

# **Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields**

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*This article explores law's protagonism and effects in contemporary conflicts over development, natural resource extraction, and indigenous peoples' rights. It focuses on the sociolegal site where these conflicts have been most visible and acute: consultations with indigenous peoples prior to the undertaking of economic projects that affect them.*

*I argue that legal disputes over prior consultation are part of a broader process of juridification of ethnic claims, which I call "ethnicity.gov." I examine the plurality of public and private regulations involved in this process, and trace their affinity with the procedural logic of neoliberal global governance. I further argue that ethnicity.gov is a highly contested field, as shown by the legal strategies and regulatory frameworks on consultation which the global indigenous rights movement has advanced in opposition to neoliberalism.*

*Drawing on empirical research in Colombia and other Latin American countries, I study consultation in action and document its ambiguous effects on indigenous peoples' rights.*

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## INTRODUCTION

*A. Law in the Minefields of Global Capitalism*

As I watch the PowerPoint slides pass from one to the next, I forget for a moment that we are in one of the most violent corners of the world. The person speaking is a leader of the Embera-Katío, an indigenous people from northern Colombia, who tells us of a succession of tragedies that now threaten to render his people extinct. “The State and the multinational companies seek to exploit natural resources in indigenous territories,” he says, as a map of Colombia’s indigenous reservations flickers on the run-down school’s only blackboard. “And what we Embera have is water.” With a click, the map of the Urrá dam appears. The dam was constructed in the early 1990s, against the indigenous people’s will, amid the jungle’s web of rivers that brought us to this place. “Before Urrá, the Embera people lived off of fishing and hunting, but now, with our territory flooded and the rivers’ courses altered, we have to travel three hours by motorboat to the closest town to buy sources of protein. And we can’t hunt because the guerrillas covered the mountain with landmines.”

The guerrillas he refers to are the Revolutionary Armed Forces of Colombia (FARC), the oldest guerilla group in the world. They prowl the reservation and terrorize the Embera while they fight with the Colombian army over territory and compete with right-wing, paramilitary groups over narcotrafficking business. The paramilitary groups have also been sowing death and destruction in the region for the past fifteen years. In fact, we are only five hours (three by boat and two by car) from Tierralta, one of the paramilitary world capitals, in the Córdoba province. Since the late 1980s, Tierralta has served as the headquarters for the counteroffensive that was launched by landowners, narcotraffickers, politicians, and sectors of the army to drive out the guerillas and gain control of the fertile land, water, minerals, and coca crops. To achieve this goal, they deemed it necessary to forcefully displace over 30,000 people from Tierralta,<sup>1</sup> perpetrate twenty-two

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1. See *Diagnóstico Departamental de Córdoba, Observatorio del Programa Presidencial de Derechos Humanos y Derecho Internacional Humanitario, n.d.* 4 [Diagnosis of the Department of Córdoba, Observation from the Presidential Program of Human Rights and International Humanitarian Rights] (Colom.) (discussing human rights violations stemming from armed conflict involving left-wing guerilla groups (FARC

massacres in Córdoba,<sup>2</sup> and kill hundreds of people. Among those killed were at least nine indigenous leaders who opposed the Urrá dam,<sup>3</sup> which represented the type of economic development that was vigorously supported by the paramilitaries.<sup>4</sup> Thus, with the next click, the face of Kimy Pernía appears. In 2001, paramilitaries assassinated Pernía, the leader of the Embera resistance against the dam.<sup>5</sup>

The PowerPoint slides then take an unexpected turn. The maps and photographs are followed by a list that discusses a cascade of norms and judicial decisions—the International Labor Organization’s (ILO) Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples, and the precautionary measures ordered by the Inter-American Commission on Human Rights to prevent the annihilation of the Embera people after Pernía’s assassination.

Click. An even longer list appears, recounting the Colombian Constitutional Court’s decisions against the government for its failure to consult indigenous leaders before initiating economic projects within their territories, notwithstanding Colombia’s ratification of ILO Convention 169, which imposes this obligation.

Thereafter, the phrase repeated in the presentation is “prior consultation.” Its effect is magnified because it is one of the few Spanish terms—along with others, such as *Corte Constitucional* (Constitutional Court), *sentencia* (ruling), and *gobierno* (government)—that sprinkle the remarks of participants who only speak Embera. At this point, it is clear that the talk has turned into a legal memorandum. The speaker, a leader who has braved death sentences from the paramilitaries and the guerillas for nearly a decade to defend his people, stumbles uncertainly

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and ELN), right-wing paramilitaries (AUC), drug-trafficking gangs, and the Colombian military).

2. *Id.*; see also Eder Maylor Caicedo Fraide, *El Plan Córdoba* [The Córdoba Plan], VERDADABIERTA.COM (Feb. 4, 2009, 03:37 PM), <http://www.verdadabierta.com/parapolitica/cordoba/851-el-plan-cordoba> (explaining how paramilitaries have infiltrated Córdoba’s state agencies and politics).

3. Comisión Colombiana de Juristas, *Boletín No. 22: Serie sobre los derechos de las víctimas y la aplicación de la ley 975, Urrá II, una amenaza mortal para el pueblo indígena Embera Katío del alto Sinú 2* [Commission of Colombian Lawyers, *Bulletin No. 22: Series on Victims’ Rights and the Application of the 975 Law, Urra II, Deadly Threat for the Indigenous Emera Katío of Sinu*, Bulletin] (Jan. 8, 2008).

4. See also Resolución Defensorial No. 013, *Sobre La Violación de los Derechos Humanos de la Comunidad Indígena Emberá-Katío del Alto Sinú* [Defensory Resolution No. 013, On the Human Rights Violations of the Indigenous Embera-Katío of Sinu], (June 19, 2001) (Colom.) (explaining the trajectory of the Embera’s plight, and the ombudsman’s role in the process).

5. *Kimy Pernía, líder indígena embera asesinado* [Kimy Pernía, Embera Leader Assassinated], VERDADA BIERTA.COM (Jan. 6, 2010, 10:00 AM), <http://www.verdadabierta.com/nunca-mas/asesinatos/periodistas/1898-kimy-pernia-lider-indigena-embera-asesinado>.

into the terrain of legal procedure: how to prove the dam has caused harm to Embera communities; which court to bring a new case before in order to suspend the government and the company's plans to enlarge the dam; what is the status of the last legal action presented by the nongovernmental organization (NGO) that represents them; who is the indigenous people's legal representative in the approaching prior consultation procedure; how to make use during these ensuing procedures of the Constitutional Court's judgment<sup>6</sup> and the report by the ILO committee,<sup>7</sup> which both condemned the Colombian government for authorizing the construction of the Urrá dam without consulting the Embera.

These legal artifacts—the succession of procedural deadlines, the architecture of laws and decisions, the affirmation of equality between parties to a case—are precisely what generate the illusion of order, and in turn, make us forget for a moment that we are in the heart of the chaos. Thereafter, we get stuck in a long discussion about prior consultation's technicalities, as if death squads were not patrolling just a few kilometers away, as if the territory were not littered with landmines, as if all of the few families in attendance did not have some member who had been assassinated or forcibly displaced, as if we had not crossed paths along the river with speedboats that were driven by fully armed soldiers, who play cat and mouse with the settlers that transport coca downriver.

How is this coexistence of order and chaos (this coexistence of the utmost legal formalism and the most extreme violence) possible? At what point did indigenous peoples' resistance to cultural and physical annihilation turn into a discussion of legal procedure? This article is an attempt at answering these questions and explaining law's protagonism, effects, and paradoxes in cases such as Urrá, arising from the "socio-environmental conflicts" that characterize global capitalism at the turn of the century.<sup>8</sup> Indeed, as the globalization of both extractive capitalism and indigenous rights has intensified over the last two decades, conflicts

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6. See Corte Constitucional [C.C.] [Constitutional Court], noviembre 10, 1998, Sentencia T-652/98 (Colom.).

7. Comm'n of Inquiry, International Labour Organization [ILO], Fourth Supplementary Report: Representation Alleging Non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association (Asmedas), ILO Doc. GB.282/14/4 (Nov. 2001).

8. See MARISTELLA SVAMPA, *CAMBIO DE ÉPOCA: MOVIMIENTOS SOCIALES Y PODER POLÍTICO* [CHANGE OF EPOCH: SOCIAL MOVEMENTS AND POLITICAL POWER] 104-12 (2009) (analyzing the transformation of social movements in Latin America, and the rise of new structural conflicts revolving around the ownership and exploitation of natural resources).

over the exploitation of indigenous lands have multiplied and escalated apace across the world. Such disputes involve myriad national and international actors (e.g., national states, transnational corporations (TNCs), NGOs, grassroots movements, and transnational regulatory and financial agencies) and condense into a particularly revealing and volatile mix some of the key legal, political, and economic processes underlying globalization.

As David Harvey has shown in his analysis of contemporary capitalism,<sup>9</sup> the renewed economic importance of export-oriented, extractive industries, driven by China's demand for raw materials, has generated transnational competition for natural resources and, therefore, has renewed interest in the exploration of frontier territories. These lands are precisely where indigenous peoples, displaced from their ancestral territories, have settled historically and where the most intense conflicts about free, prior, and informed consultation (FPIC) have taken place. Thus, in terms of political economy, the explosion of these socio-environmental conflicts occurs in the context of a brand of capitalism that is marked by "accumulation by dispossession,"<sup>10</sup> including the dispossession of indigenous peoples and communities who have been traditional inhabitants of territories presently coveted by all—from states and TNCs to mafias and illegal armed groups, who each want a share of the bounty of gold, coal, oil, coltan, diamonds, water, and other natural resources—.

In the following discussion, I use the term "minefields" to refer to these territories and the dynamics of social interactions produced within them, including FPIC processes. They are minefields in both the sociological and the economic sense. In sociological terms, they are true social *fields*,<sup>11</sup> characterized by the features of enclave, extractive economies, which include grossly unequal power relations between companies and communities, and a limited state presence. They are *minefields* because they are highly risky; within this terrain, social relations are fraught with violence, suspicion dominates, and any false step can bring lethal consequences. In this regard, they are an indication of the volatile social relations that are associated with hybrid economies—situated at the crossroads of legality, illegality, and informality—which abound in nations of the Global South (and

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9. DAVID HARVEY, *THE NEW IMPERIALISM* (2003).

10. *Id.* at 137-182.

11. For the classical formulation of the theory of social fields, see PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (Richard Nice trans., Cambridge Univ. Press 1977) (1972).

increasingly in the Global North) in times of globalization.<sup>12</sup>

I call them minefields because they are also frequently minefields in the economic sense. In many cases, they revolve around a mine's exploitation of some valuable resource. In other cases, like Urrá and several other conflicts I have observed in Colombia, they are also minefields in the most literal sense of the word: the indigenous territories in dispute are plagued by anti-personnel mines that are planted by illegal, armed groups as a strategy of war and for obtaining territorial control. The two types of mines, therefore, are the most visible face of the social field's risk, the incorporeal vertigo that we could sense that night in the Colombian jungle of the Embera's territory.

*B. Prior Consultation of Indigenous Peoples: The Article's Argument and Organization*

In this article, I analyze the sociolegal site where one can most clearly observe the role of law in minefields: processes of consulting indigenous peoples prior to carrying out economic projects or adopting laws or policies that directly affect them. The idea of prior consultation is relatively new in international law, arising from the aforementioned ILO Convention 169 of 1989. Despite its youth, however, it has precipitated a true explosion of hard and soft law norms at both the international and national levels, which incorporate different versions of indigenous peoples' right to FPIC. In fact, I argue in this article that FPIC's rise and impact in regulations and disputes about indigenous rights have been so profound that instead of merely constituting a legal figure, it entails a new approach to ethnic rights and multiculturalism, with its own language and rules. Thus, the consultation approach has become the most likely candidate for replacing the integrationist approach, which prevailed in international law and domestic legal frameworks throughout the twentieth century and purported to resolve the "indigenous problem" by assimilating aboriginal peoples into the rest of society.<sup>13</sup> In this sense, it is no coincidence that Convention 169 originated from the ILO's decision to revise the emblematic legal framework of assimilation (i.e., ILO Convention 107, which went into effect in 1959), "to shift the Convention's emphasis from the objectives of integration to that of respect for identity of [indigenous] populations and to promote increased consultation with, and participation by, these

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12. See John L. Comaroff & Jean Comaroff, *Law and Disorder in the Postcolony: An Introduction*, in *LAW AND DISORDER IN THE POSTCOLONY* 1, at 29-31 (Jean Comaroff & John L. Comaroff eds., 2006).

13. See LUIS RODRÍGUEZ-PINERO, *INDIGENOUS PEOPLES, POSTCOLONIALISM, AND INTERNATIONAL LAW: THE ILO REGIME* 299 (2005).

peoples in the decisions affecting them.”<sup>14</sup>

A brief look at some of the most recent regulatory instruments inspired by this approach is enough to appreciate its diversity, dizzying growth, and tensions, as well as its high stakes. While the World Bank issued Operational Policy 4.10 (O.P. 4.10) in 2004 (which requires governments to consult with indigenous peoples as a prerequisite for receiving loans for projects that affect them), a Working Group that was established by the then U.N. Commission on Human Rights made the final revisions to the FPIC-related provisions of the Declaration on the Rights of Indigenous Peoples (which at long last was adopted by the U.N. General Assembly in 2007, after twelve years of intense debate and negotiations regarding, principally, the controversial subject of consultation).<sup>15</sup>

In another telling coincidence, while the International Council on Mining and Metals (ICMM), the largest global mining industry association, adopted a set of principles to govern relations between companies and indigenous peoples, which included the need to “ensure a fair and open process of consultation,”<sup>16</sup> the ILO undertook an assessment of twenty years of Convention 169’s implementation and launched a new edition of its application manual for the convention.<sup>17</sup> In 2010, Oxfam published a multilingual practice guide to orient indigenous communities in exercising a more demanding right to free, prior, and informed *consent* (FPIC*Consent*).<sup>18</sup> In the same year, the International Finance Corporation (i.e., the World Bank Group’s entity that grants loans to the private sector) revised its Policy on Social and Environmental Sustainability to consider whether, instead of requiring consultation of affected indigenous peoples, borrowers should be required to obtain their consent.<sup>19</sup>

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14. ILO, Program and Budget of the Biennium 1986/1987: 60th Financial Period ¶ 50.16 (1985).

15. For a detailed account of this plural legal field, see Lillian Aponte Miranda, *The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law*, 11 LEWIS & CLARK L. REV. 135 (2007).

16. Position Statement, ICMM, Mining and Indigenous Peoples (May 2008). This document is part of ICMM’s Sustainable Development Framework, the association’s code of conduct. For additional information about the Framework, see generally *Sustainable Development Framework*, ICMM, <http://www.icmm.com/our-work/sustainable-development-framework>.

17. ILO, INDIGENOUS AND TRIBAL PEOPLES’ RIGHTS IN PRACTICE: A GUIDE TO ILO CONVENTION NO. 169, at 5 (2009).

18. OXFAM, GUIDE TO FREE, PRIOR AND INFORMED CONSENT (2010).

19. Int’l Financial Corp., *Policy on Social and Environmental Sustainability* (2010), available at [http://www.fias.net/ifcext/policyreview.nsf/AttachmentsByTitle/Phase2\\_SustPolicy\\_English\\_clean/\\$FILE/CODE\\_Progress+Report\\_AnnexB\\_SustainabilityPolicy\\_Clean.pdf](http://www.fias.net/ifcext/policyreview.nsf/AttachmentsByTitle/Phase2_SustPolicy_English_clean/$FILE/CODE_Progress+Report_AnnexB_SustainabilityPolicy_Clean.pdf)

How can the overlap between such diverse actors around the subject of prior consultation be explained? What type of legality will result from the hybridization of these legal regimes? What lies behind this explosion of legal standards regarding the procedure of FPIC and, more recently, FPIC Consent? What impact has this phenomenon had on indigenous peoples? What does all of this tell us about the future of conflicts over land, resources, and ethnicity in times of globalization?

In what follows, I address these questions by using empirical evidence from Latin America, the region where social and legal conflicts concerning FPIC have been most visible and acute. As I write this article, the most hotly contested political debate in Peru pertains to the law before Congress regulating the right to consultation.<sup>20</sup> The discussion is actually just the most recent episode of the deepest social conflict in Peru, which exploded in 2009 with the Amazonian indigenous peoples' mobilization against the commercial exploitation of their ancestral territories and reached such proportions that it led to a public faceoff between the Peruvian President and the U.N. Special Rapporteur on Indigenous Peoples.<sup>21</sup> At the same time, in Ecuador, the Constitutional Court handed down one of the most polemic judgments of its short history, regarding a case brought by the Confederation of Indigenous Nationalities of Ecuador (Conaie) against the 2009 mining law for lack of consultation.<sup>22</sup> As in Peru, the Ecuadorian case is part of

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20. Javier la Rosa Calle, *El derecho a la consulta previa de los pueblos indígenas en el Perú: dificultades para su implementación* [Indigenous Peoples' Right to Prior Consultation in Perú: Implementation Challenges], 14 APORTESDPFL 14 (Sept. 2010).

21. See Informe del Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas: Observaciones sobre la situación de los pueblos indígenas de la Amazonía y los sucesos del 5 de junio y días posteriores en las provincias de Bagua y Utcubamba, Perú [Special Rapporteur, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Observations on the Situation of the Amazonian Indigenous People and the Events of June 5 and After in the Provinces of Bagua and Utcubamba, Perú*], U.N. Doc. A/HRC/12/34/Add.8, United Nations, Hum. Rts. Council, (Aug. 18, 2009) (by S. James Anaya); see also United Nations Human Rights, *Declaración pública del Relator Especial sobre los derechos humanos y libertades fundamentales de los indígenas, sobre la "Ley del derecho a la consulta previa a los pueblos indígenas u originarios reconocido en el Convenio No. 169 de la Organización Internacional de Trabajo" aprobada por el Congreso de la República del Perú* [Special Rapporteur, *Public Declaration of the Special Rapporteur on the Human Rights and Liberties of the Indigenous, Over the "Legislative Bill on the Indigenous Peoples' Right to Prior Consultation as Stipulated in ILO Convention 169" approved by the Peruvian Congress*], (July 7, 2010) (by S. James Anaya), available at <http://www.ohchr.org/SP/News/Events/Pages/DisplayNews.aspx?NewsID=10194&LangID=S>.

22. Corte Constitucional [C.C.], marzo 18, 2010, Sentencia 001-10-SIN-CC (Ecuador).

a more structural dispute over natural resources, the environment, and ethnic rights, which had generated profound divisions within the 2008 Constituent Assembly.<sup>23</sup> Meanwhile, in Chile, the government and the indigenous movement are locked in a fight over the legal intricacies of implementing Convention 169, which became effective in Chile in 2009.<sup>24</sup> Simultaneously, the Inter-American Commission on Human Rights ordered Guatemala to suspend exploitation of a gold mine that it had granted to a multinational firm, Goldcorp, as a provisional measure in a case alleging violation of FPIC.<sup>25</sup> Meanwhile, the Colombian Constitutional Court, which for the past two decades has been developing the region's richest jurisprudence on FPIC, issued a ruling that halted Muriel Mining's exploitation of a major copper deposit,<sup>26</sup> citing Inter-American Court of Human Rights' jurisprudence, which imposes the stricter FPIC consent requirement for cases in which projects or measures being consulted have an impact on the very survival of the affected indigenous group.<sup>27</sup>

We are, thus, before a sociolegal field of regional scale—highly disputed and still in formation—which allows us to witness processes with global repercussions in vivid detail. In the following pages, I analytically and empirically unpack this field, drawing on evidence obtained using a combination of techniques—such as qualitative research, including eighty-eight semi-structured interviews with key actors in consultation processes (e.g., indigenous leaders, state officials, human rights lawyers, experts in corporate social responsibility, environmentalists, officials or ex-officials of the United Nations, academics specializing in environmental or ethnic studies, and advisors to companies). Likewise, I draw on participatory observation of meetings of grassroots and human rights organizations, indigenous leaders, and state officials. Although the information was gathered

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23. BOAVENTURA DE SOUSA SANTOS, REFUNDACIÓN DEL ESTADO EN AMÉRICA LATINA: PERSPECTIVAS DESDE UNA EPISTEMOLOGÍA DEL SUR [REFOUNDING THE STATE IN LATIN AMERICA: EPISTEMOLOGICAL PERSPECTIVES FROM THE SOUTH] 116-19 (2010).

24. Jorge Contesse, *Consulta y pueblos indígenas: el caso de Chile* [*Consultation and Indigenous Peoples: The Case of Chile*], 14 APORTESDPFL 32 (Sept. 2010).

25. Cmtys. of the Maya People (Sipakepense & Mam) of the Sipacapa & San Miguel Ixtahuacán Muns. in the Dep't of San Marcos, Guatemala, Precautionary Measures, Order of the Comm'n, No. PM 260-07 (May 20, 2010). For a summary of the measure, see *Precautionary Measures Granted by the Commission in 2010*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, <http://www.cidh.org/medidas/2010.eng.htm> (scroll down to "PM 260-07").

26. See Corte Constitucional [C.C.], octubre 2, 2009, Sentencia T-769/09.

27. Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 133-37 (Nov. 28, 2007).

primarily in Colombia and the case study referred to throughout the text is on Urrá,<sup>28</sup> my research also included interviews and ethnographic work in Ecuador, Chile, Peru, and other locations (principally Washington, D.C.), where regional activism and norms about the subject are generated. Lastly, in terms of documented sources, I draw upon an analysis of the key judicial decisions and laws on consultation in the aforementioned countries, as well as an examination of the genesis and application of FPIC in international law.<sup>29</sup>

With this analytical focus and information in mind, I develop three sets of arguments, which correspond with this article's three sections. In the first section, I sketch a conceptual framework that situates conflicts and law on consultation within a wider sociolegal process: the regulation of ethnicity in times of globalization, which I call "ethnicity.gov." Using this concept, I try to shed light on the juridification of ethnic claims and demands, which include extremely diverse regulations, from those produced by nation-states (e.g., treaties, laws, and judicial decisions on collective rights) to norms created by the private sector (e.g., companies' codes of conduct that regulate their relations with indigenous groups) and by social movements' legal battles (e.g., human rights litigation in international and national courts). I trace the origins of this plural legality and maintain that the point of convergence for its varied components is the emphasis in procedural aspects and in deliberations among actors in regulatory conflicts, including indigenous peoples. I argue that this emphasis reflects a broader trend: the prevalence of the neoliberal "governance paradigm,"<sup>30</sup> which explains the proliferation of terms such as "participation," "empowerment," and "consultation" of "stakeholders" in all types of regulations. I then show that ethnicity.gov is a controversial process, to the extent that the global movement in support of indigenous rights has

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<sup>28</sup> For an in-depth study of the Urrá case, see CÉSAR RODRÍGUEZ-GARAVITO & NATALIA ORDUZ, *DESARROLLO, DERECHOS INDÍGENAS Y CONSULTA PREVIA: EL CASO DE LA REPRESA DE URRÁ EN COLOMBIA* [DEVELOPMENT, INDIGENOUS RIGHTS, AND PRIOR CONSULTATION: THE CASE OF URRÁ DAM IN COLOMBIA] (forthcoming 2011).

<sup>29</sup> The results of these studies on international rights are found in CÉSAR RODRÍGUEZ-GARAVITO ET AL., *LA CONSULTA PREVIA A LOS PUEBLOS INDÍGENAS: LOS ESTÁNDARES DEL DERECHO INTERNACIONAL* [INDIGENOUS PEOPLES' RIGHT TO PRIOR CONSULTATION: THE STANDARDS OF INTERNATIONAL LAW] (2010), and CÉSAR RODRÍGUEZ-GARAVITO & YUKYAN LAM, *ENTRE LA CONSULTA Y EL CONSENTIMIENTO: EL DERECHO INTERNACIONAL SOBRE LA PARTICIPACIÓN DE LOS PUEBLOS INDÍGENAS* [BETWEEN CONSULTATION AND CONSENT: INTERNATIONAL LAW AND THE PARTICIPATION OF INDIGENOUS PEOPLE] (forthcoming 2011).

<sup>30</sup> See generally Bob Jessop, *The Rise of Governance and the Risks of Failure: The Case of Economic Development*, 155 INT'L SOC. SCI. J. 29, 29 (1998) (discussing "whether the rise of the governance paradigm might also reflect fundamental shifts in economic, political and social life").

contested the governance paradigm for the past three decades. By vindicating the principle of indigenous peoples' self-determination, this movement has influenced international and national rules on collective rights.

Against this backdrop, I devote the remainder of the article to FPIC, the most vivid and complete illustration of the features, political tensions, actors, interests, and legalities at play in ethnicity.gov. In the second section, I examine the *regulation* of FPIC within international law and its incorporation into national legal regimes, especially in Latin America. I show how FPIC—from its genesis in the ILO debates during Convention 169's drafting—has exemplified a tradeoff between different legalities and visions of multiculturalism, which can be so different as those defended by the global indigenous movement, on the one hand, and those put forth by TNCs in the extractive industry, on the other. I also assert that this tradeoff has been made possible precisely because of the focus on consultation procedure and the bracketing of significant conflicts over land, resources, and self-determination. In this regard, I argue that FPIC's global diffusion (and attraction for such different actors) is due to the fact that, in concentrating on procedural aspects (such as meetings' durations and certifications of the affected communities' representatives), it offers a *lingua franca* that allows for contacts between radically different conceptions of development, nature, and human flourishing. In other words, law's intrinsic procedural nature—exacerbated by the governance paradigm's neoliberal multiculturalism—at the very least permits provisional communication between them.

The key word, however, is “provisional.” For I also argue that the emphasis on procedure postpones or mitigates, but does not eliminate, substantive disagreements, nor contrasting visions of participation and empowerment defended by the governance crowd and the indigenous rights movement. Although FPIC comprises points of convergence among very different regulations and actors, it is also plagued by chronic tensions that resurface at each procedural step along the way. As we will see, the most telling example of the resurgence of substance over form is the current debate over whether international law requires only consultation or also requires obtaining the indigenous peoples' consent—a debate that, in fact, nearly frustrated the negotiations on the U.N. Declaration on the Rights of Indigenous Peoples.

Before drawing some brief conclusions, in the third section, I switch from the regulation of FPIC to an examination of its *operation*. In practice, how do consultations work? What effects do they have? Ethnographic evidence confirms the replacement of substantive discussions by procedural talk. Debates on factors such as timelines,

affidavits, and attendees' legal standing tend to take the place of discussions on ethnic rights, land, and natural resources. However, such replacement is partial and temporary because substantive conflicts resurface at every turn in the course of consultations, even if under the guise of procedural disagreements. I show that the pervasive entanglement of form and substance produces recurrent misunderstandings and missteps during negotiations among corporations, governments, and indigenous peoples.

Further, I show that FPIC's impact on indigenous peoples is also ambiguous. On the one hand, the juridification of indigenous claims and demands through FPIC has converted at least part of the movement's political energy into legal discussions that favor procedure and has transferred part of the responsibility for initiating and controlling these claims to external legal advisors. FPIC thus dilutes and displaces collective demands and turns them, at least partially, into procedural observations. On the other hand, evidence indicates that in the extreme circumstances of social minefields, sometimes FPIC is the only mechanism effective at slowing down extractive economic projects' dizzying pace and contesting governmental decisions that back them. In fact, in some cases, the consultation processes (and the litigation that surrounds them) have been catalysts for the political mobilization of affected peoples, along with national and international activist networks. As such, consultation has asserted its place among the political priorities of the international indigenous movement, just as it took by storm the discussion that night in the Urrá minefield.

## I. ETHNICITY.GOV

### A. *Global Governance and the Regulation of Ethnicity*

The rise of FPIC is neither gratuitous nor isolated. On the contrary, its legal, procedural logic is part of an entire *Zeitgeist*: that of neoliberal globalization taking place at the end of the twentieth century through the beginning of the twenty-first. As Comaroff and Comaroff have argued, an essential aspect of this era is the centrality of the law, or, in their terms, the "fetishism of the law": the global faith in "the capacity of constitutionalism and contract, rights and legal remedies, to accomplish order, civility, justice, empowerment."<sup>31</sup> The planetary

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31. Jean Comaroff & John L. Comaroff, *Millennial Capitalism: First Thoughts on a Second Coming*, in *MILLENNIAL CAPITALISM AND THE CULTURE OF NEOLIBERALISM* 1, 38 (Jean Comaroff & John L. Comaroff eds., 2001). For an insightful discussion of legal fetishism in contexts of political violence, see JULIETA LEMAITRE, *EL*

expansion of the law is palpable everywhere: in the avalanche of new constitutions in the Global South; in the growing power of judiciaries around the world;<sup>32</sup> in the proliferation of “law and order” programs and the “culture of legality”<sup>33</sup> in cities; in the judicialization of policy through anti-corruption programs led by judges and prosecutors; in the explosion of private regulations, such as the voluntary standards on corporate social responsibility;<sup>34</sup> and in the transmutation of social movements’ struggles into human rights litigation.<sup>35</sup>

The extension of this process into the domain of ethnicity is what I call ethnicity.gov. It entails the juridification of collective claims of cultural identity, self-determination, and control over territories and resources—claims that are brought by indigenous peoples, Afro-descendant communities, and other ethnic groups in Latin America and other parts of the world. Thus, with this concept, I seek to capture the legal dimension that is central to the “politics of cultures.”<sup>36</sup>

I use the term ethnicity.gov to refer to this process in order to create a literal parallel that reveals its deep intertwining with another fundamental process of ethnicity transformation in times of neoliberal globalization, which Comaroff and Comaroff christen “Ethnicity, Inc.”<sup>37</sup> The latter consists of the “process of cultural commodification, and the incorporation of identity in which it is imbricated.”<sup>38</sup> It comprises phenomena as diverse as the economic exploitation of cultural identity (evident, for example, in the ecological and cultural tourism boom) and the commercial protection of indigenous knowledge (reflected, for

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DERECHO COMO CONJURO: FETICHISMO LEGAL, VIOLENCIA Y MOVIMIENTOS SOCIALES [LAW AS A SPELL: LEGAL FETISHISM, VIOLENCE, AND SOCIAL MOVEMENTS] (2009).

32. See generally RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004) (discussing how constitutional courts in different parts of the world have become involved in resolving fundamental political issues); SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES 201 (2006).

33. John L. Comaroff & Jean Comaroff, *Reflections on the Anthropology of Law, Governance and Sovereignty*, in RULES OF LAW AND LAWS OF RULING: ON THE GOVERNANCE OF LAW 31, 33-34 (Franz von Benda-Beckmann et al. eds., 2009).

34. See generally Ronen Shamir, *Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony*, in LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY 92 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005) [hereinafter LAW AND GLOBALIZATION FROM BELOW].

35. See Boaventura de Sousa Santos & César Rodríguez-Garavito, *Law, Politics, and the Subaltern in Counter-Hegemonic Globalization*, in LAW AND GLOBALIZATION FROM BELOW, *supra* note 34, at 1.

36. CULTURES OF POLITICS/POLITICS OF CULTURES: RE-VISIONING LATIN AMERICAN SOCIAL MOVEMENTS (Sonia E. Alvarez et al. eds., 1998).

37. JOHN L. COMAROFF & JEAN COMAROFF, ETHNICITY, INC. 235 (2009).

38. *Id.* at 20.

example, in the patenting of indigenous traditional medicines).<sup>39</sup> Just as “Ethnicity, Inc. [is] . . . a projection of the entrepreneurial subject of neoliberalism onto the plane of collective existence,”<sup>40</sup> I argue that ethnicity.gov is the projection of the neoliberal legal subject onto the plane of collective rights. It thus concerns the collective legal subject, whose two fundamental (neo)liberal rights are recognized: freedom of contract and due process. As our analysis of FPIC will demonstrate, we are dealing with a legal subject constituted for the purpose of participating in deliberations and consultations—processes that transform collective conflicts into negotiations governed (at least on paper) by due process principles (e.g., publicity, transparency, celerity). Crucially, in line with the liberal fiction embedded in the institutions of freedom of contract and due process, it is assumed from the outset that the ethnic collective subject (e.g., an indigenous people) is on a level playing field with the other subjects that will participate in the consultations and negotiations (e.g., TNCs and the state entities interested in economically exploiting indigenous territory). The foregoing reflects the obvious affinity between the collective subjects of Ethnicity.Inc and ethnicity.gov. At the end of the day, the latter’s collective subject is the same “entrepreneurial subject” of the former, but clothed with the legal attire of the “contracting party.” The affinity is so apparent that, in even more literal terms and borrowing from Internet conventions, we could call the two processes “ethnicity.com” and “ethnicity.gov,” respectively.<sup>41</sup>

Unlike the terminology used by Internet websites, I use the suffix “.gov” to denote governance, not government. As mentioned, the juridification of ethnicity occurs not only through hard law that is created by governments (and states in general), but also through a wide range of soft law rules, such as the operational policies that multilateral and private banks impose on companies that work in indigenous territories and the codes of conduct that pertain to mining companies that operate in these territories. Consequently, ethnicity.gov is marked by the phenomenon of legal pluralism and comprises multiple manifestations of governance without government.

By defining ethnicity.gov as a form of governance, I seek to capture

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39. *See id.* at 3 (citing RACHEL PROCTOR, CULTURAL SURVIVAL 2001).

40. *Id.* at 140.

41. There are multiple indications of the overlap between these two processes. One particularly revealing sign is the resemblance in their discourses. Note, for instance, the centrality of the term “empowerment” in both. While the term is, as we will see, ethnicity.gov’s buzzword for ethnic groups’ participation in decisions and regulations that affect them, in ethnicity.com, the term is equally omnipresent and is associated with “. . . finding something essentially their own and theirs alone, something of their essence, to sell. In other words, a brand.” *Id.* at 15.

not only the diversity of its regulations, but also the content they have in common. Beyond these legal forms' obvious differences in scope (i.e., focus and proponents), they have a common emphasis on consultation, deliberation, and collaboration among "stakeholders" in ethnic rights disputes. Thus, given its content, ethnicity.gov exemplifies the procedural legality of the "governance paradigm."<sup>42</sup>

A wealth of studies on forms of regulation based on public-private partnerships have theorized about and documented this paradigm.<sup>43</sup> At its core, it is not top-down state regulation nor market self-regulation, but rather a "third way," consisting of flexible regulations produced through deliberation and cooperation among stakeholders, which include companies, state entities, local communities, NGOs, unions, and citizen associations. Employing diverse labels,<sup>44</sup> governance analysts have asserted its relevance for regulatory problems as varied as the global protection of labor rights,<sup>45</sup> environmental conservation,<sup>46</sup> and the coordination of national policies and legal standards within regional trading blocs.<sup>47</sup>

The governance paradigm has been equally influential in the realms of public policy and judicial reform. In effect, it has inspired

42. See generally Jessop, *supra* note 30.

43. For a critical overview of the governance literature, see César Rodríguez-Garavito, *Global Governance and Labor Rights: Codes of Conduct and Anti-Sweatshop Struggles in Global Apparel Factories in Mexico and Guatemala*, 33 POL. & SOC'Y 203 (2005).

44. Among the terms used by governance theorists are "collaborative governance," "soft law," "post-regulatory law," "democratic experimentalism," "reflexive law," and "responsive regulation." See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); Francis Snyder, *Soft Law and Institutional Practice in the European Community*, in *THE CONSTRUCTION OF EUROPE: ESSAYS IN HONOUR OF EMILE NOËL* 197 (Stephen Martin ed., 1994); Gunther Teubner, *After Legal Instrumentalism? Strategic Models of Post-Regulatory Law*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 299 (Gunther Teubner ed., 1986); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Charles Sabel, *Bootstrapping Reform: Rebuilding Firms, the Welfare State, and Unions*, 23 POL. & SOC'Y 5 (1995).

45. See generally ARCHON FUNG, DARA O'ROURKE & CHARLES SABEL, *CAN WE PUT AN END TO SWEATSHOPS?* (2001) (proposing market-driven regulatory systems to improve the enforcement of labor rights).

46. See generally Bradley C. Karkkainen, *Environmental Lawyering in the Age of Collaboration*, 2002 WIS. L. REV. 555 (2002) (examining the changes and innovations in environmental law).

47. *GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS* (Jonathan Zeitlin & David Trubek eds., 2003) (examining "the common challenges confronting the European Union and the United States as they reconfigure work and welfare in a new economy and struggle to develop effective and legitimate governance arrangements").

countless regulatory undertakings, from projects for institutional reform based on the promotion of “good governance” (such as those of the World Bank)<sup>48</sup> to voluntary, private regulation initiatives that make part of the corporate social responsibility industry (e.g., codes of conduct)<sup>49</sup> and collaborative regulatory projects undertaken by multilateral organizations, like the ILO’s “social dialogue”<sup>50</sup> and the United Nation’s Global Compact.<sup>51</sup>

In summary, a specific type of legality dominates ethnicity.gov: that of the governance paradigm, which, as Santos has argued, is the legal matrix of neoliberal globalization.<sup>52</sup> The elective affinity between neoliberalism and governance theories and practices lies precisely in the fact that these theories and practices focus on participatory institutions’ procedural intricacies and explicitly leave aside discussion of the material conditions necessary for genuine deliberations.<sup>53</sup> In particular, they bracket power asymmetries among participants in deliberations (e.g., companies and indigenous communities engaged in consultation processes) and the distributive and cultural conflicts that they entail. As a consequence, the procedures and types of participation that they support leave power relations untouched and replicate a vision of the public sphere as a depoliticized space for collaboration among generic “stakeholders.”<sup>54</sup>

Accordingly, global governance and neoliberalism share a lexicon of key terms such as “empowerment,” “corporate social responsibility,” and “sustainable development.”<sup>55</sup> The fluency with which protagonists of global liberalism—from TNCs to the World Bank—speak the language of governance also follows from this. “We engage with a broad range of stakeholders—governments, indigenous peoples, international organizations, communities, end-users, civil society organizations, and academia—in a bid to strengthen performance and enhance our

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48. Tania Murray Li, *The Law of the Project: Government and ‘Good Governance’ at the World Bank in Indonesia*, in *RULES OF LAW AND LAWS OF RULING*, *supra* note 33, at 237.

49. See generally Shamir, *supra* note 34.

<sup>50</sup> See generally *Social Dialogue*, ILO, <http://www.ilo.org/public/english/dialogue/themes/sd.htm> (last visited Feb. 1, 2011).

<sup>51</sup> See generally *United Nations Global Compact*, UNITED NATIONS, <http://www.unglobalcompact.org/> (last visited Feb. 1, 2011).

52. Boaventura de Sousa Santos, *Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality*, in *LAW AND GLOBALIZATION FROM BELOW*, *supra* note 33, at 29, 35.

53. See Dorf & Sabel, *supra* note 44, at 409.

54. For a development of this critique, see Rodríguez-Garavito, *supra* note 43, at 209-10.

55. See generally Santos, *supra* note 52; Svampa, *supra* note 8.

contribution to sustainable development,”<sup>56</sup> declares the website of the International Council on Mining (i.e., the global association of mining TNCs).

As a synthesis of the relationship between neoliberalism and governance, the statement is difficult to surpass. The fact that this reference comes from the industry involved in the most intense conflicts with indigenous peoples foretells ethnicity.gov’s tensions and contradictions in the specific domain of indigenous rights. In the following section, I sketch these tensions as a prelude to a more in-depth analysis of the way in which they operate in the specific field of FPIC.

### *B. Ethnicity.gov Meets Indigenous Peoples: Legal Struggles Around Multiculturalism and Indigenous Rights*

Ethnicity.gov is not a peaceful process. In the area of indigenous rights in particular, the governance paradigm has been contested from below by a counterhegemonic legality that has evolved in tandem: that of the transnational movement advocating indigenous rights.<sup>57</sup>

The origins of international law on indigenous peoples date back to the transnational activism that produced the movement’s first milestone: the U.N. Human Rights Commission’s resolution in 1971, which called upon the Sub-Commission on Prevention of Discrimination and Protection of Minorities to study “the problem of discrimination against indigenous populations” and formulate measures for eliminating it.<sup>58</sup> Over a decade later, the mandate led to the influential “Martínez Cobo report,”<sup>59</sup> which was followed by the mobilization of indigenous peoples and human rights NGOs, urging the creation of contemporary international law’s pioneer institution on the subject: the U.N. Working

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56. *About Us*, INT’L COUNS. OF MINING & METALS, <http://www.icmm.com/about-us> (last visited Sept. 4, 2010).

57. For overviews of this global movement and the resulting legal instruments, see generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2nd ed. 2004); RONALD NIEZEN, *THE ORIGINS OF INDIGENISM: HUMAN RIGHTS AND THE POLITICS OF IDENTITY* (2003). On Latin America, see generally ALISON BRYSK, *FROM TRIBAL VILLAGE TO GLOBAL VILLAGE: INDIAN RIGHTS AND INTERNATIONAL RELATIONS IN LATIN AMERICA* (2000); *MULTICULTURALISM IN LATIN AMERICA: INDIGENOUS RIGHTS, DIVERSITY, AND DEMOCRACY* (Rachel Sieder ed., 2002)[hereinafter *MULTICULTURALISM IN LATIN AMERICA*]; DONNA LEE VAN COTT, *THE FRIENDLY LIQUIDATION OF THE PAST: THE POLITICS OF DIVERSITY IN LATIN AMERICA* (2000).

58. United Nations, Econ. & Soc. Council (ECOSOC), *The Problem of Indigenous Populations*, Res. 1589(L) ¶ 7, U.N. Doc. E/5044 (May 21, 1971).

59. Special Rapporteur, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/476, United Nations, Econ. & Soc. Council, Sub-Comm. for the Prevention of Discrimination & Protection of Minorities, (July 30, 1981) (by José R. Martínez Cobo).

Group on Indigenous Populations. Established in 1982, the Working Group produced the first draft of the Declaration on the Rights of Indigenous Peoples in 1994, which, after over a decade of discussions and numerous revisions, led to the final Declaration that was approved by the U.N. General Assembly in 2007. The Declaration is an icon in the globalization of indigenous rights and, together with the aforementioned ILO Convention 169 of 1989, constitutes a central reference point in international law on the subject.

The global movement's *Leitmotiv* is the demand for the recognition of indigenous peoples' right to self-determination,<sup>60</sup> which is a right that is only partially enshrined in legal instruments—to a greater extent in some (e.g., the Declaration) than in others (e.g., the Convention 169). The substantive legality that derives from the principle of self-determination contrasts noticeably with governance's procedural legality. From a political and cultural point of view, indigenous claims typically do not include demands for territorial secession, but they do embody a variety of multiculturalism that entails a degree of autonomy over territories and economic resources that surpasses the degree contemplated by “neoliberal multiculturalism.”<sup>61</sup> Neoliberal multiculturalism, for its part, recognizes cultural difference and collective rights, as long as they do not give rise to this type of entitlement and do not question, as indigenous claims do, the conventional conceptions of economic development.

At the national level, the transnational law on indigenous peoples has rapidly permeated constitutions, especially in Global South countries that underwent political transitions and proceeded to incorporate this law into new constitutions. Latin America, the region on which this article is focused, presents the most vivid illustration of this trend. The Guatemalan Constitution of 1985 inaugurated a regional wave of “multicultural constitutionalism,”<sup>62</sup> which was joined by Nicaragua (1987), Brazil (1988), Colombia (1991), Paraguay (1992), Peru (1993), Bolivia (1994), Argentina (1994), Mexico (1994), Venezuela (1998), and, especially, Ecuador (2008) and Bolivia (2009)<sup>63</sup>—with each country recognizing the right of self-determination to a different extent. The convergence of the global indigenous rights movement with Latin American multicultural constitutionalism is evident not only from the

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60. ANAYA, *supra* note 57, at 97.

61. Charles R. Hale, *Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America*, 28 POLAR 1, at 10, 26 (2005).

62. VAN COTT, *supra* note 57, at 257.

63. BARTOLOMÉ CLAVERO, GEOGRAFÍA JURÍDICA DE AMÉRICA LATINA: PUEBLOS INDÍGENAS ENTRE CONSTITUCIONES MESTIZAS [LEGAL GEOGRAPHY OF LATIN AMERICA: INDIGENOUS PEOPLES AMONG MESTIZO CONSTITUTIONS] (2008).

various constitutions that have incorporated Convention 169's norms, but also from the fact that the ten countries from the above-mentioned group that have ratified the Convention<sup>64</sup> constitute nearly half of the countries that have ratified the instrument worldwide.<sup>65</sup>

The judicialization of conflicts over collective rights is the other fundamental component of multicultural constitutionalism and, thus, is a key part of the global indigenous rights movement's contribution to ethnicity.gov. As is apparent in Latin America, courts have become central actors in the juridification of ethnicity, as the indigenous movement's political claims have materialized in hundreds of cases being litigated before constitutional courts and bodies of the Inter-American System of Human Rights.<sup>66</sup>

The most explicit example of this tendency is found in Colombia, where the judicialization of ethnic conflicts has become so profound that legal mobilization is now a defining strategy of the indigenous movement.<sup>67</sup> "For this reason, Colombian indigenous leaders prompted us to go to law school after the 1991 Constitution," said the General Secretary of the National Indigenous Organization of Colombia (ONIC), himself a lawyer, in our interview.<sup>68</sup> In addition to leading cases decided by the Inter-American Court of Human Rights<sup>69</sup> and, above all, Ecuador and Bolivia's new constitutions, which are based explicitly on the principle of plurinationalism,<sup>70</sup> Colombian constitutional law has gone the farthest in incorporating some of the corollaries of the self-determination principle demanded by the global indigenous movement.

64. The sole exception in the group is Nicaragua.

65. At the time of writing, twenty-two countries had ratified Convention 169. *C 169*, ILOLEX, <http://www.ilo.org/ilolex/cgi-lex/ratifics.pl?C169> (last visited Jan. 15, 2011).

66. For an analysis of the proliferation of national and regional jurisprudence on indigenous rights, specifically the right to prior consultation, see Christian Courtis, *Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous Peoples*, 10 SUR-INT'L J. HUM. RTS. 53 (June 2009).

67. See LEMAITRE, *supra* note 31.

68. Interview with Luis Fernando Arias, ONIC General Secretary, in Chemesquemena, Kankuamo reservation, Colombia (June 16, 2010) (author's translation of interview).

69. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, (Nov. 28, 2007); *Sahoyamaya Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 146, (Mar. 29, 2006). For an early assessment of the Inter-American Court's jurisprudence with regard to indigenous land issues, see generally S. James Anaya and Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HAR. HUM. RTS. J. 33 (2001). For a recent critical assessment, see generally Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WIS. INT'L L. J. 51 (2009).

70. Santos, *supra* note 23.

Beyond the intricacies of national legal norms, it is important to highlight two key points here to complete the characterization of ethnicity.gov. First, the joint effect of the global indigenous rights movement and the rise of multicultural constitutionalism has been a profound juridification of indigenous peoples' political and cultural claims. As fieldwork throughout the region has revealed, Latin American indigenous leaders today have to spend as much time in indigenous territories as in key legal forums: human rights NGOs, government agencies, constitutional tribunals, the Inter-American Commission on Human Rights in Washington, and the offices of specialized U.N. bodies in Geneva (e.g., the Special Rapporteur on Indigenous Peoples, the Permanent Forum on Indigenous Peoples, and the Committee for the Elimination of Racial Discrimination).<sup>71</sup>

Secondly, the coexistence of the legality of the global indigenous rights movement and the legality of the governance paradigm implies obvious tensions and contradictions. Ethnicity.gov is an intensely controversial legal field in which the dominance of neoliberal legality—based on freedom of contract and due process—is constantly contested by the legality that is based on indigenous self-determination. Therefore, norms on indigenous rights result from the complex interactions among actors of these two regulatory strategies at both the international and national levels.

The clearest example of the interaction between these two legalities is the regulation of FPIC, ethnicity.gov's emblematic institution. In the remainder of this article, I focus on this figure in order to empirically unpack the regulation and operation of ethnicity.gov.

## II. PRIOR CONSULTATION AND THE REGULATION OF INDIGENOUS RIGHTS

The tension between the legalities associated with governance and the international indigenous rights movement is evident from the very discussions within the ILO that led to Convention 169's adoption. From the beginning, the objective of replacing indigenous peoples' "integration" with their "participation" in deciding matters affecting them was the key reason behind the ILO's decision to revise Convention 107. In fact, such motivation was expressed in the document presented by the organization's Secretariat to the experts convened for the

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71. Interview with Luis Évelis Andrade, ONIC President, in Geneva, Switzerland (Aug. 11, 2009); Interview with Javier de la Rosa, lawyer for indigenous affairs, Instituto de Defensa Legal, Lima, Peru (Aug. 10, 2010).

revision in Geneva in 1986.<sup>72</sup> Experts and delegates from the three sectors of the ILO (i.e., employers, workers, and states) agreed to reject the aspiration indicated in Convention 107's preamble: to "facilitate" the "progressive integration [of indigenous peoples] into their respective national communities."<sup>73</sup> However, controversy surrounding the concept of participation was evident. While a large segment of experts supported the proposal made by such organizations as the World Council of Indigenous Peoples, which implied substituting participation with indigenous peoples' *control* of their socioeconomic conditions, employers' delegates tended to support the idea of participation and objected to recommendations that were based on the principle of indigenous peoples' self-determination.<sup>74</sup> The effort to reach a compromise between these two positions is apparent in the report that the experts presented to the ILO, which recommended that the Convention's revision guarantee that indigenous peoples have "*as much control as possible* over their own economic, social and cultural development."<sup>75</sup> Importantly, the experts recommended creating a procedural mechanism as an intermediary solution for cases in which the affected indigenous group's consent could not be obtained. The solution, prior consultation's precursor, consisted in requiring that participation include public review of the matter in question in which indigenous representatives would partake.<sup>76</sup>

The contrast between the two positions increased during the 1988 and 1989 ILO conferences, in which the Convention's revision was debated. The original proposal of the ILO's Office, which included a more stringent requirement that governments "seek the consent" of indigenous peoples in relation to decisions affecting the latter, met with strong resistance from many states and employers' organizations. Given this situation, the Office modified its proposal as it looked ahead to the final conference in 1989 and, thus, adopted the weaker formulation of "consultation" that was ultimately enshrined in the final approved text of Convention 169.<sup>77</sup> In this way, according to Rodríguez-Piñero,

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72. See Tony Simpson, *ILO 107—A License to Rights*, Aboriginal Law Bulletin 7 (1987), available at <http://www.austlii.edu.au/au/journals/AboriginalLawB/1987/7.html#fn1>.

73. ILO, Indigenous and Tribal Populations Convention, pmbi., adopted June 26, 1957, 328 U.N.T.S. 247.

74. Russel Lawrence Barsh, *Current Development: Revision of ILO Convention No. 107*, 81 AM. J. INT'L L. 756, 759 (1987).

75. *Id.* at 761 (citing the expert's report, ILO Doc. APPL/MER/107/1986/D.7, at 32) (emphasis added).

76. Barsh, *supra* note 74, at 761.

77. RODRÍGUEZ-PIÑERO, *supra* note 14, at 381; see also James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction*:

“consultation’, ‘participation’, and ‘respect for identity’ became the themes of a never too-well articulated discourse which appealed to pragmatism and easily acceptable values, while explicitly avoiding principle-based discussion that could raise the ILO constituency’s concern on political grounds,” thus, revealing that, despite the obvious consensus against integrationism, there was “no clear alternative discourse upon which to draw—only pieces thereof.”<sup>78</sup>

Although this conclusion duly highlights FPIC’s political function—that is, to serve as a procedural compromise between two substantively opposing positions—it overlooks the fact that consultation itself *is* an alternative discourse. In fact, as I argued in the previous section, FPIC echoes the discourse of global governance, which was gaining ground at the time of Convention 169’s adoption and on its way to becoming the hegemonic legal discourse of globalization at the turn of the century.

The fit between consultation and governance explains the ease with which FPIC was incorporated into the neoliberal mainstream, specifically in the discourse of economic development. In Convention 169 itself, FPIC’s rights-based dimension is situated within the economic framework of the “development process.”<sup>79</sup> Despite the fact that, as we will see, the tensions between collective rights and development have resurfaced in practice over the course of actual consultations, it is clear that the final text of Convention 169 subordinates FPIC to the priority of economic development. This helps explain the fact that actors of global neoliberalism, from multilateral banks to TNCs, have embraced FPIC, finding it to be a useful and business-friendly mechanism for responding to growing criticisms of their operations’ impact on indigenous peoples. In fact, FPIC became a key component of the discursive adjustments with which the “development project”<sup>80</sup> was repackaged and re-exported across the world. Put differently, once stricter demands relating to the principle of self-determination were purged from consultation, neoliberalism’s global actors were able to

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*The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT’L & COMP. L. 7, 12 (2005).

78. RODRÍGUEZ-PIÑERO, *supra* note 14, at 299.

79. “The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.” ILO, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art. 7(1), *adopted* June 27, 1989, 28 I.L.M. 1382.

80. On the origins and trajectory of development as a transnational project, see PHILIP MCMICHAEL, DEVELOPMENT AND SOCIAL CHANGE: A GLOBAL PERSPECTIVE (2008).

convert it into another adjective for qualifying, yet maintaining and reinforcing, the discourse of development. For example, in the Inter-American Development Bank (IADB), participation, empowerment, and consultation have become the core of the “development with identity” approach, which inspired the IADB’s recent Operational Policy on Indigenous Peoples.<sup>81</sup> Consultation’s incorporation into the development endeavor is reflected most clearly in the words of the director of the IADB division that formulated the Operational Policy—words which also provide a perfect statement of the aforementioned Ethnicity, Inc.: “[i]ndigenous peoples are increasingly interested in using their assets of natural resources, cultural heritage, and social capital as vehicles for improving their social and economic conditions.”<sup>82</sup> With equal transparency, the same source reveals the connection between “development with identity” and Ethnicity, Inc., on the one hand, and the language of governance and ethnicity.gov, on the other: “[o]ver the years, the IADB has developed a number of projects incorporating good practices, such as participatory planning, socio-cultural issues, decentralized execution mechanisms, the linkages between the strengthening of environmentally- and territorially-based aspects to local participation in management and decision-making.”<sup>83</sup>

In the language adopted by the World Bank, consultation became a prefix, rather than an adjective. Yet, the result—the “ethno-development” approach<sup>84</sup>—is the same, insofar as it involves a business-friendly version of FPIC and indigenous rights that fits into the mainstream development discourse, now amended to include the governance paradigm’s participatory and procedural tinge. As a World Bank-requested independent report on the impact of its extractive industry loans concluded,<sup>85</sup> in addition to invoking a weak version of consultation, the Bank’s operational policies regarding indigenous peoples fail to establish effective monitoring mechanisms and are rarely

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81. INTER-AMERICAN DEVELOPMENT BANK, SUSTAINABLE DEV. DEP’T, INDIGENOUS PEOPLES & CMTY. DEV. UNIT, OPERATIONAL POLICY ON INDIGENOUS PEOPLES (Feb. 22, 2006).

82. Anne Deruyttere, *Perceived Challenges to Recognition of Prior and Informed Consent of Indigenous Peoples and Other Local Communities: The Experiences of the Inter-American Development Bank*, 4 SUSTAINABLE DEV. L. & POL’Y 40, 41 (2004).

83. *Id.* at 42.

84. Shelton H. Davis, *Indigenous Peoples, Poverty and Participatory Development: The Experience of the World Bank in Latin America*, MULTICULTURALISM IN LATIN AMERICA, *supra* note 53, at 227, 233.

85. 2 WORLD BANK GROUP, EXTRACTIVE INDUS. REV., STRIKING A BETTER BALANCE: STAKEHOLDER INPUTS: CONVERGING ISSUES AND DIVERGING VIEWS ON THE WORLD BANK GROUP’S INVOLVEMENT IN EXTRACTIVE INDUSTRIES 48-49 (DEC. 2003).

applied in practice.<sup>86</sup>

In the absence of strict procedural standards and effective monitoring mechanisms and sanctions, the version of FPIC endorsed in multilateral bank directives and TNC codes of conduct embodies the two principal limitations of the governance paradigm mentioned earlier. On the one hand, the lack of procedural guarantees to mitigate the profound power asymmetries among indigenous communities, corporations, and states render consultation a form of participation in which indigenous peoples have limited negotiating leverage and even more limited decision-making power. On the other hand, the absence of effective and functional monitoring and sanctioning mechanisms is reminiscent of the preference for self-regulation inherent in governance's approach, which accounts for the ineffectiveness of operational policies and voluntary standards recognizing the duty to consult indigenous peoples.

Similar limitations are apparent in the version of consultation incorporated into legislation in the majority of states that have ratified Convention 169.<sup>87</sup> As a result, this dominant version of FPIC and this interpretation of Convention 169 are central pieces of what Hale calls "neoliberal multiculturalism," which is the legal regime that recognizes cultural rights, but denies, *de facto* or *de jure*, "the assertion of control over resources necessary for those rights to be realized."<sup>88</sup> It is the type of multiculturalism and consultation that is today prevalent even in those Latin American countries that have joined the wave of multicultural constitutionalism and ethno-development, without addressing the structural causes of indigenous peoples' exclusion or establishing forms of participation with decision-making power.<sup>89</sup>

This does not mean that the details and procedural rules are inconsequential or that FPIC's regulation has been devoid of controversy. On the contrary, each step taken to regulate FPIC or to put it into practice sparks ethnicity.gov's characteristic tension, between neoliberal legality (which focuses on the *procedure* of consultation, as a manifestation of contractual freedom between supposedly equal parties)

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86. Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 BERKELEY J. INT'L L. 570, 575 (2009); Fergus MacKay, *The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or More of the Same?* 22 ARIZ. J. INT'L & COMP. L. 65, 67 (2005).

87. For an overview of the regulation and operation of FPIC in Latin America, see generally the essays compiled by the Foundation for the Due Process of Law, 14 APORTESDPLF (2010).

88. Hale, *supra* note 61, at 13.

89. See Rachel Sieder, *Introduction*, in MULTICULTURALISM IN LATIN AMERICA, *supra* note 57, at 1, 14.

and the legality of indigenous rights (which assesses the procedure in terms of its *outcomes*, that is, in terms of the degree to which it allows for indigenous peoples to freely consent to or reject the project or decision under consideration as an expression of their right to self-determination).

The interaction between these two positions has given rise to multiple interpretations of Convention 169 and to the creation of new instruments of international law. As for Convention 169, national and international bodies in charge of applying it have adopted diverse interpretations located at different points along the spectrum between consultation and consent. For example, although the ILO committees that review complaints alleging violations of Convention 169 opt for the former, they have also strengthened consultation's procedural guarantees and have found violations of the Convention on multiple occasions, as in the case of Colombia's Urrá dam.<sup>90</sup> Meanwhile, international human rights bodies, such as the U.N. Rapporteurship on the Rights of Indigenous Peoples and the Inter-American Court of Human Rights,<sup>91</sup> have adopted interpretations of international law in general, and of Convention 169 in particular, which uphold the consultation requirement but also establish the stricter requisite of obtaining consent when dealing with large-scale development projects that may profoundly impact an indigenous people. For their part, national courts have established extremely varied jurisprudence, which ranges from weak interpretations, (i.e., a procedural conception of consultation, as in Ecuador)<sup>92</sup> to strong interpretations closest to the positions of the U.N. Rapporteurship and the Inter-American Court (i.e., the recent decisions of the Colombian Constitutional Court),<sup>93</sup> and including intermediary positions similar to those of the ILO (i.e., the Peruvian<sup>94</sup> constitutional tribunal).

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90. Special Rapporteur, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. Doc. E/CN.4/2003/09, United Nations, Econ. & Soc. Council, Comm. on Hum. Rts., (Jan. 21, 2003) (by Rodolfo Stavenhagen) [hereinafter *Situation of Human Rights*].

91. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, (Nov. 28, 2007).

92. Corte Constitucional [C.C.] [Constitutional Court], marzo 18, 2010, Sentencia 001-10-SIN-CC (Ecuador) (declaring constitutional the National Mining Code and rejecting legal arguments about the violation of constitutional provisions on FPIC brought up by CONAIE, the national indigenous organization).

93. Corte Constitucional [C.C.], octubre 2, 2009, Sentencia T-769/09 (suspending copper exploration in Western Colombia until FPIC is conducted with local indigenous peoples, and declaring that consent is required when development projects can have a profound impact on an indigenous community).

94. Robert Kozak, Dow Jones Newswires, *DJ Court Orders Peru to Consult Indigenous [sic] Peoples on Mining, Oil Projects*, TRADINGMARKETS.COM (Sept. 1, 2010,

Beyond Convention 169's text and interpretation, the dispute over establishing FPIC's standards has been apparent in the process of adopting the most recent international legal instrument on the subject: the U.N. Declaration on the Rights of Indigenous Peoples. Upon studying the reports produced during the eleven years of discussions held by the Working Group established in 1995 by the Commission on Human Rights to draft the Declaration, one sees clearly that the reason why the process took so long (and why it nearly fell through in 2005 only to be saved by an ad hoc workshop held in Mexico) was precisely the continuing disagreement between indigenous organizations and a large segment of states regarding the standard of participation that should be incorporated into the Declaration. While the former group demanded consent, the latter preferred a form of consultation that was similar to that of Convention 169. The compromise found in the final Declaration text, which the U.N. General Assembly approved in 2007, consisted of a hybrid that upheld the general standard of FPIC, but went farther than Convention 169 in the direction of the indigenous groups' proposal by establishing that consultations should be carried out with the objective of obtaining the consent of indigenous peoples<sup>95</sup> and directly requiring consent for relocating an indigenous people from their territory.<sup>96</sup>

In sum, after two decades of existence, FPIC has become a central institution in the transnational regulation of indigenous rights. Thus, it embodies the dominant modality of ethnicity.gov and multiculturalism in the neoliberal era. However, consultation is situated within a highly dynamic and complex sociolegal field, coexisting—at times in tension and at times merged in different hybrid forms—with other legal approaches to the “indigenous question.” The actors, principles, and mechanisms pertaining to this question are condensed in Table 1. On the one hand, consultation coexists with the remnants of the integrationist paradigm, which, while superseded by international law instruments, continues to be highly influential in legal regimes around the world that consider indigenous peoples as objects of national development policies, rather than as legal subjects and right bearers.<sup>97</sup> On the other hand, consultation coexists with a counterhegemonic form

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14:56:15 EDT), [http://www.tradingmarkets.com/news/stock-alert/mioie\\_dj-court-orders-peru-to-consult-indigenous-peoples-on-mining-oil-projects-1145502.html](http://www.tradingmarkets.com/news/stock-alert/mioie_dj-court-orders-peru-to-consult-indigenous-peoples-on-mining-oil-projects-1145502.html).

95. United Nations, Declaration on the Rights of Indigenous Peoples, arts. 19, 32, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter Declaration].

96. Declaration, *supra* note 93, at art. 10.

97. I take the distinction between policy and rights-based approaches to indigenous peoples from BARTOLOMÉ CLAVERO, DERECHO INDÍGENA Y CULTURA CONSTITUCIONAL EN AMÉRICA 75 (1994).

of multiculturalism, which is advocated by the global indigenous rights movement, inspired by the principle of self-determination, and embodied by the standard of free, prior, and informed consent.<sup>98</sup> A telling illustration of this variant of multiculturalism is found in Guatemala in autonomous consultations organized by indigenous communities, which mounted a challenge to neoliberal economic policies and corporate-led consultations, and resulted in decisive votes against mining projects in their territories.<sup>99</sup>

**Table 1.** Legal approaches to indigenous peoples

	Integrationism	Neoliberal multiculturalism	Counterhegemonic multiculturalism
Governing principle	Assimilation	Participation	Self-determination
Legal paradigm	Regulation	Governance	Collective rights
Mode of participation	None	Consultation	Consent
Indigenous peoples' legal status	Objects of policies	Objects of policies/subjects of rights	Subjects of rights
Legal bases	ILO Convention 107, national constitutions	ILO Convention 169 (weak interpretation); multicultural constitutions	ILO Convention 169 (strong interpretation); U.N. Declaration on the Rights of Indigenous Peoples; Jurisprudence (Inter-American Court of Human

98. This characterization of indigenous, counterhegemonic multiculturalism draws on Santos' theory of multiculturalism and human rights. Boaventura de Sousa Santos, *Toward a Multicultural Conception of Human Rights*, in *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* 39, 44 (Berta Hernandez-Truyol ed., 2002). On law and counterhegemonic globalization, see Santos and Rodríguez-Garavito, *supra* note 35.

99 Amanda Fulmer, Angelina Snodgrass Godoy & Philip Neff, *Indigenous Rights, Resistance and the Law: Lessons from a Guatemalan Mine*, 4 *LATIN AMERICAN POLITICS AND SOCIETY* 91 (2008); Rachel Sieder, *El derecho indígena y la globalización legal en la posguerra guatemalteca (Indigenous Law and Legal Globalization in Post-War Guatemala)*, 16 *ALTERIDADES* 23 (2006).

			Rights, Colombia); pluricultural constitutions (Bolivia, Ecuador); indigenous legal systems
Key actors	Governments	Governments, courts, ILO, TNCs, multilateral banks	Indigenous organizations and communities, human rights NGOs, courts, ILO, U.N. organs (Rapporteurship on Indigenous Peoples, Permanent Forum on Indigenous Issues, Working Group on Indigenous Populations)

As in all typologies, for the purposes of analytic clarity, Table 1 stylizes and underscores the differences among the categories of interest—in this case, the three approaches to indigenous rights. In practice, of course, international legal instruments, national judicial decisions, legislation, and other legal artifacts often straddle the middle ground between ideal types. In fact, as I have highlighted throughout this section and summarized in the table, Convention 169's interpretations range from weak ones (from the viewpoint of indigenous rights) that are clearly entrenched in neoliberal multiculturalism (e.g., those dominant in companies' codes of conducts and multilateral banks' operational policies) to strong understandings that draw upon counterhegemonic multiculturalism, thereby establishing stringent procedural rules and even combining consultation with consent (e.g., the U.N. Declaration and some rulings and recommendations of entities like the Inter-American Court of Human Rights and the U.N. bodies that work on indigenous rights).

The ambiguous character of Convention 169 illustrates a broader point. Ultimately, the effects of regulatory frameworks on FPIC—as those of law in general— result from both the limits and opportunities created by the legal rules, on the one hand, and the subjective understandings and legal strategies of the actors that use them, on the

other.<sup>100</sup> My interviews and ethnographic research show that the same rules (e.g., those of Convention 169) are often invoked by indigenous peoples and the corporations keen on commercially exploiting indigenous territories. The hegemonic or counterhegemonic effects of those rules, therefore, are partly determined by the relative success of their competing interpretations in a specific dispute.

The synthesis portrayed in Table 1 allows us to appreciate the diversity and internal tensions of ethnicity.gov as it relates to indigenous rights. If we shift from analyzing consultation's regulation to empirically studying its application, we will see even more vividly the reasons behind the protagonism of this institution, as well as behind the battles over its procedures and ramifications and the hybrids that result from them. This is the step that I take in wrapping up the analysis in the next section.

### III. ETHNICITY.GOV IN ACTION: THE EFFECTS OF CONSULTATION IN PRACTICE

There is an abysmal difference between the contexts in which FPIC is regulated and the contexts in which consultations actually occur (i.e., in the social minefields that often serve as the stage for conflicts over territories, resources, and indigenous cultures). In these minefields, there is a glaring absence of the minimum conditions necessary for communication—conditions that have been envisioned by regulatory bodies, such as the ILO, the United Nations, multilateral banks, and courts, attempting to project the image and semblance of their own deliberations onto this disputed terrain. Thus, in places like Colombia's Urrá dam or the oil fields of the Peruvian and Ecuadorian Amazon, consultation takes on unexpected contours and produces profoundly ambiguous, even contradictory, effects, resulting from a singular cocktail of legal formalities, volatile social relations, and life-or-death struggles.

Given this article's interest in FPIC as a paradigmatic form of ethnicity.gov, I will highlight here some of consultation's effects that illustrate and question two traits of ethnicity.gov: the predominance of procedural rationality and the power relations among (supposedly) equal parties participating in the consultation process. I argue that, in the context of minefields, these characteristics yield four sets of consequences that define consultation in practice: (1) the displacement effect, (2) the miscommunication effect, (3) the domination effect, and (4)

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<sup>100</sup> I am grateful to Angelina Snodgrass-Godoy and Rodrigo Uprimny for comments that helped me elucidate this point.

the emancipation effect. I now briefly turn to each.

A. *The Displacement Effect*

The first thing about a consultation proceeding that strikes an outside observer is the contrast that was obvious that night, in mid-2010, in the jungle around the Urrá dam, when the PowerPoint slides were running on the power of the only electric generator available in the reservation of the Embera-Katío. In the midst of a literal minefield, the leader of the Embera, who are victims, in the words of the U.N. Rapporteur on Indigenous Peoples, of “a clear case of ethnocide,”<sup>101</sup> focused his conversation on procedural intricacies of the most recent proceeding in the case of the Embera people pending before the Inter-American Commission on Human Rights for violation of the right to consultation, the appeal being planned by the Urrá corporation against the Ministry of Environment’s decision to deny the license needed for the dam’s new phase of construction, and the usefulness of a Constitutional Court’s recently established precedent that requires obtaining consent for certain economic projects being carried out in indigenous territories.

This contrast suggests that, both in Urrá and in other cases, consultation’s procedural steps displace, replace, or postpone the more substantive conflicts. This is what I refer to when I speak of consultation’s displacement effect. How is this contrast produced? In circumstances in which disagreements touch upon the most vital convictions and interests of the parties involved, how is it possible that the conversation becomes dominated by formalities regarding deadlines, legal recourses, notification, and certification of legal representatives?

As I have already suggested, consultation’s global diffusion and protagonism in ethnicity.gov are due precisely to its displacing effect: its power to transform substance into form; its capacity to offer a point of contact among actors defending extremely different, even antagonistic, positions. That capacity is rendered even more explicit—and consultation’s transactional character all the more useful—when the differences among the parties are more profound and potentially explosive, as occurs in minefields. This is where law’s role as a means of equalizing differences is clearest, as Comaroff and Comaroff suggest:

In situations of ruptured hyphen-nation, situations in which the world is constructed out of apparently irreducible difference, the language of the law affords an ostensibly neutral medium for

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101. *Situation of Human Rights*, *supra* note 85, at 15.

people of difference—different cultural worlds, different social endowments, different material circumstances, differently constructed identities—to make claims on each other and the polity, to enter into contractual relations, to transact unlike values, and to deal with their conflicts. In so doing, it forges the impression of consonance amidst contrast, of the existence of universal standards that, like money, facilitate the negotiation of incommensurables across otherwise intransitive boundaries.<sup>102</sup>

The empirical evidence on FPIC allows us to make two comments about this lucid observation, which help to give greater specificity to consultation's role and significance. First, while it is true that law generally fulfills this equalizing function, it is actually *procedural* law that does so in a paradigmatic way. In legal procedure, the law's appearance of neutrality is taken to an extreme because its rules deal precisely with universal measures: time, money, and space. Procedural norms invoke these measurements in pure, legal form, apparently cleansed of any relation to the conflicts' substance. In consultation's realm, those forms consist of deadlines, timelines, expenses, and locations for consultation meetings. They are what permit communication among incommensurables.

Secondly, it is possible to extend the Simmelian allusion to money's equalizing power and its functional similarity to law even further. In fact, the allusion confirms the parallel between Ethnicity, Inc. and ethnicity.gov: while the principal medium for exchange in the former is money, in the latter, it is (procedural) law. Furthermore, the affinity between the two processes is so significant that it is misleading to speak of parallels, since the two are constantly intertwined in practice. The protagonism of monetary compensation in consultations among states, companies, and indigenous peoples illustrates this point. A large part of consultation processes consists of calculating the economic project's possible cultural and environmental harm and agreeing on a form of compensation for the people affected. The same occurs in litigation deriving from the lack of consultation or inadequate consultations. In these cases, since damage has already been inflicted, the courts' task is to determine the means and amount of compensation. Although the reparation adopted is not monetary in some cases, in many other situations, the compensation is pecuniary. In these latter circumstances, money and law are fused into one.

This amalgam is evident in the emblematic Urrá lawsuit. When the Colombian Constitutional Court decided the case, alleging a violation of

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102. Comaroff & Comaroff, *supra* note 31, at 39.

the right to consultation, the dam had already become an irreversible reality. In the five years since the dam's construction, the Sinú River had been diverted and part of the Embera-Katío's territory flooded.<sup>103</sup> In light of the situation, the Court decided to "order the Urrá Company Inc. to indemnify the Upper Sinú Embera-Katío indigenous people, at least in an amount sufficient for guaranteeing their physical survival, while they confront the economic, social, and cultural changes from which they can no longer escape and for which the project owners and the State denied them the opportunity to choose or refuse, in clear violation of the Constitution and effective legislation."<sup>104</sup> The Court then determined that the compensation should consist of money, specifically, the payment of a monthly sum over the following 20 years, "corresponding to a food and transportation subsidy to be paid by the company owning the project to each and every member of the indigenous people . . . in order to guarantee the people's physical survival . . . while they educate the next generation to prevent their culture's disappearance in the medium term."<sup>105</sup> A lower court subsequently determined the compensation's exact amount, which, adjusting for inflation, is today approximately the equivalent of eighty dollars per month, per person.<sup>106</sup>

The court's decision to order monetary compensation and the Urrá company's initiation of periodic payments after forming a trust for the purpose in 1999 have had profound and probably irreversible consequences, some of which are tragic. With regards to my argument in this article, the compensation illustrates, as vividly as it does painfully, consultation's displacement effect and its intertwinement with cultural commodification. As one Embera leader expressed during an interview, many of his people's communities, which had been self-sufficient when the river sustained its own economy and culture, now depend entirely on the monetary compensation for survival.<sup>107</sup> In other words, their collective identity has been transformed in just one decade. Today, it is defined by the Emberas' role as individual consumers in the market economy, a shift provoked by the compensation's precarious, but essential funds. The process of identity's commodification,

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103. Corte Constitucional [C.C.] [Constitutional Court], noviembre 10, 1998, Sentencia T-652/98.

104. *Id.* at 49 (author's translation).

105. *Id.* (author's translation). For the decision specifying the twenty-year period, see Corte Constitucional [C.C.] [Constitutional Court], diciembre 1, 2008, Auto Aclaratorio a la Sentencia T-652/98.

106. Tribunal Superior de Montería, [High Court of the City of Montería] noviembre 12, 2005, Sentencia de Liquidación de Indemnización.

107. Interview with legal advisor to the Embera-Katío people, in Tierralta, Colom. (Nov. 14, 2009).

individualization, and pauperization has been accompanied by the above-mentioned effect of legal displacement. In fact, the dependence, vis-a-vis compensation, is so significant that the Embera political leadership believes that the greatest threat posed by the company's plans for expansion to the people's cultural survival is that many communities may actually accept definitive flooding of their territories in exchange for prolonging the payouts.<sup>108</sup>

In sum, FPIC's procedural nature allows for communication among incommensurable substantive positions, due to the displacement of the latter by the former. As the Urrá experience suggests, consultation's power of facilitating communication has costs. Moreover, as we will see in the next section, when consultation operates under the circumstances of minefields, it is also highly imperfect.

### *B. The Miscommunication Effect*

Those who attend negotiations and discussions during a consultation process will notice something strange. When it seems that a point on the agenda has been exhausted or an agreement has been reached, it is common that the conversation returns to the same matters or, in fact, discussion of them in a subsequent meeting begins again from scratch. For this reason, unless the proceedings are perfunctory or imposed under deception or coercion (which is not infrequent), consultations tend to follow a non-linear path in which delays, repetition, and misunderstandings are endemic.

Once again, the case of the Urrá dam is indicative of this tendency. In effect, one of the principal points of controversy among the parties to the case is whether an agreement had ever been reached. In other words, the State, the company, and the Embera-Katío have not agreed on the existence of an agreement. While the first two maintain that they reached an agreement with the Embera in 1999, allowing the dam to be filled following the Court's decision, the Embera argue that such an agreement never existed. To complicate the misunderstanding further, the consultation process, as it often does, produced an internal division within the Embera people. Thus, some communities currently argue that there was an agreement, while others disagree.<sup>109</sup> Considerable uncertainty results, thus aggravating the lack of confidence among the parties and heightening rather than mitigating the volatility of the situation on the ground.

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108. Interview with Embera leader, in Zambudó, Embera-Katío reservation, Colom. (June 13, 2010).

109. Focus group with Embera leaders, in Zambudó, Embera-Katío reservation, Colom. (Nov. 14, 2009).

How are such misunderstandings produced? What causes miscommunication, which is so prevalent that it leads to constant communication breakdown among the parties and to long stalls in consultation processes? One of the primary causes is that consultations embody a discursive clash, in which claims and different kinds of knowledge, based on radically distinct epistemological roots, get crossed. In a stark historical short circuit, consultations combine “pre-modern” indigenous claims, “post-modern” designs of global governance, and classical “modern” forms of primitive accumulation of capital—all of which are smelted in the crucible of modern legal forms par excellence: due process and freedom of contract.

The misunderstandings that can arise from this epistemic Tower of Babel are apparent in various consultation processes that I have observed. One particularly telling and internationally known case is the consultation of the U’wa people, which derived from Occidental Petroleum’s plans for oil exploration in the U’wa’s territory in eastern Colombia.<sup>110</sup> The U’wa’s consultation process has lasted for nearly twenty years, and a stalemate among the parties persists, due in part to the countervailing power of a coalition of indigenous and environmental NGOs worldwide that have assembled in solidarity with the U’wa. Beyond the case’s intricacies, what is interesting to highlight is the abyss between the State and the oil companies’ pro-extraction vision and the U’wa’s conception of territory and oil—both sacred and untouchable, to the point where the U’wa have announced that they will commit collective suicide in the event of oil exploration in their territory.<sup>111</sup> The result is a breakdown in communication, unresolved by the procedural mechanism of consultation, as various paradoxical incidents in the case reveal. For example, in 1997, when the Colombian Constitutional Court ruled in favor of the U’wa regarding a complaint that they brought and, thereby, ordered the State to undertake prior consultation before authorizing seismic exploration in indigenous territory,<sup>112</sup> the U’wa surprised their allies who were celebrating this “legal victory” by issuing a communiqué expressing their rejection of the Court’s ruling and reiterating that their goal was not that the oil project be consulted or negotiated, but rather that it simply be cancelled for

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110. For a detailed analysis of the U’wa case, see César A. Rodríguez-Garavito & Luis Carlos Arenas, *Indigenous Rights, Transnational Activism, and Legal Mobilization: The Struggle of the U’wa People in Colombia*, in *LAW AND GLOBALIZATION FROM BELOW* *supra* note 34, at 241.

111. *Carta de los U’wa al Hombre Blanco*, U’WA COMMUNIQUÉ, (U’wa, Colom.), Sept. 5, 2008, available at <http://www.maippa.org/Campa%C3%B1a-U-Wa-Colombia/carta-de-los-uwa-al-hombre-blanco.html> (author’s translation).

112. Corte Constitucional [C.C.] [Constitutional Court], febrero 3, 1997, Sentencia SU-039/97.

attacking their most profound cultural convictions. As the circulated communiqué stated, “we do not understand why they summon us to participate in a hearing when they know what we will say, which is the same as what we have been saying from the beginning.”<sup>113</sup>

A second reason behind the constant misunderstandings is the very effect of displacement analyzed earlier. The displacement of substance by form is partial and temporary. Disagreements regarding the actual merits resurface at every turn during the consultation process, and the procedural language available is insufficient for expressing them. Thus, in many cases, references to procedure (e.g., to the deadlines, timelines, and agreements reached in meetings) are just indirect ways of discussing what is really at stake. As one leader of the Kankuamo people of Colombia, a lawyer with ONIC, stated, “the real subject of consultation is life”:<sup>114</sup> the life of the people involved; the physical survival of its members; the extractive companies’ survival in the market, the biodiversity at stake; the plans for life and death executed by the illegal, armed groups that swarm the minefields.

As a consequence, the consultation meetings mix extremely varied topics, and their agendas are debated constantly. While state officials and company representatives seek to limit discussion to immediate procedural topics (e.g., operationalizing agreements, certifying the list of participants, and navigating the intricacies of compensation payments), the indigenous representatives, as we observed in the U’wa case, constantly return to the subjects of the sacredness of the earth and its resources and the collective history and denouncement of the violence that engulfs them. It is, therefore, unsurprising that delays are recurrent and miscommunication is endemic.

Not all misunderstandings are involuntary, however. Companies, state agencies, and indigenous peoples strategically use the laws, judicial decisions, and legal recourses available to them and invoke procedural rules to defend their substantive interests. To do this, the first two groups employ an army of professional advisors (e.g., lawyers, anthropologists, engineers, and social workers). The indigenous peoples and their allies, however, take advantage of opportunities offered by national courts’ stricter interpretations of consultation’s requisites and mobilize the support of international bodies, like the ILO and the U.N. Rapporteurship on the Rights of Indigenous Peoples. In the Urrá case, for example, during the first phase of the dam’s construction, the Embera were at the mercy of the State and the company, who simply failed to consult the Embera. But, following the 1998 Constitutional

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113. *Comunicado a la Opinión Pública, U’WA COMMUNIQUE*, (U’wa, Colom.), Feb. 10, 1997 (author’s translation).

114. Interview with Ana Manuela Ochoa, in Bogotá, Colom. (Nov. 18, 2009).

Court's decision, the Embera had incorporated legal strategies exploiting international and domestic norms on consultation into their political battle and their organizational alliances, in order to revive their substantive claims. It is the use of these norms that has allowed them to keep the plans for the dam's expansion at bay, which legal obstacles have blocked during this past decade. In this case as in others, the battle over applying and interpreting procedural norms has become an extension of a political struggle—the struggle for territory, self-determination, and resources.

### *C. The Domination Effect*

Contrary to the (neo)liberal premise of equality between parties, the legal battle is actually highly asymmetric. In fact, the experience of consultation illustrates the governance paradigm's limitations mentioned earlier, which escalate in the context of minefields cohabited by actors endowed with abysmally different degrees of power. Instead of the ideal conditions for communication postulated by governance theorists, the reality of consultation usually resembles a private act of negotiation more than a public act of deliberation. As in all contractual acts, it reproduces and legitimates structural power differences among the parties. In this regard, consultation reinforces the dominant relations among companies, states, and indigenous peoples.

The domination effect has several manifestations. To begin with, consultation processes tend to be privatized operations. De facto, if not de jure, the company interested in executing operations in indigenous territory administers, funds, and controls the consultation process. On more than one occasion, I have traveled to consultation sites on transportation chartered by the company, accompanied not only by the latter's representatives, but also by public officials who are required to attend the consultation, but who have neither the funds nor the means to arrive at such isolated places (where, moreover, they have never visited before). Within the enclave economies where many consultations occur, the company, for practical purposes, *is* the state: access to the locale depends on the company, local authorities coordinate and interact with the company, and a large sector of the population is subordinated to the it, either through labor relations or indirect economic dependence.

The domination effect also has a violent face in contexts of armed conflict, in which the company's operations depend in some way or another on protection provided by legal or illegal armed groups. In Urrá, for example, the company had the enthusiastic support of right-wing paramilitary groups, who considered the dam to be essential for the interests of the large landowners they represented. The situation was

captured in an article written by Bernard Henry-Levy,<sup>115</sup> who traveled to the region in 2001 and interviewed Carlos Castaño, commander of the United Self-Defense Forces of Colombia, who was later assassinated by his subordinates. When the French philosopher reminded Castaño of the indiscriminate executions committed by his paramilitary death squads, the following exchange ensued:

*Castaño:* Random attacks? Us? Never! There is always a reason. The trade unionists, for example. They prevent people from working! That is why we kill them.

*Henry-Levy:* Okay, and the leader of the indigenous people in the Upper Sinú—that small Indian leader that came down to Tierralata [the closest town]—who was he preventing from working?

*Castaño:* The dam! He was blocking the operation of the dam!<sup>116</sup>

Violence and intimidation against leaders are common in many of the cases I have observed. One frequent practice in Colombia, for example, consists of the following: the illegal, armed groups interested in the company's entry intimidate and perpetrate violence against representatives of the community to be consulted, provoking their forced displacement from the territory. Thus, when consultation occurs, it is carried out with members of the community who have stayed behind, in extremely coercive conditions that do not even reach those of a private negotiation. As one leader from ONIC said in an interview in reference to this practice, "There is no negotiation when you have a gun to your head."<sup>117</sup>

Even where there is no physical coercion involved, the relations of domination among the parties are present due to the profound economic inequalities that consultation leaves intact. In Urrá as in other places, extreme conditions of poverty and the indigenous people's social disintegration—which, as explained, border on ethnocide—do not allow for free and informed participation in the consultation process, let alone genuine consent. Although these power asymmetries are mitigated when international and national activist coalitions intervene in support

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115. Bernard Henry-Levy, *Guerra Contra los Inocentes*, REVISTA SEMANA, July 9, 2001, <http://www.semana.com/noticias-opinion/guerra-contra-inocentes/17869.aspx> (author's translation).

116. *Id.*

117. Interview with ONIC leader, in Valledupar, Colom. (June 15, 2010).

of indigenous peoples, they continue to be endemic, even in cases such as Urrá, where the indigenous cause has gained national and international visibility.

The power asymmetry between company and community is exacerbated by the fact that, as legislation and practice in the Latin American countries under study demonstrate, the state acts as official witness of the consultation process, more than as its regulator or guarantor. In this regard, the state apparatus rarely mitigates, or even mediates, the company's dominance over the community. As a former official of the Colombian Ministry of Environment, who participated in consultation processes for a number of years, told us, "the State's accompaniment is minimal, a matter of protocol. In many cases, secondhand information submitted by the company serves as the basis . . . . [For example], environmental impact studies are conducted by anthropologists paid by the companies."<sup>118</sup> Or, as the official who directs the governmental entity in charge of consultations at the national level candidly recognized, "We coordinate, we summon the parties, we mediate, we direct the meetings. But it is the entity that consults, [the company], that must offer the logistical support necessary for convening the community. We do not do this part. The party who consults does it."<sup>119</sup> The party who consults is the company. The consulted is the indigenous community. And, the state stamps its official seal on whatever agreement is produced.

Beyond the physical or economic coercion, the effect of domination operates by more subtle and indirect means. Mere participation in consultation processes or in litigation related to them places the indigenous cause within the logic of procedure, which has costs, as it limits what can be said, demanded, and achieved. Although the substantive claims reappear during the course of negotiations and judicial proceedings, in order for them to be effective, they must be articulated within the limits of language and the international and domestic procedural norms related to FPIC. The result is dissolution, at least in part, of politics into law: the conversion of strong political claims (i.e., related to self-determination and consent) into weaker claims (i.e., related to participation and consultation's requisites). Along the way, indigenous political subjectivity is transformed. In place of the contentious subject of indigenous movements, consultation demands a docile, communicative subject.

This domestication of indigenous demands can operate even in cases

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118. Interview with former official in the Colombia Ministry of Environment, in Bogotá, Colom. (Oct. 17, 2009).

119. Interview with Claudia Cáceres, Director of the Prior Consultation Unit, Colom. Ministry of the Interior, in Bogotá, Colom. (Nov. 16, 2009).

in which the right to consultation is successfully defended before governments, courts, and international human rights bodies, as Hale concludes<sup>120</sup> after analyzing the consequences of the Mayagna indigenous people's legal victory in the foundational Inter-American Court of Human Rights case, *Awás Tingni v. Nicaragua*.<sup>121</sup> For the Mayagna, the price paid for several years of involvement in proceedings and negotiations with the State, the World Bank, and other actors that participated in the demarcation of indigenous territory ordered by the Court was "a deeper entanglement in . . . neoliberalisms' 'grid of intelligibility'",<sup>122</sup> which entailed "an unprecedented involvement of the state and of neoliberal development institutions in the community's internal affairs: regulating the details of the claim, shaping political subjectivities, and reconfiguring internal relations."<sup>123</sup> Indigenous peoples involved in consultation processes must pay this same price, as the Urrá case illustrates. After the successful legal case brought before the Constitutional Court, the collective and individual lives of the Embera have stayed trapped in—in fact, have become defined by—neoliberalism's grid of intelligibility: in the company's monthly payouts upon which the Embera now depend, in the political division among communities that formed opposing sides during the consultation process, and in the proliferation of new cases presented before national courts and the Inter-American System of Human Rights to confront continuing problems—exacerbated by the dam's construction—regarding security, food, and other basic necessities.

The allusion to the Urrá case's legacy leads us to the last incarnation of the dominance effect, which operates not only between companies and indigenous communities, but also between communities and their allies in consultations. As it often occurs in processes of legal mobilization,<sup>124</sup> the risk of shifting the cause of a social movement to the domain of the law is the transfer of power from the movement's subjects (e.g., indigenous peoples involved in the consultation) to their legal advisers (e.g., NGOs and international bodies that deal with indigenous rights). As we will now see, this displacement also has an emancipatory effect to the extent that it helps mitigate the power disparities between companies and communities. However, its existence is undeniable, as we observed when the aforementioned Embera leader concluded an hourlong presentation of detailed legal arguments effused over

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120. Hale, *supra* note 57, at 15-16.

121. Mayagna (Sumo) Awás Tingni Cmty. v. Nicaragua, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

122. Hale, *supra* note 57, at 15.

123. *Id.* at 16.

124. MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

elaborate PowerPoint slides. “At the end of the day,” he said to us as he took a seat, “you tell us what to do, because I am only an Indian and don’t know about these things.”

*D. The Emancipation Effect*

The reverse of the domination effect consists in the emancipatory possibilities presented by consultation processes. In practice, consultation is simultaneously a means to both perpetuate and challenge profound inequalities among actors situated in minefields. While they dilute indigenous political demands, procedural norms also create precious opportunities and tools—sometimes the only ones available—for halting (or at least postponing) irreversible cultural and environmental harm and founding or re-founding processes of collective mobilization.

The ethnographic evidence demonstrates that consultation’s emancipatory effect can be direct or indirect. The effect is direct when subaltern actors—indigenous communities and their allies—demand compliance with procedural norms and propose interpretations of them that mitigate power asymmetries vis-à-vis consultation’s dominant actors. The process itself has emancipatory potential, to the extent that it establishes strict requirements that reduce the gap between the conditions of actual consultations, on the one hand, and those necessary for genuine deliberation, on the other.

As we saw earlier, procedural regulations are not irrelevant. Once they are put into operation, they make a difference that can be, literally, a difference between life and death. For example, an indigenous people’s survival can depend on the possibility that not only do their members have standing to participate in consultation, but so do allied national indigenous organizations who—due to their legal expertise or experience in other consultations—can help balance out power relations. As the U.N. Rapporteurship and the Inter-American Court of Human Rights have recognized, whether the standard of consultation or the standard of consent is applied can determine the fate of an indigenous people affected by a large-scale economic project. The Embera of northern Colombia have experienced this difference between life and death literally.

As such, many of the consultation proceedings consist of debates about whether or not there has been compliance with requisites established by national legislation, Convention 169, and other legal instruments. Were affected communities notified in a timely manner and in good faith? Were those who attended the proceedings the true legal representatives of the indigenous people? Who should pay for the

costs of translation between Spanish and the indigenous language? Should the timeline of meetings be extended in order to attain increased attendance? Who is responsible for financing the transportation costs of the members coming in from the most remotely located communities? Each one of these questions starts a justiciable controversy that can slow the frenetic pace of economic projects in indigenous territories and can be, in practice, the only defense against the flooding of indigenous reservations, such as the Embera's, or against the incursion of engineering crews, settlers, and armed groups in oil-rich territories, such as the U'wa's.

The emancipatory effect also operates through indirect means, far from the formal consultation meetings. In societies such as those of Latin America, where the wave of multicultural constitutionalism of the 1990s arrived precisely when indigenous peoples were experiencing both organizational revitalization and collective extermination, the norms enshrined in Convention 169 and other legal instruments opened up additional paths of resistance and political mobilization. In these circumstances, consultation has been embraced as an instrument for slowing down the avalanche of mining and other extractive projects engulfing indigenous communities situated in economies bent on the exploitation of natural resources. This explains why, as I have observed in countries like Colombia, Peru, Ecuador, Chile and Guatemala, cases and technical legal discussions about FPIC occupy a privileged position in the agendas of national indigenous organizations.<sup>125</sup> As a result, at the national level, FPIC has become a useful card that indigenous movements can play in negotiations and litigation before States and companies. The card's effectiveness is demonstrated by the multiple laws that regulate matters of vital importance for companies and indigenous peoples, such as the use of forests or the exploitation of hydrocarbons, in those countries,<sup>126</sup> which have been subsequently struck down by national courts for violating Convention 169.

At the transnational level, FPIC has also opened new avenues for counter-hegemonic legal mobilization. In the Americas, for example, it has allowed indigenous organizations and human rights NGOs to stretch Inter-American law's interpretation to create hybrid versions that combine standards of consultation and consent. And, at the global

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125. Andrade interview, *supra* note 67; de la Rosa interview, *supra* note 67.

126. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], enero 23, 2008, Sentencia C-030/2008 (Colom.) (declaring unconstitutional the National Forestry Statute due to the omission of prior consultation with indigenous and Afro-Colombian communities); Corte Constitucional [C.C.] [Constitutional Court], marzo 18, 2009, Sentencia C-175/2009 (Colom.) (declaring unconstitutional the National Rural Development Statute for the same reason).

level, it has offered a unique forum for collaboration between the labor union movement and the indigenous movement, in light of the multiple occasions in which the former, on behalf of the latter, has presented the latter's complaints alleging violations of Convention 169 to the ILO, as in the cases of the Urrá dam and oil exploration in the U'wa's territory.

In this regard, on the ground, procedural rules related to consultation may create space for advancing empowered versions of participation<sup>127</sup> that borrow elements from counter-hegemonic multiculturalism and, on some cases, revitalize the process of reinventing collective identity and strengthening political organization in the face of negotiations with companies and the State, as it did in the U'wa case.<sup>128</sup>

### CONCLUSIONS

With the benefit of hindsight, law's omnipresence and the frequent allusions to "prior consultation" during the meeting in Urrá, mentioned at the beginning of this article, turn out to be less surprising than they were that night in the Embera reservation. Similar incidents combining extreme violence and the most sophisticated legal formalism proliferate in minefields where the fates of indigenous peoples in Latin America and around the world are decided.

In this article, I have tried to explain the reasons behind this phenomenon. I have argued that FPIC's ascendancy and global diffusion form part of a process comprised of the global juridification of difference—a process that I have termed ethnicity.gov—which reflects the dominant type of multiculturalism and governance that dominates in the era of neoliberal globalization. Ethnicity.gov's procedural logic permits communication between substantively distinct positions, which are defended by opposing parties to conflicts over culture and distribution that proliferate in both the Global South and the Global North.

In the specific area of indigenous rights, after twenty years of existence, FPIC has become a central mechanism by which a range of legal regimes (e.g., ILO and U.N. human rights instruments, multilateral banks and TNCs' codes of conduct, national constitutions, etc.) have sought to manage disputes over indigenous territories,

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127. For a discussion on empowered participation and its contrast with token consultation, see Archon Fung & Erik Olin Wright, *Countervailing Power in Empowered Participatory Governance*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 259 (Archon Fung & Erik Olin Wright eds., 2003).

128. See Rodríguez-Garavito & Arenas, *supra* note 101, at 249-64.

natural resources, identity, and self-determination. Drawing on the premises of the governance paradigm, FPIC has replaced integrationism as the dominant regulatory approach regarding indigenous peoples.

I have also sought to show that ethnicity.gov, in general, and FPIC, in particular, are contested legal fields in which counter-hegemonic conceptions of multiculturalism and indigenous rights dispute the supremacy of neoliberal multiculturalism and governance. Based on principles of self-determination and the figure of free, prior and informed consent, these conceptions have been advanced by the transnational indigenous movement and its allies.

In addition, I have traced this contested figure's origin, evolution, and effects on two different levels. First, I focused on FPIC's regulation, as a product of the ILO Convention 169, the national constitutions that took the "multicultural turn" in the 1990s, the transnational soft law norms, the decisions of human rights courts and bodies, and, most recently, the U.N. Declaration on the Rights of Indigenous Peoples. Based on this analysis, I demonstrated the existence of multiple hybrid formulae that embody substantially different forms of indigenous participation—from the feigned participation characteristic of consultations carried out without stringent procedural requisites and effective monitoring to the empowered participation with genuine decision-making power associated with regulations that have adopted some version of the consent requirement.

Second, I examined consultation's operation and effects in practice. When put to the test in contexts that are radically different than the negotiations imagined by governance theorists and international regulators, FPIC's procedural norms yield unexpected and ambiguous results. On the one hand, they dilute indigenous political claims into procedural discussions that are dominated by companies, with limited state mediation. However, the displacement of substantive disputes by procedural ones is both incomplete and imperfect. As a result, differences regarding the merits reappear constantly, thereby, combining substance and form and leading to frequent miscommunication during negotiations—some of which are unintended, while others are deliberate and caused by companies, indigenous communities, and state officials seeking to strategically exploit the confusion.

Given the abysmal disparities in power and resources between the actors involved, it is unsurprising that FPIC's procedural rules constantly reinforce and legitimate the relations of domination among them. Yet consultations have served as a forum for resisting these relations. The details pertaining to procedural norms (e.g., who will participate, how long will the consultation last, what type of

compensation should be accorded, etc.) can open up opportunities for indigenous political mobilization. And, they may offer a last recourse—a last inconvenience in the way of death—to which indigenous peoples cling to in the face of all odds, as the Colombian Embera communities continue to do in their struggle against collective annihilation.

PROOFS