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The Principle of Political Unity and Cultural Minorities' Self-Government

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INDIGENITY AND THE STATE: COMPARATIVE CRITIQUES

THE PRINCIPLE OF POLITICAL UNITY AND CULTURAL MINORITIES' SELF-GOVERNMENT

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I. INTRODUCTION

Within the 1991 Colombian Constitution there is a tension between cultural unity and cultural diversity. This tension is constituted by two analytically distinguishable but practically intertwined conflicts of principles and rights. The clash between the constitutional recognition of the indigenous groups' diverse moral and political principles (some of them illiberal) and the liberal Bill of Rights of the political charter comprises the first conflict.

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The tension between the constitutional declaration that Colombia is a unitary state and the self-government and judicial powers granted to aboriginal groups composes the second clash of political values. In this Article, I will analyze the second conflict of constitutional principles and rights, as well as the ways in which the Constitutional Court has attempted to solve it. To accomplish this aim, I will first analyze the values that structure the second facet of the constitutional tension. Then, I will critically analyze the Constitutional Court's jurisprudence on aboriginal groups' territorial autonomy. In these cases, the Court must balance the principle that Colombia is a unitary state against the self-government rights granted to cultural minorities. The analysis of the Court's jurisprudence will be divided in three parts.

First, I will examine case T-428/92 (*Cristianía* case),[1] in which an aboriginal groups' political autonomy, although a fundamental dimension of the conflict, is ignored by the Court. Second, I will analyze case T-405/93 (*Military Base* case)[2] where indigenous communities' political autonomy is radically restricted and implausibly subordinated to other constitutional values. Third, I will analyze cases T-257/93 (*Vaupés* case),[3] T-380/93 (*Embera* case),[4] SU-039/97 (*U'wa* case),[5] and T-652/98 (*Urrá* case),[6] where indigenous communities' political autonomy are supported, although in some cases using paternalistic arguments.[7] In the last section

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1. Case T-428/92, Corte Constitucional, exp. No. T-859, June 24, 1992; *Corte Constitucional. Sistema de búsqueda* [hereinafter Constitutional Court, Search System], *available at* http://www.ramajudicial.gov.co/csj_portal/jsp/frames/index.jsp?idsitio=6&ruta=/jurisprudencia/consulta.jsp (last visited Aug. 29, 2005).

2. Case T-405/93, Corte Constitucional, exp. No. T-12559, Sept. 23, 1993; Constitutional Court, Search System, *supra* note 1.

3. Case T-257/93, Corte Constitucional, exp. No. T-10.239, June 30, 1993; Constitutional Court, Search System, *supra* note 1.

4. Case T-380/93, Corte Constitucional, exp. No. T-13636, Oct. 14, 1993. Constitutional Court, Search System, *supra* note 1.

5. Case SU-039/97, Corte Constitucional, exp. No. T-84771, Feb. 3, 1997. Constitutional Court, Search System, *supra* note 1.

6. Case T-652/98, Corte Constitucional, exps. No. T-168.594 & T-182.245, Nov. 10, 1998; Constitutional Court, Search System, *supra* note 1.

7. Case T-188/93, the seventh case decided by the Court regarding aboriginal groups' territorial autonomy, will be briefly explored in a footnote. The only argument presented in this case that is relevant for the issues analyzed in this Article is reiterated in case T-652/98 (*Urrá* case). This argument, the Court's declaration that aboriginal groups' have a fundamental right to the state's recognition of their ancestral lands as collective property, will be analyzed when *Urrá* is examined. *See* Case T-188/93, Corte Constitucional, exp. No. T-7281, May 12, 1993. Constitutional Court, Search System, *supra* note 1.

of this Article, I will offer some concluding remarks that will assess the contributions and obstacles that the Court's jurisprudence has created for the protection and strengthening of aboriginal authorities' self-government.

II. THE VALUES IN CONFLICT

The components of the second clash of political values that constitutes the cultural unity — cultural diversity conflict within the 1991 Colombian Constitution are, on the one hand, the principle of political unity, and on the other, the cultural minorities' self-government rights. The principle of political unity is recognized by Article 1 of the political charter that declares that, "Colombia is a social state of law, organized as a unitary Republic. . . ." Cultural minorities' self-government rights are recognized by Article 330, which acknowledges the aboriginal groups' right to govern themselves by their uses and costumes and by Article 246 which grants aboriginal peoples the right to exercise jurisdictional powers within their territory.[8] Cultural minorities' self-government rights are also recognized by Articles 287, 288, and 289 which state that aboriginal lands have "territorial entities" status as provinces or municipalities, by the declaration that Indian territories are collective property,[9] and by the obligation of the state to promote the participation of aboriginal communities in the decision making process concerning the exploitation of natural resources within their lands.[10]

The principle of political unity has been traditionally interpreted as stating that in Colombia there is one and only one legal system and one and only one centralized and hierarchical political structure. Congress and the executive power are the only entities with the power to transform political decisions into law. All other government authorities have merely the power to develop the legal norms produced by these institutions. The

8. The Colombian Constitution also recognizes other rights that develop and facilitate cultural minorities' self-government rights. Article 171 creates the senate's special national electoral district for indigenous peoples, Article 176 declares that the law can create a House of Representative's special electoral district for cultural minorities, Article 10 states that communities with their own linguistic traditions have the right to a bilingual education, Article 68 declares that cultural minorities have the right to an education that respects and develops their cultural identity, and Article 10 recognizes that the indigenous groups' languages are official within their territory.

9. COLOM. CONST. art. 329.

10. *Id.* art. 330.

Colombian Constitution, however, also grants Indian tribes the power to create law. Their legal decisions can collide with the legal rules created by Congress and the executive power. Their traditions might require doing things that are prohibited by the legal norms proclaimed by the central institutions. Implicit in this conflict of outcomes is a broader debate about the basic structure of the Colombian state. What should be the political and legal relationship between the center and the periphery? What political and legal powers should government authorities, at the national and the local level have?

The Colombian Constitution clearly indicates that Colombia is a unitary state. Yet, it also grants aboriginal groups' self-government rights, indicating that Colombia is decentralized, and declaring its territorial units autonomous.[11] Do these statements mean, as they traditionally have, that in Colombia the power to create law is concentrated in the central government and that Indian authorities are just administrative instruments in charge of developing, at the local level, what the center orders? Or should they be interpreted as indicating that aboriginal authorities have the power to create law as long as it does not conflict with the Colombian Constitution and the legal norms created by the center? Or should these statements be understood as saying that Indian authorities have a general right to create law, even law that conflicts with laws and decrees created by national authorities?

The tension between the principle of political unity and cultural minorities' self-government rights is concretized with special strength in the public debate about the content and limits of the territorial autonomy rights granted to aboriginal groups by the Colombian Constitution. This discussion is particularly important since it evinces the intertwined character of political autonomy and territory. To exercise control over a territory is a necessary condition for self-government. All legal and political decisions made by any government authority would be void from a practical point of view if there were no land in which to enforce them. This is also an important issue because the 1991 Colombian Constitution gave broad territorial autonomy powers to aboriginal communities. Thus, the way these rights are interpreted by the central authorities will affect in a notable way the more narrow territorial autonomy rights granted by the

11. *Id.* art. 1.

juridical system to other cultural minorities, such as rural black communities of the Pacific coast.[12]

The public discussion about the content and limits of aboriginal groups' territorial autonomy has been particularly intense in the last thirteen years. The Colombian Constitution gives Indian groups the right to determine the rules governing the use of their land, the exploitation of natural resources in their territories, and the transit and settlement of their Resguardos.[13] However, the political charter also includes some important principles and values that limit aboriginal groups' territorial autonomy. This right is constrained by the constitutional declaration that the subsoil and all nonrenewable resources are owned by the state,[14] the constitutional recognition of freedom of movement,[15] and the constitutional principle stating that private property rights can be restricted when in conflict with the general interest of the polity.[16]

The tension between aboriginal groups' territorial autonomy and the conflicting constitutional rights can only be understood if the objectives that each of these values pursues are made explicit. The principle of territorial autonomy authorizes aboriginal groups to use their land and administer the natural resources in their territories in accordance with their traditions. This authorization allows Indian tribes to accomplish two important, interrelated ends. It allows aboriginal groups to determine autonomously their necessities and the way they should be satisfied, and it allows the consolidation and reproduction of the groups' way of life. Cultural traditions can survive only if they are regularly applied in the public realm and if they are used to educate new generations. When traditions are utilized to define the community's public life by determining how to make use of and distribute their resources, its members learn or are reminded of their content and can perceive their worth and vitality. When the leaders of the community decide, for example, that its members can only catch a specific number of fish in a sacred lagoon during certain months of the year, they are not just applying the religious rules in which the community believe. They are also consolidating their authority and the

12. *See* Law No. 70 of Aug. 27, 1993, *in* D.O. No. 41.013, Aug. 31, 1993.

13. *Resguardo* is a territory over which one or more indigenous groups have collective property and where they can rule their private and public lives through their cultural traditions. *See* Decree No. 2164, Dec. 7, 1995, art. 21 (articles 329 and 330).

14. COLOM. CONST. art. 332.

15. *Id.* art. 24.

16. *Id.* art. 58.

legitimacy of the community's religion. Adult members of the group will be reminded that the lagoon is sacred territory and children will be taught that this is the case. Adults and children will be reminded of, or educated about, the religious and political hierarchy of the group.

The principle of territorial and political autonomy also authorizes aboriginal groups to establish policies regarding settlement and transit of persons within their lands. This authorization pursues two fundamental aims: to allow indigenous groups to control their relationship with other cultures and to protect and reproduce their ways of life. Indigenous groups are authorized to decide if they want to live culturally isolated or if they want to interact with other cultural communities. If they want to interact with other groups they are also authorized to determine the circumstances and pace at which these encounters should be maintained. Indigenous groups are then allowed to close their borders to non-Indians and are given the powers to control the cultural, political, and economic consequences that the settlement and transit of non-Indians within indigenous groups' territory usually have.[17] Aboriginal communities are authorized as well to apply their traditions for regulating the movement and settlement of their own members within collective lands,[18] and through this mechanism, to give shape to the community's public and private life. In this way, community members are continuously taught or reminded of the norms that govern the group and the stability and reproduction of the traditional culture are made possible.

The Article of the Colombian Constitution that proclaims the state ownership of nonrenewable resources, however, pursues two objectives that can be at odds with aboriginal groups' territorial autonomy: economic development and economic stability.[19] The exploitation of nonrenewable natural resources is fundamental for attaining these aims. Oil, coal, iron, among other natural resources, provide energy or raw materials needed to keep the economy moving, to fund its industrialization, and to generate

17. Examples of these consequences are the following: distribution of available resources among a greater number of people, arrival of goods and knowledge that could change the way of life of the community, and the nonrecognition of traditional authorities by persons that do not belong to the group.

18. Aboriginal groups' authorities can for example prohibit the transit of the members of the community over sacred lands and organize the settlement of new families in accordance with the economic system of the group.

19. The principle stating the prevalence of the general interest over the interest of private individuals, obviously, is applicable in other noneconomic contexts and thus, can be understood as having other objectives.

much needed income to pay for government's services and programs. Colombia, as many other third world countries, strongly depends on the exploitation of these resources for economic growth and government spending.[20] Any advance in the satisfaction of the necessities and wishes of the population, and the redistribution of wealth required for creating a just society depends on the industrialization and vitality of the economy. For these reasons, the Colombian Constitution established the state ownership of nonrenewable resources. The government, for the benefit of all, should be able to determine the ways these resources ought to be exploited and used.

The problem is that many nonrenewable resources' reserves are located within aboriginal groups' territories and many of these communities do not want them to be exploited. A few indigenous groups argue that the exploitation of the subsoil is forbidden by their traditions, such as The U'wa. They believe that any attempt to extract minerals from beneath the ground would enrage their gods, threaten the stability of the universe, and express disrespect for their cultures.[21] Some other indigenous communities, indeed the majority of them, claim that the exploitation of nonrenewable resources within their lands would affect their ways of life negatively, such as the Embera. The arrival and transit of outsiders allowed by the construction of roads needed for the transportation of the minerals, the large amounts of money brought into their economic system by oil companies, and the destruction of hunting and fishing areas by mining activities, for example, would destabilize communities and endanger their cultural integrity.

Freedom of movement also collides with aboriginal groups' territorial autonomy. Freedom of movement forbids unreasonable government restrictions on individuals' right to travel and settle in any region of the country they choose. In order to pursue their private and political projects, individuals should be free to move around the country and to settle in its various regions. Indigenous groups' authorities, however, have the power to prohibit the transit or settlement of non-Indians in their territory. In fact, many aboriginal communities consider the presence of non-Indians in their

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20. Between 1996 and 2003, oil, coal, and iron constituted approximately 40% of Colombian exports. *Exportar, Colombia, Exportaciones por Sector Económico* [Exporting, Colombia, Exports by Economic Sector], *available at* http://www.businesscol.com/comex/estexp01.htm (last visited Aug. 29, 2005).

21. The U'wa people's opposition to the exploitation of oil in their ancestral lands is justified along these lines. *See infra* text accompanying notes 70-76.

lands endangers the cultural integrity of their communities and threatens their political stability (e.g., the Kogui, Arhuaco, Huitoto, and Muinane aboriginal groups).

The cultural and political problems that non-indigenous religious groups have generated in almost all aboriginal communities, Indian authorities argue, are a good example of the situations that they want to avoid by closing their borders to nonmembers. With the acquiescence of the government, missionaries destroyed the links between many aboriginal communities and their traditional religious beliefs. For many theocratic aboriginal groups, this meant that their political leaders lost legitimacy and thus, the stability of their political system was put in question.[22]

The principle stating that private property rights can be restricted when they clash with the general interest of the polity is in tension with aboriginal communities' territorial autonomy as well. The rationale behind this principle is that the property rights of some individuals should not be an obstacle to the realization of the polity's interest. The general interest should prevail over the interest of a few. Aboriginal groups, however, own 24.5% of the land of the country and many *Resguardos* are located in economically strategic areas or in regions where the guerrilla groups and drug traffickers have a strong presence.[23] The state then might need to limit aboriginal groups' property rights in order to protect the rights and freedoms of all individuals who inhabit Colombia and/or to promote the economic prosperity of the country.

The political charter imposes on the government the obligation to guarantee the security of all individuals living in Colombia so that they can exercise their constitutional rights. Criminal activities, the fear that they cause among people and the social chaos that they create, can become serious obstacles to the implementation of citizens' rights. The state might need to send police or armed forces to transit or settle in Indian lands in order to control the illegal activities happening within them. However, the continuous presence of law enforcement agencies or the army within Indian territories might have negative consequences for the communities. The arrival of a large number of soldiers, for example, might break the balance of the fragile environment in which many Indian communities live

22. *See, e.g.*, Case SU-510/98, Corte Constitucional, exp. No. T-141047, Sept. 18, 1998; Constitutional Court, Search System, *supra* note 1.

23. Raúl Arango & Enrique Sánchez, Los Pueblos Indígenas de Colombia 1997 [Indigenous Peoples of Colombia 1997] 223 (Tercer Mundo ed., 1999).

and on which they depend, and might generate new cultural dynamics that could negatively affect the cultural integrity of the group.

Similarly, the Colombian Constitution obliges the government to do everything possible to achieve economic growth. Yet, the economic stability and development of the country depend on the construction of an infrastructure that allows the movement of persons and goods and provides energy and other basic services to industries and households. The country needs to construct roads, bridges, ports, and airports that allow products to be moved rapidly and cheaply from where they are produced to where they will be consumed and that allow people to move rapidly to satisfy the demands of businesses and the job market. The country also needs to build dams and power plants to guarantee a regular supply of energy that allows businesses to function and to provide basic services to its citizens.

The economic development and stability of the economy further depend on the exploitation of renewable natural resources. The nation needs to exploit rationally its woods, waters, flora and fauna in order to satisfy the food requirements of the population and to produce important goods like medicines and paper. Many *Resguardos* are rich in renewable natural resources and are located in strategic areas where the building of infrastructure works would contribute to the economic development of the nation. The use of the former and the construction of the latter would probably affect Indian groups' cultures negatively. The building of big infrastructure works, for example, might require the aboriginal groups to leave their ancestral lands and the intensive exploitation of forests would destroy the main source of food and shelter for many Indian communities.

The tensions between these constitutional values generate many theoretical and practical questions, which can be divided in two groups. The first set of queries arises from the conflict between aboriginal communities' right to use autonomously their land and exploit their natural resources, on the one hand, and the central government's ownership of non-renewable resources and the right to limit private property rights when necessary for the general interest, on the other. What should be done when an aboriginal group disagrees with the government's decision to exploit nonrenewable natural resources within its territory? What should be done if the exploitation of natural resources owned by the state and necessary for the effective functioning of the national economy puts in peril the cultural integrity of an indigenous community? What should be done when Indian land is necessary for constructing infrastructure that would benefit a large number of citizens? Can the government legitimately impose its view over aboriginal groups and construct any project on Indian land, even

if opposed by the communities? If that is the case, what does it mean that Indians are collective owners of *Resguardos*? What is the meaning of the government's duty to favor the participation of indigenous groups in the decision making process regarding the exploitation of natural resources within their territories? What are the characteristics that this process of participation should have so that indigenous groups' views are truthfully taken into account?

The second set of questions arises from the tension between indigenous groups' right to determine autonomously issues regarding transit and settlement of persons in their land and the rights and principles above cited. Can a non-Indian settle in an aboriginal group's territory without the authorization of the community's leaders? Can non-Indians move through Indian territory without the approval of indigenous communities? Are the representatives of the central government authorized to transit or settle in Indian land when necessary to comply with their constitutional or legal obligations? Does the central government have the right to overrule any decision made by aboriginal groups' authorities on these issues? If that is the case, in what sense are indigenous communities territorially autonomous?

In sum, underlying the tension between territorial autonomy and the unitary character of the Colombian state, the priority of the general interest over private property rights, freedom of movement and the state ownership of nonrenewable resources there is a conflict of political and economic ideals. There is a conflict between different facets of the ideal country that Colombians would like to have. On the one hand, we value cultural diversity and are committed to the principle of self-determination. We want aboriginal groups to be politically and territorially autonomous. We want indigenous communities to have the tools for protecting and reproducing their culture and we want to remedy the many injustices that the state perpetrated against them in the past. On the other hand, we want our country to develop economically and are committed to the ideas of progress and distributive justice underlying this aspiration. We also want a united country with a stable democratic system where the voice of the majority is heard, and where freedom of movement is protected.

III. THE CONSTITUTIONAL COURT AND THE TENSION BETWEEN POLITICAL UNITY AND CULTURAL MINORITIES' POLITICAL AUTONOMY

In the last thirteen years the Constitutional Court has been the public institution that has tried most actively to solve the theoretical and practical questions generated by the tension between the principle of political unity and cultural minorities' self-government rights. The conceptual framework developed by the Court has determined the character of the public debate about the content and limits of cultural minorities' political and legal autonomy. This basic conceptual structure has been laid out by the Constitutional Court in seven cases directly related to aboriginal communities' territorial autonomy. In these cases, the Court most clearly and sharply presents its interpretation about the second component of the cultural unity — cultural diversity tension within the Colombian Constitution. Unfortunately, the doctrine developed by the Court in these cases has been inconsistent, and in some cases, conceptually unsound. The Court's opinions present views that are incoherent and unable to solve all dimensions of the conflicts underlying the cases.

In some of these cases the Court has also been paternalistic. The Court sees indigenous groups as passive subjects that should be protected by the government from the undue interference of external forces in their lands and not as agents with the right to autonomously govern their territories. The Court, in these cases, does not see a conflict between aboriginal communities' territorial and political autonomy and other constitutional values, but a tension between the state's duty to protect cultural minorities and other constitutional principles. The application of which might harm Indian groups.

Yet, some of the Court's opinions also present theoretical tools useful for understanding and strengthening the rights and responsibilities of Indian groups' territorial self-determination. From a practical point of view, the Court's opinions generally have had a positive effect for indigenous communities' territorial autonomy. Although sometimes for the wrong reasons, aboriginal groups' rights have usually been protected. The Court has confronted government and powerful private organizations when their actions have affected aboriginal groups' rights negatively and has ordered compensation for damages caused by their actions.

IV. BLIND INDIVIDUALISM: IGNORING ABORIGINAL GROUPS' TERRITORIAL AUTONOMY

The first case regarding cultural minority rights ever decided by the Constitutional Court was *Cristianía* (T-428/92).[24] The facts of this case are stated below. The government's expansion and pavement of a road within the lands of the Cristianía people (located in the province of Antioquia) caused, at least in part, the destruction of the economic infrastructure of the community. Landslides partially generated by the government's works in the geologically unstable area where the *Resguardo* is located ruined the heart of the group's productive system (sugar mill, stables, corrals, and coffee bean processing area). The government did not do the study legally required to establish the possible environmental consequences that the expansion and pavement of the road would have in the region. Briefly after the action against the government was filed, the Court ordered the government to suspend all work on the road until the case was decided.

The opinion of the Court was centered on the analysis of the tension between the interest that the province of Antioquia's inhabitants had in the construction of the road, given the economic benefits that it would bring, and the interest of the indigenous community in protecting its economic infrastructure and culture. The Court decided that the interest of the latter had priority over the interest of the former and instructed the government to maintain the suspension of the works until a study of the environmental consequences that might be generated by the road was completed. The Court also ordered the state to take all measures needed to prevent further damage and to pay for the damage already caused to the indigenous community.

The Court justified its decision with the following two arguments. First, it argued that the interests of the aboriginal community and the non-Indian inhabitants of the region were collective in character. Thus, the Court added, the conflict to be decided was not between the general interest and the interest of private individuals but between two collective interests:

> Formally, this is a conflict between two collective interests, not a conflict between the general interest and a private interest. . . . From a substantive point of view this is a conflict between the interest of the inhabitants of the coffee growing region regarding the improvement of the area's transportation infrastructure and the

24. Case T-428/92; Corte Constitucional, exp. No. T-859, June 24, 1992.

> interest of the Indigenous community regarding its property rights over estate that is fundamental for its survival.[25]

Second, the Court stated that the interest of the indigenous group should be given priority because of its connection to the individual rights of the community's members:

> [I]t is obvious that from the point of view of the right in which each interest is based, the demands of the Indigenous community have more weight. While the interest of the Aboriginal group is based on the right to property, to work, and to maintain its ethnic and cultural integrity, the interest of the rest of the community is based on the right to finish a construction work conceived for the economic benefit of the region.[26]

The expansion of the road, the Court said, negatively affected the individual rights of the aboriginal community's members, and the continuation of the construction might affect them further. The Indians' rights to life,[27] private property, work, and the integrity of their culture were all threatened or violated by the destruction of the aboriginal groups' economic infrastructure. In contrast, the interest of the non-Indian inhabitants of the region was related just to the general economic benefits that the expansion and pavement of the road would bring to the area. The Court added that the government could never violate the individual rights of the citizens to satisfy the general interest of the population. "The norm that establishes the priority of the general interest [the Court said,] cannot be interpreted as justifying the violation of the fundamental rights of a few for the benefit of the interest of all."[28]

In *Cristianía*, the Court faced, for the first time since its creation, the difficulties of interpreting the tension between cultural diversity and cultural unity that exists within the Colombian Constitution.[29] More specifically, the Court had to decide a case where aboriginal groups'

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25. *Id.*

26. *Id.*

27. "[T]he loss of the estate where the community's primary productive infrastructure was based, puts in peril the group's precarious conditions of subsistence and thus, the integrity and life of its members." *Id.*

28. *Id.*

29. The Colombian Constitution was enacted in July 1991 and the opinion of this case was issued in June 1992.

territorial autonomy collided with the economic development of the country. The Court's analysis focused solely on the tension between the individual rights of the aboriginal group's members and the interest that the non-Indian inhabitants of the region had in the improvement of the road. The Court's decision in favor of the indigenous community was structured exclusively around two arguments. The first argument was that the works on the road affected the rights to life, property, and cultural integrity of the aboriginal group's members negatively. The second argument was that the general interest of the community could not be achieved at the expense of violating individual rights. Individual rights, the Court argued, are the shield that in a liberal democracy protect all persons from the tyranny of the majority.

The liberal argumentation of the Court, seen in an isolated way, is plausible. It sheds light over an important problem underlying the case and resolves it in a just manner.[30] Yet, the Court's focus on the individual rights of the members of the Cristianía people obscured the fact that the government and the engineering company violated rights to which the community as a whole is entitled and that can only be exercised collectively. The Court's opinion did not address the fact that the government and the engineering company violated the territorial autonomy of the indigenous group. It said nothing about how their actions violated aboriginal group's right to determine the way its land should be used and the Indian community's collective property rights over their territory. Land belonging to the Cristianía people was used in the expansion of the road without the aboriginal groups' consent. The group's view on the consequences that the pavement and expansion of the road could bring to the community's cultural integrity was not heard.[31] It seems that if the

30. The practical results of the Court's first attempt to give content to the constitutional provisions regarding cultural minorities' rights were positive. On the one hand, the Court decided to stop the expansion and pavement of a road that was going to bring significant economic benefits for an important region of the country, because of the negative consequences that these works had (and could have) for an indigenous group. On the other hand, the Court's opinion ordered the government and the company in charge of the construction works to compensate the aboriginal group for the damages that were caused to its property. The Court then, in its first opinion on cultural diversity issues, inclined the balance in favor of cultural minorities and sent a strong message to the country: cultural minorities' rights should be respected and those who violate these rights will be held accountable.

31. It is one thing to have a narrow, dirt road crossing Indian territory and another to have a wide, paved road that will bring heavy traffic and numerous people to the area. If consulted, the Cristianía people might have agreed to the expansion and pavement of the road. However, the

work on the road had not destroyed the productive infrastructure of the community and individual rights of the community's members had not been negatively affected as a consequence of this action, the Court would have condoned the state and company's actions.

There are two intertwined reasons that explain the Court's decision in *Cristianía*. First, *Cristianía* was the Court's first attempt to give meaning to the multicultural component of the 1991 Constitution. It was unanimously decided in 1992, only a few months after the Court was created, by a panel constituted by Justices Ciro Angarita, Eduardo Cifuentes, and José Gregorio Hernández. The three Justices did not have any precedent that could help them to interpret the facts and the legal problems of this case. Therefore, it was to be expected that they would use the traditional legal and political language to understand and solve this conflict.

Moreover, it was to be expected that the Court would use individual rights, one of the most important categories of this traditional language, to interpret the case. When these legal and political categories are used, it is easy to lose the collective dimensions of the phenomenon examined. This is exactly what happened. The Court did not see that aboriginal group's territorial autonomy was violated by the government and road-construction company. The Court only saw that some of the individual rights of the aboriginal group's members were violated, e.g., the right to property and the right to life.

Second, this was a tutela case, and thus, a case where fundamental rights are supposedly being (or threaten to be) violated. Article 86 of the Colombian Constitution indicates that the tutela action can be used only to protect Colombians' fundamental rights. In the 1991 political charter, not all fundamental rights are individual rights. There are some social entitlements that are also considered fundamental, such as children's right to health. Yet, the majority of them are in fact individual rights. Thus, it was probable that the Court focused on the individual rights and not on the collective rights dimension of the case.

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community might have disagreed, given the increased contact with the dominant culture that these construction works imply.

V. MILITANT CENTRALISM: REJECTING ABORIGINAL GROUPS' TERRITORIAL AUTONOMY

While indigenous communities' territorial rights were ignored but not undermined in *Cristianía*, in the *Military Base* case,[32] aboriginal groups' territorial self-determination was radically and unjustly restricted. In the facts of this case, the national government constructed a military base in the territory of the Huitoto and Muinane aboriginal communities. The base hosts a group of U.S. and Colombian soldiers in charge of managing a radar device for controlling drug-trafficking-related activities. The Indian groups claimed that the construction of the base was undertaken without prior consultation. The government, however, alleged it did inform the Huitoto and Muinane about the construction of the base and that some members of the community accepted work on the construction.

The indigenous groups also argued that the base was built on one of their sacred sites. Since these places purify the environment, Indian leaders added, the violation of the sacred site caused negative environmental changes that affected the health of the population that lives in the region.[33] The Huitoto and Muinane also claimed that the construction of the base in their territory caused damage to the *Resguardo's* infrastructure and ecosystem. The military's intense use of the *Resguardo's* airport and the road that goes from this place to the town of Araracuara seriously damaged these transport facilities. The fact that a significant number of persons were living in the base also created problems related to the disposal of waste and the management of natural resources like water and forests in the *Resguardo*.

The Court's opinion in *Military Base* focused on solving the tension between what it called "two general interests:" national security, such as the protection of the Colombian state from internal and external threats, and indigenous communities' cultural integrity. The Court decided that in

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32. Case T-405/93, Corte Constitucional, exp. No. T-12559, Sept. 23, 1993.

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> [W]ith the installation of the radar device, the community has suffered numerous injuries. . . . [I]t has not been able to develop its cosmogony given that the radar device is located in a sacred place. . . . [The negative consequences generated by the radar device] can be seen in the unbalance of the environment that creates the epidemics that the members of the community are suffering. . . . [F]or us, sacred sites purify the air.

Id. (comment of some of the aboriginal groups' leaders cited in the opinion of the Court).

this case national security should prevail over Indians' rights. The Court justified its decision with the following arguments. First, indigenous groups' collective property over their lands is not an absolute right. Property rights can be restricted when public order issues are at stake. Second, the principle of national security prevails over the indigenous community right to protect the integrity of its culture. The military station allows the control of drug-trafficking-related activities that affect all citizens, while the protection of the Huitoto and Muinane culture affects them only. For the Court,

> Formally this is a conflict between two collective interests, not a conflict between a particular and a general interest. Both collective interests have differences regarding their grade of generality. The aboriginal group's interest is clearly limited in a spatial and temporal ambit; the Colombian state's interest is related to the control of drug trafficking in the Amazon and low Caquetá region and the security of the Colombian population. . . . The latter is then, an interest that includes a greater number of persons, and it could be said that within this number of persons the Middle Amazon indigenous community is included.[34]

The Court also said that while the aboriginal groups' interest is based in the right to property and the protection of its cultural integrity, the interest of the state is based in its duty to protect the rights and freedoms of all Colombians:

> While the interest [of the indigenous communities] is based in the right to property and to maintain its cultural and ethnic integrity, the interest of the people of Colombia and in particular the interest of the state is based and supported by the government's [duty to protect] national sovereignty, to control the public order and to guarantee the security of all the inhabitants of Colombia. . . .[35]

Third, no fundamental rights were violated by the construction of the base, although it was built in Indian's sacred territory. The Court explicitly said that "given that [the radar device's] strategic location is essential for

34. *Id.*
35. *Id.*

activities of control, it cannot be thought that the radar device violates fundamental rights that should be protected through the *tutela* action, even though for the Indigenous community the place where it is located is sacred."[36] Fourth, the government did discuss the project with aboriginal communities; the fact that some of its members worked on the construction of the base proved that the community was not opposed to its building. The Court said that,

> The installation of the radar device, as can be deduced from the reading of the case's file, was accepted by the Aboriginal community before its actual installation, even though it was subsequently argued that the obligation to consult about this project that directly affected the Aboriginal community was not satisfied. Before the installation there were meetings with the Aboriginal community and Indians worked in the preparation of the area and in the installation of the radar device. Thus, it should be deduced that if the members of the Indigenous groups helped in the installation [of the radar device] they were not opposed to it.[37]

Fifth, Colombia is a unitary republic. The creation of law is the exclusive power of Congress and the national government. The indigenous groups are instruments that can only apply or develop Congress's or the central government's decisions. For the Court, Colombians

> are governed, as it is affirmed by article 1 of the Constitution, by a state that is organized "as a unitary Republic, decentralized and with autonomy of its territorial entities." This system of articulation of power in the territorial sphere implies that political decisions and law are the monopoly of the central State, of Congress -in the best of cases- or the government. . . . [C]onsequently, any alternative source for the production of law is excluded and local instances appear only as neutral instruments of the central power.[38]

The Court, however, found that the activities of the soldiers that lived on the base did affect the environment and the infrastructure of the *Resguardo* negatively. As a result, the Court ordered the government to

36. *Id.*
37. Case T-405/95, Corte Constitucional.
38. *Id.*

create an intercultural committee that would be in charge of preparing a plan for managing natural resources within Indian lands.

The Court's decision in this case is justified by four arguments: First, it held that the Huitoto and Muinane agreed to the construction of the base and therefore the communities' property rights were not violated. The Court decided then that consent was the first criterion that should be applied to solve *Military Base*. From the Court's holding, the Huitoto and Muinane exercised the collective property right that they have over their *Resguardo*. For the Court, these aboriginal communities voluntarily ceded to a third party (the Colombian state) the use of a portion of their land — as all property owners have the right to do.

Yet, the Court's ruling did not contain evidence to support the Court's holding. The Court just held that the government organized some meetings where members of the Huitoto and Muinane communities participated and that some members of the community worked on the installation of the radar device. The scope of the Court's order did not contain anything about who participated, what was specifically discussed, or what was the purpose of these meetings. Were these meetings organized to inform the communities about a project that was going to be done in their lands? Were they organized to ask for the communities' permission to install the radar device? Were the communities' authorities at the meetings? If that is the case, what did they say about the construction of the base in their territory? Did they oppose the project? If the communities agreed, why did they change their mind and sue the government?

The only evidence available in the case shows that the government merely informed the aboriginal groups that a radar device was going to be installed in their territory and that the Huitoto and Muinane disagreed with the whole project. In a memo cited by the Court, the Ministry of Defense said that the state informed aboriginal groups about the construction of the military base and the benefits that this project would bring to the region. In this memo, the Ministry said that

> The [radar device's] installation and functioning operations were known by the Indigenous communities at the relevant time. . . . [T]he benefits for the communities were also explained to them. We made them realize that the infrastructure and the improvements in the runway would be left to the community since the radar device

> is mobile and the military personnel would stay in the area only transitorily. . . .[39]

The memo also said that, "[t]he national security and sovereignty have priority over the transitory hassles caused to the Indigenous groups."[40]

The director of a semi-public foundation that works in the *Resguardo*, also cited by the Court, said that among the negative effects generated by the radar device's installation was the malaise generated between the Huitoto and Muinane because they were not consulted about the construction of the military base. He said that with the installation of the radar "the Indigenous groups have felt a presence that was not previously consulted with them in a place that they consider of great importance for their cultural traditions."[41] In the suit filed against the government, the aboriginal groups' representatives specifically stated that the authorities of the community were not consulted about the installation of the radar device.

The Court's holding seems to assume that the fact that the aboriginal groups living in the Monochoa *Resguardo* were informed about the construction of the base legitimated the government decision to move ahead with the project. This assumption is wrong. Aboriginal groups are collective owners of *Resguardos*; they have the same rights, with the exception of the right to sell the property, as any other landowner in the country.[42] Indigenous communities then, have the right to decide who can transit and settle in their territories. The Constitution does not allow the government to violate the property rights of citizens just because it previously informed the owners of the actions that were going to violate their rights. If the state thought that despite the indigenous communities' opposition to the base, it was fundamental for national security reasons to install the radar device in the Monochoa *Resguardo* it should have followed the legal procedures for expropriating the land necessary to accomplish that aim.

The fact that some members of the community participated in the building of the base hardly shows that the community agreed to the construction of the military base. The authorities of the Monochoa

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39. *Id.*

40. *Id.*

41. *Id.* (comment of the Corporación Araracuara's director).

42. The Court itself offered this argument. Case T-257/93, Corte Constitucional, exp. No. T-10.239, June 30, 1993.

Resguardo are the only ones entitled to make any decision related to the transit and/or settlement of non-Indians in their territory. The fact that a group of Huitoto and/or Muinane worked on the construction of the base at most shows that *these persons* agreed with the arrival of the Colombian and U.S. military personnel at the *Resguardo*.[43] There is no evidence that the individuals that worked on the building of the base were acting as representatives of the community. The Court's ruling would oblige us to accept that it would be legitimate for Brazil, for example, to construct a military base on the Colombian side of the border (on public lands) if a group of Colombians work on its building. From the Court's holding, this would be evidence that the Colombian state and all its citizens agreed with the Brazilian government's actions.

The second argument that the Court's ruling used to justify its decision was that the general interest of the polity should always have priority over the interest of private individuals. The Court decided that while protecting the indigenous groups' legal interests would affect only them, protecting national security would affect all Colombians positively. Without a minimum level of stability and order, the Court's holding added, the rights and freedoms of people (Indians and non-Indians) would be just empty concepts. If the state were not able to control the widespread violence and corruption that drug trafficking has generated in Colombia its citizens would not be able to exercise their rights and freedoms. Although aboriginal groups' rights to property and cultural integrity are important for the polity, in this case they should be notably restricted.

There is no doubt that national security is an important political value and that the control of drug trafficking activities that the radar device allows contributes to its protection. Yet, it is not clear why this value needs to be protected through the encroachment of aboriginal groups' rights. There is no evidence in the case indicating that the military base had to be constructed in Indian lands. Could it have been constructed at another site? If to protect national security it was absolutely necessary to construct the

43. We can imagine other reasons that might have motivated some members of the Huitoto and Muinane communities to work in the construction of the base. They might have been non-traditional members of the community and might have thought that the arrival of the armed forces was going to help the community to move away from questionable customs. To help in the construction of the base was for these nontraditional members of the group to help their community to move in the right cultural direction. Another reason that might explain why a group of Huitoto and Muinane worked in the construction of the base is the bad economic situation that they were (and are) living with; the money paid by the armed forces might have tempted some of them to work in the installation of the radar device.

base in the Huitoto and Muinane territory, why was it constructed precisely on an area considered sacred by these aboriginal groups? There is no information available in the case that answers this last question, but it is highly unlikely that within the *Resguardo* there was no other piece of land that would have been appropriate. It might have been the case that the location of the base was chosen for logistical reasons, e.g., since the base is right next to the runway of the region's airport this probably facilitates the arrival of supplies and the mobility of the military personnel. However, these logistical justifications can hardly be seen as reasons powerful enough to violate the sacred lands of the peoples that inhabit the Monochoa *Resguardo*.

The third argument offered in the Court's ruling was to justify its decision that national security should be a priority over aboriginal groups' rights because the location of the base did not violate any of the Indian communities' fundamental rights. The Court held that the location of the radar device "neither harms nor ignores the ethnic or cultural rights of the Aboriginal group, nor does it endanger the conditions that allow the group to exist, nor the integrity or the life of its members."[44] In the Court's order there is no evidence that the base negatively impacted the rights of the Huitoto and Muinane. The Court's decision is implausible. The fact that the military base is located in the aboriginal groups' sacred lands is in itself a violation of freedom of religion. The Huitoto and Muinane's right to practice their religious views was violated by the desecration of their lands.

Practicing a creed, involves defining what is sacred, what conduct is allowed toward the sacred, what consequences follow from the violation of these rules, and the actual practice of these rules by the faithful and their religious leaders. The location of the military base made the Huitoto and Muinane's religious rules about the sacred inapplicable. These aboriginal communities believe that nobody should live in sacred lands since they maintain the balance of the environment. They also believe that any violation of this rule would generate changes in the environment that would bring negative consequences for human beings. Consequently, the presence of military personnel in holy lands has meant for the Huitoto and Muinane the arrival of diseases in their territory and the impossibility of performing any personal or collective religious ceremony in these lands.[45]

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44. Case T-405/93, Corte Constitucional.

45. The Huitoto and Muinane's religious beliefs might seem unattractive by many in the dominant culture. The connection between illnesses and sacred lands might look unreasonable to

The installation of the radar device in the Huitoto and Muinane's holy lands also violates the constitutional principle that recognizes cultural diversity. This principle entails the recognition of cultural minorities' ways of life. It implies then that cultural communities' have the right to organize their public and private institutions through their traditions and that the state should respect the worldviews of the various communities that inhabit the country. The government's violation of the Huitoto and Muinane's freedom of religion is also a violation of their right to live in accordance with their traditions. When the state violated the Indian communities' right to practice their creed, the state also violated their right to express their cultural difference. Religion is a fundamental element of these aboriginal groups' personal and collective identities. It is an essential component of their cosmogony.[46]

The last argument that the Court's holding makes to justify its decision is that Colombia is a unitary republic. From the Court's order, this means that the central state has a monopoly over the creation of law and that all other authorities in the country should only implement or develop the legal norms created by Congress and the president. In the Court's ruling on article 1 of the Colombian Constitution, indigenous communities do not have the right autonomously to create and implement legal norms that reflect their cultural traditions. In this view, Indian authorities are mere instruments of the central government. Although they have certain freedoms on the margins, e.g., to decide fishing and hunting rules, their main task is to enforce at the local level what the national Congress and the president have already decided for the whole country.

Implied from the Court's decision on the Colombian Constitution there is the modern idea that stability and order cannot be achieved without the centralization and homogenization of law. From this perspective, there

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them. However, the reasonableness of persons' religious beliefs should not be relevant for deciding if the state violated their religious freedom through a specific action. These indigenous groups do not want to impose their religious views over all Colombians. They just want to be able to live in accordance to their religious traditions.

46. The government would have never constructed a military base on lands sacred to the Catholic majority. The state would have never dared to install a radar device in, for example, a place where a historic church was once built or on a site where it is believed that the Virgin Mary appeared. On the one hand, the majority of government officials are Catholic and most probably would not take the first step to desecrate the sacred symbols of their faith. On the other hand, even if the government would be willing to do it, the opposition of the Catholic majority of the country would have made it politically impossible. Yet, one cannot but wonder what would the Court have decided if this had happened.

should be one and only one legal system to avoid the disintegration of the state. If there were various legal systems this would mean the existence of various sources of power and the continuous possibility of struggles among them. This central structure would guarantee law's coherence and rationality as well. Law should be created by the same entity (or group of entities) to minimize the risks of internal contradictions and voids. The centralization of law would also guarantee the general and abstract character of legal rules as well as their equal enforcement in all areas of the country. All persons would have the same rights and all laws would be in principle applicable in all of the state's territory. The central powers would create laws, which provincial, as well as local authorities, would contribute to those laws' enforcement. The possibility of various legal systems coexisting within a country is thereby ruled out. Without centralization, there would be conflicts of competence, laws that favor individuals living in certain areas or belonging to certain groups, and individuals uninformed about the rules that should guide their conducts.

The Court's order trivializes cultural diversity within its ruling on Article 1 of the Colombian Constitution. In the Court's holding, the constitutional recognition of the various cultural traditions that coexist in the country means that the state recognizes all traditions that do not conflict with the dominant culture. Since the hegemonic cultural tradition controls Congress and the executive power, the institutions that hold the monopoly for the creation of law, cultural minorities are condemned to be eternal appendages of the majority. They would have no other mission but to implement what the majority decides. Aboriginal groups would be allowed to dress, dance and eat differently, for example, but they would not be able to apply any cultural tradition that conflicts with the values of the majority. In the Court's finding in the Colombian Constitution, Indian lands are simply another territorial entity like provinces and municipalities. Aboriginal groups' territories are just one more administrative division designed to facilitate the enforcement of the decisions taken by the central state. Indian lands and authorities are nothing but a marginal piece in a bureaucratic structure that is meant to communicate and apply in the periphery decisions made by the center.

The political and territorial self-determination granted to Indian groups by the 1991 Colombian Constitution, however, was specifically designed to break this modern way of understanding law and to temper the power that the central state and the majority usually have in the life of minorities. These rights were granted to indigenous communities so that they could protect and reproduce their cultures; so they could design private and

public institutions in accordance with their traditions. The recognition of diverse legal systems by the charter is a necessary consequence of the constitutional recognition that Colombia is a multicultural country,[47] aboriginal groups' judicial powers,[48] and indigenous communities' political self-determination rights.[49] These constitutional provisions break the traditional monopoly over the creation of law that the central state had for centuries in Colombia. Aboriginal groups, the Colombian Constitution states, have the power to create laws, to enforce them, and to choose political leaders in accordance with their traditions. Obviously, a system that coordinates the various legal systems should be developed. Legal pluralism is a source of innumerable problems and challenges. Jurisdictional limits should be determined, areas of competence should be defined, and minimum procedural standards, among many other things, should be decided. However, all these tasks should be done in a way that allows cultural diversity to flourish and not in a way that minimizes the possibility of the expression of differences.

As a result, in *Military Base*, the Court's decision radically and unjustly restricted aboriginal groups' territorial autonomy. Indian communities' collective property rights were extremely weakened, and the indigenous groups' right to live in accordance with their traditions was drastically undermined. In the Court's holding, the Colombian Constitution authorizes the government to use, transit across, and settle in Indian territories just by informing aboriginal communities that this would be the case. From the Court's rulings, aboriginal groups are just instruments that the central government uses for the implementation and development of laws created by Congress and the president. From the Court's opinion, the only space where aboriginal groups can exercise their autonomy is within the gaps left by the legal grid created by the central state. Aboriginals can develop this grid; they can even give it a local "flavor." However, they cannot modify, contradict, or create an alternative to this system.

The Court's jurisprudential turn in *Military Base* can be explained by the following three reasons. First, the Court's ruling could not avoid addressing the challenge to the Huitoto and Muinane's territorial autonomy rights. It was obvious that the construction of a military base in the lands of these aboriginal communities was in tension with the collective property rights that they hold over the Monochoa *Resguardo*. It

47. COLOM. CONST. art. 7.
48. *Id.* art. 246.
49. *Id.* art. 330.

was also apparent that the construction of the base and the permanent presence of U.S. and Colombian military personnel (supposedly) without the Huitoto and Muinane's permission violated their self-government rights. Second, the military base that was constructed on Indian territory was an attempt to control drug trafficking related activities in the country. Drug trafficking in Colombia is a national security issue. It is also the main topic of the agenda of U.S. and Colombian relations. Within the Court's opinion, it would have been politically very challenging to solve this case in a different way. The Justices could have easily been accused, by the Colombian and the U.S. governments, the media, and public opinion, of obstructing the war on drugs and harming Colombia's relationship with the United States. Third, are the political commitments of Justice Herrera. *Military Base* was decided unanimously by Justices Herrera, Morón, and Martínez. Justice Herrera, who wrote the opinion, was one of the most conservative Justices on the Court. During the nine years that he served in the tribunal, his commitment to conservative values like security, order, and legal, and political, centralization was constantly made explicit in his opinions.[50]

VI. RADICAL COLLECTIVE AUTONOMY: BETWEEN A PATERNALISTIC AND A JUST AFFIRMATION OF ABORIGINAL GROUPS' TERRITORIAL AUTONOMY

From 1993 to 1998 the Constitutional Court decided four cases in which indigenous communities' territorial autonomy was strengthened. In *Vaupés*, *Embera*, *U'wa*, and *Urrá*, the Court provided some useful tools for understanding the specific rights and responsibilities that aboriginal groups' territorial self-determination entails. However, the reasoning of the decisions was not always clear, coherent, or conceptually sound. Particularly problematic were those arguments that offered a paternalistic defense of aboriginal groups. In these arguments, the Court reproduced the mainstream's view that aboriginal groups are weak and passive entities that should be protected by the state from internal or external threats.

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50. *See, e.g.*, Case C-221/94, Corte Constitucional, Dissenting Opinion, exp. No. D-429, May 5, 1994; Case T-569/94, exp. No. T-48.344, Dec. 7, 1994; Case C-098/96, Dissenting Opinion, exp. No. D-911, Mar. 7, 1996; , Case C-239/97, Dissenting Opinion, exp. No. D-1490, May 20, 1997; Case C-481/98, Dissenting Opinion, exp. No. D-1978, Sept. 9, 1998; Constitutional Court, Search System, *supra* note 1.

The first case where the Constitutional Court explicitly affirmed aboriginal groups' territorial autonomy was *Vaupés*.[51] In this case, Nuevas Tribus de Colombia — a U.S. Protestant group — quested the government to revalidate the permission it had been granted to use an airport located in the *Resguardo* of Vaupés. This religious group's mission is the conversion of aboriginal groups to Christianity and it had been working in the area where the airport is located for several years. The government agency that administers airports denied the permission because the Vaupés *Resguardo*'s authorities informed the agency that the aboriginal communities they represent did not want Nuevas Tribus back in their territory. The religious group argued that the freedom of movement and the religious freedom of its members had been violated.

The Court's holding centered on the tension between freedom of movement and the collective property of Indian lands. It decided that the latter should prevail over the former. The Court ruled that Article 24 of the Colombian Constitution should be read that the law can limit freedom of movement. It also determined that the American Convention of Human Rights and the International Covenant on Civil and Political Rights — to which Colombia is a party — assert that freedom of movement can be limited to protect the rights and freedoms of third parties. Finally, the Court stated that indigenous communities have the same rights over their lands as any other proprietor and consequently, that Indian groups have the right to limit the transit and settlement of persons within their territories.[52] For the Constitutional Court,

> the property rights that an Aboriginal community exercises over its *Resguardo* are rights ruled by article 58 of the Constitution. Thereby, property over a *Resguardo* is a *right-duty* in the following sense: a) For the owner — the Indigenous community — it is a subjective *right* that has the characteristics established by article 669 of the Civil Code. . . .[This article] establishes [the following]: Property is a real right over a corporeal thing for its arbitrary enjoyment and disposal, if this is not against the law or the right of another person. . . . Particularly, the consent of the owner(s) is required for circulating in it [the property]. Property is also a *duty*

51. Case T-257/93, Corte Constitucional, exp. No. T-10.239, June 30, 1993.

52. The only exception to this rule is that article 329 of the constitution states that *Resguardos* are not commercially available. Indigenous groups are not allowed to sell their legally recognized collective lands.

> because it has a social function. b) For third parties, it is a *duty* to respect someone else's property. . . . and not to circulate in it without the consent of the owner. In this way, the Aeronáutica Civil's decision of demanding the consent of the community. . . . for operating the Yutica-Yapima runway is justified in constitutional and legal provisions as well as in international treaties.[53]

In this case, the Constitutional Court strongly affirmed aboriginal groups' territorial autonomy. The Court recognized the right that the Indian groups that live in the *Resguardo* of Vaupés had to deny the entrance of Nuevas Tribus de Colombia to their territory. The Court confirmed that aboriginal groups' own the *Resguardos* they inhabit,[54] acknowledged that *Resguardos* are not mere administrative divisions like provinces and municipalities, and made explicit the content of Indian groups' property rights over their lands. The Court declared that because indigenous groups are collective owners of *Resguardos*, they have the right to determine who can settle and transit their territory. The Court also stated that the government and private individuals have no option but to comply with the decisions made by Indian communities' authorities on these issues.

The Court's reasoning is very significant if placed in a historical context. Since being a Spanish colony, Colombia has promoted the assimilation of aboriginal groups through religion. The Catholic Church was the institution favored by the Colombian government to "civilize" indigenous groups.[55] Yet, protestant organizations were also part of this process. During the twentieth century, various protestant denominations, such as, Jehovah Witnesses and Seventh Day Adventists, performed

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53. Case T-257/93, Corte Constitucional (bold in the original).

54. COLOM. CONST. art. 329.

55. Law 89 of 1890 was the most important legal norm enacted in the recent history of Colombia on these matters. Law 89 gave the Catholic Church the mission of "civilizing" aboriginal groups in the country. To "civilize" Indian communities meant that their members should convert to Christianity, learn Spanish, and participate in the dominant culture's market economy. To achieve this aim, Law 89 put the Catholic Church in charge of the education of all aboriginal groups in Colombia. It also gave the Church judicial and political powers over Indian communities. Until 1996, when in Case C-139 the Constitutional Court declared partially unconstitutional Law 89, this legal norm defined the basic contours of the relationship between the state and aboriginal groups. *See* Case C-139/96, Corte Constitucional, exp. No. D-1080, Apr. 9, 1996; Constitutional Court, Search System, *supra* note 1.

evangelist activities in Indian lands with the approval of the Colombian government.[56] Aboriginal communities were obliged to accept the settlement or transit of missionaries in their territory and had nothing to say about the activities that these persons were carrying out in their lands. They had no other option but to accept what the central government had decided was beneficial for them. The Court's decision made clear that those days ended with the 1991 Colombian Constitution. The Court affirmed that the government and the various churches interested in converting indigenous groups to their creed, are autonomous agents and thus, they alone can decide if they want to assimilate to another culture.

The Court's ruling that the rights indigenous groups have, as collective owners of their *Resguardos*, are, with the exception of the right to sell, identical to the rights held by any other landowner of the country that has an important strategic consequence. This statement allows the average citizen of the dominant culture to understand what is at stake in many of the conflicts in which aboriginal lands are involved, because it suggests an accessible way to identify with the Indian groups' claims. Members of the dominant culture would be able to see that Indian groups' defense of their lands is based on the same rights that any landowner claims over her land. Aboriginal groups and landowners in the dominant culture can then become implicit, or explicit, partners in the defense of Indian territories. It is in the interest of the dominant culture's landowners to defend private property. They would not want to see their rights to control who can transit their properties limited.

The Court's holding exclusively focused on property rights for defending Indian groups' territorial self-determination is, however, problematic. This determination obscures the fact that the collective property of *Resguardos* is not the only source of aboriginal groups' territorial autonomy. These groups' control over their own land is not only because they are proprietors, but also since they are culturally different. The constitutional recognition of these groups' right to define the way

56. *See* CHRISTIAN GROS, POLÍTICAS DE LA ETNICIDAD: IDENTIDAD, ESTADO Y MODERNIDAD [Politics of Ethnicity: Identity, State and Modernity] 146-50 (2000); DAVID STOLL, IS LATIN AMERICA PROTESTANT? THE POLITICS OF EVANGELICAL GROWTH (1990). The evangelizing work done by the Instituto Linguístico de Verano in Indian lands since 1962 was particularly effective. This U.S. protestant group, with the state's approval, studied the languages of indigenous communities all around the country in order to convert their members into Christianity. The staff of the Instituto Linguístico learned Indian groups' languages to find ways of communicating Christian ideas in a way understandable to the aboriginal communities.

their lands and resources should be used and administered[57] is based on the constitutional recognition of the legal theory of cultural diversity.[58] The Constitutional Assembly granted aboriginal groups' territorial self-determination in order for them to be able to express, protect, and reproduce their cultural ways. To recognize cultural difference commits the state not only to recognize in the abstract the diverse ways of life of the various communities that inhabit the country, but also to create the conditions in which these different ways of life can flourish.

The second case in which the Constitutional Court affirmed aboriginal groups' territorial autonomy was *Embera* (T-380/93).[59] The facts of this case are the following: A contractor of a wood company exploited 8.40 acres of forests within the territory of the Embera community over approximately three years. Some of the Embera's leaders approved the exploitation of the communities' woods by the timber company and received cash, a boat engine, and a chainsaw as compensation for their consent. However, the wood company did not get the government-issued license that it needed legally to exploit the natural resources in Indian lands, which are also a legally constituted forestal reserve. The contractor's heavy exploitation of the *Resguardo*'s forests notably altered the ecosystem of the area, threatening the economic viability of the community.

The group has a subsistence economic system based on the exploitation of the tropical forest that was endangered by the company's destruction of nearly all the *Resguardo's* forests. The state agency in charge of protecting the environment in this region of the country knew about the illegal use of the Embera's natural resources but did nothing to stop it. After the exploitation of the aboriginal group's territory ended, this government agency ordered the wood company to repair the damage caused by their actions and to refrain from further exploitation of the natural resources in the region without obtaining the necessary licenses. The government agency also instructed the wood company to do a study of the environmental consequences that its actions had and would have in the region.

The Court's opinion was centered on the analysis of the tension between the cultural, social, and economic risks involved in the exploitation of natural resources in Indian lands and the special protection

57. COLOM. CONST. art. 330.

58. *Id.* art. 7.

59. Case T-380/93, Corte Constitucional, exp. No. T-13636, Oct. 14, 1993.

that the government should give to aboriginal communities.[60] The Court decided that the state's indifference towards the illegal exploitation of natural resources within Indian territory threatened the existence of the Embera community. Given the Embera's total dependence on the tropical forest for their survival, its destruction meant that the community would probably disappear physically and culturally. The Court then ordered the government to implement all necessary programs to restore the natural resources destroyed by the illegal exploitation of the forests within the Embera *Resguardo*. The Court also instructed the state to pursue all legal actions against the wood company in order to oblige it to pay the Embera community compensation for all the damages caused by its actions.

The Court's decision was supported by three arguments. First, it stated that the aboriginal group's collective property over their territories includes the ownership of all renewable natural resources within them. However, the Court also ruled that aboriginal groups should use their natural resources with responsibility, particularly in areas where Indian territories overlap with forestal reserves. Further, the Court ordered that natural resources cannot be illegally, or arbitrarily, exploited; their use cannot negatively affect the environment or any other common good or political value. Accordingly, the Court declared that the approval given by some of the Embera's leaders to the wood company actions was illegal:

> The right to the collective ownership of renewable natural resources within [Indian] territories, does not give the representatives of Indigenous communities absolute power to decide what do with these resources. Indian authorities' autonomy for administering their own affairs, especially regarding the use of natural resources (CP art. 330), should be exercised with responsibility (CP art. 95-1) The *ultra vires* doctrine could always be used against [Indian] authorities' actions in which the natural riches of their territory have been used illegally or arbitrarily[;] [these actions] thereby should be divested of all legal validity.[61]

60.

> This panel should decide two fundamental questions. First, how to resolve, in the light of the Constitution, the conflict between the exploitation of natural resources in Indian territory and the special protection that the state should give to ethnic communities so that they can maintain their cultural, social and economic identity.

Id.

61. *Id.*

Second, the Court held that indigenous communities (not only their members) are subjects of rights. For example, the Court granted that,

> An Indigenous community is not anymore a mere factual and legal reality; it has become a "subject" of fundamental rights. In this case, the interests that should be constitutionally protected, and defended as fundamental rights, are not only the rights predicable of the members of the community but also the rights to which the community itself is entitled. . . . [This is] precisely the presupposition [underlying] the explicit constitutional recognition of the "ethnic and cultural diversity of the Colombian nation" (CP arts. 1 and 7). The Charter's protection of cultural diversity is derived from the acceptance of different ways of social life, to which the communities manifestations and continuous cultural reproduction are entitled as autonomous collective subjects and not as simple aggregations of their members. . . .[62]

As subjects of rights, the Court also decided that aboriginal groups have the right to live and not to be forcefully removed from their land. The constitutional recognition of the country's cultural diversity, the Court's ruling added, requires the protection of aboriginal groups' communal ways of life and not merely the rights of the individual members of these communities. This duty implies the protection of the preconditions that allow the community to survive economically. In this case, the Court said, that the means of protection of the forest that makes the subsistence economic system of the Embera viable is that:

> Among other fundamental rights, Indigenous communities are entitled to the fundamental right to subsist. . . . [This right] is directly deduced from the right to life enacted in article 11 of the Constitution. Indigenous communities' culture, indeed, corresponds to a way of life that is synthesized in a particular way of being and acting in the world. . . . that if cancelled or eliminated — and that can happen if its environment suffers a severe deterioration — can generate the communities' destabilization and eventual extinction. The prohibition of every form of forced disappearance (CP art. 12)

62. *Id.*

> is also predicated from Indigenous communities, who have a fundamental right to their ethnic, cultural and social integrity.[63]

The third, and last, argument presented by the Court's holding, was that the state has the obligation of protecting environmentally fragile areas like the forestal reserve where the Embera live. Embera is sustained by three pillars. First, it protects aboriginal groups' collective property rights. For the Court, collective property is no different from individual property. Collective owners have the rights to use the land, to transform it, and to receive the fruits that it produces (the classical rights given to all individual proprietors: *usus*, *abusus*, and *fructus*). They also have the right to decide who enters and transits their property. Second, as with other owners, aboriginal groups have obligations with respect to their property. They cannot use it in ways that negatively affect the rest of the community. The Court reminds aboriginal groups that they cannot use their lands in ways that radically disturb the environment. This issue is particularly important given the fact that the Embera live in a natural park. Their collective lands are also a nationally protected region due to the richness of their ecosystems. Thus, the Embera are not the only ones who have interests in their lands — the cultural majority and other cultural minorities do as well.

Third, the Court grants a new subject of rights that concern the Indian community. Its rights include the right to life and the right not to be forcefully removed. After taking this position, the Court's ruling connects

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63. *Id.* The Court also said that,

> The close relationship between a balanced ecosystem and the survival of indigenous communities that inhabit rain forests, transforms environmental deterioration factors produced by deforestation, sedimentation and pollution. . . . into a potential peril against the life and the cultural, economic, and social integrity of minority groups. . . . State's inaction, after serious damage to the environment of an ethnic group has been caused — given the biological interdependence of the ecosystem — can contribute passively to generating an ethnocide. . . . [This ethnocide] would be the forced disappearance of an ethnic group. . . . by the destruction of its life environment and system of beliefs. From a constitutional perspective, the omission of the duty to restore natural resources by the states' agencies in charge of monitoring and recuperating natural resources (CP art. 80). . . . constitutes a direct threat against the Embera-Katío community's fundamental rights to life and not to be forcefully disappeared.

Id.

the three fundamental issues of this case: property, the limits to its use, and the cultural survival of aboriginal groups. Indian tribes cannot survive as culturally distinct communities, if their collective property rights are not protected. However, the collective rights that they hold over their lands are not absolute. These Indians have limits, which means they may not exploit their territories in ways that damage the environment.

The definition of what the legal problem is in a case determines which facts should be considered relevant and which are not, the way the relevant facts should be organized, the type of arguments that could be validly presented, and a limited range of possible decisions for the conflict. In this opinion, the Court's definition of the legal question to be resolved is questionable. The conflict that the Court believed it should resolve established a paternalistic framework for the analysis of the issue underlying the case. The Court decided the problem presented was the tension between the state's duty to protect aboriginal communities and the risks that the exploitation of natural resources in Indian lands involves for the cultural, social, and economic integrity of indigenous groups.

This way of defining the problem presents the Embera community as a passive agent to be protected from the actions of members or nonmembers of the group that might affect the community negatively. The Court's determination reproduces the traditional view that the hegemonic culture holds with respect to indigenous groups. Indian communities are fragile entities, unable to protect themselves from internal or external threats. The state does have a duty to protect indigenous groups. Article 7 of the Colombian Constitution declares that the state must protect the country's ethnic and cultural diversity. Yet, the way in which the Court decides on the problem shows the conflict only from the state's point of view. It offers only the possibility of exploring the way in which the state protected, or failed to protect, an aboriginal group. *Embera* is not only — and not principally — about how the state should protect a cultural minority from the actions of its authorities or the actions of members of the dominant culture. The case is about defining the meaning and limits of indigenous groups' territorial autonomy, determining the rights and responsibilities of non-Indians, regarding the exploitation of renewable natural resources in aboriginal communities' lands, and sanctioning the persons or entities that violate aboriginal groups' rights.

Fortunately, shortly after presenting the legal problem to be resolved, the Court's holding took an unexplained conceptual turn, focusing on the limits of aboriginal groups' territorial autonomy. The Court's fundamental analysis of this issue is plausible. Indigenous communities' collective

property over their lands is not an absolute right. Although Indians' collective property of *Resguardos* implies the collective ownership of renewable natural resources within them, aboriginal groups cannot exploit these resources with unconstrained freedom. They are limited by the legal regulations that protect the environment and define the rules for guaranteeing a sustainable development of the country. The message that the Court is sending to indigenous groups' authorities is important. Indian authorities have to exercise their power responsibly. In environmental matters, aboriginal communities' authorities are limited not only by the interests of their own communities, but also by the interests of non-Indians. The dominant culture has a legitimate interest in the protection of the environment, particularly in biologically rich and fragile areas like forestal reserves.

The Court's decision, however, has some problematic consequences when applied to aboriginal groups whose *Resguardos* are also forestal reserves (or any other type of natural reserve). The overlapping of Indian lands with a natural reserve generates a serious conflict of jurisdictions. On the one hand, indigenous communities are constitutionally empowered to define the use of their lands in accordance with their ways of life. On the other hand, Indian lands that coincide with nature reserves are governed by special environmental legislation that imposes severe limits for the exploitation of their natural resources. The Indians' territorial self-determination then is notably limited by these environmental rules. The Court's order assumed that this theoretical conflict of jurisdictions would not generate practical negative consequences for aboriginal groups or the environment. The Court concluded that the aboriginal communities' traditional way of life does not present any risk for the stability of the nature reserve's ecosystem. However, the opposite result is actually reached. For the Court, the fact that the Indian groups are living in the reserve guarantees the protection of the environment. The majority of indigenous groups, the Court also stated, has a subsistence economic system that does not use the environment excessively but rather guarantees its sustainable exploitation.

The Court adequately describes the economic systems of many of the aboriginal groups that inhabit Colombia. However, indigenous communities might decide (forced by poverty or motivated by ambition, for example) to change their traditional productive systems. A hunter-gatherer group might want to grow crops or an agricultural community might decide to intensify its crop production or industrialize its economic

system.[64] However, if these changes were implemented, aboriginal groups would probably violate the severe environmental laws governing natural reserves. The problem is not that aboriginal groups have to use their natural resources responsibly. The issue is that the burden imposed on Indian communities is heavier than the obligation imposed on any other individual or community in the country. The strict environmental laws, ruling natural reserves, may compel aboriginal cultures to indirect conformity requirements culturally.[65] Either they maintain their subsistence economic systems, or they face monetary or criminal sanctions due to the violation of environmental laws.[66]

What will happen if new generations of Indians want to transform their economic traditions? What if demographic changes within aboriginal groups require changes in their production systems? If present generations are willing to comply with environmental rules (as a strategy for getting the state to recognize their lands, for example), are they not limiting the autonomy of future generations? Is the Court not contributing to this cultural freezing of aboriginal groups when it states simply that Indian communities have to comply with all environmental laws, including those regulating natural reserves? Is the Court not contributing to the obfuscation of this problem when it declares that aboriginal groups' economic systems are (and will be) compatible with the environment?

Once the Court ends its reflection about the limits to indigenous groups' territorial autonomy, its decision analyzes private individual responsibilities when exploiting renewable resources in Indian lands, the

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64. The case of the Embera of the Alto Sinú can illustrate this argument. Due to the flooding of an important part of their ancestral lands for the construction of a dam, this Indian group had to change their productive system from one based on fishing and the rotation of crops to one based on sedentary agriculture. The problem was that the lands that remained after the flooding overlapped with a national park. In national parks there are very severe restrictions on agricultural activities. *See supra* text accompanying notes 59-69.

65. The level of pressure imposed on aboriginal groups varies depending on how strict the environmental laws applicable to the specific type of natural reserve are (e.g., Flora Sanctuary, Fauna Sanctuary, National Parks or various types of Forestal Reserve). In some cases, National Parks for example, the applicable rules are very stringent; in other cases, Productive Forestal Areas for example, the governing rules are very flexible. *See* Arango & Sánchez, *supra* note 23, at 235; *Reservas naturales del orden nacional* [National Natural Reserves] (Raimundo Tamayo comp., Ministerio de Medio Ambiente), *in Ecosistemas Forestales* (last modified 18 Oct., 2004) http://www.minambiente.gov.co/plantilla1.asp?pag_id=753&pub_id=45&cat_id= 159.

66. *See* Criminal Code (Law No. 590, July 24, 2000, *in* D.O. No. 44.097, July 24, 2000), Title XI, Single Chapter, *About the Crimes Against Natural Resources and the Environment*, arts. 328, 329, 331.

supervisory role that the state should have in these cases, and the connection that these two issues have with the indigenous groups' survival. The ruling by the Court offers, regarding these problems, adequately define and help decide the issue at stake. The Court ordered that the wood company's actions in Embera lands and the failure of the state to control them endangered the existence of the Embera community. The Court held that since the survival of this aboriginal group depends entirely on the rain forest, its destruction would certainly mean the disappearance of the indigenous community.

The Court's reasoning makes explicit that the cultural and physical survival of aboriginal groups is impossible without land. From a cultural point of view, they would not be able to put in practice many of their religious, social, and political traditions. From a physical perspective, they would not be able to survive since their economic systems make them totally dependent on what their lands produce. Since Indian groups' cultures and economy are so deeply intertwined with their territory, the destruction of the latter would mean the disappearance of the former. A "river people," for example, would not be what it is culturally if the stream that is its life's center is deviated for the construction of a dam or if it has to move from its ancestral lands because of the government's forced relocation programs. Moreover, the health and life of its members would probably be harmed if this occurs. Their basic source of nourishment, fish, would disappear, and the community would not have the know-how to put in practice an alternative economic activity that could produce another food source.

The Court's determination is valuable not only because it makes explicit the link between land and aboriginal groups' cultural and physical survival. It is also valuable, because, in contrast with *Cristianía*, the Court's opinion examines the collective dimensions of the conflict. What is at stake is not only the rights to life and property of the aboriginal groups' members, but also the right of indigenous communities, as collectivities, to survive as distinct cultures. The constitutional recognition of all ethnic and cultural groups that inhabit the country mean that neither the government, nor private individuals, can take any action that can have, as a direct or indirect consequence, the destruction of cultural minorities' worldviews. Thus, any governmental program that can directly or indirectly force the assimilation or generate the destruction of these groups' way of life would be unconstitutional. Private individuals are equally forbidden from putting into practice any action that can endanger Indians' ways of life.

The Court's holding, however, went much further and stated that the Colombian Constitution, in Articles 11 and 12, granted aboriginal groups the rights to life and not to be forcefully removed.[67] This argument is implausible. It is not clear why the Court needs to create two new rights for defending aboriginal groups' right to live according to their traditions. As the Court ruled in its opinion, the constitutional recognition of cultural diversity entails aboriginal groups' (and other cultural minorities) right to protect and reproduce their cultural traditions. There is no need to create two new rights recognizing interests that are already protected.

More importantly, the Court does not explain how the aboriginal groups' collective rights to life, and to remain in their original state, derive from the individual rights to life and not to be forcefully removed.[68] Articles 11 and 12 of the Colombian Constitution refer to human beings and not to groups. Article 11 states that "[t]he right to life is inviolable [and that] there will be no death penalty." Article 12 declares that "[n]obody will be subject of forced disappearance, torture or any cruel, inhumane or degrading treatment or punishment." The language of these provisions, although abstract and general, refers to individuals only. Collective entities (like cultural communities) cannot be put to death, tortured, or cruelly or inhumanely treated, or punished. Similarly, in the Constitutional Assembly Acts, there is no reference to discussions that might suggest that these articles of the Colombian Constitution were intended to be applied to groups of individuals. On the contrary, all discussions about the right to life and the right not to be forcefully removed were held within the debates about individual rights.[69]

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67. The Court does not address the relationship between these two rights and individual rights. What would happen for example if the individual rights of the members of an aboriginal group's internal minority are violated as a means to protect the "life" of the cultural community? *See* Case SU-510/98, Corte Constitucional, exp. No. T-141047, Sept. 18, 1998; Constitutional Court, Search System, *supra* note 1.

68. The Court's holding does not seem to recognize the legal and philosophical problem into which it strayed by giving rights to groups. The Court's ruling says nothing about the long and difficult debate about whom can be subject of a right and more particularly if cultural communities can and/or should be holders of rights. Are human beings, individually considered, the only entities that can truly be subjects of rights? *See, e.g.*, MICHAEL HARTNEY, *Some Confusions Concerning Collective Rights*, *in* THE RIGHTS OF MINORITY CULTURES (Will Kymlicka ed., 1996); D.M. Johnston, *Native Rights as Collective Rights: A Question of Self-Preservation*, 2 CANADIAN J.L. & JURISPRUDENCE 19 (1989); M. McDonald, *Should Communities Have Rights? Reflections on Liberal Individualism*, 4 CANADIAN J.L. & JURISPRUDENCE (1991).

69. *See, e.g.*, Aída Abella et al., *Informe-Ponencia, Proyecto de Nueva Carta de Derechos, Deberes, Garantías y Libertades* [Report, Project for New Rights', Duties', Guaranties', and

However weak or strong the arguments used by the Court to justify its decision might be, the order in itself is notably favorable for aboriginal groups' rights. The Court granted the state to implement an environmental plan for the complete recovery of the ecosystem of the Embera territory. The Court's ruling also instructed the state to quantify the damages caused by the wood company in Embera lands and to sue the company so that it would compensate the aboriginal group. With this decision, the Court is saying to the state and the dominant culture, as it did in *Cristianía*, that those who violate indigenous groups' territorial autonomy will be held accountable.

The third case, in which the Court strengthened aboriginal groups' territorial autonomy, was *U'wa*.[70] The facts of this case are the following: Occidental of Colombia, a multinational oil company, requested a license from the Department of Environmental Issues for carrying out seismic tests within the territory of the U'wa tribe. These tests were part of the process of exploration of oil-rich areas within U'wa land. Performing these tests required the construction of access trails, some excavation works, and the use of dynamite. In order to satisfy the constitutional and legal obligation to consult aboriginal groups when the exploitation of natural resources within their territories is being planned, the government organized a meeting where representatives of the company, the state, and the U'wa participated. In this meeting, the aboriginal community

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Liberties' Charter], Gaceta Constitucional No. 51; Francisco Maturana, *Proyecto Acto Reformatorio No. 5, Propuestas de Reforma Constitucional Relacionadas con los Derechos, Garantías y Deberes de los Ciudadanos Colombianos* [Project of Reform Act No. 5, Proposals for Constitutional Reform Related to the Rights, Guaranties, and Duties of Colombian Citizens], Gaceta Constitucional No. 6; José Matías Ortiz Sarmiento, *Proyecto Acto Reformatorio No. 122, Sobre la Carta de Derechos, Estado de Sitio y Fuerza Pública* [Project of Reform Act No. 122. On the Rights' Charter, State of Emergency, and Armed Forces], Gaceta Constitucional No. 29; Guillermo Perry et al., *Proyecto Acto Reformatorio No. 84, Derechos, Libertades y Deberes* [Project of Reform Act No. 84, Rights, Liberties, and Duties], Gaceta Constitucional No. 24; Diego Uribe Vargas, *Informe-Ponencia para Primer Debate en Plenaria, Carta de Derechos, Deberes, Garantías y Libertades* [Report, For First Debate on Floor, Charter of Rights, Duties, Guaranties, and Liberties], Gaceta Constitucional No. 82; Alfredo Vásquez Carrizosa, *Proyecto Acto Reformatorio No. 12, Reforma Constitucional Sobre los Derechos, Humanos* [Project of Reform Act No. 12, Constitutional Reform on Human Rights], Gaceta Constitucional No. 10; Antonio Navarro Wolff y otros, *Proyecto Acto Reformatorio No. 50, Derechos, Garantías y Deberes Fundamentales, Título III* [Project of Reform Act No. 50, Fundamental Rights, Guaranties, and Duties, Title III], Gaceta Constitucional No. 22; Alberto Zalamea Costa, *Proyecto Acto Reformatorio No. 34, Derechos y Deberes Humanos* [Project of Reform Act No. 34, Human Rights and Duties], Gaceta Constitucional No. 21.

70. Case SU-039/97, Corte Constitucional, exp. No. T-84771, Feb. 3, 1997.

expressed its opposition to the tests, claiming that carrying them out would threaten its cultural integrity. It argued that all objects in the physical world were created and belong to their supreme god Sira. Natural resources, the Indian group added, cannot be owned by individuals, and should be administered following Sira's laws by the U'wa community.

As a consequence of the Indian group's opposition, the government and the oil company agreed with the community's authorities to modify the way the seismic tests were to be performed. The parties agreed to the creation of an intercultural committee that would evaluate, and transform, the project using two criteria: the protection of the cultural integrity of the aboriginal group, and the technical and scientific requirements necessary for executing the tests appropriately. The parties also agreed that the aboriginal group was to be shown the exact sites where the seismic tests were to be performed, and that a meeting, to discuss the conclusions reached by the intercultural committee, would be organized.

The government agency, however, granted Occidental the environmental license before the agreement was implemented. The aboriginal community claimed that the license was illegally approved, inasmuch as the government did not complete the process of consultation required by the Colombian Constitution when natural resources are to be exploited within Indian territory. The government argued that this obligation was fulfilled during the meeting coordinated by its representatives, in which all parties involved in the project participated. Occidental agreed with the government and added that thirty-three other meetings with representatives of U'wa, other aboriginal tribes, and government agencies, were arranged to find the best way to balance the interests in play. Occidental also asserted that the fact that some members of the U'wa were part of the company's staff performing the seismic tests, showed that these works did not endanger the cultural integrity of the community.

The Court's opinion focused on the tension between the cultural, economic, and social risks entailed in the exploitation of natural resources within Indian lands, and the state's obligation to protect the cultural integrity of cultural minorities.[71] The Court ruled that the meeting,

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> The first [problem] is to determine how to resolve within the constitution the conflict generated by the exploitation of natural resources in Indian lands and the special protection that the state should give to Indigenous communities so that they can maintain their ethnic, cultural, social and economic integrity. . . . The

organized by the government, could not be considered to satisfy the state's duty to consult the U'wa about the plans to exploit natural resources in their territory. This meeting could be determined only as the starting point of the process of consultation with the indigenous community.[72] Therefore, it ordered the state to take all the steps to complete this process. The Court's decision is supported by the following arguments: First, it determined that the U'wa community is a subject of rights, including the right to life. Second, the Court held the consultation process should be considered a fundamental right, because that right is the tool which aboriginal groups can use to protect their cultures from the negative effects that the exploitation of natural resources within their territory usually have. "[P]articipation through the mechanism of the consultation, acquires the connotation of a fundamental right because it is a basic instrument for preserving the ethnic, social, economic, and cultural integrity of Indigenous communities and thus, for guaranteeing its subsistence as a social group."[73]

Third, because the consultation process is a form of democratic participation, it should be done in good faith and the parties should mutually respect each other. The Court also confirmed that the process

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> exploitation of natural resources in Indian lands makes the harmonization of two colliding interests necessary: [On the one hand,] the necessity to plan the management and use of natural resources in Indian territories to guarantee their sustainable development, conservation, restoration, or substitution (CP art. 80).... [On the other hand,] the necessity to guarantee the ethnic, cultural, social and economic protection of Indigenous communities. . . . that is, [to assure the protection] of the basic elements that give Indigenous communities cohesion as a social group.

Id.

72. The Court also said that the thirty-three meetings organized by Occidental with the government and indigenous groups could not be considered as part of the consultation process. The Colombian Constitution and the law clearly state that the consultation process should be coordinated and put into practice by the government. The Court explicitly said on this respect,

> the numerous meetings that according to the representative of Occidental of Colombia Inc. have been held with various members of the U'wa community cannot be considered or understood as [satisfying] the consultation process required in these cases. . . . [This process of consultation,] undoubtedly, is exclusive competence of the state's authorities . . . given the superior interests it involves.

Id.

73. *Id.*

should provide aboriginal groups with complete information about the project and its possible consequences. Indigenous groups should have the opportunity to evaluate freely the advantages and disadvantages of the project, express doubts and comments regarding the plan, and indicate views about its viability. When an agreement between the parties cannot be reached, the Court determined that the decision taken by the government should not be arbitrary. The government's decision should be objective, reasonable, and proportionate to the state's duty to protect cultural minorities. The state should take all measures for mitigating or repairing the negative consequences that its decision might have for the community.

In addition, the Court held that when agreements or compromises cannot be reached, the authorities' decision should not be arbitrary or authoritarian; consequently, the decision should be objective, reasonable, and proportionate to the constitutional aim that demands from the state the protection of the aboriginal group's social, cultural, and economic identity. In any case, all mechanisms should be taken for mitigating, correcting, and neutralizing the effects that, in detriment of the community or its members, are generated or could be generated by the measures implemented by the authorities.[74]

In *U'wa*, the Court's order protects aboriginal communities' self-government rights through a combination of old and new arguments. The Court's opinion reiterates the declaration, originally presented in *Embera*, that aboriginal communities are subjects of rights. Aboriginal groups have the right to life, and not to be forcefully removed. These privileges are endangered when the state assumes that the process of consultation ordered by the Colombian Constitution becomes a mere formality. To neutralize the government's position towards the consultation process, the Court's ruling states that this procedure is a fundamental right. In this way, the Court's decision creates a new fundamental right: a right of higher constitutional importance that can be protected through the tutela action. The Court's holding also states that the process of consultation should give aboriginal groups complete, clear, and truthful information. From the Court's determination then, these three arguments are all intertwined. Aboriginal communities' right to life, and not to be forcefully removed, can be easily endangered by projects aimed to exploit nonrenewable resources within their lands. To protect these rights, the Court argues, the

74. *Id.*

consultation process is a fundamental tool. In order to be effective, this process cannot be an empty ritual. Rather, it is as a fundamental right aimed at giving aboriginal communities all the information necessary to make adequate decisions.

Nevertheless, the Court's opinion reiterated some of the arguments presented in *Embera*. Once more, the decision by the Court indicated that the tension to be examined in the case is between the state's duty to protect aboriginal groups' cultural integrity, and the harm that the exploitation of natural resources in Indian lands can cause to indigenous communities' cultural traditions. Yet again, the Court presented indigenous communities as passive agents to be protected by the state. The Court's determination defined the problem in *U'wa* as overemphasizing the role that the state played in the conflict at the base of the case, and the role the state should play in its solution. Its holding obscures the real tension of rights generating the conflict among the indigenous group, the government, and the oil company. *U'wa* is not about how the government should defend aboriginal groups. It is about defining the state's rights and obligations when exploring and exploiting nonrenewable resources in Indian lands, on the one hand, and the extension and limits of aboriginal groups' territorial self-determination, on the other.[75]

The great contribution of the Court's *U'wa* decision is its declaration that consultation is a fundamental right and a process through which participatory democracy is put in practice. In this statement, the Court's rule recognizes indigenous communities' right to participate in the decision-making process that would notably affect their public and private life. The Court's characterization of consultation, as a fundamental right, is important for two reasons. First, the Court opinion acknowledges the impact that the exploitation of natural resources in Indian lands can have for aboriginal communities. Second, its order that consultation is a fundamental right that allows aboriginal groups to use the tutela when the state (and in some cases private individuals) violates or threatens to violate this basic privilege. This legal action has become the only expeditious way to protect the fundamental constitutional rights of Colombians.

U'wa is also a significant opinion, not only because it clearly indicates that the process of consultation is not a formality, but also because it provides a set of criteria to guarantee the purpose for which this process

75. The Court restated the idea that aboriginal communities have the right to life and once more it did not justify how the collective right to life of Indian groups is derived from the individual right to life guaranteed in Article 11 of the Colombian Constitution.

was created. Indian groups can control what happens in their territories. The Court granted that those interested in exploiting natural resources within aboriginal communities' territories should thoroughly inform Indian groups about the characteristics and possible consequences of the projects they intend to implement. Equally, Indian communities should have the opportunity to express their views about the projects and to propose alternatives to them. Finally, the Court indicated that all parties involved in the process should act in good faith.[76]

The issue becomes difficult, however, if aboriginal groups disagree with the implementation of a mining or oil exploitation project. The Court said that in these cases the state could impose its view on indigenous communities. Yet, the Court also indicated that the government's decision about how to proceed in these situations should not be arbitrary but reasonable, objective, and should take into account the state's duty to protect aboriginal groups' cultural identity. The Court also determined that the government should minimize the negative consequences that the decision would generate for indigenous groups and compensate the damages that the determination made might have for aboriginal communities' life.

The problem with these criteria is that they give too much power to the government. The government can impose its views over aboriginal groups in all cases. What would happen if there is evidence that the implementation of a particular mining project will radically harm an aboriginal group's culture even if executed in the least damaging way possible? How could this type of harm be compensated? It is true that the Colombian Constitution indicates that the state is the owner of all nonrenewable resources in the country. It is also true that the Colombian Constitution only says that the government should favor the aboriginal groups' participation in the decision making process related to any project aimed to the exploitation of natural resources in their territories. Yet, we should ask ourselves if we want the state to exploit its natural resources at all cost. The exploitation of nonrenewable resources, no doubt, brings important economic benefits for the country. But, should the state attain economic stability and growth at the cost of causing irreparable harm to some of its citizens?

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76. The criteria offered by the Court were not its creation. These criteria were taken from International Labor Organization's Covenant 169. This Covenant was made part of the Colombian legal system by Law 21 of 1991.

The fourth, and last, case in which the Constitutional Court strengthened aboriginal groups' territorial self-determination is *Urrá*.[77] The facts of this case are the following: The national government declared the public interest character of an area necessary for the construction of the Urrá I dam. The construction of this dam required the modification of the course of a river that was essential for the Embera-Katío's way of life as well as the flooding of an important part of the collective territories of this aboriginal community. The collective territories of the Embera-Katío overlap with a national park. The government granted the environmental license to the company constructing the dam and authorized the start of the first part of the project (deviation of the river and excavation works) without having previously discussed the venture with the aboriginal community. Consequently, the construction company — without even contacting the Indian group — executed the first part of the project. Yet, before the start of the second part of the venture (filling and getting the dam started) the company agreed with the Embera-Katío that they would prepare and execute an ethno-development plan. The aim of this plan was to study the consequences that the dam, had and would have, for the indigenous group and to propose solutions for the problems that it had generated or could generate.

Two years later, the government, the community, and the company agreed that the latter would be responsible for funding and executing the commitments established in the already elaborated ethno-development plan. The parties also agreed that the company should improve and reform the programs aimed to solve the issues that the dam's construction generated for the area's ichthyologic resources (fundamental in the diet and culture of the Embera-Katío). The indigenous community demanded that before the dam would be filled and put to work, the community should be compensated for the actions needed to protect the forests and waters of the area. The Embera-Katío also said that they should be paid a percentage of the profits generated from the dam. The company agreed to pay some money for the former but denied any payment for the latter. The community also claimed that the company should not negotiate the buying of lands individually with families that live outside the *Resguardo*. The community said that the authorities of the *Resguardos* were the only ones who could legitimately negotiate with the company.

77. Case T-652/98, Corte Constitucional, exps. No. T-168.594 & T-182.245, Nov. 10, 1998.

Approximately one year after the agreement between the company, the government, and the community was subscribed, the company requested from the Ministry of Environmental Issues (which replaced the Agency of Environmental Protection) the environmental license necessary to start the second part of the project. The Ministry, arguing that the community was not properly consulted about the project, denied the license.

The Embera-Katío have traditionally been a community in which the political power is segmented and diffused. The various communities that compose the two *Resguardos*, between which the ancestral land of this Indian group is divided, have their own forms of government.[78] However, to confront the challenges posed by the construction of Urrá, the community centralized its government and created a Supreme Council. Soon after the Council was formed, a power struggle between the various communities that compose the Embera-Katío exploded. Some of the communities of the group felt that they were not appropriately represented in the Supreme Council. These communities decided to create two other Councils to represent them before the company and the government. The company stopped all programs related to the ethno-development plan because of this power struggle. The corporation argued that it did not know who were the authoritative representatives of the community and thus, did not know who was the valid interlocutor, with whom to discuss the implementation of the ethno-development plan's programs. It also said that the conflict should be resolved, and the legitimate representatives of the community, determined in order for the company to continue with the programs.

The Court's ruling established, through a judicial inspection, that the works done by the company affected the life of the area's fishes negatively and that the programs to improve the reproduction and movement of the fishes in the region had stopped or did not work. Since fish are a fundamental element in the community's diet and culture, their endangerment put in peril the physical life of the members of the community, and the traditional way of life of the group. The Court's decision also discovered that the municipal and provincial governments did not comply with their legal obligations during the process of negotiation and implementation of the agreements reached by the

78. The Institute for the Agrarian Reform divided the ancestral lands of this indigenous group into two *Resguardos* based on purely procedural matters. The government agency did not take into account that the aboriginal community believes that its traditional territory is an indivisible whole. *Id.*

company, the Embera-Katío and the government itself. The municipal government stopped providing health and education services to the members of the group, did not answer various petitions presented by Indian authorities, and retained funds belonging to the community because of the power struggle among the various communities composing the Embera-Katío. For this last reason, the provincial government retained budgeted resources that were assigned to pay for the indigenous group's health services.[79]

The opinion of the Court was structured around six problems. The first problem was that although there was only one indigenous group, the Embera-Katío, the government had created two *Resguardos* within its ancestral lands. At the base of the power struggle among the various communities that compose the Embera-Katío was the fact that the group was artificially divided by the government's decision to create two *Resguardos*. The Court thereby ordered the government to unify the lands belonging to the community stating that the government recognition of the collective property of aboriginal groups' ancestral lands is a fundamental right. Without this right, aboriginal groups would not be able to survive. The Court determined that in other cases it

> has reiterated the fundamental character of ethnic groups' collective property rights over their territories. . . . [N]ot only because of what property over the lands they inhabit means for the survival of Indigenous and *Raizales* groups, but also because land is part of Aboriginal groups' cosmogonies and the material substrate necessary for the development of their characteristic cultural forms.[80]

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79. Immediately after the Court agreed to examine the case, it ordered the company not to fill the dam before a decision on the conflict was reached.

80. Case T-652/98, Corte Constitucional. In cases T-567/92 and T-188/93 the Court also acknowledged the importance that the state's recognition of aboriginal groups collective property over ancestral lands has for the physical and cultural survival of indigenous communities. In these cases, the Court questioned as well the government's indifference towards Indians' petitions for the state's legal recognition of their lands and for resolving conflicts related to them. In the first case, two aboriginal communities requested the Agency for the Agrarian Reform to recognize the lands they inhabit as a *Resguardo*. The government agency did not answer the several requests that for more than seven years the communities presented. In the second case, two aboriginal groups shared, as collective owners, a piece of land. Political problems for the control of the *Resguardo* arose between the two groups and some members of one of the communities verbally and physically abused in several occasions some of the members of the other. The community victim of the attacks requested the Agency for the Agrarian Reform to study the possibility of dividing the land in two.

The second problem was that the government and the company did not discuss the construction of the project with the Embera-Katío as ordered by Article 330 of the Colombian Constitution. The company argued that during the long process of planning and construction of the dam two different corporations owned the project. When the environmental license was requested and granted, the defendant corporation did not even exist. When it was created, its representatives believed in good faith that the previous company had consulted the Embera-Katío about the viability of the project. The government argued that when the environmental license was granted Congress had not developed Article 330 of the Colombian Constitution (and thus, was not enforceable) and that the government's unit for working on this issue had not been created. The Court dismissed both arguments and ordered the company to pay for the damages caused to the indigenous community by the implementation of the first part of the project. Damages paid by the company should be enough to guarantee the physical survival of the group's members while they adapt to the cultural, economic, and social changes generated by the construction of the dam. The Court's ruling asserted that if the company and the Embera-Katío did not reach an agreement on the amount of the damages, the indigenous community should request a lower tribunal to determine the amount necessary to pay the indigenous community a transportation and food subsidy for the next fifteen years.[81]

The third problem is related to the fundamental right that all indigenous groups have to be consulted about any plan to exploit natural resources in their territories and the development of the second part of the project (filling of the dam). The Court ordered the company and government to discuss with the aboriginal community the way the second part of the project would affect the community. It also mandated that the government and the company discuss with the Embera-Katío the way the problems generated by this phase of the project might be neutralized, the way other problems might be prevented, and the way the company should

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The state agency did not answer the requests of the community. *See* Case T-567/92, Corte Constitucional, exp. No. T-3746, Oct. 23, 1992; Case T-188/93, Corte Constitucional, exp. No. T-7281, May 12, 1993.

81. Once the company pays the amount determined by the tribunal, the Court added, a trust fund should be created for the administration of these resources.

compensate the indigenous group for the negative consequences that the project will inevitably generate.[82]

Fourth, the construction of the dam obliged the Embera-Katío to pass from a "subsistence economy with low environmental impact to an agrarian economy with less productivity and high environmental impact."[83] Due to the changes caused by the building of the dam, the Embera-Katío are no longer able to pursue their traditional economic practices: hunting, fishing, gathering, and rotation of crops. In order to survive, the indigenous community would now be dedicated exclusively to the growing of crops to be sold in the dominant culture's market. However, because the indigenous community's territory overlaps with a national park, it may not plant crops in the way required to survive in an agrarian market economy. The Court held that the protection of the natural reserve could not be done at the expense of the physical and cultural survival of the indigenous community. Aboriginal groups, the Court ruled, have the right not to be forcefully removed. Yet, it also decided that this privilege should be balanced with the state obligation to protect environmentally fragile areas (Article 79 of the Constitution). The Court thereby, ordered the government to create, as ordered by Decree 622 of 1997,[84] a special legal regime to balance economic survival of the community and the protection of the national park. The Court also determined the company decide, with the government and the community's input, the amount it should pay to make the Embera-Katío's transition to an agrarian market economy possible.

The fifth problem is related to the recognition of the authoritative representation of the Embera-Katío. The Court declared that government and company violated the aboriginal groups' right to determine their political life autonomously just as they did not recognize all the representatives appointed by the various communities that compose the

82. The Court stated that the company should pay attention to the serious damage that had been and will be caused by the dam to the aquatic life from which the Embera-Katío depend for their nutrition. The Court asserted as well that the company should pay special attention to the consequences that the flooding of the richest lands of the community would have for its capacity to grow crops. The Court also ordered the government to provide health services to the Embera-Katío to neutralize the problems that the community's members are experiencing due to the environmental changes generated by the construction of the dam. Finally, the Court ordered the government to register the community in the social security system and to give its members the medicines prescribed by doctors for free. Case T-652/98, Corte Constitucional.

83. *Id.*

84. Decree 622, Aug. 11, 1997.

Embera-Katío, and when they stopped programs in favor of the Embera-Katío because of the power struggle within the community.

> [The] company and the authorities that have intervened in the various attempts to solve the Indigenous group's internal conflict, have violated the Aboriginal community's right to autonomously solve its issues[.] Imposing a specific form of political organization, assuming the right to perform electoral censuses, organizing elections, and choosing which of the Embera's authorities should be registered and which should not, are not activities within the government or the company's competence.[85]

The government and the company, the Court also affirmed, must recognize the institutions and leaders that the indigenous group wants them to recognize. They cannot put pressure on the aboriginal community to solve its political struggles in certain ways or to transform their political structures. For the justices deciding this case,

> neither the Constitutional Court panel, nor the Interior Ministry, the Government of the Province of Córdoba, the municipality of Tierra Alta's Town Hall, the Multipurpose Company, the organizations that wrote *amicus curiae* briefs, nor any organization or person different from the Embera-Katío communities listed above can decide which are this Indian group's authorities. The Town Hall and the Interior Ministry have been empowered by law only to register the decisions adopted by Indigenous communities and to certify what Indian groups want these entities' archives to include.[86]

The sixth and last problem is related to the indigenous authorities' claim that the company cannot negotiate directly with the families that belong to the group but live outside the *Resguardo*. The Court held that Indian authorities do not have any power over people that live outside Indian territory. Families that live away from the community's collective property decided to break their links with the Embera-Katío traditions. Neither the government nor the aboriginal community can force them to

85. Case T-652/98, Corte Constitucional.
86. *Id.*

reconsider this decision. These persons are free to negotiate with the company about the selling of their lands.

> To this respect, it should be said that the Territorial Council of the Iwadó *Resguardo* is an Embera authority with functions within the *Resguardo*, but without any authority outside it. The Embera that lived outside the *Resguardo* should be specially protected. . . . inasmuch as they belong to a minority group and preserve an important part of the traditions that characterize the Embera people; but neither this Court, nor the Council, nor any other authority can oblige them to return to the communal life in the *Resguardo*. . . . [Nobody can] impede these persons either to sell what is theirs because the Territorial Council did not participate in the negotiation.[87]

Urrá is a complex, rich case where the Court's holding presented some new arguments useful for the understanding and strengthening of Indian communities' territorial autonomy and reiterated some others that accomplish these same aims. First, the Court decided again that the process of consultation, which the government should implement when non-Indians intend to exploit natural resources in aboriginal groups' lands, is a fundamental right. As it did in *U'wa*, the Court made explicit the relationship between the consultation, participatory democracy, and the protection of aboriginal groups' cultural integrity.

Second, the Court held in *Urrá* that indigenous groups have a fundamental right to government recognition of their ancestral lands as collective property.[88] This determination has great importance for aboriginal groups. Historically, the state has ignored, delayed, or created obstacles for satisfying Indian communities' requests regarding the recognition of their ancestral lands as collective property.[89] The state's negligence has been very costly for aboriginal groups. Non-Indians have occupied their ancestral lands, communities have disintegrated, and old

87. *Id.*

88. The Court first presented this argument in case T-188/93. *See supra* text accompanying notes 7 & 80.

89. In Cases T-188/93 and T-001/94, the Court makes explicit the negligence with which the state generally responds aboriginal groups' requests for the recognition of their ancestral lands as collective property. *Supra* text accompanying note 80 (summarizing the facts of the first case). *See* Case T-001/94, Corte Constitucional, exp. No. T-21908, Jan. 13, 1994 (for the facts of the second case); Constitutional Court, Search System, *supra* note 1.

traditions have been lost. As the Court said in *Embera*, aboriginal groups' cultures are intertwined with their ancestral territories. Their subsistence economic system depends on the particular characteristics of the lands they inhabit and their cultural traditions refer, or are practiced in specific sites within their territories. Without their lands, aboriginal groups have a very slim chance of surviving as distinct cultures.

The Court's decision that aboriginal groups' have a fundamental right to the recognition of their ancestral territories as collective property is positive on two accounts. On the one hand, it holds that the state should make every effort to protect this right. On the other hand, the Court grants indigenous communities the power to use the tutela to protect this right. This legal action is the most efficient resource that citizens have for the protection of their fundamental rights: it is cheap, fast, and procedurally simple.

Third, the Court's ruling solves the tension at the heart of this case between environmental laws protecting natural parks and aboriginal groups' self-determination rights in favor of the latter. Due to the flooding of an important part of their ancestral lands and the deviation of the river that was the center of their life, the Embera-Katío's traditional economic system was not viable anymore. However, since their territory overlaps with a national park, alternative agricultural activities were radically restricted. If the aboriginal group had complied with the environmental laws regulating national parks, the community would not have been economically viable. The Court's decision to order the government not to enforce the Natural Resources Code but to put in practice Decree 622 of 1997[90] is of great importance. This opinion unenforced until *Urrá*, orders the creation of a special legal regime for natural parks that are inhabited by aboriginal groups. This judgment tells the government that environmental laws should not be used at the cost of destroying aboriginal communities. This, no doubt, should be the leading criterion for guiding the government in the creation of a long-term solution of the tension between environmental law and aboriginal groups' rights. Without a legal regime on the subject this tension will not disappear.

Fourth, the Court's order requires registration and certification of Indian authorities by the state. The Ministry of Interior is the entity in charge of registering and certifying the legitimate authorities of all aboriginal communities in the country. This process of registration and

90. *Supra* text accompanying note 84.

certification has important consequences for aboriginal groups' political and territorial autonomy. Only registered authorities are recognized by the state. The actions of these "registered" authorities are the only ones considered legally binding within and outside aboriginal communities. If the government decides not to recognize a particular Indian authority, the ability of the group to govern itself disappears. The leaders of the community, for example, would not be able to receive money from the national budget, and would not be able to discuss any project with provinces' governments, and their decisions would not be legally binding. If aboriginal authorities were not properly recognized by the state then, they would not be valid interlocutors with the outside world and would not have any legal power internally.

The Court's decision that the only role that the state can play in this process is to register and certify the authorities chosen by aboriginal groups is an important triumph for indigenous groups' self-determination. Its holding ends the state practice of intervening in Indian communities' internal affairs by deciding to register or not to register the political leaders chosen by the groups. Indian groups are now free to pick their leaders and solve their political disputes in whatever way they consider adequate. The government is only empowered to keep a file that systematizes and centralizes the political decisions made by aboriginal communities.

The declaration that Indian authorities do not have any power over members of the community living outside the borders of *Resguardos* is the fifth and last argument presented by the Court's opinion in *Urrá* that is significant for understanding aboriginal groups' territorial autonomy, particularly its limits. Members of aboriginal groups should be able to leave and break the links with the communities to which they once belonged. Individuals should not be obliged to comply with traditions that they do not believe in, or obey the decisions of authorities that they do not consider legitimate.

The Court's determination that the energy company must pay for the damages caused to the Embera-Katío by the construction of the dam is also noteworthy. As in *Cristianía* and *Embera*, the Court held responsible the corporations that violated aboriginal groups' right of self-determination. Yet, what is notable in *Urrá* is that the Court ordered the company to pay the costs of planning and implementing the measures needed to provide the present and future generations of Embera-Katío the conceptual and practical tools to survive in the new world in which they were compelled to live. Since the situation in which the community is now immersed is irreversible, the Court's holding made sure that the Embera-Katío would

have a chance to adapt to the new circumstances and, at the same time, to maintain its distinct culture.

In sum, in *Vaupés*, *Embera*, *U'wa*, and *Urrá*, the Court's decision made genuine efforts to consolidate aboriginal groups' territorial autonomy. First, it declared that aboriginal groups have the right to survive as distinct cultures. The government, and private individuals, should abstain from any action that endangers the cultural integrity of Indian communities. Second, indigenous communities have the fundamental rights to have their ancestral lands recognized as collective property by the state, and to be consulted whenever there is a project to exploit natural resources in their territories. Third, Indian authorities have the right to decide who transits and settles in their lands. Concerning indigenous communities' political self-determination, the Court also made a notable decision. Indian groups have the right to choose their authorities and solve their political disputes, in accordance with their traditions. Just as significant, was the Court's determination to hold accountable the violators of aboriginal groups' territorial autonomy.

Equally important, were the Court's decisions that defined limits on aboriginal groups' right of self-determination. Indian authorities do not have any power over former members of the community that live outside *Resguardos*. Nor do they have authority to exploit their lands irresponsibly. They have an obligation to use their lands in ways that do not affect the environment negatively. In cases where there is a tension between environmental laws protecting natural reserves and aboriginal groups' self-determination, the Court determined that the state should create a special legal regime to balance the values at stake. Environmental law, the Court added, should not be enforced in ways that could endanger the survival of aboriginal groups' cultures.[91]

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91. Despite all their virtues, *Vaupés*, *Embera*, *U'wa*, and *Urrá* also had some weaknesses. In two of these opinions, the Court defined paternalistically the problems that were to be solved. Aboriginal groups were presented as passive subjects and the conflicts at stake were viewed only from the state's point of view, more specifically, from the perspective of the government's duty to protect indigenous communities. The criteria provided by the Court to guarantee that the consultation would not become a mere formality were also implausible. These criteria, although appropriate to define how the process of consultation should be executed, put no limits on the state power to impose its view over aboriginal groups when Indian authorities oppose the exploitation of nonrenewable resources in their lands. Finally, the Court did not justify how the aboriginal groups' right to life and not to be forcefully disappeared can be derived from the individual rights to life and not to be forcefully disappeared.

The turn made by the Court's jurisprudence in these four cases can be explained by the following three interrelated reasons. First, the Court's judgment is a honest attempt to protect aboriginal groups' self-government rights. In *Vaupés*, *Embera*, *U'wa*, and *Urrá* it is easy to see that the Court's ruling takes aboriginal communities' rights seriously. From the Court's opinion, it is clear that Indian tribes cannot survive as distinct cultures if they do not have control over their territories. In these cases, we see the Court's decision attacking, on several fronts, and creating various strategies in order to protect Indian cultures from disappearing (creating new fundamental rights, strongly reprimanding the government for not complying with its constitutional duties, and creating clear limits to aboriginal authorities' powers). Second, the Court's judgment was able to protect aboriginal communities' self-government rights using legal and political language that it is well-known and presents no theoretical or practical challenges: the language of property rights. The main argument the Court's holding uses in *Vaupés*, *Embera*, *U'wa*, and *Urrá* to protect aboriginal rights to self-govern is that Indian communities are proprietors of their lands, and, that as such, they have the right to determine who can transit along and settle in them. As proprietors, Indian groups also have the right to determine how and when to exploit the resources within their territories. Therefore, what the Court's judgment does is not fundamentally different from the job that any judge would do to protect the rights of a Colombian landowner. Third, the Court's holding is influenced by the traditional paternalistic view that the Colombian state has held over aboriginal groups. This perspective is that Indians are passive and weak agents that should be guarded by the government from the dangers of contemporary life.

VII. CONCLUDING REMARKS

In *Cristianía*, *Military Base*, *Vaupés*, *Embera*, *U'wa*, and *Urrá*, the Court's opinion goes from blind individualism, to militant centralism, to radical collective autonomy. If the turns and twists that the Court's judgments make in these six cases are connected, the path that the tribunal created in the process of understanding and solving the tension between the principle of political unity and aboriginal groups' self-government rights can be made explicit. The Court's ruling started this process in 1992 by defending aboriginal interests through the defense of the individual rights of the members of the Cristianía people. The aboriginal group's

collective self-government rights were never mentioned, although they were at the heart of the case's legal problem. In *Cristianía*, the Court's holding was blinded by its individualistic approach to the case. The emphasis that the Court's decision put on the rights to property and life of the members of the Cristianía people, did not allow the Court's determination to consider the collective rights dimension of the conflict. The Court's opinion in *Military Base* was an advance and a regress for aboriginal self-government rights. This judgment was an advance because it acknowledged that Indians' self-government rights were at issue. It was a regress because it ruled in favor of the principle of political unity over aboriginal groups' autonomy. The fact that the opinion of this case was written by Justice Herrera, a conservative Justice, and that the case was related to a national security issue, drug trafficking, determined the militant centralism of the Court's verdict.

The Court's findings in *Vaupés*, *Embera*, *U'wa*, and *Urrá* mark a fundamental advance for the protection of aboriginal groups' self-government rights. Although some of the Court's conclusions had a paternalistic tone, they gave priority to Indian groups' political autonomy rights over the political unity principle. This development was possible, fundamentally, because the Court's ruling had at hand a well-known legal and political category to interpret aboriginal rights' territorial autonomy over their own property. The opinions of *Vaupés*, *Embera*, *U'wa*, and *Urrá* were written by different Justices and the cases were decided by very different panels.[92] However, in all of them, the main argument that justified the Court's holdings included an appeal to property. For the Justices, the use of a category, so rooted in our legal and political tradition, made them feel that their interpretations were sound and that they would not be politically questioned by the government, Congress, or public opinion.

Military Base on the one hand, and *Vaupés*, *Embera*, *U'wa*, and *Urrá*, on the other, synthesize two very different solutions to the conflict between political unity and aboriginal groups' self-government rights at

92. *Vaupés*, was unanimously decided by Justices Alejandro Martínez, Fabio Morón, and Vladimiro Naranjo. Justice Martínez wrote the opinion of the Court. The opinion of *Embera* was written by Justice Cifuentes. The panel that decided the case was also formed by Justices Martínez Caballero and Hernández. *U'wa* was decided by the Court's nine Justices since it was a Unification Opinion case. Six Justices agreed with the opinion written by Justice Barrera. Justices Herrera, Naranjo, and Morón disagreed. The opinion of *Urrá* was written by Justice Gaviria. Justices Hernández and Betancur were also part of the panel that decided this case.

the core of the 1991 Colombian Constitution. While *Military Base* is identified with legal and political centralism, *Vaupés*, *Embera*, *U'wa*, and *Urrá* are identified with political autonomy. While the former holding is committed to a country in which all the fundamental legal and political decisions are made in the center, the latter are committed to giving aboriginal groups enough space to allow them to regulate their private and public life through their uses and customs.

In *Military Base's* militant centralism, there is a vertical conception of the distribution of political and legal power. The capacity to create law is concentrated in national legislative and administrative institutions. Provincial, local, and special jurisdictions (like aboriginal groups') have impartial residual powers to create legal norms.

At best, these jurisdictions can create juridical rules that adapt national legal norms to the particularities of their jurisdictions. Generally, it is understood that they are just in charge of enforcing the decisions made in the center. Militant centralism is not a new conception of the state in Colombia.

This has clear roots in the Spanish colony and in the strong influence that French public law has had in the country for more than a century. We can fully comprehend its continuing normative power (and weaknesses) if it is seen as a theoretical and practical weapon used by liberals in eighteenth and nineteenth century France to fight the *ancien régime*. This was a powerful instrument to battle aristocratic privileges, the capriciousness of the king's will, and the jurisdictional disorder inherited from feudal times.

For the French, Spanish, and Colombian legal and political traditions, centralism is associated with important values like equality, juridical security, government responsibility, and order. Centralization of the power to create law implies that the norms created at the national level will be equally applicable to all citizens. The legal rules enacted by Congress and the President have a general and abstract character that respects the equality of all citizens. No particular rules can be created; no special privileges or obligations for distinct groups of persons can be enacted.

Similarly, centralism allows citizens to know easily and clearly what are their rights and obligations. In principle, all legal rules created by Congress and by the executive power will be applicable indefinitely to all citizens. There are no overlapping jurisdictions with a variety of (sometimes contradictory) legal rules determining citizens' rights and burdens.

Equally important for the French, Spanish, and Colombian legal and political traditions, is that centralism clearly specifies that only a few national institutions have the right to create law. This feature of a centralized political system allows an easy identification of state institutions' obligations and responsibilities. If there is a failure in the system, for example, corruption or negligence, it is easy to determine those responsible, and to apply the measures needed to correct it. Finally, militant centralism determines a clear chain of command, guaranteeing order in the political system.

Vaupés's, *Embera*'s, *U'wa*'s, and *Urrá*'s radical collective autonomy, in contrast, is a new political and legal perspective in Colombia. Its origin does not go very far back in the history of the country. The earliest traces of radical collective autonomy can be found in the wide political movement that, during the 1980s, pushed for the decentralization of Colombia's political system. The main result of this political perspective was the 1986 constitutional reform that allowed the popular election of mayors and governors (before they were all appointed by the president). Yet, it was only in the 1991 Constitutional National Assembly that the possibility of granting wide political autonomy rights to aboriginal communities was initially discussed.[93] In the 1991 Colombian Constitution, for the first time in the history of the country, its multicultural character was seen as something valuable, rather than as a historical burden to be destroyed.

93. Law 89 of 1889 gave aboriginal communities a very limited political autonomy to judge the violation of moral rules by their members. However, all laws created by Congress and the executive power were applicable to Indian tribes. Moreover, this residual autonomy was thought to be a temporal entitlement while missions achieved their duty to transform all aboriginal groups into Christian Spanish speakers.