment on Preliminary Objection, Merits, Reparations and Costs 2013)
[349] See (R. Correa, Enlace Ciudadano No 203 2011)
[350] (Pasara 2014, 95-96)
[351] The National Council of the Judiciary is not a new body, it is present prior to the 2008 Constitution. It was created in order to modernize the judicial function by entrusting a technical body with the administration of the human and material resources of the country's courts. The Judiciary Council is responsible for appointing judges at

prevent that judges decline its competence to solve criminal cases when indigenous law is applicable by their authorities and own due process. In addition, the Ministry of Justice issued several measures to prevent judges of ordinary justice from declining their competence in indigenous justice matters.[352]

The council of the judiciary was directly appointed by Rafael Correa Delgado after the constitutional reform, and this gave him great power.[353] This generated a high level of dependence on the interpretation and administration of justice. The Ecuadorian government, in addition to this enormous power in its functions, had great resources in the media. On the one hand, it owned the public channels and media that came under the direct control of the government.

On the other hand, it frightened or shut down its opponents. Several media outlets and radio frequencies, especially local and short-wave, many of them community radio stations of indigenous peoples, which broadcast opinions contrary to the government were shut down or denied permission to operate for various reasons. These included clandestine transmission, political purposes, incitement to violence and terrorism.[354]

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the national level and administers and decides disciplinary proceedings initiated against the country's judges. During Correa's administration, several allegations were made public that Council members used disciplinary processes to influence decisions in certain processes of interest to the government. (Pasara 2014)

[352] (Correa, Enlace Ciudadano No 208 2011, min 02:15:30)

[353] (Redacción 2011)

[354] (Redacción política 2010)

Thus, from this enormous capacity for censorship and dissemination, the president strove to frame the rights of indigenous peoples (especially the right to prior consultation as a mere formality that had nothing to do with the idea of self-determination of the plurinational State. The president's interpretation of the issue was so influential that it will be the interpretation of the Ecuadorian judicial organs. above the jurisprudence of international courts.[355]

As for the social movements, from the beginning of his term Rafael Correa tried to govern as if his political party was a social movement that was in power. Thus, he claimed that his party and the millions of votes he had obtained gave him the power to impose himself on the other groups in society whom he felt he had defeated at the polls. Therefore, he repeatedly affirmed that he governed for the majorities and not for the minorities who only had interests in preserving their privileges or enriching themselves.

He also stated that, by voting for him, citizens share his social, developmental and even religious vision, and that those who thought differently should win an election if they wanted to see their aspirations reflected in State policies. He made it very clear that the indigenous movement was an electoral minority and should therefore subordinate its policies to the actions of its government.[356]

“The political project that won was the *Alianza Pais*. Comrades of CONAIE, you lost, no matter how indigenous you are, no matter how mistreated

[355] (Judgment No. 001-10-SIN-CC 2010)
[356] (R. Correa, Third Inaguration Adress to the Nation 2013)

you may have been, you lost. We have all the democratic legitimacy to put into practice the winning political project, which respects the rights of minorities, but which does not allow you to impose your whims, your point of view a minority, which in the electoral campaign got 2% of the votes, if you want to protest, then do it!"[357]

Correa's constant confrontation with civil society generated a policy of disqualification and polarization against indigenous leaders who did not support his government and called on his supporters to persecute and discredit them in the social networks.

"I appeal to all the civilized citizens of this country, if there are 200 of them, then we are 200,000. Denounce these stateless people! These irrational and foolish groups, fight them! If you see them coming out in the streets, go say to them: "Don't be irresponsible". Let's censor them socially. Enough of these irresponsible anarchists.... There are some leaders that live off this and have nothing to lose, accustomed to creating chaos, like Mr. Salvador Quishpe. Make him pass an intelligence test to see how much he gets, propose it in the elections to see how much he gets. And this is the leader who wants to impose his agenda on us, go somewhere else with that story, sir, here are other leaders who know the Ecuadorian people that in the midst of a national emergency, with a tremendous external problem, want to bravely anarchize the country."[358]

[357] (Correa, Enlace Ciudadano No 69 2008)
[358] (R. Correa, Enlace Ciudadano No 63 2008, min 1:32:40)

This policy included the harassment of NGOs such as the closure of the non-profit organization Pachamama for allegedly having broken their social goals by meddling in politics, by supporting the mobilization of an indigenous nationality of the Ecuadorian Amazon who demanded respect for their territory.[359] Also, there were two attempts to close down the human rights organization and environmentalist group *Acción Ecológica*; in both cases it was argued that there was a breach of the aims of this organization.[360]

Moreover, the government also attempted to evict the CONAIE from the building it had occupied for several decades following the 1990 uprising.[361] Regarding this issue, and in response to a letter from the indigenous leadership asking them to abstain from the eviction and reminding them of the plurinationality of the State, Correa said:

"It’s a pity that [indigenous peoples] have this level of leadership. What a pity that they have this mindset. We are at a crucial moment: either we accept these morons, or we establish a true rule of law pluricultural and plurinational, but with equal rights and responsibilities for all. Comrades, it should not be about "I am ancestral, and I have to have a loan of use of a building as gift, and I will be really upset if you don’t give it to me. Moreover, if you don't understand that everything belongs to us, it's because this is a monocultural state, for this State must understand that everything belonged to the Indians and must return to the Indians. Please, that’s enough. Don't be morons. Either they comply with the

[359] (Redacción Política 2013)
[360] (Carvajal 2017)
[361] (Redacción 2015)

law or the loan will be reversed because that is a public asset of all Ecuadorians. (…) Besides, it is forbidden for political activities to take place in that public asset and we need it to support young people involved in drugs. Stop being ridiculous. For them, the loan is not a loan, it is a gift, and if we do not see it in that way, then we are a monocultural State. If we are multicultural, then we must understand that any loan for them is a gift. Please stop being ridiculous; young indigenous people, revolt against this pseudo-leadership that makes you look so bad; there are people so brilliant in the indigenous world and we must put up with this ridicule… Now we are stupid because we have altered the historical dimension, and, because they were here before the Spaniards, even the building in the center-north of Quito belongs to them."[362] These words are attempts to prevent social movements from developing their activities, which make Correa's two terms in power resemble a corporative citizenship regime.

Finally, regarding racial policies. Correa built a discourse about the kind of indigenous that were the "good indigenous" and which ones were the "bad indigenous".

"We have representatives, believe me, the richness of our country, our diversity is a deep pride for me, a deep joy. We have representatives of these nationalities, in this case of the Amazon. Here we have Kichwas from the Amazon, we have our heroic Waoranis. Here in the province of Pastaza, Moi[363] tells me that there are 7 indigenous nationalities. The Amazon is where we have

[362] (Correa, Enlace Ciudadano No 407 2015, min 2:21:00)
[363] Correa is talking about Moi Enomenga, a leader Waorani that supported Correa.

the most nationalities (...). We need to have intelligent leaders who stop politicking, defending spaces of power by betraying those they represent. The true leaders go beyond their fundamentalism, beyond their ideology, they see reality, and seek the welfare of their people. This is obvious. The indigenous people are advancing rapidly, accessing universities, accessing basic services, opportunities, overcoming poverty. How it is possible that certain leadership is against the [citizenship] revolution? Because they are not representing the indigenous people, they are representing their own interests. That bad leadership, never again comrades."[364]

As can be seen in the quotation above and in the Table # of all the *sabatinas* studied, in ten years Rafael Correa spoke about indigenous peoples and nationalities in a high percentage of them. Regarding indigenous peoples and nationalities, as can be seen in the Table #, each time he spoke in favor or in a positive way about indigenous peoples or nationalities, he did so in favor of indigenous leaders or groups who supported his government's policies and who accepted policies aimed at imposing control and the development model of the State, where the majority of actions were aimed at limiting or denying the autonomy of indigenous peoples.

"Then we had a meeting with the leaders of the CONAIE to listen to their proposals on plurinationality. I insisted that everything was to be through dialogue, not by force. Then there were some leaders who threatened me with an uprising if we didn't heed their proposals. Do what you want, if you want to

[364] (Correa, Enlace Ciudadano No 411 2015)

destabilize the government, (...) On the contrary, with this fraternal dialogue, between people like us who have worked with the Indigenous people, we have given a great part of our lives for our ancestral peoples, for their education, for development, fighting against poverty, we will always obtain many fruits and benefits. We have reached many points of coincidence"[365]

Correa presented plurinationality as help that was to be given to these groups, that were historically excluded groups, the State assistance that they needed to improve their economic status or living conditions from a mestizo perspective. When Correa spoke about the leaders who opposed his policies or had another vision, he did it in pejorative terms, portraying them even as criminals,[366] or as so stupid that they cannot understand the needs of their people, or as incapable of deciding for themselves the instruments of other parties, other governments or NGOs.[367] No matter if they were good or bad for him, Correa presented them in a condescending way, as people incapable of deciding for themselves. Peoples that were left behind in relation to the model and the advances of the western setting. For Correa, they should be guided, kept under surveillance and humanitarian assistance.

"Today in the morning I met with quinoa exporters. Comrade Avelino proudly tells me, "we are exporting quinoa to Holland, France, Germany and I don't know where else" and thanks to the support of the national government, the recollection centers, etc. Look at the roads, the millennium schools in

[365] (Correa, Enlace Ciudadano No 65 2008, min 1:20:44)
[366] See (R. Correa, Enlace Ciudadano No 272 2012, min 3:11:10)
[367] See (R. Correa, Enlace Ciudadano No 249 2011)

indigenous areas, look at the reduction of poverty in the countryside, in general, and especially in indigenous areas; go see the increase of enrolment in secondary, high school, universities. But there are pseudo-leaders allied with the right wing; opposed to this progress. They do it to keep their political spaces; and because they want to take back health, education, etc."[368]

Rafael Correa said it was unfair for members of indigenous peoples and nationalities to not use or buy certain types of accessories, or to have certain professions of higher education that they used in the cities, or to go to the city. In these assertions lay the idea of what being a well-developed citizen of the country meant to Rafael Correa. Rafael Correa spoke badly of indigenous peoples and nationalities who sought to protect the idea of autonomy. Indigenous peoples who sought to take collective action to protest oil or mining exploitation within the national territory were attacked by the President.

"This is enough comrades. The fact that many, or almost all, of the indigenous peoples have been victims of exploitation, does not justify that they in turn can commit certain abuses. For example; the whole problem is that they want to control the water disguising their aspirations in ancestral traditions. Therefore, contradicting the Constitution, which speaks of a single water authority in the hands of the State, they want a plurinational council. That is to say that the Pérez Guartambel, Lourdes Tibán, Mery Zamora, are the ones who

[368] (R. Correa, Enlace Ciudadano No 416 2015, min 32:57:21)

manage the water; and that we are not going to allow compatriots. Then march if you want, and in the next elections you will lose."[369]

"No, I care for the indigenous people very much, what we are criticizing is a few ridiculous leaders who have already missed the train of history and are playing the right-wing game. They are losing more and more credibility, and it makes me sad because we really want to support the indigenous movement. However, we want to support an indigenous movement with a historical vision, the indigenous movement of the early 90's that prevented and tenaciously opposed neoliberalism, which was the most important social movement in the decade in all of Latin America. Nevertheless, now our comrades of CONAIE have lost their direction and now they are the best allies of the status quo of the right wing that we are fighting, of the groups of power. They are accusing us of being neoliberal, can you imagine? To be genocidal, genocidal who according to them have killed hundreds of people, who barbarously throwing mud with a fan believe that they are going to attract attention and what they do is fall into ridicule".[370]

He called them "golden ponchos", and he used to doubt whether these leaders were indigenous. He referred to them as mestizos who tried to impersonate indigenous.

"I hope the indigenous movement recovers because it is in such a crisis that ECUARUNARI, the most important movement in the central Sierra, has had

[369] (Correa, Enlace Ciudadano No 378 2014, min 53:47)
[370] (Correa, Enlace Ciudadano No 378 2014, min 53:47)

to put a non-indigenous guy, Carlos Pérez Guatambel, as president. Hopefully the grassroots will put a true indigenous person who is in total support of the government (...) do not let them deceive you, young people of the homeland, they are violent people, damaged people, people who lost the election on February 20 and who with sticks and stones believe that they will achieve what they did not achieve in the ballots, they are the same persons, the same as always. (...) Poverty is not culture, in Lake San Pablo, indigenous persons build three or four-story houses that do not allow the lake to be seen, and the Kichwas, and the indigenous say nothing." [371]

He even went so far as to say that the indigenous peoples who denied oil or mining exploitation in their communities were not composed of responsible, capable and adult people who could make such decisions.

"They handled indigenous health, they handled CODENPE; everything was political distribution. However, sadly it was the worst, bilingual education was of the worst quality. Now you can see how health has improved because of the integral policies. CODENPE is no longer building latrines, classrooms; under clientelism basis. Using those spaces some pseudo-leaders became assembly members; but now there are integral, transversal policies; respecting the Constitution that defines us as a plurinational and pluricultural State. But those who were used to the distribution of the power: they will march on Thursday.

[371] (Correa, Enlace Ciudadano No 337 2013, min 2:35:23)

March if you want, you will lose ether way in the next election. People trust us."[372]

He claimed that these decisions were not their own, but those were agendas imposed by deception by international NGOs and other states against progressive left-wing governments seeking to move their countries forward by selling commodities.

"That minority want to impose on us by force that which is based on their very "particular" visions. With pain I tell them that they are not even the indigenous comrades, nor the community members of that area. They are people from universities, foreigners from NGOs, who have their stomachs full. They have their own visions, and they have manipulated the people so that they are mirrors of those visions, and since they have nothing to lose, they make the rest lose a lot." [373]

"We are going to march against the water statute, the indefinite re-election, against the schools of the millennium, against the diversification of the energy matrix, against the World Cup, they no longer know what to say. They have not progressed, what a pity! What poverty of arguments! They have not progressed, I would say to them, not even in the 20th century, the 19th century! Its postulates, its simplicity is from the beginning of the 20th century; and the worst thing is that they go to the polls and get 3%. But they declare themselves

[372] (R. Correa, Enlace Ciudadano No 415 2015, min 3:46:14)
[373] (Correa, Enlace Ciudadano No 90 2008, 53:50)

ancestral peoples, the water owners and then they want to impose their interests."[374]

Rafael Correa's success in all the elections in which he participated made it easy for him to take over all the public institutions in the judicial, legislative and obviously executive spheres. This led to his vision of the development and destiny of indigenous peoples and nationalities being reflected in other branches of the State as will be described below.

6.2. How international and domestic law contradicts Correa's discourse on prior consultation

The 2008 Constitution states that Ecuador has a pluralist system of law sources, especially concerning indigenous peoples' rights. The text of Article 57 establishes both the right of prior consultation and the sources to be used to interpret it.[375] In the first paragraph of the article, the Constitution establishes that Indigenous Peoples' Rights will be recognized and guaranteed "in accordance with" specific sources of applicable law: The Constitution itself and human rights agreements, conventions, declarations, and other international instruments.

This part presents how International law has created some framing over institutions in interpretative dispute as the prior consultation right. Indeed, international institutions have developed standards of interpretation on the right to prior consultation. The sources of the applicable law come from the

[374] (Correa, Enlace Ciudadano No 378 2014, min 36:46)
[375] (Constitution of the State of Ecuador 2008, art. 57)

institutions devoted to monitor compliance with the international treaties on human rights and indigenous peoples' rights. In the universal system, it is important to first examine the two covenants of indigenous peoples' rights under the International Labor Organization and its mechanism for settling claims. Second, there is the International Convention on the Elimination of All Forms of Racial Discrimination and its Committee. Third, there is the UN Declaration on the Rights of Indigenous Peoples, and the special mechanisms under the Commission on Human Rights: The Special Rapporteur on Indigenous Peoples' Liberties, the Expert Mechanism on the Rights of Indigenous Peoples, and the Working Group on Indigenous Populations. Regarding the Inter-American regional system, this part shows how non-special mechanisms (the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights) have been interpreting the American Convention on Human Rights to cover indigenous peoples' rights within its scope. The purpose of this section is to present a systematization of the standards of the right to prior consultation taken from case law and reports by the above-mentioned institutions.

The indigenous peoples' right to prior consultation appeared in positive International law in the ILO 169 Convention, specifically Articles 6 and 15.[376] Besides being included in these provisions, the right to prior consultation is also included in several parts of the treaty about specific obligations of states, such

[376] (ILO 1989), Art. 15.

as special measures for the protection of indigenous peoples,[377] participation in the plans for national and regional development,[378] exploration and exploitation of natural resources in their lands,[379] relocation in new lands,[380] vocational training programs,[381] and public education in their own languages.[382]

The other international document that recognizes the right to prior consultation is the U.N. Declaration on the Rights of Indigenous Peoples.[383] The Declaration emphasizes that states must not only consult indigenous peoples, but that an appropriate consultation process must obtain the consent of those consulted. Articles 19 and 32 talk about the consent as the objective of the consultation process, but Articles 10, 29, and 30 state that consent is necessary in cases of forced removal,[384] provision of hazardous materials,[385] and military activities in their lands.[386] Finally, Articles 11 and 28 provide the obligation to redress indigenous peoples for actions taken without "their free, prior, and informed consent" when those actions have affected their cultural traditions and customs[387] or their territories.[388]

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[377] *Id.*, Art, 4.
[378] *Id.*, Art. 7.
[379] *Id.*, Art. 15.2.
[380] *Id.*, Art.16.
[381] *Id*., Art. 22.
[382] *Id*., Art. 28.
[383] (UN General Assembly 2007), Art. 19
[384] "No relocation shall take place without the free, prior and informed consent of the indigenous peoples". (UN General Assembly 2007), Art. 10.
[385] *Id*., Art. 29.
[386] *Id*., Art. 30.
[387] *Id*., Art. 11.
[388] *Id*., Art. 28.

Nevertheless, the practices of states regarding consultation processes show that it has been used as a formality rather than as a substantive right. This assertion in confirmed in the findings of the UN Rapporteur for Indigenous Peoples.[389] Professor James Anaya presents the issue of the misunderstanding of the right to prior consultation and the consent objective in the following terms:

This requirement that agreements should at least be an objective of the consultations means that the consultations cannot simply be a matter of informing indigenous communities about the measures that will affect them. Consultation processes must be crafted to allow indigenous peoples the opportunity to genuinely influence the decisions that affect their interests. This requires governments to fully engage indigenous peoples in the discussions about what the outcomes of those decisions should be before they are taken. It also requires procedural safeguards to account for indigenous peoples' own decision-making mechanisms. Including relevant customs and organizational structures and ensuring that indigenous peoples have access to all necessary information and relevant expertise.[390]

6.2.1. The Consultation Process must be Conducted by States

The first standard that can be found in case law and reports is the obligation of states to conduct consultation processes without delegating this task to private companies.

[389] (J. Anaya, Report of the Special Rapporteur on the rights of indigenous peoples (A/HRC/24/41/Add.5) 2013)
[390] Id., p. 154.

In its judgment on the merits and reparations of the case of Sarayaku v. Ecuador, the Inter-American Court of Human Rights performed an in-depth analysis of the obligations of the State with respect to the right to prior consultation.[391] The Inter-American Commission on Human Rights presented to the Court the case regarding the violation of the Sarayaku Kichwa Indigenous People's human rights to private property, life, judicial guarantees, judicial protection, freedom of movement, and personal integrity, which are established in Articles 4, 5, 8, 21, 22, and 25 of the ACHR with regards to the obligations to respect, to ensure, and to adopt domestic measures, in accordance with Articles 1 and 2 of the ACHR.

The case concerns the activities of CGC oil company in the Sarayaku's territory from 1996[392] to 2003. In 1996, CGC signed a partnership contract with the State for the exploration and exploitation of crude oil in Block 23,[393] which includes Sarayaku territory.[394] The State did not give the Sarayaku people the opportunity to participate in the decision-making process, and the community fought against all the company's attempts to research their territory for drawing up an Environmental Management Plan.[395]

In *Sarayaku*, the IACourtHR addressed several standards about the right to prior consultation, and that is why this case will be referred to throughout this

[391] (Almeida, Arrobo Rodas and Ojeda Segovia 2005)
[392] (Case of Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Merits, and Reparations 2012, para 63)
[393] *Id*., para. 64.
[394] *Id*., para. 65.
[395] *Id*., para. 69 and 72.

paper. The first standard is that “the obligation to consult is the responsibility of the State”.[396]

This standard has some explanations. First, states are responsible for the implementation of human rights, and delegation is possible only if a private stakeholder can offer the same guarantees as the state. For the exploitation of natural resources, private companies have a direct interest in the results of the consultation process, so they are not impartial participants. Second, if a company engages in the exploitation of natural resources, there must be a legal agreement with the state, and that agreement must be a prior decision in which the indigenous people should have been consulted. This last argument has a direct connection with the standard regarding the timing of the consultation process.

6.2.2. Role of Traditional Authorities in the Consultation Processes

Another important question raised in reports and in cases is who should be considered for the consultation process. A prior consultation differs from other forms of social participation, such as referendums or plebiscites where the whole population is consulted by suffrage. Furthermore, suffrage is a Western concept, and indigenous peoples around the world have different kinds of participation and decision-making processes.

In the report by the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples

[396] *Id*., para. 187.

Convention, made under Article 24 of the ILO Constitution by the Ecuadorian Confederation of Free Unions (Confederación Ecuatoriana de Organizaciones Sindicales Libres -CEOSL) (the FIPSE case) of 2001, the ILO's tripartite committee addressed the alleged violation of the right to a prior consultation process of the Shuar Nation in the context of oil extraction in its territory. On April 27, 1998, Ecuador signed a contract for oil production in the Shuar territory (before the entry into force of the ILO Covenant 169) without informing or consulting the people. Ecuador alleged that there was no obligation to consult or inform the Shuar because the Covenant had not yet entered into force.

For the Committee, even if the convention did not apply to the jurisdiction of Ecuador because of *ratione temporis* considerations, its effects are extended in time beyond the date of the deposit of the ratification of the treaty (May 15th, 1999). Therefore, the obligation to conduct a consultation was applicable to the State acts after May 15th, 1999.[397] On August 13th, 1998, the FIPSE assembly decided not to allow any negotiations with ARCO, an oil company. In response, the company tried to sign agreements with individuals and groups without the organization and institutions of the Shuar Nation.

In its conclusions, the Committee highlighted the importance of the principle of representation as a component of the right to prior consultation.

[397] (Report of the Committee in the case of the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL) v. Ecuador 2001, para. 30)

Moreover, the Committee established that a consultation process without the true representative institutions fails to comply with the treaty.[398]

In *Sarayaku*, CGC practices involved contacting individuals of the community, offering them jobs and money. The IACourtHR found these practices as not respecting the international standards of the right to prior consultation.[399]

6.2.3. Participation on Designing and Planning the Consultation Process

Case law and reports also established the standard of participation of indigenous peoples in designing and planning a consultation process. In its report, the IACHR said that indigenous and tribal peoples' rights over their ancestral lands and natural resources require that the true representatives of the indigenous people, as recognized by the community be considered.[400]

To determine how a consultation process can be culturally adequate (e.g. following the customary traditions and ancestral authorities), communities should participate in the design of the consultation process. In *Saramaka*, the Court said that it is not the State that should decide who is to conduct the consultation process; rather, it is the right of the Saramakas to choose their representatives according to their customary law.[401]

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[398] *Id*., para. 44.
[399] (Case of Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Merits, and Reparations 2012, para 203)
[400] (IACHR 2009, para 287)
[401] (Case of the Saramaka People. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs 2007, para. 15)

6.2.4. Obligation of Conducting a Prior Consultation

The timing of the consultation is a fundamental issue. Whether or not the results of the consultation are effective will depend on when the consultation takes place. A country's rules could create certain rights for interested companies, with opposition by the community involving legal conflicts and the possibility of judicial actions against the people's decision without their participation.[402]

In *Saramaka*, the IACourtHR, underlined the importance of the timing of the consultation. This judgment addressed the violation of the human rights of the Saramaka tribe, part of the maroon people, whose territory was subjected to timber and mining concessions that Suriname granted to private companies. The Saramakas alleged that the concessions were granted without a consultation process and that the effects of those activities were affecting their rights associated with the use of their lands. The Court found Suriname responsible for the violation of the right to private property, to legal personhood, and to judicial protection. In the matter of prior consultation, the court was of the opinion that Suriname had to consult the Saramakas before the first stage of the project could start.[403]

In *Sarayaku*, the State never conducted a consultation process; however, the Court used the opportunity to advance criteria on when an adequate

[402] (Lipsett and Deisley 2013, 2A-19)
[403] (Case of the Saramaka People. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs 2007, para. 147)

consultation should take place. For the Court, the consultation must be a constant process included at every stage of the implementation of the activity.[404]

The Court upheld its decision asserting that the effective impact of the consultation depends on its timing. A consultation that takes place in the first stages of a project offer an opportunity for influencing planning and implementation to create safeguards for the community's rights.[405]

Even if there are few decisions, the precautionary measures of the IACHR are important legal mechanisms to enforce the duty to consult. In 2011, the IACHR granted precautionary measures to several indigenous communities of the Xingu River Basin in Pará, Brazil, affected by the construction of the Belo Monte hydroelectric power plant. The IACHR requested that Brazil should suspend the project until a proper consultation was conducted. In the Belo Monte decision, the IACHR stated that a proper consultation should be "free, informed, of good faith, culturally appropriate, and with the aim of reaching an agreement, […] to be an informed consultation process, the indigenous communities should have access beforehand to the project's Social and Environmental Impact Study, in an accessible format, including translation into the respective indigenous languages"[406]. Belo Monte gave rise to a debate on the competence of the IACHR to adopt such precautionary measures due to its non-conventional origin. Brazil, Ecuador and Venezuela, among others, reacted

[404] (Case of Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Merits, and Reparations 2012, para. 183-184)
[405] *Id*., para. 167.
[406] (Indigenous Communities of the Xingu River Basin, Pará v. Brazil 2011)

with proposals of restructuring the Inter-American system including the express exclusion of the precautionary measures from the IACHR functions. The same year, the IACHR changed its decision, lifting the ban of the construction of the dam, keeping the protection measures to protect indigenous peoples' rights, and declaring that the debate of prior consultation is a matter of merits in petition, so it "goes beyond the scope of precautionary measures"[407].

6.2.5. Obligation of Conducting an Informed Consultation

Consultations must be carried out with all the important information about the project available to enable the community to have all the elements to arrive at an informed decision. Therefore, the information must be adequate given the circumstances of the consulted population and must state the hazards and benefits of the activity in question. In addition, the circumstances to be considered include the degree of difficulty of the matter, the language, and the level of literacy of the population.

In *Saramaka*, the IACourtHR established that Suriname should have "ensured that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily".[408] In order to provide this information, the Court also stated that Suriname should

[407] Id.
[408] (Case of the Saramaka People. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs 2007, para. 133)

have conducted a study on the environmental and social impacts of the project.[409]

Furthermore, in *Sarayaku*, the IACourtHR indicated that the information provided must contain the potential environmental and health risks of the project.[410] Moreover, the IACHR stated that the information produced by the parties must always be shared. In this case, the Court found that a presentation of only some information (socialization) was not enough to allow the Sarayaku people to have a basis for arriving at a decision and to participate actively in a dialogue about the project.[411]

6.2.6. Obligation of Conducting a Free Consultation

The consultation process must be free. The IACourtHR, in *Sarayaku*, while discussing good faith established that consultation must be conducted with "the absence of any form of coercion by the State or by agents or third parties acting with its authority or acquiescence".[412] Furthermore, the right to prior consultation should be protected by rules that allow its achievement, and states must "avoid enacting laws that prevent the free exercise of those rights, and ensure that laws that protect these rights are not annulled or amended".[413]

Free exercise of a right implies the possibility of refraining from exercising it. A prior consultation process conducted correctly must be an opportunity for

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[409] *Id*., para. 155.
[410] (Case of Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Merits, and Reparations 2012, para. 208)
[411] *Id*., para. 209.
[412] *Id*., para. 186.
[413] *Id*., para. 221.

indigenous peoples to have a real influence in the state decision-making process. Past practices have shown, however, that for some states, the consultation process is a formality that does not take the opinion of indigenous peoples seriously. Therefore, the free standard also means that legislation that enables states to continue with the project, without the opinion of the communities in the case that they refuse to be consulted, is not compatible with the right to prior consultation.[414] In addition, states and companies cannot use force, reprisals, or intimidation to make indigenous peoples participate in the consultation process; i.e., consultants cannot use the provision or continuity of the provision of basic services as a strategy of coercion.[415]

6.2.7. Conducting the Consultation Process following the Traditions and Institutions of the Consulted Population

The respect for the traditions and institutions of the consulted people is a fundamental standard of the right to prior consultation. It implies that consultations must be flexible to adapt to people's own structures and decision-making processes. Therefore, consultations must be conducted in dialogue with the legitimate representatives of the peoples, planned with them, and scheduled respecting their own times, culture, and worldview.

The IACourtHR defined the standard of a culture-appropriate consultation in *Saramaka*. States meet that standard when conducting a

[414] (J. Anaya, Report of the Special Rapporteur on the rights of indigenous peoples (A/HRC/24/41/Add.5) 2013, para. 25)
[415] *Id*., para. 24.

consultation process by following the customs and traditions[416] of the consulted people. For the Saramaka tribe, this means respect for their political organization (clans, captains, head captains, and the *Gaa'man*)[417] and their customary law.[418]

In addition, to guarantee this right, states must adapt their policies to the flexibility that a culturally-adequate consultation warrants. To put it differently, states with indigenous peoples must have adequate legislation and institutions to deal with complex multicultural scenarios, because having an adequate ad-hoc process does not ensure that the consultation will also be conducted properly. In *Sarayaku*, the IACourtHR underlined this standard and established that the entire state apparatus must be organized to guarantee access to a culturally-adequate consultation process; furthermore, states "must consider the traditional decision-making practices of the people or community".[419]

6.2.8. Obligation of Good Faith and Prior Consent

Finally, the good faith standard and the object of achieving consent are the most problematic. The good faith standard is the sum of all other standards. Therefore, all elements must be provided to give a real opportunity to communities to participate in the decision-making process. Even though there is a consensus about the aim of the consultation process, the binding opinion of

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[416] (Case of the Saramaka People. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs 2007, para. 133)
[417] *Id*., para. 81.
[418] *Id*., para. 100.
[419] (Case of Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Merits, and Reparations 2012, para. 177)

the people is not very clear. The standard for securing consent and the obligation to achieve it have been addressed in international law instruments. In this part of this paper, some elements of the debate will be presented.

The IACourtHR has addressed this issue in *Saramaka* and *Sarayaku* with two different standards. In the first case, the Court considered that consent is not merely an aim but a duty adopting the highest standard on the right to prior consultation. In this case, the Court also established a two-prong test to determine if consent is an obligation: (i) the project must be a large-scale one, and (ii) there must be the risk of a major impact on the peoples' territory.[420]

In *Saramaka,* besides the aforementioned test, the Court also found that "the difference between consultation and consent in this context requires further analysis".[421] However, in its next case (*Sarayaku*), the Court did not address this issue. In *Sarayaku*, the Court discusses the importance of good faith and the aim of an agreement. In the opinion of the Court, these two elements constitute a guarantee for real protection of the indigenous peoples' rights instead of a mere formality in the decision-making process.[422]

The Court continues with a comprehensive study about how good faith is an element in both domestic legislation and case law of several states. In a good faith consultation there is no place for practices such as coercion, bribing of

[420] (Case of the Saramaka People. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs 2007, para. 137)
[421] *Id*., para. 134.
[422] (Case of Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Merits, and Reparations 2012, para. 186)

leaders, negotiation with individuals, and the creation of a parallel organization.[423] Consequently, the right to prior consultation must be an opportunity for dialogue between states and indigenous peoples and must be based on mutual confidence and respect. If the indigenous peoples' opinions and decisions is not considered, then the consultation will not guarantee their rights.

The difference between consent as the aim or as the obligation is dealt with in other forums. The universal system has contributed to the doctrine of consent as a duty, and the ILO has remained in the discussion about the standard of a consultation process that aims for consent.

In the universal system, one of the most influential opinions of consent as a duty comes from the Committee on the Elimination of Racial Discrimination (CERD). Based on its competence for addressing general comments for a better application of the Convention on the Elimination of All Forms of Racial Discrimination (CEFRD), in 1997 the CERD adopted General Recommendation No. 23 on the rights of indigenous peoples. In this document, the CERD urges state parties of the CEFRD to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent".[424] Furthermore, the CERD maintained this position in its subsequent analysis about situations in specific countries; for instance, in its

[423] *Id*., para. 186.
[424] (Committee on the Elimination of Racial Discrimination 1997, para. 4.d.)

2003 study of the situation in Ecuador, the CERD argued that for extracting oil or minerals from the subsoil, consulting indigenous peoples was not enough due to the magnitude of the impact on their territory, thus obliging the State to secure the consent of indigenous peoples.[425] The same statement was made when reviewing the situation in Bolivia.[426]

Special Rapporteurs have been using the consent duty as a standard to analyze the situation of indigenous peoples under their mandates. In his 2003 report to the Human Rights Council, Rapporteur Rodolfo Stavenhagen concluded that for resource extraction projects inside indigenous peoples' territories, states must take all provisions to protect their rights. Therefore, these projects cannot be executed without the free, prior, and informed consent of the indigenous peoples affected; "whose right to development means the right to determine their own pace of change, consistent with their own vision of development, including their right to say no". [427]

James Anaya, the next Rapporteur, maintains this position in his reports. In his 2013 report about extractive industries and indigenous peoples, the Rapporteur states that the general rule is "that extractive activities should not take place within the territories of indigenous peoples without their free, prior,

[425] (Committee on the Elimination of Racial Discrimination 2003, para. 62).
[426] *Id*., para. 339.
[427] (Stavenhagen, Report of the Special Rapporteur on the rights of indigenous peoples (E/CN.4/2003/90) 2003, para. 66)

and informed consent".[428] He argues that this principle is gaining acceptance in national legislations, and it is well established in International law.

This is the feature that was most disputed in Ecuador during the presidency of Rafael Correa. While the indigenous movements, especially the CONAIE, interpreted historic justice as self-determination and autonomy that were gathered in the concept of plurinational state, International law supported these ideas in interpreting institutions as the prior consultation. On the other hand, the ethno-racial policy of President Correa set an agenda of economic development based on oil extraction from the indigenous peoples' territories, and to deny any possibility of self-determination and autonomy of the indigenous peoples regarding prior consultation. Correa declared several times that he was not willing to stop oil extraction because of the indigenous population, and that prior consultation does not mean prior consent. The legal system, as will be shown, reacted by conservative interpretations of the law that responded both to the pressures of the president, and to the limit the frame work of the liberal legal system to address the plurinationality.

In conclusion, even without the right to consent in international treaties, the informed and free right to prior consultation must be understood as a right to consent when the magnitude of the project could violate other rights of indigenous peoples. Indeed, projects that include displacement, deforestation, contamination, or other activities that have a major impact on the territory,

[428] (J. Anaya, Report of the Special Rapporteur on the rights of indigenous peoples (A/HRC/24/41/Add.5) 2013, para. 27)

culture, or subsistence of indigenous people cannot be performed without their full consent, since indigenous peoples are entitled to those other rights too.[429]

6.3. First legislative acts without prior consultation. The case of the unconstitutionality claims against the Mining Statute

By January 2009, just over a year after the new Constitution came into force, the National Assembly approved a new mining statute. The new legislation created a more organized regimen of mining concessions, and it defined the phases of operation and the spaces of social participation of the population of the impacted area. It also recognized environmental principles and causes of concession contracts secession. Moreover, due to the country's experience on speculative trade with the mining titles, it established duties and timelines to advance through each phase from concession to exploitation.

Even though this was not a statute addressed specifically to indigenous peoples and nationalities, it would in fact have a direct impact on them.

Between 2008 and 2011 there were 18 main mining projects in Ecuador, classified as of priority interest. 5 of them were classified as strategic. (Viewpoint, Fruta del Norte, Loma Larga, San Carlos Pananza, Rio Blanco). Of the 18 projects 15 were located directly in indigenous territories or in nearby reserves or areas needed for the use of water or access to it. This was a defining moment for the future of the Plurinational State.

[429] (J. Anaya, Report of the Special Rapporteur on the rights of indigenous peoples A/HRC/21/47 2012)

As this was a statute that had direct influence on the territory of indigenous peoples and nationalities, article 57 numeral 17 established that a consultation to the indigenous peoples affected must be held. However, the legislative authority (in this case the National Assembly) did not carry out the consultation. The CONAIE was critical of the former mining statute of the neoliberal era and had concrete objections and contributions for a new project, but they were not invited to the deliberation process, nor were they invited to a proper consultation process.[430]

The approval of the Statute, and imminent approval of a water law bill, generated demonstrations coordinated by the CONAIE. The indigenous movement called for a national uprising, whose collective actions were most intense in territories where it was already known that this statute would be applied, i.e. in the Shuar territory. The clashes between the demonstrators and the police led to the death of a Shuar indigenous teacher, Bosco Wisum. In addition, several people were wounded, a criminal process was opened against indigenous leaders, and at the date of closure of the present work, the case has still not reached a final decision.[431] Correa accused the indigenous leaders of the death of the teacher.

"They protest for the sake of protesting. They have blocked the water law bill for 4 years, and then shamelessly opposed that law and called to go out

[430] About a detailed description of the effects that oil industry in indigenous territories, see (Acosta, La maldición de la abundancia 2009)
[431] See (Tuaza Castro 2011)

armed with poisoned spears, they shot and now the teacher Bosco Wisum is dead."[432]

However, several reports, including the report of the National Assembly's own Human Rights Commission, stated that Bosco Wisum's murder was influenced by the actions of the mining company. Additionally, the beginning of violence and armed confrontation was aggravated by actions of the national police "who arrived from Quito without knowing the cultural context or the actions in the territory."

Several Human Rights Organizations prepared a report of the conflict and their conclusions were very different to those of the government. The reports collect the testimonies of the community about the shooting; in conclusion, it was the improper use of force from the police, and not of the demonstrators, that caused his death.

In this context of confrontation, the CONAIE decided, at the end of 2010, to file an action of unconstitutionality before the Constitutional Court against the mining statute for having been approved without consulting the indigenous peoples and nationalities of Ecuador. The National Assembly responded to the demand by pointing out that a member of the Assembly commission in charge of drafting the bill had met with CONAIE. The Assembly shared Rafael Correa's vision that the Plurinational State and the rights of indigenous peoples were to be a mere formality, for they never justified how that single meeting had fulfilled

[432] (Correa, Enlace Ciudadano No 357 2014)

the objective of allowing the participation of indigenous cultures at the same level as that of the mestizo culture. The principle of self-determination of the plurinational State was not respected.

Other statutes enacted without prior consultation were: Statute of Food Sovereignty (21° December of 2010), Water Statute (5° August of 2014), Administrative Regulation of the Inter-Cultural Education Statute (19° July of 2012), and National Equality Councils Statute (7° July del 2014). All of them attacked some aspect of the autonomy of the Indigenous Peoples:

TABLE 6.1. Statutes passed by the National Assembly without consolation to the indigenous peoples and their impact in the indigenous social movements.

Before	**Action**	**After**
The water associations (Juntas de Agua) were indigenous communitarian local spaces	Water Statute (5° August of 2014)	Juntas de Agua disappear
Communities controlled bilingual education	Inter-cultural Education Statute (19° July of 2012)	Education Ministry took control of the communitarian schools
An Plurinational entity (CODENPE) decided which community was indigenous and which leaders had the legal representation of the community	National Equality Councils Statute (7° July of 2014)	An entity with no representation of the indigenous nationalities took those decisions

Application of Indigenous Law does not have any limitation	Constitutional Remedies and Judicial Review Statute (22° October of 2009)	The Constitutional Court gained jurisdiction to review indigenous law decisions

The criminalization of the collective actions of members of the Ecuadorian indigenous movement was a constant in Rafael Correa's period, as denounced by several human rights organizations and demonstrated at several hearings on the Inter-American Commission on Human Rights.

TABLE 6.2. Criminalization of Indigenous Peoples Movement. Processed for protest / to which charges were filed and criminal proceedings initiated (only cases directly related to the defense of indigenous people's territories)[433]

Year	Action	Crime	Province	Prosecuted
2009	Mobilization Water Law / Death Bosco Wisum	Terrorism and sabotage	Morona Santiago	2
2009	Mobilization Water Law /	Resistant and Assault to the authority	Morona Santiago	8
2009	Mobilization Water Law	kidnap	Morona Santiago	3
2011	Mobilization Water Law	Road closing and stopping public service	Cotopaxi	1
2011	Indigenous Leader Statements	slander	Pichincha	1

[433] Source: (INREDH 2015)

2012	Protests Proyecto Hydroelectric	Terrorism and sabotage	Bolivar	2
2012	Protests Proyecto Hydroelectric	Resistant and Assault to the authority	Bolivar	5
2014	Protests Proyecto Hydroelectric	Property Damage	Zamora Chinchipe	2
2014	Expropriation Shuar Territory	Resistant and Assault to the authority	Zamora Chinchipe	2
2014	Expropriation Shuar Territory	Resistant and Assault to the authority	Imbabura	2
2015	March Orellana oil concessions	Resistant and Assault to the authority	Orellana	2
2015	March Orellana oil concessions	Incite to violence	Orellana	1
2015	National strike	Resistant and Assault to the authority	Cotopaxi	8
2015	National strike	Resistant and Assault to the authority	Pastaza	18
2015	Indigenous Uprising	Resistant and Assault to the authority	Cotopaxi	4
2015	Indigenous Uprising	stopping public service	Cañar	13
2015	Indigenous Uprising	Resistant and Assault to the authority	Azuay	1
2015	Indigenous Uprising	Incite to violence	Azuay	1
2015	Indigenous Uprising	stopping public service	Loja	31
2015	Indigenous Uprising	stopping public service	Morona Santiago	6

2015	Indigenous Uprising	Resistant and Assault to the authority	Orellana	3
2016	Indigenous Uprising	Sabotage	Orellana	8
2016	Mining concession	stopping public service	Azuay	2
				126

There is a structural pattern of violence and harassment of indigenous leaders that leads to intimidation, and judicial persecution. The same story of the last 500 years was happening again, but there was a difference this time, the Constitutional Court had the power to enforce the norms of the Plurinational State Constitution. The Court had the chance to defend the principles of the plurinational state, especially self-determination and autonomy in the first case about this topic.

6.3.1. The decisions of the Constitutional Court on the Mining Statute case.

The CONAIE challenge to the Mining Statute was the first indigenous peoples case decided based on the 2008 Constitution. The action sought the declaration of unconstitutionality based on one formal and two material arguments. The formal argument was the breach of indigenous peoples' right to legislative, prior consultation, because the indigenous peoples were not consulted during the legislative approval process. The two material arguments referred to the incompatibility between statute norms and the rights to territory and prior

consultation. In April 2010, the Constitutional Court made a controversial decision in the case.

On the formal argument, the Court stated that the legislative, prior consultation is a collective right of indigenous nations that forms part of the legislative process for enacting statutes.[434]

A legislative, prior consultation is not just a formality in the process, but a substantial right that allows indigenous people to participate in major decisions concerning their rights. Moreover, conducting a legislative consultation is mandatory and a *sine qua non* requirement; so, without it the enacted piece of legislation would be unconstitutional.[435]

Nonetheless, the Court came up with a doctrine regarding the novelty of the Constitution, which means that in the absence of the norms that apply to the Constitution, the State should apply constitutional rules in their best sense. The Court negated the Constitution's direct effects and justified the breach of fundamental rights because there were no statutes or any other inferior legislation. For this reason, the Court accepted the exchange of letters between the CONAIE President and a group of Assemblies as a prior consultation process.[436]

The Court then decided to establish a set of minimum regulations and procedures for conducting a legislative, prior consultation until the Ecuadorian

[434] (Judgment No. 001-10-SIN-CC 2010, 1)
[435] *Id*., p. 13.
[436] *Id*., p. 16.

National Assembly enacted a regulation for this subject.[437] Furthermore, these rules are extremely specific and include three general principles (exclusivity, specificity, and relevance), and several specific procedure provisions. On the principles, the legislative, prior consultation must be "exclusive," meaning conducted only for peoples and nations prior to enacting any piece of legislation, "specific" enough to not be confused with the other two kinds of consultations, and the decision of the people should be "relevant" to objectively protect their collective rights.[438]

The procedure provisions include a definition of the consulted parties, the consulter, and the stages.[439] The Court stated that local methods and rules regarding decision-making should be respected throughout the process; nevertheless, it established a rigid procedure where indigenous people would not participate in the design of the process; e.g. the agenda is determined by the consulter;[440] the consulter also decides which population is to be consulted;[441] the consulted parties have to sign up for the process within five days after the announcement of the consultation process;[442] the community has to write its decision on the standard forms designed for the process within twenty days, these forms should include a description of the internal deliberation

[437] *Id*., p. 16.
[438] *Id*., p. 16.
[439] *Id*., p. 17.
[440] *Id*., p. 17.
[441] *Id*., p. 17.
[442] *Id*., p. 17.

process;[443] and, twenty days thereafter the leaders of the consulted communities must join the authorities for a roundtable discussion.[444]

For the first material objection, the plaintiffs alleged that the Mining Statute created a model of consultation that was incompatible with the constitutional and international standards. In order to make a decision on the matter, the Court declared that although there were no constitutional norms on prior consultation, international law sources have afforded the Court the elements to establish the applicable law in the case.[445] The international sources used by the Court are the rulings by the Inter-American Court of Human Rights, the decisions of the Colombian Constitutional Court, the recommendations of the International Labor Organization, and the reports by the UN Rapporteur on Indigenous Peoples' Rights.[446]

Consequently, the Court named the standards it deemed applicable to the case, such as the following: consultations should be flexible enough to be adapted to the specific culture of each people; they must be conducted at the beginning of each stage of the project; the process must be public and offer complete information to the consulted group; consultations cannot merely be an informative process but rather a systematic process of dialogue and negotiation; the consulted parties should act in good faith; and the duration of each part of the process should be reasonable.[447]

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[443] *Id*., pp. 17-18.
[444] *Id*., pp. 17-18).
[445] This ruling was issued before Sarayaku.
[446] (Judgment No. 001-10-SIN-CC 2010, 22)
[447] *Id*., pp. 22-23.

The Court stressed that a consultation must be a concerted procedure, so that the people are involved in the planning of the process, starting by designating the participants through their representatives and using traditional decision-making processes. Moreover, the opinion of the people should be recorded as part of the State's decision-making process, yet it is not binding for the State; however, the Court ascribes the decisions of the people to the status of "soft law" in International law. Finally, the Court highlighted that the State act would be void in the case that the State fails to consult.[448] Furthermore, it said that these standards should apply until the National Assembly enacts a statute on prior consultation.[449]

For the second material objection, the right to territory, the CONAIE argued that the Statute allows the State to take away their lands according to Western rules and based on the land's commercial value. For indigenous people, however, the value of their ancestral territory cannot be measured by the same standards. Indeed, several articles of the Statute refer to mining easements and expropriation processes when mining so requires, but the Statute does not make any distinction between its application to private property and to indigenous territory.

The Court considers that the IACHR's definition of indigenous people's right to territory differs from the right to property, stating that territory is a living space indispensable for the material and cultural existence of an indigenous

[448] *Id*.
[449] *Id*., p. 25.

people. Hence, territory cannot be limited by modern institutions regarding individual rights, such as the declaration of eminent domain. The Court arrived at the conclusion that the norms of the Mining Statute (thirteen articles) cannot be applied to the territory of indigenous people, so under that condition the articles are not void.[450]

Despite the positive aspects of the rulings, the Court was criticized for not declaring the Mining Statute void because no consultation was conducted. The only possible theory behind that decision is the indirect application of the Constitution and International law. Moreover, in a civil law country the rulings of higher courts are not regarded as general law, so the real power of the Court was to rule the Statute void and not to make rules. Accordingly, the forthcoming acts of both the Executive and Legislative branches did not respect the decision for this case.

6.3.2. Other legislatives measures

The President of the Republic of Ecuador has two main sets of functions. One set is the administrative function consisting of the formulation of public policies, law enforcement, and public administration. The other set refers to legislative powers through administrative regulations enacted by executive directives, but this function depends on the existence of a statute on the matter.[451]

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[450] *Id.*, p. 22

[451] (Constitution of the State of Ecuador 2008), Art. 147. The following are the attributions and duties of the President of the Republic, in addition to those stipulated by law: […]13. To issue the regulations that are needed to enforce laws, without

Two executive directives were passed to regulate the right to prior consultation: Directive No. 1040 and Directive No. 1247. Constitutional provisions establish that human rights may only be regulated through a statute enacted by the National Assembly, according to the Ecuadorian Constitution,[452] and the two directives do not stem from a proper legislative act. Nevertheless, they have been in application since their enactment. The reasons for this restriction are to allow for a representative democratic debate on the statutes that could limit human rights and the international standard on limitation of human rights. Notably, the American Convention on Human Rights (ACHR) prescribes that states can only limit human rights through statutes under its Article 30.

For the Inter-American Court, the word "laws" in its article means "a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the States Parties for that purpose."[453] In such an important issue as human rights regulation, it is important to engage in a democratic debate ascribing legitimacy to the future regulation.[454] According to the Constitution and the International law, regulating through directives is not legal practice; it diminishes the opportunity to engage in a democratic debate and involves the threat of arbitrary acts. Hence, having

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infringing them or altering them, as well as those that are required for the sound functioning of the administration.

[452] (Constitution of the State of Ecuador 2008), Art. 142.

[453] (The Word "Laws" in Article 30 of the American Convention on Human Rights 1986, decision)

[454] *Id*., para. 22.

no statutory regulation, but rather an arbitrary administrative regulation, led to several situations where some standards of the indigenous peoples' right to prior consultation were not respected. Due to its magnitude as well as its importance to the self-determination of several indigenous nations at risk, the case of the Amazon Consultation will be addressed in the following paragraphs.

The 1998 and 2008 Constitutions included remedies for guaranteeing fundamental rights. Some cases were brought to court under the 1998 Constitution for failure to enforce indigenous peoples' right to a prior consultation, but just two reached the Constitutional Tribunal (the former higher court on constitutional issues) and were not analyzed deeply and were carried out in a classical private law style.[455] Under the paradigm of the Plurinational State, one case has been resolved by the Constitutional Court: the case of the unconstitutionality of the Mining Statute, addressing the right to a prior consultation.

[455] In 2000, the Independent Federation of the Shuar People (FIPSE) filed a lawsuit against ARCO Oil Company demanding that all activities in their territories be stopped because their right to a prior consultation had not been respected. The Tribunal found ARCO practices to be attempts to divide the community and was therefore against the good-faith standard of the right to a prior consultation, and that it constituted a serious breach of specific rights of indigenous peoples. (Constitutional Tribunal 2000). The other case resolved by the Constitutional Tribunal was Waorani *v.* AGIP case. In 2001, AGIP Oil Company signed agreements with members of the Waorani nation in order to start extraction activities in its territory. The CONAIE lodged a lawsuit on behalf of the Waorani nation, demanding that the Tribunal disregard those agreements because they violated the right to a prior consultation. The Tribunal ruled against the plaintiff because the CONAIE is devoid of *locus standi*, without addressing the merits of the case. (Judgment No.0054-2003-RA 2003)

6.3.3. Implementation by the Legislative Branch

Since 2008, some statutes and regulations have been enacted for matters that could affect indigenous peoples' rights, such as the Food Sovereignty Statute, the Territorial Organization Statute, the Mining Statute, and the Petroleum Statute, among others. The indigenous peoples of Ecuador were not consulted on any of them. The most paradigmatic was the Mining Statute because of the trial about its constitutionality.

The Mining Statute is a general statute that establishes the mining law for the entire territory of Ecuador, even though the main mineral deposits are located in indigenous territories. Besides the operational norms concerning tenders regarding deposits, revenue distribution, and stages of operations, the Statute contains rules on easements, expropriations, and prior consultation. Regarding prior consultation, the Statute establishes a procedure that should take place at the beginning of the stage for initiating mining, i.e., prospection, extraction, distribution of profits, casting, refinement, commercialization, and closing of the mine. Nevertheless, there is no consultation process for the call for bids. The community is consulted only when there is no real chance that they might reject mining.[456]In this stage, the State decides which company will be awarded the mining contract; consequently, companies will have economic expectations and earn rights that eventually may entitle them to file a torts lawsuit against the State if they are not allowed to continue their activities.

[456] (Mining Statute 2009, Art. 27)

In the prior consultation, as explained in detail above, the Statute ascribes the same treatment to the consultation of indigenous people as in the environmental consultation (for non-indigenous peoples). Consequently, there is a significant reduction of standards, the most important being the need for the consent from indigenous people for large-scale projects (such as open-pit mines) to take place in their territories as the IACHR stated in *Saramaka*.

The Constitutional Court analyzed the constitutionality of the Mining Statute in the above-mentioned ruling. In the document, three specific orders were given to the National Assembly: (i) based on the decision of the Court, the Assembly must conduct legislative, prior consultations addressed to indigenous people, following the procedure indicated in the ruling; (ii) the Assembly should pass legislation on the right to legislative, prior consultation; and, (iii) the Assembly should enact legislation on the (administrative) prior consultation right.

None of the three has been fully implemented yet. The Assembly passed more legislation about which they should have consulted the indigenous people before it was passed, but they did not, and there were no talks with them either. There is no statute with rules on the right of indigenous people to a free, informed, and prior consultation. However, the Assembly drew up “instructions” on the application of the legislative, prior consultation,[457] but they have no legal status. Although the “instructions” are not a source of law in the Ecuadorian system, they were approved by the Council of Legislative Administration. This

[457] (Nacional Assambly Administrative Council 2012)

Council is formed by five members and the President of the Assembly. Again, the Assembly ignored the Court's clear instructions to pass legislation on the matter.

In general, the "instructions" reflect the wording of the Court's decision, specifying certain things, such as the timing of the consultation within the legislative process.[458] In addition, the document provides the following elements: principles of the process,[459] the creation of regional meetings prior to the national roundtables,[460] the shortening of the time of the roundtables from twenty to five days,[461] and that the agreements will be directly included in the legislation proposed for the second debate at the Assembly;[462] however, after that point there are two more opportunities to modify the bill.

Finally, the instructions were approved without the indigenous people and nations of Ecuador having been first consulted.

6.4. The XI binding round

In 2012, the Ecuadorian government launched an international bidding round for the production of oil in thirteen oil zones in the Ecuadorian Amazon Region.[463] The process has been named the South Orient Round or the Twenty-First Oil Round, and it involved the provinces of Pastaza, Morona Santiago,

[458] *Id*., Art. 5.
[459] *Id*, Art. 3.
[460] *Id*., Art. 18.
[461] *Id*., Art.19.
[462] *Id*., Art. 20.
[463] (President of the Republic of Ecuador 2012)

Orellana, Napo, Morona Santiago, and Pastaza.[464] The initiative sought to boost the country's oil production to 192.5 million barrels a year for social and industrial investment.[465] However, the oil zones overlapped with the ancestral territory of seven indigenous nations: Kichwa, Waorani, Andoa, Zapara, Achuar, Shiwiar, and Shuar.[466] Therefore, the law cited in the preceding paragraphs apply to this operation.

6.4.1 The Amazon Consultation

The bidding process was preceded by an "Amazon Consultation." Through this process the State endeavored to meet its obligation to conduct a prior, free, and informed consultation to the indigenous peoples affected by the project.[467] Furthermore, the government defined the process as an opportunity for obtaining information and participating in the decision-making process regarding the possible award of oil zones.[468] During the process of the Amazon Consultation , the ruling for *Sarayaku* was issued, and the Constitutional Court also decided on another case (the unconstitutionality claim against the Mining Statute). This meant that several standards directly applicable to the process were available to the authorities. Despite this, the government based its consultation process on Executive Directive No. 1247.

According to the authorities, the Amazon Consultation accomplished its goals and respected the indigenous peoples' rights. It was an opportunity to

[464] (Secretaría de Hidrocarburos 2013)
[465] *Id*., p. 11.
[466] *Id*., p. 53.
[467] *Id*., p. 56.
[468] *Id*., p. 56.

engage in an intercultural and democratic dialogue with indigenous nations. In addition, it allowed consulted individuals to access information and to participate in the decision-making process and the design of programs for local development.[469] Furthermore, the consultation employed diverse mechanisms such as informative workshops, assemblies, and work meetings with the legitimate representatives of the nations to ensure broad participation.[470]

The Amazon Consultation was conducted as an informative process that aimed to offer revenue for the communities that agreed to oil extraction in their territories. Furthermore, informative flyers were translated to Kichwa, Shuar, and Waorani and addressed the revenue distribution,[471] although the environmental and cultural impact studies were only available in Spanish. The *Secretaría de Hidrocarburos* (SHE, Secretariat for Oil Activities) set up 45 permanent offices and 106 itinerant offices and held 37 public meetings and 32 feedback meetings. According to the SHE, approximately ten thousand people partook in the process.[472]As a result, 63 agreements were signed, but only 13 with indigenous peoples' groups.[473] The agreements contained provisions on how the resources from oil extraction would be invested in the community. They also included a clause on the acceptance of the fulfillment of the right to prior consultation under the Executive Directive No. 1247.[474] However, State

[469] (Secretaría de Hidrocarburos 2013a)
[470] *Id*.
[471] *Id*.
[472] *Id*.
[473] (Secretaría de Hidrocarburos 2013b)
[474] (Secretaría de Hidrocaburos 2013c, 1)

investment in public services would be made with petroleum profits that would go solely to the communities that had signed an agreement.[475] In other words, services such as free education, health care, drinking water, and so on that are always accessible to the citizens of cities were to be available to the indigenous peoples of the Amazon Region only if they agreed to cooperate with the oil industry. This cooperation is explicit in a clause of the agreement that stipulated the community's duty to not interfere in oil activities and instead cooperate.[476]

The perspective of indigenous peoples is different, however. As of the start of the process, the CONAIE rejected the implementation of the process. In addition, the affected nations, even the ones who had agreed early on to engage in the consultation process, expressed serious concerns about the State's practices. They claimed that the State had employed coercion and intimidation, and had even attempted to divide communities, while failing to respect the internal decision-making process and provide information about the impacts and supporting illegitimate representatives.

Leaders of the Zapara Nation claimed that the State had signed agreements with non-Zapara people who tried to pass as Zapara authorities. The Zapara Nation has approximately three hundred members left and has allowed other indigenous peoples to live in their territory for several decades.[477] When oil companies started their activities in the Amazon region in the seventies, the Zapara sheltered people of other nations in their territory, and

[475] *Id*., p. 2.
[476] *Id*., p. 6.
[477] (Ruiz 2013)

these people now outnumber the Zapara. As an extended strategy of negotiation and disruption in the internal affairs of the communities, oil companies have funded private indigenous organizations with legal standing in the mestizo world. This is the case of the Zapara people that formed the Organization of the Zapara Nation in Ecuador (NASE), presided by Basilio Mucushigua, who was not part of Zapara Nation. Although the Zapara nation had decided to reject oil production in their territory, Mucushigua signed agreements on behalf of the NASE. By the time Mucushigua negotiated the agreements, he had been accused of misappropriating public funds and that his designation was flawed. In January 2013, the Zapara Nation met and decided once again to forbid oil activities in their territory and to reject the agreements signed by Mucushigua;[478] nevertheless, the government still views those agreements as part of their consultation success. In that meeting, a new representative of the Zapara Nation was appointed and was acknowledged by the CONAIE and the CONFENIAE, but not by the government.

In late April 2013, a new assembly rejected the Mucushigua agreements again, and it was informed about the Amazon Consultation process conducted in their territory. It was determined that Mucushigua did not consult any Zapara or non-Zapara in the communities of the Zapara territory before signing the agreements. Furthermore, Mucushigua had submitted signed sheets of support to State authorities that did not belong to the inhabitants of the Zapara

[478] *Id*.

territory.[479] Internal conflicts turned violent and ended with the death of a thirteen-year-old Zapara boy. Meanwhile, the government had been using Mucushigua as a symbol of the consulted indigenous peoples of Ecuador in videos for viewing by potential investors in the South Orient Round.[480]

The Shiwiar also had similar complaints. At the time of the land reform statute in the seventies, the Shiwiar Nation had to organize five peasant associations to obtain titles for their lands. Although the five associations still have legal status, the Shiwiar Nation established a general organization called the *Nacionalidad Shiwiar del Ecuador* (NASHIE, "Shiwiar Nation of Ecuador") to enable the associations to get land titles unified into one indigenous territorial title.[481] The NASHIE representatives have to consult the Shiwiar Assembly on every important decision; although this condition ascribes high legitimacy to their leaders, it falls short of Western standards.[482]

When the SHE authorities first talked with the NASHIE's *consejo de gobierno* ("board of directors"), the Shiwiar Nation had already discussed some of the implications of oil production, made a preliminary decision to reject the activities, and agreed to let State authorities voice their opinions at their assemblies. After that, the SHE never tried to discuss with the NASHIE again.[483]As a result, the SHE changed its tactics and looked to engage in

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[479] *Id*.
[480] (Secretaría de Hidrocarburos 2013a)
[481] (F. Santi 2013)
[482] (Polleta 2002, 12-15)
[483] (F. Santi 2013)

negotiations with the associations by hiring young people from the communities to act as community facilitators. Under those circumstances, the SHE signed agreements with three communities (towns).[484] In September, the NASHIE joined forces again in an assembly and rejected the attempts of the SHE to divide the nation and upset its harmony. It called on the signatory communities to respect their traditional institutions and organizational practices; otherwise, they could be penalized under their customary law.[485]

The Shiwiar Bufeo Tunkintza Shiwiar Association (ASHIB-T) received an offer of eight million dollars in exchange for their support in the SHE initiative; consequently, they are trying to separate from the Shiwiar Nation. The legal consequences regarding their legal protection and their status as indigenous peoples could be affected by these actions. However, the deliberate division of the nation over oil interests is of utmost concern.[486]

In the communities where the SHE gained access, the prior consultation process involved conveying the economic advantages of oil production; however, the social, cultural, and environmental risks were not included in the information provided. When responding to claims by some critics about the impact that oil activities have had on other indigenous communities in the northern part of the Amazon, the SHE said that it was due to lack of control and that the same mistakes will not be made again.[487] Finally, the SHE warned that

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[484] *Id*.
[485] *Id*.
[486] *Id*.
[487] *Id*.

oil activities would be carried out in spite of the opposition by indigenous peoples, so the smart thing was to negotiate an agreement to receive economic benefits.[488] The process was conducted in Spanish.

In response to the agreements signed by certain communities, a new assembly of the Nation took place in November 2012. The Shiwiar Nation decided to reject the agreements and refused to comply with state resolutions concerning oil production in their territory.[489] Moreover, they declared that they would exercise their constitutional right to resist based on their right to self-determination and thus stopped any oil exploration or production activities from being carried out in their territory.[490]

Another nation that was affected is the Kichwa of the Amazon. This Nation is spread across the entire Amazon region and is one of the most affected by oil pollution in the north of the Amazon region of Ecuador. The Sarayaku people are part of the Kichwa Nation. They have an effective resistance strategy that has allowed them to keep oil production outside their territory for almost two decades now. Their strategy includes the implementation of sustainable alternatives for the community to earn money (community tourism, small transportation business, and so on); political and communicational tactics (including a documentary, web page, lobbying, and so forth*)*; and, litigation that concluded with a ruling by the Inter-American Court of

[488] Id.
[489] Id.
[490] Id.

Human Rights. However, they are worried about the government's new initiative to extract oil in their territory.[491]

In 2013, municipal authorities (*juntas parroquiales*) tried to secure access for the SHE to enter Sarayaku territory and talked with people from the communities. The representatives rejected the proposal because the people from there believed that an invitation to establish a dialogue should have been made to them directly or through the indigenous organization (CONAIE and CONFENIAE). They saw a lack of transparency in the SHE's approach as they believed that the SHE wanted to divide indigenous communities once again.[492]

After these incidents, the assembly of the Sarayaku people decided to deny the SHE access to their territory.[493] However, the SHE ignored the decision of the Sarayaku and entered Sarayaku territory through the Molino community. The Sarayaku authorities rejected this action and fought with the Molino authorities.[494] Moreover, the internal relationships of these people have been deteriorating due to the SHE's tactics of hiring young Sarayaku to disseminate the government's financial promises among the communities.[495]

The SHE's interpretation of the impacts is very limited. Due to the zone's hydrological system, the contamination of upstream water sources directly affects the Sarayaku people. Nevertheless, the agreements signed by the

[491] (Gualinga 2013)
[492] *Id*.
[493] *Id*.
[494] Id.
[495] *Id*.

government and peasants and people from urban areas might lead to pollution of the Bobonaza River and directly affect the Sarayaku.

As with the Shiwiar, the information that the SHE presented to the Molino community was incomplete. The government's information only conveyed economic opportunities but not the environmental risks posed by oil production.[496]Although José Gualinga, leader of the Sarayaku people, knows what rejecting the SHE proposal means —to not receive financial assistance from the State— they are willing to move forward anyway with the rejection of the SHE proposal.[497]

Presently, the Sarayaku are forging an alliance with other Kichwa people to build a united front for future negotiations with the State. In 2011, the Boberas and Parkayaku peoples joined the Sarayaku in an initiative to create an indigenous political district.[498] The people of the future Kichwa territory of the Bobonaza Watershed (Circunscripción Territorial Autónoma Kichwa del Bobonaza - CITAKIB) have already discussed their priorities to agree on a common position with regard to the oil issue. For the people of Bobonaza, it is important to tell the government that they have a "life plan", that they are thinking about their future, and that oil is not part of their plans. They signed the Declaration of Harmonious Coexistence among the Kichwa (Ayllu, Llaktapura.

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[496] *Id*.
[497] *Id*.
[498] Under the Territorial Organization Statute, if more than 50% of a municipality's population is indigenous, an Indigenous Territorial District can be created. This concept differs from that of an indigenous territory, and it designed to give indigenous people a chance to be their own local authorities under the mestizo political scheme.

and Sumak) to express their view of the world, their relationship with their land, and their plans for the future. In their words: “The CITAKIB is a hard zone clear of oil, mining, and timber extraction; it is not a nature services market and it is not prey to bio-piracy. It is a barrier protecting life, Kawsay Sacha (living forest)”.[499]

The Sarayaku people have been steadfast in their decision to exclude oil extraction from their development agenda. This is despite that fact that Instead of conducting a prior consultation process based on international standards, the government insists on employing its tactics of sparking division among the communities and signing agreements with individuals who do not represent them.[500]

For indigenous peoples, the Amazon Consultation was a violation of their right to a free, informed and prior consultation. It did not respect international law and failed to be an opportunity for real dialogue where indigenous opinions have the chance of influencing the government’s decision-making process. The Amazon peoples of all nations united in the CONFENIAE in order to agree on a common position on the South-Orient Round and the Amazon Consultation. A congress of indigenous leaders was formed in April 2013 and they arrived at a unanimous, common position to reject the new round for oil extraction.[501] Again,

[499] (CITAKIB 2011)
[500] (Gualinga 2013)
[501] (Posicion of the Nationalities, Communities ans Social Movements of the Amazon on the XI Oil Tender Round 2013)

some of them claimed that the agreements signed with the State were never discussed or consulted with the communities.

6.4.2. Standards were not applied

Article 57.17 of the Constitution recognizes the indigenous peoples' right to "be consulted before the adoption of a legislative measure that might affect any of their collective rights". Article 6.1.a of the Convention No. 169 of the ILO lays down that "governments shall […] consult the peoples concerned, through appropriate procedures and through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly". Additionally, the UN Declaration on the Rights of Indigenous Peoples in Article 19 sets down that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them".

From these provisions of Constitutional and International law comes the conclusion that the legislative prior consultation is not optional for the Ecuadorian State.[502] Since 2008 the State has violated this right on at least three occasions: the expedition of the Rules for the Free, Informed and Prior Consultation in the Tender Process of Oil Extraction Zones (Executive Directive 1247), the approval of the Instructions for the Legislative Prior Consultation, and

[502] (Case of Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Merits, and Reparations 2012, para. 181)

the approval of the Mining Statute. The first went into law after the decision of the Constitutional Court on the Mining Statute case that should have been the last valid legislative process without consultation.[503]

On the free, informed and prior consultation

Article 57.7 of the Constitution recognizes the right that the indigenous people have to "free prior informed consultation […]on the plans and programs for prospecting, producing and marketing nonrenewable resources located on their lands and which could have an environmental or cultural impact on them".[504] Article 6.1.a of the Convention No. 169 of the ILO lays down that governments shall consult indigenous peoples on "administrative measures which may affect them directly".[505] Additionally, the UN Declaration on the Rights of Indigenous Peoples contains the same provisions as Article 19.[506]

Ecuador cannot consider the prior consultation right as a mere formality; instead, it must be a real instrument of participation and dialogue based on mutual trust and respect with the goal of reaching a consensus between the parties.[507] This means that the fulfillment of the duty to consult does not only include performing a consultation; in addition the process should be conducted in good faith and in compliance with the right's standards:

[503] (Judgment No. 001-10-SIN-CC 2010, p. 13).
[504] (Constitution of the State of Ecuador 2008, Art. 57.7)
[505] (ILO 1989, Art. 6.1.a.)
[506] (UN General Assembly 2007, Art. 19)
[507] (Case of Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Merits, and Reparations 2012, para. 186)

This entails the duty to organize the entire government apparatus appropriately and, in general, all the organizations through which public power is exercised, so that they are capable of legally guaranteeing the free and full exercise of those rights. This includes the obligation to structure their laws and institutions so that indigenous, autochthonous or tribal communities can be consulted effectively, in accordance with the relevant international standards. Thus, States must incorporate those standards into prior consultation procedures, to create channels for sustained, effective and reliable dialogue with the indigenous communities in consultation and participation processes through their representative institutions.[508]

Although the South-Orient Round had a consultation process (the Amazon Consultation), several breaches of the law applicable to prior consultation could be found in the practice of the Ecuadorian government.

First, the consulted peoples should be part of the planning and design of the process of consultation.[509] The Amazon Consultation was a process ruled in detail by the Executive Directive 1247, so this rigid process could not be adapted to the particularities of each people. Furthermore, the State failed to open a dialogue with the leaders of the nations to identify those particularities including the number and location of the communities and the internal deliberation process to adjust the times of the consultation. As a result, the government obtained the mistrust of the Zapara and Shiwiar nations, and the

[508] *Id*., para. 166.
[509] (Judgment No. 001-10-SIN-CC 2010, p. 23)

Sarayaku people, from the start of the consultation process. The agreements signed with individuals that were not representative of the groups just made it harder to build a productive relationship between the parties. As a result, the three groups decided not to participate in the rest of the process after internal discussions.

Second, any contact with the consulted peoples should be established through their legitimate authorities.[510]A large scale project like the South Orient Round should include the national indigenous organization (CONAIE) and the indigenous regional organization (CONFENIAE). The six nations affected by the project are members of both organizations. Moreover, each nation has a *consejo de gobierno* ("board of directors") that represents the nation or the people under the commands of the community assembly. The Ecuadorian government did not try to reach out to the CONAIE and CONFENIAE, and the government's approaches to the nations stopped whenever they found any real intention to discuss the feasibility of the project. In all the cases, the Ecuadorian government preferred to look for allies inside the nations and sign agreements with them. These practices divided the communities and generated disharmony between its members.[511]

Third, the consultation should be prior to any decision about engaging in a project that affects indigenous peoples' rights.[512] The key to identifying the

[510] *Id*., p. 22-23.
[511] (Report of the Committee in the case of the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL) v. Ecuador 2001, para. 44)
[512] (Judgment No. 001-10-SIN-CC 2010, p. 22-23)

moment when the prior consultation should be implemented is at “the first stages of the planning or preparation of the proposed measure, so that the indigenous peoples can truly participate in and influence the decision-making process”.[513]In the South-Orient Round, the geographical distribution, the environmental impact assessment, the timeline and the tender process were settled before starting the Amazon Consultation. Furthermore, in the information sessions, the State agents said to the communities that exploitation will occur with or without the peoples’ consent. Hence, the decision to extract oil from indigenous peoples’ territory was taken before the consultation.

Fourth, the “informed” characteristic of the consultation means that the State should provide all relevant information necessary to arrive at a reasoned decision in an accessible way to the consulted people.[514] This information should include both benefits and risks of the project.[515] In the Amazon Consultation, the environmental impact assessment was only in Spanish, and the information distributed by the SHE personnel was only related to the distribution of revenues. The information about environmental and social risks of the activity came from past experiences with oil and mining companies or from testimonies of other indigenous peoples from the North-Orient part (with 40 years of experiences in oil extraction).

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[513] (Case of Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Merits, and Reparations 2012, para. 167)
[514] (Judgment No. 001-10-SIN-CC 2010, p. 22-23).
[515] (Case of Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Merits, and Reparations 2012, para. 177) and (Case of the Saramaka People. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs 2007, para. 133)

Fifth, consultation should be conducted without any kind of treaty or coercion. The indigenous leaders reported that the SHE agents told the communities that the extraction was imminent, and that their cooperation was the best idea to obtain benefits of the oil extraction.

Finally, the consultation must be conducted in good faith aiming to obtain the consent of the indigenous people that are being consulted.[516] Even though this is the least objective of the standards, there are some conditions that can be found in a case by case analysis. Signs such as the decisions taken before the consultation process, avoiding establishing a dialogue with the traditional authorities of the peoples, using social investment (that the State should be doing no matter what) as a coercion mechanism, among other particularities of the Amazon Consultation, clearly show how the Ecuadorian government conducted the process as a mere formality with no intention of respecting the peoples' decision.

In conclusion, even if the right to a free, informed, and prior consultation and its standards are formally part of the law, its implementation is in practice quite different.

6.5. The indigenous law is not good enough for civilized societies

In 2010, a group of indigenous youth was involved in the murder of another member of the La Cocha community, Marco Antonio Pallo. La Cocha is an indigenous community in the province of Cotopaxi in the highlands region of

[516] (Judgment No. 001-10-SIN-CC 2010, p. 22-23)

Ecuador that belongs to the Kichwa nationality. On May 16th, due to the request of the victim's relatives, authorities and members of the community gathered in a general assembly that was directed by the community's customary authorities and applied indigenous law.

After a period of investigation, Ivan Candaleja, Wilson Chiluisa, Klever Chaluisa and Ivan Candaleja were identified as perpetrators of the murder, on May 16th, 2010, they went to trial and were declared responsible. On May 23rd, 2010, Manuel Quishpe also went identified as perpetrator and was sanctioned.

On May 19th, a criminal prosecutor intended to enter La Cocha's territory with the intention to arrest the perpetrators of the murder and the authorities of the community. However, the community stopped this from happening. On June 8th, Marco Pallo, brother of the victim, filed an extraordinary protection remedy to the Constitutional Court to challenge the decision of the indigenous authorities.[517]

On June 24th, 2010, the Ministry of Justice instructed an operation with the police to extract the perpetrators and the authorities of the community. As a result, the indigenous leaders of the La Cocha were processed are imprisoned by the mestizo criminal justice system. The leaders were released, some days after thanks to an habeas corpus decision by a judge of Latacunga. The perpetrators of the murder remained in custody.

[517] (Olivo Pallo 2014)

Because of these events, two criminal proceedings were initiated. In the first case, the young people who had participated in the murder were judged again. In the second, the leaders of the community of La Cocha were prosecuted for physical mistreatment, given that part of the purification process contained in the decision of the indigenous community was understood by the prosecutor and the media[518] as corporal punishment prohibited by the Constitution.

Both cases came before the Constitutional Court, which should decide on the scope of the right of indigenous peoples and nationalities to create and apply their own right within the framework of the plurinational State.

In the first ruling of the Constitutional Court, known as La Cocha case 1, the court discusses the conflict of competence between the ordinary justice system and the indigenous community authorities. The Court began its arguments with a definition of the Plurinational State:

“The plurinationality is a concept of a nation that recognizes the peoples’ right to identify themselves, not only with certain geographical place, but also with a certain culture. In this sense, the term plurinationality refers to the coexistence of several cultural nations or ethnically distinct peoples within a great civic nation... in this way, for plurinationality to develop it needs interculturality. Thus, these concepts keep among themselves a relation of complementarity in the sense that one complements or perfects the other. On

[518] (Redacción 2010)

the other hand, the principle of unity of the state or unitary state refers to a nation directed by a central government, with full powers over the national territory and with a democracy sustained in a single citizenship without affecting the collective rights of each ethnic group and to the feeling of belonging of the people to a certain ethnic-cultural community".[519]

The concept of plurinationaly that the Court used is not different to the concept of multiculturalism of the Constitution of 1998, and of common use in political science. The concept of plurinationality used by the constitutional court does not differ from the concept of multiculturalism included in the 1998 constitution, which meant the recognition of the coexistence of several cultures in the same territorial space. The concept of self-determination or at least some political consequence of such cultural diversity is excluded from the Court's definition. This definition is consistent with the court's decision in the case.

Articles 57.10 and 171 of the Constitution of 2008 recognize the right of indigenous peoples and nationalities to develop and apply their own law (Indigenous law) with the sole limitation that such application be for acts occurring within the community and that such right does not contravene the human rights recognized in the Constitution and in international treaties ratified by Ecuador. Moreover, the Organic Code of Justice states that any authority of the ordinary justice system must decline jurisdiction if a case brought to its

[519] (Judgment No. 113-14-SEP-CC 2014)

attention has already been decided or is pending on decision by the authorities of indigenous peoples and nationalities.

Under these rules the decision on the competence of the case did not seem complicated, for it shows a preference for a decision in favor of the competence of the community. However, the Court's rationale was to analyze whether decisions on a case such as this one of ordinary justice and indigenous justice were of the same nature, and, therefore, if they excluded each other. In other words, the Court was to decide if the rule of *ne bis in idem* or double jeopardy was applicable, or if double trial was constitutional.

A widespread idea about justice for the Kichwa nationality of the Sierra holds that the aim of judicial proceedings is not only to establish individual responsibilities, but above all to assume the offences as a collective responsibility, where reparation for the victims and harmony of the community are the main objectives of the process.[520]

This idea was taken up by the Constitutional Court itself, which extracted these concepts from an expert's report ordered by the Court itself, to be carried out as one of the evidence of the process. The court then recognized that the Kichwa justice of the community of "La Cocha" had different purposes than those of the ordinary criminal system. The expert witness summoned by the court highlighted these different characteristics of the two proceedings, which was used by the Court to hold that the proceedings before the community had

[520] (R. F. Ávila Santamaría 2018)

a scope of collective reparation, but it neglected the individual rights of the victims of a crime which, on the contrary, in the Court's view were the central objective of the ordinary criminal process.

Consequently, in the absence of a decision on the individual rights of the victims, the Pallo murder case had to be prosecuted again by ordinary justice. Moreover, the court affirmed that while the indigenous process protected collective rights, only the ordinary criminal procedure may protect the individual right to life of the victim.

The Court's decision brings with it a major difficulty, for the decisions under the Kichwa law comes with financial support of those responsible to the victims, community work, and the immediate reintegration of the aggressors into the activities of the community. The apparent non-contradiction between the two procedures meant that in practice the deprivation of liberty of those responsible rendered the community's decision unenforceable, but it also establishes that the only adequate form of protection of fundamental rights is prison, a concept that does not exist in any of the nationalities and indigenous peoples present in Ecuador.

The Court's decision was formulated in a way that expressly excluded crimes against life from the jurisdiction of indigenous communities: "The jurisdiction and competence to hear, resolve and punish in cases that threaten the life of any person is the exclusive and excluding power of the ordinary criminal law system, even in cases in which the alleged perpetrators and those presumed responsible are citizens belonging to indigenous communities,

peoples and nationalities, even if the events occur within an indigenous community, people or nationality. The administration of indigenous justice retains its jurisdiction to hear and resolve internal conflicts that occur among its members within its territorial scope and that affect its community values."[521] Therefore, the limitation of the jurisdiction of the Indigenous law in Ecuador was established through jurisprudence.[522]

With respect to the case known as "La Cocha 2", the Court decided that since the indigenous authorities had applied a type of punishment permitted by the Kichwa law, there was no crime. Therefore, the leaders' behavior was protected by the Constitution and the Indigenous law.

There are several conclusions that can be drawn from this case. In the first place, behind the court's decision to determine what would be the appropriate way to resolve cases and attempts against life appears the hegemonic liberal legal narrative by which there would exist methods established and accepted by law to resolve these kinds of social conflict and which is so rooted in the legal actors, as well as in society that makes it difficult to accept that other cultures have developed different legal solutions. Although alternative concepts such as restorative justice are slowly being introduced into Western legal systems, prison remains as the main response to the social need to control the behavior of its members. Thus, this case shows how the idea of

[521] (Judgment No. 113-14-SEP-CC 2014)
[522] In other countries this kind of limitation comes from a statute of the central state. For example, in U.S. the jurisdiction of the Indigenous Peoples was limited in major crimes by the Major Crimes Act, enacted in 1885, for crimes murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. See (Getches, et al. 2011, 474)

the hegemonic society's law ends up limiting the exercise of a right expressly recognized in the 2008 constitution.

The application of the Indigenous Laws was already recognized in the Constitution of 1998, but it was not limited until the La Cocha cases. The different approach to crimes that most of the Indigenous Laws have, has led to the same objections as those made by the constituent Assembly members who opposed it in the Constitution of 1998:

"What I told them was that I very concerned about how the Constitution of 98 ended [regarding the Indigenous law]. I proposed that it should be perfectly clear in the constitutional text that [this law] should only deal with domestic issues and small conflicts, minor thefts within an indigenous community. This should have been the use of indigenous justice - to serve as a parallel justice. I stated this idea in my column in the El Universo diary… In these days the cases of justice by their own hand have increased. Those have been covered without restrictions by some television stations, and they have taken place in indigenous communities of the high Andes in the sight and presence of the police, with the subsequent tolerance of the public ministry of the judges and of the same government. Well, there are several of the Ministries or levels of the State that should intervene to put an end to these wild and primitive practices"[523]

The ethno-racial policy of the State regarding the justice administration has not changed in the 20 years of the Multicultural (1998) and then the

[523] (Alcívar 2016)

Plurinational (2008) State. The response of the ordinary justice, the National Council of the Judiciary and the Attorney General was publicly known, and the La Cocha case was the opportunity to do make the society aware that the State would not going to let the Indigenous law application keep existing without serious limitations. The head of the National Judiciary Council, Gustavo Jalkh, publicly opposed the application of Indigenous law, which had a strong influence on the decisions of the judges since this council has the power to discipline judges whose interpretations are considered by the council as an “inexcusable error” of interpretation. Jalkh, in an intervention to the assembly, pointed out that "indigenous justice must be applied to internal affairs. (...) Processes have already been opened to sanction bad judges who misuse this right of indigenous peoples for particular interests.”[524]

President Rafael Correa himself pronounced on the case, describing it in terms of "the need to abandon these savage practices that challenge the law of the central State and that must be applied to all Ecuadorians throughout the national territory".[525] In this sense, the decision of the Constitutional Court, the actions of the council of the judiciary and the attorney general's office, as well as the declarations of the president, show a State policy that tries to discourage the practice of cultural customs alien to the idea of what is civilized under the western paradigm: jail.

TABLE 6.3. Decisions of the Constitutional Court on indigenous peoples’ cases

[524] (Jalkh 2013)
[525] (Redacción Política 2010)https://www.eluniverso.com/2010/07/19/1/1355/cocha-indigenas-dicen-correa-basta-senor-presidente.html

Before	Action	After
The Constitution Establishes that prior consultation is a duty and has to be conducted with the aim of gain the consent of the Indigenous Peoples	Decision in the Unconstitutionality of the Mining Statute Case	It is not a duty without a statute that develops the right. No statute has been approved with a prior consultation process. No statute on prior consultation has been enacted
Application of Indigenous Law does not have any limitation	Decision in the La Cocha Case	Murder and manslaughter crimes cannot be regulated by indigenous law.

In the court's decision little or nothing had to do with the applicable international law. Even though ILO Convention 169 recognizes the right of indigenous peoples to resolve their internal conflicts in accordance with their ancestral customs and that this provision in other countries such as Colombia has led to the recognition of indigenous peoples' decisions even when these contravene conventional social notions of the ways in which social conflicts can be resolved through criminal law.

Finally, for CONAIE this was a case that generated consternation and rejection, given that, as established in Chapter 4, indigenous justice is one of the cornerstones of the plurinational State.[526] This decision opens the door to

[526] (Yumbay 2017)

future restrictions to Indigenous law; the objection of the lack of protection to individual rights could be extended to virtually any crime, and, in doing so, would turn the indigenous law and the plurinational state more and more illusory. [527]

As was the case during the Correa period, the indigenous movements did not have a strategy that would allow them to influence decisions taken by institutions of such importance as the Constitutional Court. The Court is the legitimate interpreter of the 2008 constitution and their decisions are understood to join the body of the Constitutional law.

CONAIE was able to constitute in a constituency of accountability that made politicians who participated in the legislative and executive branches to respond to their demands on social justice and ethnical recognition. It was how their collective actions threatened the possibilities of governability what create the challenge, for the uprisings showed how effective their collective power could be. However, in the legal field, power corresponds to a different rationale; the lack of independence in Ecuador has made the judges accountable only to the politicians that put them in power and subsequently threaten their positions. In addition, the lack of integration of the plurinationaly and the indigenous peoples' rights into the legal theory and the idea of the law, make it easy for the State to ignore the claims of implementation of the peoples.

[527] (Redacción 2010)

Chapter 7

7. DISMANTLING THE PLURINATIONAL STATE ACT 2. THE GRADUAL EXTERMINATION OF THE INDIGENOUS PEOPLES LIVING IN VOLUNTARY ISOLATION

There was October 19 of 2015, the Inter-American Human Rights Commission called a hearing on the Tagaeri and Taromenane People v. Ecuador. The petitioners - the plaintiffs - were not affiliated activists, they were the CONAIE and a young social movement, “the Yasunidos”. The petitioners presented the testimony of the Alicia Cahuilla, the Vice-president of the Waorani Nationality of Ecuador (NAWE for its abbreviation in Spanish). The State lawyers offered the testimony of Moi Enomenga, the president of the NAWE.

While we were waiting for the hearing to start, we bumped into Moi in the corridor outside the court room. Several of the petitioners’ lawyers had known Moi for several years due to his activism for the rights of the Waorani people. Moi looked happy to see us there and talked for a little while with us until one of the lawyers of the General Attorney’s Office of Ecuador approached and took him away. The next time we met eyes in the court room the cordiality was over. His testimony revealed why. The last massacre of the Tagaeri and Taromenane Peoples had happened some months ago, and a criminal procedure against several Waoranis was pending. Moi talked to the Commission as if he was defending them and trying to justify under his culture why his fellow Waoranis should not be condemned for the killing of approximately 40 persons, including women and children that were unarmed. The State used Moi’s testimony to

present the case as a conflict among indigenous peoples in which the state has no responsibility. There was a little anger and confusion in Moi's testimony and answers. It was clear for us that the state lawyers had told Moi that we were there pursuing a jail sentence in the case. And he was not only visibly mad with us, but also with his Vice-president Alicia.

Alicia's testimony was very different. She talked about how the Waorani Peoples have been displaced systematically from their territory by the oil industry. How since the state made forced contact with them, they have been trying to keep their culture and live from a forest that is disappearing, and how the Tagaeri and Taromenane Peoples have been affected from the fact that they are also losing their territory. She talked about how several Waorani want to protect the isolated Tagaeri and Taromenane, but that others have hurt them due to a cycle of revenge exacerbated by the economic interests of oil and lumber industries confronting the related peoples and putting them on the edge of physical and cultural extinction.

Neither Alicia, nor her lawyers, were looking for the incarceration of the Waoranis that were involved in the massacre. We were trying to make the State accountable for putting the Waorani Nationality (including Tagaeri and Taromenane) in this situation for the oil extraction. Moi was sure that that was not the case. He approached Alicia at the end of the hearing and threatened her life for the treason that he believed she had just committed. The event was so evident, that the Commission ordered interim measures of protection to Alicia

the same day (something more unusual considering the long times that the IACHR takes to arrive at any decision).[528]

At the time of the hearing, Moi Enomenga had been attending the *sabatinas* where Correa used to salute him as one of the high officials present in those events and talk about him as a great leader of the Waorani who was working with the *Revolución Ciudadana* to take the Waorani away from their miserable condition of life. While Correa kept his invitations to Moi, his policy of rejecting the competence of the IACHR to order interim measures left Alicia without protection.

Self-determination of indigenous peoples finds its most clear and challenging case in the indigenous peoples living in voluntary isolation. These Ancient peoples who refuse contact with the Western world appear throughout the history of America, because of predation and the violent practices during the colonization. States and the economic interests of the mainstream culture try to assimilate these people, by contacting them in a violent and arbitrary way, or by changing the way in which they use their territory and resources. By these practices, states are denying these people their human dignity based on a having different conception of development and wellbeing.[529] Respecting self-determination of these peoples implies not contacting them by any means, protecting their territory from third parties, and even creating a buffer zone to prevent external invasions and pollution of their air and water. In the Constitution

[528] (Interim Measures Alicia Cahuiya v. Ecuador 2015)
[529] (Brakelaire and Possuelo 2007, 27)

of 2008, there is an explicit prohibition to conduct any extractive activity in their territory. The prohibition includes the definition of a crime (ethnocide) - something that is very uncommon in a Constitution.

Rafael Correa's government started using the protection of Tagaeri and Taromenane as one its major projects. The "initiative Yasuni ITT" was launched by Correa's government to the international community in order to collect with the hope that the donations would reach half of what the State would gain by extracting the oil of the Yasuni Park (where the Tagaeri and Taromenane live), and if this target was reached, then they would leave the oil underground and not extract it. The Plurinational State was tested again. This chapter will describe how the branches of the state reacted when they were confronted with the opportunity of giving some real meaning to the Plurinational state.

7.1. A story of three massacres

There are difficulties in describing and defining these peoples, especially in determining their representation or even probing their almost mythical existence.[530] Some authors call these indigenous peoples "without contact", but in fact saying that they have refused contact is more accurate, so it is better to call them "Indigenous People Living in Voluntary Isolation" (IPLVI). It is difficult to establish the names of these groups, whether these peoples identify themselves as a part of a bigger group, or what their ways of life are. From the Waorani's narratives, anthropologists have identified two groups of IPLVI in

[530] (Observatorio contra la discriminación y el Racismo 2012, 12)

Ecuador - the Tagaeri and Taromenane peoples; however, the debate about whether these peoples are now just one group or consist of more than these two is still open.[531]

Tagaeri and Taromenane are Waorani words and come from information provided by some Waorani interviewed by researchers and religious groups who worked in the Amazon region. Their relationship with the Waorani nationality is always an issue of debate, but there is no doubt about the close relationships (not always pacific) and the similarities between these groups.[532] The Waorani people are nomadic and are located in the territory corresponding to the Ecuadorian Amazon next to the Cononaco river. These people have had contact and relations with Western culture since the 20th century. Testimonies obtained from elderly Waorani families and records of religious groups working in the area indicate that the Taromenane belonged to one of these Waorani families who felt fear and rejection due to the colonization and exploitation within their territory, so decided to isolate themselves and to live by their traditional practices without any contact with cowories.[533] The name of the leader of the Waorani family was Taga; this is the reason why Waoranis call them Tagaeri or “the people of Taga”. Meanwhile, the Taromenane apparently came from entirely different families. Waorani’s oral traditions describe them as racially different: Taromenane are tall, lighter-skinned, and speak with a different accent. They could be people originally from the Colombian Amazon who

[531] (Proaño García 2008, 12)
[532] For a description of the worldview of the Waorani, see (Rival 2016).
[533] "Non-humans" in the Waorani language.

migrated at the beginning of the 20th century, escaping from the exploitation of rubber.

Some experts defend the hypothesis of the combination of these two groups.[534] Due to their small number, Tagaeri and Taromenane set up alliances. For the Waorani, the Taromenane are "other people", even though now they have merged with the Tagaeri, the Waorani still see them as intruders living in their territory.

The history of the indigenous peoples in the Ecuadorian Amazon is full of events of violent contact through cultural destruction, evangelization, colonization and territorial displacement. The first authorizations to enter the region were granted to Catholic missions that later would create the first cities of the Amazon territories. Later, settlers migrated from all over the country to convert these lands into areas for agriculture, exploitation of rubber and oil extraction. One of the nationalities that suffered a violent contact was the Waorani. They are not a nation from the Western conception; they do not have a central power and their decisions are not approved in a horizontal way, but they are families who share a language, a culture and a worldview.

These peoples live in common houses of up to thirty people, and they are hunter-gatherers who practice shifting agriculture and are entirely dependent on the resources within their territory. They try to keep their own number down, based on principles of kinship and marital relations, enabling them to be self-

[534] (Cabodevilla 2004, 155)

sufficient and autonomous within their own territory. Each member must contribute to the group's subsistence work; they have a leader whose status comes from their abilities as a warrior and a peacemaker. Each family takes its name from an old man or old woman who is a common ancestor of the family.

The Waorani are nomadic people whose movement helps maintain the delicate balance between their hunter-gatherer way of life and the natural resources of the jungle. They move systematically at the end of each generation, and then they go back to the place of the past generation looking for their ancestors' marks:[535]

These families maintain constant relations of friendship exchange or war. The war obeys a social pattern that is not with the aim of the conquest of other's spaces, territories, resources, or the extermination of the other group, but its purpose is to maintain the independence and to keep the social value of being a warrior.[536]

An important feature of the Waorani is that they are exogamous groups. For that reason, the kidnapping of women from other families is a common practice, and this is one of the main reasons that there are relations between different families. These relationships include Tagaeri and Taromenane families.[537]

[535] (M. Cabodevilla 2004, 48)
[536] See (Laura 1996)
[537] (M. A. Cabodevilla, Pueblos ocultos e innecesarios: El caso de Ecuador 2007)

The delimitation of the territories of these indigenous peoples should not be done by simply considering geographical or economic conditions, but by considering the isolation as a necessary condition for their life and their protection, because these peoples interpret war as a normal part of a relationship. However, if war against them involves firearms, then they will be exterminated.[538]

7.1.1. The attack of 2003

The most significant attack that the IPLVI suffered happened in May of 2003 when nine Waorani men assaulted a house belonging to the Tagaeri-Taromenane group. The Waoranis, using spears and shotguns, killed twelve people, most of them women and children. The head of one of the dead men was displayed in the streets of the closest town from the massacre, the city of El Coca. The express motive for the attack was a vendetta due to the killing of a Waorani man that had occurred ten years before.[539] However, the Waorani that committed the 2003 attack were in the timber business, and the timber companies - after several lumberjacks died by the spears of the Tagaeri-Taromenane - saw the presence of the IPLVI as an obstacle to business.

Babe, the elder leader of the community, invited Waoranis of different communities to a party in Tiguino town, with the aim of planning the massacre. After the meeting, the people who had attended the party decided to go directly

[538] (Proaño García 2008)
[539] (M. A. Cabodevilla, El Exterminio de los Pueblos Ocultos 2004)

to the Tagaeri-Taromenane's territory. In the meeting, the son of the Waorani that had been asked the assembly for justice, so the elder Babe gave the group boats, provisions and fuel for the punitive expedition.[540]

Although the logic of a clash like this between Waorani families for these reasons is possible, the fact that the attacking community was involved in illegal timber activities was very suspicious, because the Tagaeri-Taromenane were attacking lumberjacks, and thus harming the timber market.

The office of the Pastaza's prosecutor initiated an investigation (which ended up having no conclusive findings) after the inspection of the scene of the massacre and the autopsies of the corpses. This episode can be seen from a Western perspective as a way to punish the perpetrators. However, from a culturally sensitive analysis the question should be whether someone took advantage of the internal dynamics of the Waorani people.[541]

The president of one of the main organizations of Waoranis (Organización de la Nacionalidad Waorani del Ecuador - ONAWE) declared that the State should amnesty the killers and ask them not to do it again.[542] Meanwhile in the Western world, firearms have been distributed to the Waoranis, and the families in the timber business have been manipulated by the wood buyers and oil companies. The investigation was undertaken without considering the influence of external people in the conflict.[543]

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[540] Ibid.
[541] Ibid., 23.
[542] (Aguirre 2001)
[543] (Barraondo López 2005, 73)

The reopening of the investigation is necessary to establish a precedent for these kinds of crimes. The Tagaeri and Taromenane are in permanent danger because of the impunity of the attack of 2003. Meanwhile, the Waorani nation has been stigmatized for the acts of just a few members. Most of the Waorani families trying to survive living by their traditional practices suffer similar aggressions as the IPLVI families. Finally, it is important for Ecuadorian society to understand the consequences of the oil extraction in the Amazon region to realize the price that the ancestral peoples of Ecuador must pay for the amenities of the cities.

The events that occurred in 2003 have generated conflicts inside the Waorani nation. An important group of Waorani people believed that the influence of timber and oil companies was responsible for the massacre. In cases where the oil frontier expansion displaces the Tagaeri-Taromenane outside their territory, it results in clashes with Waoranis and settlers. In cases like this, the IPLVI will attack to defend their territory, and it is reasonable to believe that, under this risk, settlers and lumberjacks will eventually look for this contact to use the “self-defense excuse” and kill some Tagaeri-Taromenane.

7.1.2. Other attacks after 2003

The incident of 2003 attracted the attention of the whole country. Since that incident, further similar episodes involving IPLVI have been reported. In 2005, three illegal lumberjacks entered the Tagaeri and Taromenane’s territory, and the IPLVI attacked them with spears. One of them said that the attackers were

naked and resembled the Waorani. Another one, Efrain España, died, and his body was recovered by other lumberjacks and Waorani.[544]

Even though the lumberjacks broke the law by entering Tagaeri-Taromenane's territory, there was no investigation. Some Waorani reported these expeditions of armed personnel into their territory to the authorities. Apparently, these expeditions did not only have the intention to extract timber, but sometimes to decrease the number of IPLVI.[545]

Another incident occurred in the zone of the Armadillo oil camp in 2009. Armadillo is a zone where both independent and official information has revealed the existence of IPLVI. The maps created by the Environmental Ministry appoint that the "Armadillo Clan" lives in the area, and personnel of the Ministry have found several signs of their presence there. In this area it is possible to clearly identify the factors that are affecting the chances of survival of the Tagaeri-Taromenane People: (i) it is the easiest point of access to their territory by land, (ii) it is the part of their territory that adjoins peasant villages (such as Canelos, Nueva Esperanza and Los Reyes), and (iii) it is a zone with two oil camps (Armadillo and Hormiguero South) that contaminate the jungle with pollution and noise. Furthermore, the prosecution office said that the noise was one of the reasons for the IPLVI to move from their territory and go to the

[544] (Aguirre 2001, 20)
[545] A clash between Tagaeri-Taromenane and lumberjacks in April 26, 2006 has not been confirmed yet. However, rumors of a revenge of the lumberjacks and the killing of 30 Tagaeri-Taromenane came from different sources and the media widely broadcasted the news. (Aguirre 2001, 17)

villages.[546] The killing of the Duche family in 2009 in *Los Reyes* is a sign of the pressure that the Tagaeri and Taromenane are suffering in their territory. For the settlers of *Los Reyes,* the Tagaeri and Taromenane's presence causes fear, and even if they understand that the IPLVI are not responsible for their acts, they are armed and ready to defend themselves from a new attack.[547]

The Environmental Ministry investigated the incident, and presented a report establishing the highest vulnerability of the IPLVI in the Armadillo camp zone. This area is a zone of possible forced or fortuitous contact that puts both the colonists and the IPLVI families in danger. The Ministry said that the oil extraction activities were the cause of the situation and asked the Ministry of Non-renewable Natural Resources to take actions to stop all oil activity in Armadillo. The Ministry went even further and talked about the responsibilities under the criminal code (genocide and ethnocide) for which public authorities shall be liable if they do not take actions to stop the genocide.[548] A short time after this report appeared, the author of the report was dismissed, and the documents and the competences on IPLVI protection passed to the Justice Ministry. A few months afterwards, the new office in charge of the case denied the existence of Tagaeri and Taromenane people in Armadillo-Los Reyes.

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[546] Ecuador. Prosecutor of Orellana. *Investigation No. F1-643-2009* [investigation on the murder of the Duche family], August 10, 2009.
[547] Ecuador. Environmental Ministry, "Executive Report on the Spears Attack in Los Reyes Community". August 19, 2009, 16.
[548] Ecuador. Environment Ministry, "Executive Report on the Situation of IPLVI in the Sector of Armadillo-Los Reyes". January 27, 2010, 6-8.

7.1.3. The attack of 2013

On March 5th, 2013, a group of IPLVI attacked with spears and killed two Waorani elders, Ompure and Buganey, in the Waorani town of Yarentaro. Ompure had contact with the Tagaeri and Taromenane people before he was killed. In those meetings, the IPLVI warned Ompure that he should stop cowories crossing the river.[549] The request of the IPLVI to the old Waorani was impossible for him to achieve: to stop the expansion of the oil industry. According to some testimonies of Waorani people, the noise of the oil camps is one of the main things that cause a nuisance to the IPLVI and it could explain their decision to attack in Yarentaro. The same day, one of Ompure's sons publicly announced that he would take revenge.

Several actors from the civil society demanded the State to take immediate actions such as looking for a redress to Ompure & Buganey's community and undertaking firearms controls in the Waorani's communities, among others. The Catholic Church wrote to the Secretary of the State Department asking for immediate provisions to stop a new massacre. The State did not take any action.

On March 30th of 2013, a heavily armed group of Waoranis attacked a Tagaeri and Taromenane's house. The attackers killed approximately 30 people - men, women and children. The official position of the State was to express regret for the victims of an "inter-ethnical problem" in which the oil industry has

[549] (Cavodevilla and Aguirre 2013)

no responsibility.[550] While the official position about the massacres suffered by the Tagaeri and Taromenane is to deny the responsibility of the State, the oil extraction policy is to expand the operations in areas in which the State has recognized the presence of IPLVI.

7.2. Attempts to protect the IPLVI - Yasunidos, the social movement that tried to keep the Yasuni alive

7.2.1. The IACHR's Precautionary Measures (MC-91-06)

In 2006, a group of people concerned about the situation of the IPLVI presented a request for precautionary measures to the Inter-American Commission on Human Rights (IACHR). The measures were granted on 10th May of 2006.[551] As a consequence, the State created the National Plan of Precautionary Measures with the goal of complementing the IACHR measures. The Plan was taken over by the Environmental Ministry. Researchers and experts on the IPLVI were hired to design a plan to reduce the danger to IPLVI from third parties.

Under the first administration of the plan, a system was created to control illegal timber activities. Also, they tried to locate the IPLVI to come up with the best measures for their protection. Their research showed that there was a family of IPLVI living close to an oil camp (the Armadillo camp) which was a surprise due to the generally accepted idea about them being located even

[550] (Carvajal, Dos visiones waorani se enfrentaron en la CIDH 2015)
[551] (Precautionary Measures Indigenous Peoples Tagaeri and Taromenane v. Ecuador 2006)

deeper in the jungle. They concluded that in the place of Armadillo there must be stronger controls for illegal activities and the oil extraction should be stopped. The office sent a request asking the Mining and Oil Ministry for the immediate end of the oil activities occurring in the Armadillo camp. After the reports on the responsibility of the State for the attack in *Los Reyes*, the office was moved to the Justice Ministry where the vision of the program changed. First, the new official position was that there were no IPLVI near the Armadillo camp; and, second, even if there were IPLVI in the area, the camp is outside the "Intangible" zone for Tagaeri and Taromenane (ZITT),[552] so they were outside their territory.[553]

In early 2012, Rafael Correa, President of Ecuador, started a media conflict with the IACHR because of its decision to grant precautionary measures to a private Ecuadorian newspaper. Since then, Correa´s Foreign Service has engaged in a campaign against the IACHR accusing the institution of being under the influence of the United States and of taking illegal prerogatives as order precautionary measures. This international relations policy affected the implementation of all the precautionary measures, including the ones granted to the Tagaeri y Taromenane. Since 2012, the budget of the program has been decreasing. The new massacre of 2013 confirmed the inefficiency of the precautionary measures.

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[552] The ZITT was created by an executive order in 1999 by President Jamil Mahuad. Article 1 establishes that the ZITT is a zone where all extractive activity is forbidden. Ecuador. President of the Republic. Executive order No. 552, Supplement of the official registry no. 121. February 2, 1999.

[553] (Observatorio contra la discriminación y el Racismo 2012, 18)

7.2.2. The Yasunidos Movement and the request for a national referendum

On April 12nd of 2014, an organization of young people called “Yasunidos” presented to the National Electoral Council (CNE for its abbreviation in Spanish) 757,923 signatures supporting their request for a national referendum for deciding the future of the Yasuni park. Yasunidos tried to prevent the oil exploitation in the park after the Government’s decision to withdraw the Yasuni ITT initiative. The signatures of support are a condition to call a referendum proposed by the civil society. The gathering of the signatures was a symbolic collective action that took months and was useful to spread information about the biodiversity of the Yasuni Park and the constant threat of the disappearance of the Tagaeri and Taromenane People.

President Correa did not want the referendum. This was a contrast with his policy of regularly going to the ballots to reaffirm his electoral support. By the date that Yasunidos presented the request, Rafael Correa’s party had never lost an election. The challenge of the Yasunidos was double. On one hand, Yasunidos told those who had signed the document asking for a referendum that they had the right to choose no matter if they wanted to protect the biodiversity of the Yasuni park and the lives of the Tagaeri and Taromenane Peoples or not. On the other hand, they expressed their concern about the possibility that Correa would use his power to stop the referendum as it was against his discourse of being unbeatable in an election, probably because he thought he could have lost this electoral process.

The suspicions were proven to be justified. The CNE voided 257.601 signatures for reasons such as: the size of the sheets, the non-alphabetic order of the names, the lack of a copy of the DNI of the signatures collectors, or subjective criteria such as the impossibility of "reading" what the signature stood for. The rejection of the referendum was a national scandal due to the media coverage. The influence that the President Correa had over the CNE was publicly known, and the rejection of the referendum increased the indignation of the population, even of the people that signed just to have chance to vote supporting Presidents Correa's point of view on the matter. The Yasunidos are still active and they are litigating against the state in the Inter-American Commission on Human Rights.

7.3. The National Assembly redraws maps, and the transit from not respecting self-determination to a criminal enterprise

On October 3, 2013, the National Assembly approved the "national interest declaration of the oil extraction in the Yasuni National Park".[554] Extraction activities are forbidden by the Constitutions in Tagaeri and Taromenane's territory, so, to arrive at the decision, the discussion was focused on the existence of IPLVI in the Yasuni National Park. Several months before the discussion took place, the Environmental Ministry produced a map that located

[554] Ecuador. National Assembly. Decision on the National Interest in Oil Extraction in Zones 31 and 43 inside the Yasuni National Park. In Supplement of the Public Registry No. 106, October 22, 2013: 2.

the Tagaeri and Taromenane in the Yasuni National Park. The government used that information to advertise[555] the “Yasuni-ITT initiative”, an international fund that planned to keep the Yasuni and the IPLVI intact. However, when the time to decide if there was going to be exploitation in the Park, the Justice and Human Rights Ministry presented to the Assembly a new map without Tagaeri and Taromenane living in the Yasuni. The changing of the map produced direct effects on the protection of the territory of the Tagaeri and Taromenane; their territory and therefore protection was now reduced, and the threat of a deadly encounter between IPLVI and oil companies personal increased. A new massacre in the area will be the result of a highly coordinated scheme to increase the State’s revenues from oil industry, regardless of the fact that it might entail the extermination of these peoples.

There is ongoing discussion on the responsibility for these acts. If we accept that the massacres against the Tagaeri and Taromenane constitute the crime of genocide, who is responsible for it? Lumberjacks, oil companies’ workers, State officials, and Waorani members were involved in different ways in the events, and their level of responsibility must be established. Gordon, talking about Hannah Arend work, highlights how modern genocide needs bureaucrats to be accomplished.[556] In the case of the Tagaeri and Taromenane the actions and omissions that aids, abets, or otherwise assists the commission

[555] Ecuador. Government of the Republic of Ecuador, “El sueño ecuatoriano” [The Ecuadorian Dream], accessed on: March 17, 2017. https://youtu.be/whxwMSa6Uwc
[556] See (Gordon 2002, 80)

of the crime of genocide[557] came from several people of the Executive, the Legislative and the Judiciary branches. The actions include all the decisions that provoked pressure in the Waorani, Tagaeri and Taromenane's territories, the decision of the National Assembly to extract oil from the Yasuni Park, the changes of the official maps of the presence of the Tagaeri and Taromenane, the decisions of the judges to reject all the requests of protection under the argument of non-legitimate representation, among others. The omissions are also significant: the lack of prevention of the 2013 massacre, the lack of serious investigation and prosecution and condemnation of the perpetrators, the lack of control of illegal lumber activities, among others. These atrocities were impossible without the participation of several technicians and politicians who decided to ignore any worries about the life of the Indigenous Peoples Living in Voluntary Isolation by hiding behind formal interpretation of the law or the means to identify the presence of these groups, and blaming the Waorani for the massacres:

It may precisely be the indifference, the myopia, the belief in one's own good conscience that make it possible to fill that particular job with thorough and competent people. If that is so, then no amount of regret, sincerity or neutrality should shield the acts of systematic destruction. Otherwise the very thing that accomplishes the destruction so effectively will be what shields the planners and decision-makers from culpability. Nor should institutional legalization permit

[557] Rome Statute of the International Criminal Court, art 25.3.c.

or protect such acts, regardless of what that institution might be, and regardless of what laws are being invoked.[558]

The case of the Tagaeri and Taromenane goes beyond the lack of respect of their self-determination to a state crime. Even if this analysis exceeds the scope of this dissertation, investigating the criminal arguments helps to understand how far the state institutions went after crossing the line of the principle of the plurinational state.

In International Criminal law there are at least four useful categories to answer the question of who is responsible for the genocide committed against the Tagaeri and Taromenane peoples: direct responsibility, complicity, joint criminal enterprise, and conspiracy.

Direct responsibility refers to the perpetrator (the principal to a crime in common law or the "material author" for civil law), the person who "with the relevant *mens rea* does distinct acts which together constitute a sufficient act for the *actus reus* of an offence".[559] In the 2003 and 2013 massacres, it is public knowledge that members of the Waorani nation committed the killings; however, that does not necessarily imply that they committed the crime with the "special intent" of destroying the group. The Ecuadorian Constitutional Court decided that the Waorani people (as indigenous people in initial contact) could not be judged for the crime under Western standards, so the tribunal judging the 2013

[558] (Gordon 2002, 81).
[559] (Card, Cross and Jones 2010, sec. 23.1) and (Van Schaack and Slye 2010, 783)

massacre should apply the law with an intercultural interpretation.[560] That interpretation should consider the traditions, customs and law of the Waorani. At press time, there was not a final decision of the Ecuadorian courts about this case. Conversely, in the 2006 massacre, the attackers would have had the knowledge and the willingness of destroying the Tagaeri and Taromenane Peoples.

Complicity liability emerges when a person is held liable for the criminal act of the perpetrator because he/she substantially assists the commission of the crime (*actus reus*).[561] Several examples of substantial assistance could be found in the massacres: the supply of weapons and fuel for the massacre of 2003, or the inactivity of the authorities responsible for the protection of the Tagaeri and Taromenane peoples in the prevention of the 2013 massacre. To establish the liability for complicity the accomplices should not share the *mens rea* of the perpetrators:

With regard to mens rea, the Trial Chamber must determine whether it is necessary for the accomplice to share the mens rea of the principal or whether mere knowledge that his/her actions assist the perpetrator in the commission of the crime is sufficient to constitute mens rea in aiding and abetting the crime. The case law indicates that the latter will suffice.[562]

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[560] The Prosecutor Office of Orellana initially accused seventeen Waorani of genocide charges. See Ecuador. Constitutional Court. [Waorani Case], Judgment No. 004-14-SCN-CC, August 6, 2014.
[561] See, (Prosecutor v. Anto Furundžija 1998, par. 234.)
[562] (Prosecutor v. Anto Furundžija 1998, par. 236)

The joint criminal enterprise doctrine implies a plurality of persons acting to make the crime possible. This doctrine might be applicable if a new massacre (or a clash) occurred in the Yasuni Park. Public officials in different positions and hierarchies worked together to make the oil extraction in the IPLVI's territory possible, from the technicians that changed the maps to the representatives that voted for the decision. Several other actors will be needed to start the extraction. All of them are acting with the knowledge and willingness of the consequences of their acts. Moreover, part of the operation will include military or private security forces. A confrontation between these armed personnel and the IPLVI will end in an uneven combat that could take the lives of several Tagaeri and Taromenane. The joint criminal enterprise doctrine has as elements of the actus reus: (i) a plurality of persons, (ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime, and (iii) participation of the accused in the common design. The mens rea implies the intention to participate in the crime, or "responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk".[563] All those involved in the oil extraction in the Yasuni park willingly took the risk of the destruction of the Tagaeri and Taromenane Peoples.

[563] (Prosecutor v.Tadić 1999, par. 228)

Finally, the conspiracy is “an agreement between two or more persons to commit the crime of genocide”.[564] The *mens rea* of the conspirators is the same special intent or *dolus specialis* of the crime of genocide, that is the intent to destroy in whole or in part a specific group, as such. The *actus reus* in this doctrine differs in Civil law and Common law. In Civil law, conspiracy is “the concerned agreement to act, decided upon by two or more persons”.[565] Meanwhile, under Common law, conspiracy is “constituted when two or more persons agree to a common objective, the objective being criminal”.[566] The conspiracy doctrine is useful to connect the notion of state responsibility and individual liability, because large scale crimes as genocide usually need the planning and participation of several public officials from the highest ranks. Authors like Schabas even argue that the existence of a state policy should be a requirement for establishing if a crime has the gravity to be considered an international crime:

Probably the best argument for strengthening the policy requirement is its capacity to better articulate the relationship between State responsibility and individual criminal liability. The Nuremberg judgment was correct to insist that crimes are committed by individuals and not by abstract entities, but individual crimes committed in isolation from abstract entities are of little or no interest at the international level. Indeed, the existence of a State policy may be the best

[564] (Prosecutor v. Alfred Musema 2000, par. 191)
[565] Ibid, par. 189.
[566] Ibid, par. 190.

criterion in distinguishing between individual crimes that belong to national justice systems, and international crimes with their special rules and principles concerning jurisdiction, immunities, statutory limitations, and defenses.[567]

The approval of the oil production in the Yasuni Park and the resulting effects on the life of the Tagaeri and Taromenane Peoples could only have happened with a series of concerted acts such as the modification of the official maps of their presence and the ballot on the President's initiative in the Assembly. Moreover, it is not likely that the President would have sent the proposal without a discussion of its implications with his Cabinet, and the representatives of the President's party would likely have discussed the implications of the initiative with him or his Cabinet members. Therefore, the high authorities of both executive and legislative branches concerted to act in the together to approve the oil extraction in the Yasuni Park regardless of the consequences to the Tagaeri and Taromenane Peoples.

Under the Convention on the Prevention and Punishment of the Crime of Genocide, conspiracy to commit genocide is an independent crime,[568] but that changed in the Rome Statute[569] and the Ecuadorian Criminal Code.[570] However, conspiracy remains in International Criminal law as a doctrine to establish liability.

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[567] (Schabas 2008, 983)
[568] Convention on the Prevention and Punishment of the Crime of Genocide, 1948, art. III.
[569] Rome Statute, Art. 3.
[570] Ecuador. Integral Criminal Code. In Supplement of the Official Registry No. 180. February 10, 2014: Art. 79.

7.4. The Constitutional Court's position on the massacre of 2013

After the massacre of 2013, the Prosecutor's Office of Orellana presented a criminal charge of genocide against sixteen Waorani men that participated in the attack against the Tagaeri and Taromenane People. The lawyer's defense was the tradition of revenge of the Waorani Nationality: Tagaeri and Taromenane attackers killed two Waorani elders, Ompure and Buganey, so the attack should be considered an ethnically adequate response.

Other actors, such as the Capuchin Monks' Mission in Orellana, maintained that the problem was more complex than that, and even if there is some amount of responsibility of the Waorani, the oil extraction that puts pressure on the Tagaeri and Taromenane's territory was the key factor. Actually, months before Ompure was contacted by Tagaeri and Taromenane persons, the Mission demanded that they stop the noise (the noise was produce by the oil pump of one of the oil fields). The lack of response of Ompure apparently provoked the attack on the elders. The mission also demanded that the state take actions to stop a new revenge attack by the Waorani after the killings of Ompure and Buganey. No effective actions were taken, as was discussed in the last section. President Correa addressed this issue in one of his *sabatinas* where he disagreed with those pointing to the state as being responsible for the attack. For him this was an inter-tribal problem.

In the light of the ethnical argument, the general prosecutor's office sent the case to the Constitutional Court. The court should have decided if there were

grounds to accuse the Waorani men for genocide and how their customs were, or were not, compatible with the Constitution and the plurinational state.

As the Court did in the La Cocha case, it started with a definition of the plurinational state:

"The Ecuadorian Constitution recognizes, in article one, that the Ecuadorian State is Intercultural and Plurinational. That allows us to identify that there are different cultures and ethnic groups in our country, and that diversity has allowed the configuration of our state model. In conclusion, in our country cultural diversity exists, leaving behind practices of exclusion that have existed and still exist in our continent"[571]

This confusing definition had one recognizable argument, plurinationality meaning multiculturalism, or the recognition of cultural/ethnical diversity. The discussion on the case was not about whether under Waorani law the perpetrators had the right to kill the Tagaeri and Taromenane, but if under mestizo/western law the Waorani were conscious of the illegality of the acts that were committed, and especially their intention of destroying the group.[572]

The decision of the Court was that the Criminal Code, regarding the crime of genocide, should be interpreted in an intercultural way. That means taking

[571] Constitutional Court of Ecuador, Waorani Case, August 6th, 2014, p. 13. "La Constitución ecuatoriana reconoce en su artículo 1 al Estado ecuatoriano como intercultural y plurinacional lo cual nos permite identificar que en nuestro país existen diferentes culturas y grupos étnicos que han permitido la configuración de nuestro modelo estatal: en ese orden de ideas se colige en nuestro medio la existencia de una diversidad cultural. abandonando prácticas de exclusión que han existido y existen en nuestro continente."

[572] (Judgement No. 004-14-SCN-CC 2014, 18)

into consideration the cultural characteristics of the Waorani people. For the Court, the detention during the trial violated the collective rights. The court did not forbid the criminal judge to present charges of genocide.

In analyzing the cultural aspects of the attack, the court did not consider other factors besides the cultural idea of the revenge. However, the weapons that the Waorani man used were not traditional, and that the reason for the attack of the Tagaeri and Taromenane was external from their culture: the noise of the oil extraction.

The case was an opportunity of the Court of protect the lives of the Tagaeri and Taromenane through opening a comprehensive investigation that includes all the companies and public officials that benefit from the extermination of the Tagaeri and Taromenane, and that have been involved by actions or omissions in the massacres.

What apparently is a decision that allows indigenous peoples self-determination, is really a wordy decision that does not solve the problem about whether the national criminal system will process and eventually incarcerate the Waorani men. It did not broaden the scope of the investigation to make the protection of these peoples effective. After the decision of the court, the accusers were freed to defend themselves in liberty. However, the merits hearing has been suspended several times because the accusers do not attend. At this pace, this last attack will be, like the others, subject to impunity.

Chapter 8

8. CONCLUSION

As has been shown in the previous pages, the relationship between legal change and social change is not simple, nor is it a one-way street. These doubts are the subject of countless academic papers, including Rosenberg's "Hollow Hope"[573], on the social impact of the Brown vs Board of Education decision and the civil rights movement. His criticism of the idea that the landmark decision was a huge driver for dismantling the segregation in the United States was a challenge to an important narrative about the social movements use of strategic litigation to achieve social change through legal change. These criticisms are also valid regarding social movements' goal of making profound changes within society through legislative reform, for the depth question is if the normative has or not the power to change reality. Legal change does not necessarily imply social change.

This does not mean that legal change is ineffective or that it should disappear from the goals of social movements, but rather that it underlines the necessity of a better understanding of the complex mechanisms that operate in law. Moreover, the analysis of the relations between legal change and social change offer social movements the opportunity, on the one hand, to increase the chances of success in using legal change as a part of a broader strategy to change society, and, on the other hand, to prevent what appears to be short-

[573] See (Rosenberg 2008)

term failure in using legal change as a tool becoming a cause that demobilizes or discourages members of the social movement.

To better understand these mechanisms this work has been differentiating two aspects of legal change: legal text change and law change. Legal text change implies the modification of the texts that contain legal norms, which, being polysemic, offer almost infinite possibilities of interpretation that would be limited only by the concept that the society has of law. The concept of law encompasses much more than the text of statutes and judicial decisions, since it includes hegemonic legal theories, custom, the practices of the agents of the administration of justice and, above all, the notions of society about the Constitution as a social pact and justice as a value.

To achieve change in the concept of the law, i.e. law change, is a more complex process that occurs in the realm of the culture, and, to some extent, it is in the same dimension as social change. It is a change at the level of the concept of law that really has the potential to modify the reality of the society in which it is applied. What changes first the law, or the culture does not have an answer since both phenomena interact, they advance together according to a series of factors that do not allow us to arrive at a unique answer. Four of these factors have been considered in this dissertation: the activity of social movements, the domestic impact of international law, the ethno-racial policy of the State and the legal system.

This work was mostly organized chronologically as it seeks to construct a demonstrative narrative of the transit of the five-hundred-year process of

resistance by Ecuadorian indigenous peoples and how their claim to self-determination became the constitutional concept of the plurinational State. It is also an attempt to explain the creation of law from its material sources. Ecuadorian indigenous peoples began the formation of their first modern social movements by challenging society's notion of justice, and in doing so they became an interpretive community that based their authority on the historical exclusion from the political life of a State that never formally denied them the quality of life deserved by human beings. Such an interpretation of justice was not based on any existing rule in the legal system, so they intended to create law.

Indigenous peoples in Ecuador were seen by politicians of all sides and the mestizo society as a miserable social class. The left wing and the modern right wing considered that greater access to education and economic resources would be indigenous peoples' way out of poverty. While for the western world poverty should be measured by the lack of access to ownership of the means of production and accumulation of resources, indigenous peoples argue that poverty is the lack of choice of their own means of livelihood, which is intimately related to the protection of their territories. Hence, the Ecuadorian indigenous movement's interpretation of justice was not the redistribution of resources but the recognition of ancestral territories and self-determination as peoples.

After several debates within the indigenous movement and the analysis of western political institutions, the idea of the Plurinational State was conceived as the political entity that would allow the different nationalities that exist within

the country to develop their own political, social and development priorities from a perspective of equality between cultures that overcomes the hegemonic position that the western world view has imposed over the last few centuries.

After gaining the opportunity in the political field to move their concept of the plurinational state to the text of the Constitution of 2008, the social change expected has not arrived yet. The evidence obtained during this study demonstrates the low degree of implementation that these modifications have had regarding the plurinationality, which allows us to conclude that introducing plurinationality in the concept of law is a task still pending for the indigenous movement. Bringing plurinationality into the concept of law would allow it to reach its potential as a mechanism of change. Being part of the concept of the law, it can now gain the amount of legitimacy necessary to make it nonprofitable for members of society, politicians, judges and other actors to act against the self-determination, or if they do so they will risk their social, legal and economic capital. One of the pending tasks for the inclusion of plurinationality in the concept of law is to analyze the legal and social changes that the indigenous movement launched, especially in the last forty years, as a true process of creation of law; this is a demosprudential analysis.

Constructing a demosprudential narrative offers at least three important advantages. First, it gives meaning to the Plurinational State by analyzing its origin in the Ecuadorian indigenous movement. Second, it allows us to understand the legal changes bolstered by indigenous peoples as complex social processes that responded to the social acceptance of the exclusion of

indigenous peoples, the historical moment in which this social opening occurred in moments as transcendental as the drafting of the last two Constitutions of Ecuador and, therefore, how these changes do not respond to little reasoned innovations or novelties; therefore, they could not be easily modified. Third, they permit us to transmit these ideas of justice to a cultural level which directly influences the possibility of introducing the vision of the plurinationality into the idea of law.

The conclusions of this paper will be presented below, organized according to the four parameters that influence the relationship between legal change and social change:

Table 8.1. Comparing time frames and variables				
	Social Movement[574]	International Law	Ethno-racial Policy	Legal System
Colonial Period	Motive – There are casual challenges to local autonomy Capacity – Lack of spaces to build networks Opportunity – There was	Recognition of indigenous as persons based in the Ius gentium; origin of the IPL	Evangelization and civilization (manifest) Stablishing slavery conditions of work in the Haciendas (latent)	No recognition of rights against the state. Law is meant to help to control the colonies
Early Republic			Helping to overcome ignorance and	There are rights (life and property)

[574] See (Yashar 2005) and (Tarrow, Power in Movement: Social Movements and Contentious Politics 2011).- Changing citizenship regime that challenge local autonomy (Motive/incentive), Trans-community Networks (capacity), and Political Associational Space (Opportunity)

	not political associational space		poverty (manifest) Keeping the hacienda system (latent)	against the state. Those should be developed in statutes (civil code/criminal code). Personality is limited – indigenous peoples gain the right to vote in 1979
Modernization/ Dictatorship	Motive – There was not a challenge to local autonomy Capacity – Churches and schools as spaces to build networks Opportunity – There was not political associational space	Human Rights Movement - International Covenants/ILO	Redistribution of the land (manifest) Assimilate indigenous peoples as peasants (latent)	
Return to democracy	Motive – There was a challenge to local autonomy Capacity – Articulated network spaces Opportunity – There was political	169 ILO Convention	Protection of cultures and diversity (manifest) Assimilation into the mestizo society (latent)	Indigenous peoples rights (among other like the ESCR) were not recognized as part of the idea of law. Collective demands are

	associational space			dismissed with formal arguments
Constitution of 2008	Motive – There was a challenge to local autonomy Capacity – Disarticulated network spaces Opportunity – There was not political associational space	Returning to the sovereignty discourse – constant attack to the international human rights institutions		

8.1. Activity of the social movements.

In the first historical moments that we have analyzed, the Spanish Colony and the young Republic until the first half of the twentieth century, there was no indigenous social movement as such. In the Andean Region, the production mode of the hacienda did not threaten the community life of the indigenous peoples, which allowed the ethnicity to remain as a factor of identity that united the group. Where other social movements had to build cohesive and solidarity factors, such as class consciousness or gender consciousness, indigenous communities found both identity and solidarity in ethnicity. The collective actions of these two historical periods are sporadic and do not constitute a regional or

even national challenge to the central authority, nor were there any coordination relations between the different indigenous communities.

In the Amazon region, the scarce contact with the central State towards which the indigenous peoples of this region maintain reactions to the invasions of their territories that are not equal to the recognition of a state authority or of a society with which to negotiate power. This situation gradually changed during the first half of the twentieth century by the action of religious groups that interacted with indigenous peoples, but especially as a response to the actions of the extraction of natural resources (rubber, wood, oil, etc.) that changed the dynamics of indigenous peoples. Moreover, the first responses of the State to the demands of the left and of the indigenous peoples for land redistribution, far from being a response to the indigenous peoples of the Sierra's claims the response of the State meant the surrender of ownership of the least productive lands of the haciendas and for the indigenous peoples of the Amazon, the expansion of the agricultural frontier by the migrations of peasants seeking ownership of lands in the Amazon that the State had declared *res nullius* and therefore the dispossession of their ancestral territory.

The second half of the twentieth century is marked by the emergence of modern indigenous movements in which the FEI, the FENOC (now FENOCIN), CONFENIAE, ECUARUNARI and finally CONAIE stood out. The period of activity of modern indigenous movements has brought about the greatest legal change in terms of the recognition of indigenous peoples and nationalities in the country's history. The period of activity of modern indigenous movements has

brought about the greatest legal change in terms of recognition of indigenous peoples and nationalities in the country's history. Thus, in 1979, the right to vote was recognized for illiterate people, which directly affected indigenous peoples since the illiteracy rate in the indigenous population at that time was more than 90 percent, as explicitly recognized in the debates in the national congress on the subject. Subsequently, the 1998 constitution already contains a broad catalogue of indigenous peoples' rights, which was expanded in the 2008 constitution, not only by the recognition of new specific rights but also by the inclusion of the plurinational State.

This period is further divided into three parts: the first period covers the corporatist regime until 1978, the second period covers the neoliberalist regime until 2007, and the third period correspond to the three terms as president of Rafael Correa Delgado from 2007 to 2017. The use of the terms corporativist and neoliberalist regimes comes for the work of Deborah Yashar on the indigenous movement in Ecuador.[575]

The first period is about the corporatist regime. The corporatist regime allowed spaces of autonomy within communities permitting them to organize themselves, build political proposals (such as indigenous schools) and, thanks to the intervention of progressive sectors of the Catholic Church, consolidate intercommunity networks. However, during this period, the lack of recognition of fundamental freedoms acted as a deterrent to collective protests and the legal formation of new indigenous organizations for fear of the criminalization of these

[575] See (Yashar 2005)

activities, bearing in mind that most of this period was ruled by Ecuador's civil and military dictatorships.

The second period began in 1979 with the return to democracy that marked the gradual turn of the country and the region towards neoliberal policies. During this period, the recognition of basic freedoms (with a parenthesis during the government of León Febres Cordero) allowed fears of repression and criminalization to diminish and activate the national collective actions that would give political relevance to CONAIE from the beginning of the 1990s to the present. This period is also characterized by a constant threat to the autonomy of indigenous peoples and nationalities within their territories because the main source of income and business offered by the country to foreign investors is the extraction of natural resources in territories of indigenous peoples and nationalities. This is undoubtedly the most successful period of the indigenous movement in terms of legal change, because it includes the two constitutions of 1998 and 2008.

The third period is that of the government of Rafael Correa which cannot be categorized within the typology of Yashar since it contains characteristics of the two regimes. On one hand, and as a result of the Correa's second period, it is marked by the denial of freedom of association and expression with similar responses to that of the corporatist regime in terms of the closure of social organizations and media (such as Pachamama, ecological action, radio Arutam, etc.), the criminalization of social protest and the intention of the State to integrate the instances of civil society to the State when the government enters

to participate in the internal elections of the government councils of each indigenous nationality, of their regional organizations as well as in the direction of the CONAIE. On the other hand, it shares the threat to the autonomy of the peoples and nationalities of the neoliberal regime, since it maintains the concession contracts with transnational mining and oil companies as its main source of financing from the State.

This is a period in which, although it is true that the national collective actions of the CONAIE continue, they do not manage to be the destabilizing agent of governance that they were in the neoliberal era and that allowed it to have such political influence. This had to be the period in which the change of the text of the law had to be converted to a change of the concept of the law (in other words to have the desired effect in terms of social change), but this did not happen.

8.2. The influence of the International law.

International law has had a great influence on the modification of legal texts and the legal recognition of the indigenous peoples of Ecuador. In the colonial period the debates held in the Spanish Court and the Vatican on the nature of indigenous peoples were based on notions of the *ius gentium* of Roman origin that regulated the rights of foreign persons within a State. Not only is the *ius gentium* recognized as one of the origins of modern public international law, but the jurists who influenced the decision to recognize indigenous peoples as persons and, therefore, the impossibility of enslaving the American indigenous population, such as de Vitoria, de Las Casas, Grotius, Francisco Suarez, among

others.,[576] who are credited as being among the fathers of public international law.

International law would have importance again in the twentieth century post World War II with the international human rights movement. The two international human rights covenants of 1966 recognized the right to self-determination of peoples and responded to an international policy of ending colonialism worldwide. This recognition of the right to self-determination would open the debate on the scope of that right for peoples within the territory of an independent state.[577] Even before the international covenants, ILO Convention 107 was adopted in 1957, which already contained provisions protecting the rights of indigenous peoples and nationalities at a time when Ecuador still denied them the right to vote. By 1989, the same ILO sponsored the adoption of Convention 169, which contained a broad catalogue of indigenous peoples' rights, including the right to prior consultation, to maintain their indigenous law, and to choose their development priorities, which would appear in the Ecuadorian Constitution 9 years later with the Constitution of 1998.

The scarce or inadequate development of these rights in Ecuadorian law was replaced by international law, by the decisions of the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and the United Nations bodies responsible for the protection of human rights. For example, before Ecuador ever had a Statute regulating the recognition of

[576] See (J. Anaya, Indigenous Peoples in International Law 2004)
[577] (J. Anaya, Indigenous Peoples in International Law 2004)

indigenous territories, the Inter-American Court issued binding judgments for Ecuador on the subject, beginning with the decision in the Awas Tingui vs Nicaragua case in 2001[578] and the Yake Axa case in Paraguay[579] in 2005. Similarly, without a national statute on the matter, the court ruled in the Saramaka case in 2007[580] on the parameters for determining what an indigenous people is and when the community's decision to oppose a project in its territory should be binding on the State. In addition, in 2012 the court decided the case of Sarayaku vs Ecuador[581] which constitutes a leading case, in terms of the development of standards of prior consultation and a critique of resource extraction processes in indigenous territories of the neoliberal era in Ecuador. The importance of these cases at the local level can be appreciated using them by internal courts, as well as by the use that the indigenous movement itself tried to give to them as a legal basis for their demands for social change.

At the time of Rafael Correa's government, the importance of the influence of international law diminished considerably. Erick Posner argues in his book " The twilight of human rights" that neoliberal regimes would have an incentive to recognize international human rights law because they want to have a good image in the international community with which they want to enter into trade agreements. This incentive would not exist in the case of authoritarian

[578] (Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs 2001)
[579] (Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs 2005)
[580] (Case of the Saramaka People. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs 2007)
[581] (Case of Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Merits, and Reparations 2012)

regimes. Rafael Correa constructed an anti-neoliberal and national sovereignty discourse. As part of this discourse, he sought to discredit international human rights organizations. He was especially critical of the Inter-American Commission on Human Rights which he accused of being a foreign policy agent of U.S. government. Even though the Sarayaku case did not deal with facts that occurred within his mandate, once the sentence was known he sought to clarify that in no way did the Court's decision obligations create duties beyond the specific case and that under no circumstances should the prior consultation be understood as binding. He also made it state policy to not attend the hearings of the Inter-American Commission. Paradoxically, despite his anti-neoliberal discourse, he never failed to attend the hearings, nor did he resist complying with the decisions of the arbitration tribunals for the protection of investments.

8.3. The Ethno-Racial Policy

One of the evidences that this work shows is that ethno-racial politics in Ecuador has been latent or manifestly a constant for 530 years. At the time of the colony, the manifest policy was to civilize and evangelize the Indians. This meant entrusting priests and landowners with the education of indigenous peoples to adopt European customs and values. While Indians were considered human beings with souls, they were not given the ability to govern their lives because they were considered primitive, ignorant, and pagan. The latent policy, on the contrary, was not to integrate them into society, but to use them within the production system of the haciendas.

In the period of the Republic, beginning in 1830, the situation did not change much. The country's economic production was still based on the haciendas, so the subordination of indigenous peoples was an economic imperative. Meanwhile, the manifest policy remained to integrate indigenous peoples into mestizo society through education and fighting against poverty. This was present in the speeches of the politicians of the time like Simón Bolívar and in the text of the very constitution that founded the Ecuadorian State.

The first real attempts of integration of the indigenous peoples appeared in the corporatist era, in which they sought to assimilate the indigenous with the mestizo peasant. It was a time marked by the decline of the form of production of the Hacienda in the Andean region towards more efficient production models of plantations for exportation in the coastal region and the beginning of oil exploitation in the Amazon region that imposed the need for indigenous peoples to move from the position of communitarian agricultural workers to having small farms in which they worked individually. However, this change was not due to a real intention to improve the conditions of indigenous peoples and nationalities, since peasants shared with indigenous people a total lack of attention to State services, which was especially evident in the Amazon region, where the lack of State presence constituted a strategy to improve the negotiating conditions of oil companies with the people who lived there.[582]

The return to democracy, in 1979, begins with the inauguration of the presidency of Jaime Roldós, in whose inaugural speech he addressed the

[582] (Cristina , Varela Torres and Cordero-Heredia 2010)

country in Kichwa, being the first Ecuadorian president to use this language in an official act. This marked the beginning of the period in which the indigenous people are considered as possible voters and therefore the political parties sought their votes, however, the campaign offers, and political speeches aimed at the indigenous people went in the direction of satisfying the demands that they should have had as poor peasants. In other words, the political parties of the time offered agrarian reform and better social conditions in rural areas that allow them to escape poverty and improve their living conditions by integrating them into modern national society. However, the conception of indigenous peoples continued to be that of a group of people who, due to their conditions of ignorance and poverty, had primitive conceptions that made them incapable of making decisions about themselves and their society, and where they were considered instruments in the hands of one political party or another.

From then on, politicians' speeches on the indigenous issue were in the sense that the State had an obligation to help them out of poverty and it was assumed that programs such as literacy, nutrition, rural schools, agricultural production incentives are programs aimed at improving the living conditions of indigenous peoples. Although they were programs aimed at the poor, peasant or rural population in general, without any cultural adaptation and the indigenous people had no participation in the choice or implementation of such policies. This generated, on the one hand, a stereotype of what was indigenous, and, on the other hand, it was promoted as a national development objective and the social assimilation of the indigenous. This discourse would be the trend in the

Constitutional Assembly of 1998 in which the catalogue of the rights of indigenous peoples was approved with a discourse on the historical exclusion of indigenous peoples and the obligation of the State to help them out of the conditions of backwardness and poverty in which they found themselves. According to Pacari, there was no major debate on rights, given that they were recognized in ILO Convention 169, which Ecuador had ratified during the constituent assembly.

The two points that caused controversy were intimately linked to the idea of self-determination and autonomy. The first point was the possibility of the application of customary law within communities, which was finally approved without limitations beyond the human rights recognized in the Constitution; the second point was the proposal of the plurinational State, which was seen as a real threat by the assembly members, in theory because it could give way to the fragmentation of the State, but in essence it was the only provision that would explicitly give indigenous peoples the right to make their own decisions, even at the expense of the central State. Plurinationality was not approved in that Constitutional Assembly.

The decade between the Constitution of 1998 and the beginning of Rafael Correa's presidency in 2007 would be one of the periods of greatest expansion of extractivism and an escalation of socio-environmental conflicts in the country. The policy continued to be oriented to reject autonomy, so that prior consultations on this type of activities were either not carried out or were carried out as a mere formality without respecting the self-determination of indigenous

peoples. It is in this period that the events that provoked the decision of the Sarayaku case and the case of the Independent Federation of the Shuar People of Ecuador occurred. Both cases deal with the lack of prior consultation.

It was a period of intense social conflict that includes three coup d'états of neoliberal presidents. The CONAIE participated in these overthrowing under the argument that free trade agreements and neoliberal policies would undermine their capacity for self-determination in terms of food sovereignty, protection of the environment and extraction of natural resources in their territories. Two of the presidents, Abdala Bucaram and Lucio Gutierrez, made pacts with CONAIE and offered to govern with the indigenous people. The subsequent ruptures with the two governments were mainly due to a lack of understanding of CONAIE policy: although these two governments offered investment to improve the conditions of indigenous peoples, they intended to use the implementation of basic services to bargain for the unconditional acceptance of natural resource extraction in indigenous peoples' territories. The neoliberal policies that were promoted at the time, especially the signing of free trade agreements with the United States, were understood by the indigenous movement as a serious threat to their food sovereignty, water sources and traditional agricultural production in the highlands and in the coastal region and as a threat to nature and their way of life in the Amazon region.

Rafael Correa's presidency began with the promise of change even though the political pact with the indigenous movement failed; there was no ideological conflict. Several of Rafael Correa's party members collaborated with

the Pachakutik party or were close to the CONAIE. Alianza País occupied more than three quarters of the Constitutional Assembly, and they not only approved the inclusion of the plurinational state, but declared that Pacha Mama has rights, that the State would promote a Sumak Kawsay regime, that food sovereignty would be respected, that water is a human right, and an amnesty for hundreds of human rights defenders, many of them indigenous, recognizing that they had been criminalized for defending their rights and nature. Moreover, the enacting of statutes that aimed to destroy the spaces of organization of the indigenous peoples. Those spaces of autonomous political action that conquered by the CONAIE (i.e. bilingual education, traditional medicine, indigenous law, ancestral authorities, among others) were not only organizational and formative spaces, they were spaces to think the world outside the mestizo paradigm and the nation state.[583]

Nevertheless, Correa continued with the discourse of the indigenous as a poor and backward population, spoke several times about the indigenous development model assuring that poverty is not ancestral vision and labeled indigenous justice as savage, the indigenous worldview as superstition, labeled indigenous leaders as incapable and indigenous populations as easily manipulated, ignorant and backward. Correa also denied self-determination and criminalized social protest.

[583] (Walsh 2012)

8.4. The functioning of the legal system

The functioning of the legal system responds to an external logic and an internal logic. The external logic is the function played by the legal system within the grand scheme of the society in which it operates. For Marx, for example, the law would be among the social functions that operated in the superstructure whose form would be defined by the necessities of the forms of production and the means of production of a society. Conversely, for Weber the law will be part of the ideology that creates the narrative of a society and shapes aspects such as its economy and production. Both ideas, and several other explanations of the role of the law in culture and the society, aimed to put the law as an important function in the culture. For the change of functionalism, a change in one aspect of the society will alter the whole, so the law is at the same time capable of changing the society or being shaped by it. However, the law is seen as a conservative force because it does not necessarily react to external changes such as lawmakers, politicians, or social movements desires, and because its internal logic sought to keep it with the less possible changes to keep power for the players of the legal field.

The internal logic of the law is the narrative that sets the rules of the legal field. Influential theories at the beginning of the 20th century tried to justify the scientific nature of the study of the law incorporating the positivist approach to the study of the law, and, in doing so, they try to take away the subjectivity and the power disputes from the legal field. Contemporary versions of these positions refer to the internal logic of the legal system overcoming the positivist

conceptions that argue that systems could be rational, objective and endowed with a coherence. Authors such as Duncan Kennedy talk about the legal interpretation as a process of social justification of subjective decisions of judges,[584] but do not deny that judges need to justify their decisions, so there must be a frame that controls that subjectivity.

Bourdieu's theory of the legal field helps to understand how that frame is built. He argues that the legal field would be a social field in which different actors compete for the power to imperatively say what the law says and thus be able to invoke the authority and violence of the State for their benefit (or the benefit of their clients). The power to influence in the legal field is called legal capital, and actors in the legal field will think rationally, choosing the actions that make them keep or increase that capital.[585] Acting inside the frame of the concept of the law will be a way to keep at least a small basic amount of legal capital. Whatever theory is adopted to analyze a legal system, it seems that all agree that such system is not immune either to the influence of other aspects of society or to the interests of the actors who are daily users of the system.

These ideas provide an explanation for the non-application of certain legal provisions connected more to social, political and economic factors rather than to justifications based on the alleged lack of technique in the elaboration of legal norms. Nevertheless, the law as a social function, in the functionalist paradigm, or as the social field in Bourdieu's paradigm, is well interconnected

[584] (D. Kennedy 1986)
[585] See (Bourdieu 1987)

with the other aspects of the society, and, at the same time, is sufficiently delimited and so that the changes that operate in it influence the social balance as a conservative force or as a factor of change.

The legal system in Ecuador is a product of the eras that the society has been through. In the first part of the work, when talking about the colonial era, the “derecho indiano”[586] reflected feudal law sought to organize the government of the Spanish colonies in America. Therefore, it was a law directed to protect the rights of the sovereign rather than the rights of his subjects. In this context, there were the first deliberations regarding the origin of the title by which the King of Spain acquired the ownership of the territories of the indigenous peoples of the continent to legally legitimize a dispossession that was never remedied.

The republican era begins strongly influenced by the liberal revolutions in the United States and France. The legal system developed at that time remains present these days in several aspects, for example the idea that the only limit to what the law can establish are at least two fundamental freedoms: the right to life and the right to property. Liberalism as a political system changed the focus of legal protection; the law was no longer to protect the power of the Crown or the state, but to protect the rights and freedoms of individuals. The problem is that liberalism begins by protecting the state of affairs prior to the American revolutions, that is, using the state to protect the property of those who had assets and the freedoms of those who were considered persons. Thus,

[586] The *Derecho Indiano* is the legislation that Crown of Spain enacted to regulate its colonies in America.

the change of regime from subjects of a European power to second-class citizens in the liberal republican system did not represent any change in the lives of indigenous peoples in Ecuador.

The Ecuadorian legal system not only perpetuated the territorial dispossession of the Spanish crown, but also denied citizenship to most indigenous people until 1979 when citizenship and voting were granted to illiterate people. During all these years the legal system was developed to defend these two freedoms, life and property. The civil code, that regulated property, contracts and family law, were the basis of the training of lawyers and they were taught as the true constitution of the Republic. The same happened with the criminal code that basically contained crimes that violated these two rights and a group of crimes against the State. The ideas of legal positivism had already reached great acceptance in the legal field to the point of being the only legal theory that was taught, leaving the others practically as historical anecdotes. With legal positivism comes the concept of law as a science, i.e. a rational technical and autopoietic knowledge. Indigenous worlds were out of the frame of this law.

At the time of the emergence of the modern indigenous movement and the return of democracy, the need to overcome classical liberal visions was already being discussed in other countries, especially in the light of humanist doctrines, the eastern-western ideological conflict, the social doctrines of the Catholic Church and the influence of human rights doctrines. Liberal theories were updated to include positive freedoms or the impossibilities of people to

exercise their freedoms when they suffer from economic deprivation or belong to historically excluded groups, and there was even talk of a multicultural liberalism that would also be able to accommodate certain specific rights of ethnic minorities within some liberal legal systems.

As argued in this paper, what the indigenous movement presented was its own interpretation of historical justice and the law. They defended, with plurinationality, their own proposal of how to integrate themselves into the surrounding society in a relationship that surpasses the individual notion of person versus state to one of cultures creating a state that shelters them all. It is a challenge to notions as deep-rooted as representative and plebiscitary democracy, to the liberal and modern way of treating property ownership. To the liberal capitalist conception since there would exist goods that would be out of the market since they would belong collectively to groups not only integrated by people existing in a determined moment, but also to the future generations and their ancestors. It was also a challenge to the modernity as it reintroduces the spiritual element into social relations as the transcendent connection that a people would have with its territory and which has already been discussed in the international courts' cases such as Awas Tingi v. Guatemala[587] and Sarayaku vs Ecuador[588].

[587] (Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs 2001)
[588] (Case of Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Merits, and Reparations 2012)

Following the approval of the Constitution in 1998, the Ecuadorian legal field had to deal with the changes in the text of the law that the indigenous movement managed to introduce. Here the concept of the law framed the limits of the legal analysis of the actors in the field for whom the new institutions introduced with the 1998 constitution challenge a long legal paradigm. It was at this point where clinging to the individualist-oriented ideas of the law slowed down the implementation of new legal institutions. It was in this period, for example, that several judges ceased to protect the collective rights of indigenous peoples because they were unable to understand the notion of people or nationality, and sometimes confused it with the concept of a legal person. Therefore, judges rejected requests for judicial protection of the rights of peoples due to the lack of a legal evidence of representation. Additionally, it was the time when the prior consultation of indigenous peoples should have begun to be applied, but it was not common practice and the judges did not declare the nullity of the administrative processes in which said consultation had not been carried out. Finally, it was a period in which, in the absence of a legislative development (or a modification to the civil code) making clear how to implement the right to indigenous territory, judges were held back by the lack of a statutory norm to order, for example, the recovery of territories or the titling of territories that were already in the possession of a community. In short, the changes in the legal text introduced by the indigenous movement did not enter the concept of law, so the actors of the legal field gave them a treatment of non-law, being a force contrary to the application of these rules.

The inclusion of the plurinational State in the Constitution of 2008 breaks even more paradigms within the norms of the legal system community. The narrative of what can or cannot be done within the legal field is even more reactionary with ideas such as the application of indigenous law, prior consent and the protection of peoples in voluntary isolation as shown in the case studies.

8.5. Is there a future for the plurinational State?

Ten years after the adoption of the Constitution of 2008, very little has been achieved in terms of positively giving practical content to this concept. As demonstrated in chapters 5 and 6, the institutional interpretation of the Constitution of this concept has been negative, that is, the President of the Republic, the Constitutional Court, the National Judicial Council and the Judiciary Council have been gradually limiting the scope of the plurinational State by defining what the Plurinational State is not.

The indigenous movement has been coherent in its demand for the Plurinational State understood as a space for self-determination within the Structure of the State, and not as the corporatist representation that includes representatives of indigenous origin in the branches of government; nor as the corporatist representation that includes representatives of indigenous origin in the powers of the State according to the percentage that demographically would be the indigenous; nor with a logic of exclusion of indigenous people from public services and the state structure, but as the acceptance that they exist, that they have a logic, language, worldview, system of governance like the mestizo one, and that this must be implemented and respected under equal conditions. This

demand has never been heard or fully understood even by some allied groups of the indigenous movement.

The risk of continuing this trend is that it could reach a point where the whole meaning of the plurinational state, created by the indigenous movement, ends up reduced to a rhetorical statement about the country's cultural diversity. This is an effect of moving the indigenous peoples' interpretation of justice to a legal text, which also means moving the interpretive dispute from the political field to the legal field.

The indigenous movement has been very effective in influencing the political field where, after almost 40 years of participation, they are finally able to navigate effectively. However, the legal field has other logics, other dynamics and other actors. The daily space of the political field is in the assembly, in the streets and in the media while the daily space of the legal filed is in the courtrooms and in the law schools. Making politicians accountable to a social movement is something that the indigenous movement has been effective in achieving. However, holding judges accountable is different, since it requires understanding what interests and motivations they have, so that the collective actions of the indigenous movement can have sufficient weight to influence the interpretative decisions they take. In other words, it is to make the social movement to become an actor within the legal field.

While politicians respond to voters and are therefore sensitive to their level of social approval, judges respond to another kind of logic, especially depending on their degree of independence. Judges as actors in the legal field

also seek to preserve their personal legal capital beyond the institutional legal capital they hold for the position. Even when judges are susceptible to pressure from other branches of the State to the extent that they seek to rule in favor of those who could put their position at risk, they will always try to give their decisions an acceptable form within the framework of the concept of law. In consequence, if this concept changes to include plurinationality, the judges will weigh the cost for their legal capital of not implementing it.

Ethno-racial politics was a constant in the periods studied. A change towards an equal valuation of all cultures and their diverse ways of seeing the world could be the key element in accelerating the process of implementation of the Plurinational State. However, as we have seen, especially in the last period of Rafael Correa's government, this policy depends on the social and economic scheme, the scientific paradigm, and the development model managed by the State. The Executive and the communication skills of those in government are very influential in characterizing this policy. For the indigenous movement it is very difficult to achieve a position of popular election so high that it gives it access to this kind of influence.

However, it is not impossible that a better reception of the plurinational State by the national society, its inclusion in the concept of law, and above all the support of the indigenous movement within the social mobilization could all contribute to create a historical narrative and a balance in the public opinion capable of influencing this policy to make the indigenous become capable and responsible actors in the social, especially in the face of new proposals in

relation to the conservation of the environment and diversity. That is why, while maintaining the capacity for mobilization, contact with the grassroots and cohesion with the objectives as a social movement, the indigenous movement should not renounce the electoral contest as a mechanism for achieving its long-term objectives.

Just as the indigenous movement strategically managed to introduce cadres in the political field that were permanently supported by an active social movement, the movement must start infiltrating the legal field with the same logic of accompaniment of the bases and with the same logic of belonging and returning to the community. This process is under construction, as Nina Pacari occupied the position of Judge of the Constitutional Court, Mariana Yumbay was judge of the Supreme Court of Ecuador and other people within the movement occupied positions in the judiciary, although it should be noted that upon completion of their terms their positions were not renewed, and they continued as militant legal professionals of the indigenous movement.

The indigenous movement should not give up on the use of judicial spaces, not as an attempt to resolve disputes, but with the intention of participating in forums that have influence in the legal field. For example, the discussion of plurinationality and the application of the power of indigenous peoples to generate their own law should be discussed and implemented in academic spaces. In addition to the litigation strategy, consideration should be given to ways to generate greater visibility with respect to the decisions made by judges in these cases, and to continue strategic litigation in international

courts that demand the application and generation of jurisprudence consistent with the instruments for the protection of collective rights.

It is important to note that among the greatest advantages of the indigenous movement is the absence of what Weber would define as charismatic leaders. While there are visible figures and historical leaders, they do not have personal support or unconditional authority even in their local communities. The objectives and figures of the indigenous movement rest on their collectiveness, so that if one or another government captures a leader, the defection of this does not affect the movement and the leaders, once they have fulfilled specific functions, can return to their communities.

The indigenous movement in Ecuador is among the most important indigenous movements in the continent, which gives us hope that the goal of achieving a plurinational State is possible. The current political atmosphere is one of transition where one can retake one's own schemes and the social movements can regroup without managing to maintain their objectives and renew their strategies.

I think the theories about the sources of law are basically narrative. Since law is an arbitrary product of culture, there are no real limits to the form that societies can give to it. That is what I mean by the concept of law. If the way to create law legitimately is a narrative, the most effective way to change it is to offer an alternative narrative. This paper seeks to offer that - it tells the story of how a social movement in a specific legal system and at a specific time can achieve becoming a source of law.

In addition, this work tells the tells the story of how apparently powerless people within society interpret the concept of justice and law and manage to introduce, at least formally, that interpretation into the text of the law. I am convinced that the mere fact of starting to talk about the law with the people as protagonist is a way of changing the concept of law, from the notion of a tool of oppression of elites to an emancipatory mechanism of peoples. However, unlike the law created by the elites, the possibility of applying the plurinational State depends on the capacity of the indigenous movement to continue challenging the powers constituted in Ecuadorian society. It is not the law, but from the organization from which the social change that has been sought during more than 500 years of exclusion and exploitation of the native peoples of the Americas will come.

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After the meeting with the cabinet members of President Moreno, we walked towards the Plaza Grande (the common central park in Spanish cities, which houses the main institutions of the State and the Catholic Church, in the case of Quito the Cathedral, the Presidential Palace or Carondelet Palace, the municipality and the headquarters of the Catholic Church). Jorge Herrera and the rest of the group entered a small cafeteria to evaluate the meeting. It was also a farewell, Jorge Herrera would leave the presidency of the CONAIE, and I would return to Ithaca. At the end of the meeting we talked about our plans, I would finish my doctorate, I would teach again, and I hoped in the future to be able to work with the indigenous movement again. Jorge Herrera would return

to his community. I asked him if he would not miss what he had lived as the maximum leader of the indigenous nationalities of the country. He said that he would not, that what he missed was his family and working his land. I knew it was true, after having met five CONAIE's presidents, I could attest that all of them saw power as a burden, as a service to their communities. Each president gave space to a new one, the leadership of the movement always had new faces, it never grew old. Some weeks after this meeting, the CONAIE and the government of Ecuador signed a loan for one hundred years without conditions for the building of the CONAIE's headquarters.

Jorge Herrera was president of the CONAIE at a very difficult time in which the opportunities for negotiation and interaction with the elites was practically nil, the criminalization of leaders reached historical levels and the repression of the State to collective actions was violent and disproportionate. However, he managed to keep the movement active and cohesive. After so many setbacks over the course of the last decade, any social movement would have demobilized. Jorge Herrera's confidence that someone would take his place, that he would return to the resistance from his community, tell us about a collective social movement that has been resisting for five hundred years, that has taught them to be patient, to learn from the defeats, and to never surrender.

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APPENDIX – Two narratives in the *sabatinas*

		the noble savage		the bad savage		Autonomy			
number	fecha	cuantitative	qualitative	cuantitative	qualitative	Total autonomy	Limited autonomy	No autonomy	Textos
60	15/3/2008	1	patriotic defenders						shuar soldiers
63	5/4/2008			1	professional agitators/non-civilized/mental handicapped/no homeland			1	indigenous strike
65	19/4/2008	1	organized diversity within the State	2	violent minority		1	1	President blames poverty and colonializatio n on indigenous disunity and ignorance
66	24/4/2008			1	violents/ chauvinist				violence against women naturalized as an indigenous tradition
68	10/5/2008			1	minority/ blackmailers / impose their interests			1	consulta previa vinculante
69	19/5/2008			2	minority/ blackmailers / impose their interests			2	prior consultation of indigenous peoples as a minority/ against indigenous control in health and education
71	31/5/2008	1	cordials / hosp	1	professional agitators/Bra gging/Selfish Interests				binding prior consultation

74	21/6/2008	1	welcoming/solidarity/grateful with missionaries						president lives with indigenous people
76	5/1/2008	1,00	good dancers/ artistic traditions						indigenous people thank the president with folk groups
84	30/8/2008	1	exploited indigenous lacking opportunities						lack of basic services in Amazonian provinces with an indigenous majority
85	6/9/2008			1	children's ecological worldview/ do not understand progress				Government Wins Constituent Assembly Election in "Dayuma".
87	20/9/2008	1	simple indigenous life without evil						not to choose languages of education in Quichua education or another language instead of English
89	4/10/2008								Government Wins Constituent Assembly Election in "Dayuma".

90	11/10/2008			1	puerile		1	1	increase in the budget of sectional governments /indigenous view of child/indigenous extractivism easily manipulated by universities, foreign NGOs
91	18/10/2008							1	indigenous people are a minority, they cannot impose a vision of the use of natural resources.
92	25/10/2008							1	no binding consent prior consultation directly with the community no leaders
94	8/11/2008			1	easily manipulable/ non-representative minority			1	can't paralyze projects of national interest.
95	15/11/2008			1	child/ridicule /killer/caduco			2	indigenous minority interest cannot limit benefits to the majority.

96	22/11/2008	1	progressives, evo morals and humberto cholango	1	retrogrades/ fundamentalists do not allow the progress of the country/there are indigenous millionaires/ work with NGOs			1	the valid representation is that of the majorities of the democratic vote
133	15/8/2009	1	exemplars/ emblematic heroes						souvenir of delivery of the baton of command to president
135	29/8/2009	1	workers/collaborators						visit to a tourist project in the province of Napo
139	16/9/2009	1	good people like Cholango and Evo Morales	2	do not understand progress/no actual/desorganised authorities			1	denies that indigenous people should intervene in the water law/ threatens assembly members who try to please fundamentalist groups
140	3/10/2009	2	capable/imputable/correct their mistakes capable/imputable/correct their mistakes	2	murderers / easily manipulable/ irresponsible			1	negotiation Shuar leadership/killing bosco wisun/non-official ancestral languages in education

141	10/10/2009			1	violent/ wild			1	intercultural education in the hands of the central government
142	17/10/2009			1	backward/retarded view unknown of the technology/easily manipulable			1	the territory of the indigenous communities must not hinder mining production.
143	24/10/2009			1	easily manipulated / false leaders/ mestizos infiltrated				Shuar People's Opposition to Oil Exploitation
145	7/11/2009	1	conciliators/ humble					1	Negotiation and consultation of oil companies will be done directly with the peoples' secretariat so that they do not carry out fraudulent negotiations deceiving indigenous leaders and communities .
146	14/12/2009			1	violent				Indigenous Strike for the Closure of CODEMPE

150	12/12/2009	1	diversity within the State					1	creation of the secretary of the peoples as an organism of the executives representing the peoples
204	15/1/2011	1	diversity within the State				1		creation of equality councils
205	22/1/2011	3	indigenous heroics in the conquest/ progressives/ collaborators to the government	1	resented/ generate division			1	the judges are called upon to apply the penal code and to ignore the jurisdiction of indigenous justice in the murder of Bosco Wisum and the detention of 3 indigenous people, the call for radio resistance arutam and a pepe acacho is identified as terrorism.

208	12/2/2011	3	good leaders / participate in progress	1	violent, full of resentment, backward / superstitious			2	denies authorization from community leaders not recognized by the government, denies mechanisms of protection of ancestral knowledge / restricts application of ancestral methods in health
209	19/2/2011	2	pueblos indígenas agradecidos	1	lack of development al vision			1	delivery of cattle to chimborazo communities / indigenous people will be prosperous and will increase their properties with the distribution of oil resources / reject exploitation is to choose poverty

215	2/4/2011						1		it is proposed to allocate 12 percent of oil profits to the communities in whose territories the extraction is carried out, to invest in plans agreed with the secretary of peoples.
217	16/4/2011	1	valuable customs				1		the creation of hospital centres that include childbirths with the participation of midwives and indigenous personnel with knowledge of ancestral medicine/regulated service under the policies of the Ministry of Health and hospital personnel

218	23/4/2011	2	collaborate with the government						Community that has project with the government congratulates the president for his management and promote popular consultation for constitutional reform
219	30/4/2011			1	naive/ manipulable/			1	Indigenous Organizations Promote No to Popular Consultation to Deny Constitutional Reforms
220	15/5/2011	1	industrius						Guapulo project with indigenous communities of the sector
222	28/5/2011								oil extraction in intangible zone does not mention tagaeri taromenane extracción petrolera en zona intangible no menciona a tagaeri taromenane

223	6/6/2011			1	ingenuos				Criticizes Indigenous Movement for Allying With Lucio Gutierrez and Opposing Correa's Government
224	11/6/2011	1	hospitable						Congratulations to the indigenous community of cayambe for a tourism project with partner employment.
225	18/6/2011	1	grateful for the works of the government/ entrepreneurs	1	aggressive, resentful, anchored in the past.				Criticism of lourdes tiban for his insults to indigenous people who participate in government projects.
226	25/6/2011			1	indigenous people manipulated by NGOs				Indigenous movement manipulated by NGOs to discredit progressive governments

232	6/8/2011	1	diversity, maintain family moral values				1		typical Shuar and Kichwa constructions will be included in Amazonian housing plans if users request it
233	13/8/2011			1	retrograde			1	Criticizing Shuar leaders for an outdated vision of progress for their community. Oppose mining / 60 percent of oil redirected will be invested in the government for works approved and planned by the executive.
235	27/8/2011	1	ambassadors for diversity and participation						an ambassador of indigenous descent elected by the executive is appointed to Bolivia (another plurinational state)

236	3/9/2011			1	poverty, unhealthy			1	a community is built on the beaches of the guinea pig reserve/project that displaces about 3,000 people from indigenous communities in the oil exploitation zones to locate them in a new, totally urbanized city.
238	17/9/2011			1	poverty/ mediocrity			1	millennium schools will be built under the control of the central state in every oil influence zone to replace bilingual education at the service of communities .

241	8/10/2011	1			enemies of the progress of the fatherland			1	it is reiterated that ancestral peoples do not have full control over exploitation in their territory. "Not because they are ancestral peoples, we are going to pay attention to them in everything.
243	22/10/2011			1	backwardnes s/anarchy			1	the indigenous authorities must agree with the executive authorities to invest the oil profits, they cannot decide alone on the works to be carried out .
245	12/11/2011			1	seek to victimize themselves				trial for slander of indigenous leaders, not because they are indigenous can say what they want
246	19/11/2011			1	seek to victimize themselves				Monica chuji trial/

247	26/11/2011			1	anachronistic				the greatest danger for the deforestation of the forest is the agricultural expansion favored by the disordered mobility of the population.
248	3/12/2011			1	superstition				rabies outbreak in indigenous communities aggravated by treatment with ancestral medicine
249	10/12/2011			1	hypocrisy				refuse mining but use mining products such as radios and watches
254	14/1/2012	1	brave/ exemplary						Greetings to Rigoberta Menchu, Indigenous Heroes of Latin America
255	21/1/2012			1	easily manipulable/ liar leaders				attitude of community leaders prevents socialization of mining projects in Azuay

256	28/1/2012	1	industries			1			delivery of property titles of ancestral lands of 455000 hectares to communities
258	11/2/2012			1	chauvinistic/ backward		1		the indigenous world is very macho indigenous justice can operate but not ignore human rights and defend domestic violence
259	18/2/2012			1	chaotic leadership				the method of appointing leaders is chaotic, one cannot negotiate with the indigenous leadership, they are accustomed to making strikes instead of negotiating
260	25/2/2012			1	are unrepresenta tive, irresponsible				the indigenous leadership does not represent anyone, contrary to the interests of the majority of Ecuadorians/ about mobilization

261	3/3/2012	1	hard-working, progressive	1	irresponsible, stupid leaders				Indians who appreciate the cattle that the government brought to the communities and criticize leaders who lead to a strike against the government's extractivist policies.
262	10/3/2012	1	gratefull						interview with leaders critical of the march of indigenous communities towards Quito against the government
263	17/3/2012			1	Leaders are False Indigenous				the indigenous mobilization is criticized
264	24/3/2012			1	lying leaders, exploiters of their people				Criticism of indigenous mobilization / leaders exploit their people

265	31/3/2012			2	terrorists, murderers, seek to divide the country			1	180 indigenous leaders accused of terrorism during the mobilization/ consultation prior to the Mirador project criticized for failing to socialize and respect the authorities designated by the community
267	16/4/2012			1	oppressed			1	historically oppressed indigenous peoples that does not allow them to decide apart from the majority
268	21/4/2012			1	become victims				sarayaku case a favorable ruling does not allow them to stop oil exploitation throughout the country
269	28/4/2012			1	blackmails		1		In the case of Sarayaku, prior consent is not required for activities in indigenous territories.

270	5/5/2012			1	no real democracy			1	about the change of shuar directive it is emphasized that processes of election of indigenous authorities are not always democratic
271	12/5/2012	1	victims of racial injustice				1		Constitution Seeks to Suppress Racial and Gender Injustice
272	19/5/2012			1	violent/corru pt leaders				indigenous march organized by leaders who take advantage of the bases
275	11/6/2012		indigenous of the past/heroic resistance	1	retrograde				Encounter with Afineas indigenous movements in Bolivia/ against indigenous people seeking to avoid mining exploitation
277	23/6/2012	1	seek to progress				1		Huaorani Leaders Sign Charter Supporting ITT Exploitation

283	4/8/2012			1	fake indgenous			1	no prior consent can be obtained in all cases/ no stop of the 9th oil round by opposition indigenous people
290	22/9/2012			1	poor/ chouvinist/ retarded			1	indigenous youth and children must be educated to change the vision that leads to poverty, machismo, malnutrition, etc.
294	20/10/2012			2	inefficient/ do not understand cost benefit			1	bidding for the oil round without indigenous consent/ rejection of a Shuar leader who demands to foresee public institutions settled in their territory
299	17/11/2012			2	poverty			1	the sápara community, shuars through provincial gad is a way of life for indigenous people $115 million is earmarked for provincial gad administered by governments

310	23/2/2013	1	Good Indigenous Leaders Partner with Country Alliance						Indigenous Assembly Candidates by Government Party
316	6/4/2013			1	violent		1		are over-represented in the assembly system.
317	13/4/2013	1	are over-represented in the assembly system.						High Voting Country Alliance in Indian Majority Territories
318	20/4/2013	2	talented/ enterprising						musician saraguro awarded / cooperative saraguro / misery is not part of folklore
322	18/5/2013			1	violentos/conflictos				tagaeri taromenane murder
323	25/5/2013			1	incompetent			1	all the indigenous people ask for schools without criteria/ deplorable single-teacher education
324	1/6/2013	1	preserves traditions/ supports government entrepreneurship					1	Pre-legislative Consultation of Indigenous People Not Necessary
325	8/6/2013	1	support the progress				1		the national plan for good living favours the objectives of plurinationality

326	15/6/2013			3	liars/ false indigenous/ignorant leaders				Against Carlos Perez and Opposition to Mining Law
328	29/6/2013			1	sellfish				the communities located in oil projects do not prioritize cost benefit for the country
329	6/7/2013			1	irresponsibles				Proyecto Yasuní ITT que destinará más de 100 millones de dólares para el desarrollo de la Amazonía.
332	27/7/2013			1	infantes				Yasunidos and Indigenous Communities Oppose Oil Exploitation in Yasuni National Park
333	3/8/2013			1	fanatics/fundamentalists			1	indigenous peoples require binding prior consultation
336	24/8/2013	1	support the progress	1	fakes indigenous/ liars			1	mining law does not require prior consent
337	31/8/2013	1	heroics			1			indigenous fight in defense of nature chevron case

339	12/9/2013	1	government allies/entrepreneurs				1		Waorani leaders receive health centers support exploitation in Yasuni Park
340	21/9/2013	2	come out of poverty / trust the government				1		get out of poverty/trust the government
341	28/9/2013			1	ignorant/ delayed vision			1	Criticizes Communities Protesting Closure of Bilingual Schools and Mixed Health Centers of Ancestral Medicine
342	5/10/2013	1	entrepreneurs/trust the government	1	corrupt incapable leaders			1	projects of Amazonian cities versus traditional communities
343	12/10/2013	1	They trust the government.				1		decentralized self-governments manage resources rather than communities
344	19/10/2013	1	authentic, maintain their culture				1		millennium school in santo domingo de los tsachilas where tsáchila and Spanish are taught

345	26/10/2013			1	hypocrites			1	Leaders who oppose extractivism demand schools and works in their territories with the oil surplus.
347	16/11/2013			1	violents/murders			1	conflict in Shuar territory over mining/indigenous cannot prevent public officials from entering their territory
348	12/10/2013			1	ignorant / violent				conflicto en pueblo shuar
349	23/11/2013	1	helpless				1		conflict in Shuar territory over mining/indigenous cannot prevent public officials from entering their territory
350	30/11/2013			1	aggressive/wild/pathetic			1	Indigenous people prevent oil investment companies from entering their territory

351	9/12/2013			1	ingenuos/ manipulables /instrumentos de ongs y extranjeros			1	foreigners and NGOs poison indigenous people/ do not have the right to resist public force/ NGOs terrorism schools
352	15/12/2013			1	primitive		1		indigenous oppose closure of health centres/ refuse to implement modern hospitals deny state control
353	23/12/2013			2	violent, retrograde			2	march for the closure of bilingual schools/ closure of pachamama/ right to resistance
354	28/12/2013	2	solidarity/ beautiful cultural events						presidente pasa navidad en una comunidad indígenaPresident Spends Christmas in an Indigenous Community
378	21/6/2014			3	mediocre/simple/corrupt			2	Indigenous march against the water law
379	28/6/2014	2	simple/ wonderful folklore	3	self-conscious/dislocated/ignorant		1		visit to Amazonian gastronomy festival / Sarayaku repair

393	4/10/2014	1	simple / humble / cheerful	2	arrogant/ridiculous/patients / become victims			1	President Visits Minga/ Protest for Eviction from CONAIE Headquarters
407	17/1/2015		humbl	2	ignorant/pateful				Letter from Indigenous Leaders for Eviction of CONAIE
410	7/3/2015			1	hypocrites/clowns/corrupts		1		piden que se aumenten y se pague a los gobiernos locales asignaciones del excedente petrolero
411	14/3/2015			2	bad leaders/ poorly educated		1		Indigenous Leaders Call for Demonstration Against Azuay Mining Project
412	21/3/2015	1	valuable/intelligent/heroic						Greetings to Huaoranis within the army.
415	14/3/2015			2	clientelism/incompetent			1	Against the Niger March for Community Health and Education
416	21/3/2015	1		1	manipulators / arrogant			1	seek spaces of power to which they have no right
420	18/4/2015				poor things				Ecuador is the country with the highest number of trarados for the protection of indigenous peoples

434	24/7/2015			1	manipulable/ week				IACHR reports on criminalizatio n of indigenous leader
437	15/9/2015			1	fanatics, fundamentali sts, stupid			1	does not recognize as marriage ancestral ceremonies on the subject of deportation of manuela puig
440	5/9/2015			1	ignorant / opportunists				indigenous demosntratio n
442	19/9/2015			1	ignorant of politics/ retrograde/ incapable				Indigenous Protest March in Support of ISS Affiliates
445	10/10/2015			1	ignorant / fanatics / barbarians				indigenous community protests for closure of community school
451	21/11/2015			1	estructura deficiente/de sordenada				decentralized autonomous governments with indigenous leaders do not efficiently fulfill the program of sumac kawsay
453	5/12/2016								media give coverage to indigenous only to destabilize the government

457	2/1/2016			1	ignorant / disorganized			1	visits to tourist sites managed by indigenous communities that are not well managed
458	9/1/2016			1	violent, retrograde				salvador quishpe prison
467	19/3/2016			1	ignorant/foes of the fatherland/traitors				indigenous movement joins protests against the government
505	17/12/2016			1	clumsy/killers/delnquent/ thieves			1	Police try to evict community from territory they claim for mining project, a police and a woman died