Indigenous Land Right in new Latin-American Constitutions

From the protection of indigenous rights to the consideration of land as a "common": the development of the Nuevo Constitucionalismo

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The definition of "indigenous people" and its development in the international scenario has characterized, in the last decades, a new consideration about the rights of indigenous peoples, whose self-determination is connected to a specific land, occupied and translated from generations and synonim of an unique identity (the anthropological concept of "ancestral land"). It caused a re-interpretation of the relationship between land and indigenous peoples, providing the reintegration of indigenous peoples in their ancestral lands and considering land as a common, in which natural resources should be managed by communities.

The fact has been particularly relevant in the Latin-American contest after the transition to democracy in '80s/'90s and the draft of new Constitutions considering the protection of minorities and indigenous communities. Particularly, with the theory of Nuevo Constitucionalismo, indigenous juridical custom (costumbre), when not in contrast with human rights, granted by international conventions, is to be considered as law. Every indigenous community is seen as an entity per se, recognised by the State and entitled to possess their ancestral land and to manage it in accordance with their custom and their harmonic relationship with nature and Mother Earth (Tierra Madre or Pacha Mama).

<u>Contents</u>:

1. Definition of “indigenous people”. The international protection of indigenous peoples and their rights.

My dissertation aims to connect the sociological and the anthropological point of view on the indigenous culture with a specific juridical analysis about the protection of the indigenous peoples and of their traditions.

First of all, we need to admit that define what specifically means "indigenous people" is not quite simple. In fact, the term "people" is not a synonym of the more generic and heterogeneous term "population", that identifies a not specific group of inhabitants in a territory without an unique culture and style of life. The term "people", instead, refers to a complex of persons with the same common culture and historic background, who define themselves as a specific entity with their proper juridical institutions. Then, the term "people" distinguishes the "indigenous people" from the concept of "minority" and creates a closer similarity with the "national people", while the term "indigenous" seems to characterize a peculiar aspect of those peoples. Both the terms "indigenous people" and "minority" identifies a group of people in non-dominant position in the society and with a common culture, language, religion and ethnicity. The strong distinction from the two different types of social group remains in the adjective "indigenous", that implies a common descendant from an indigenous group of common ancestors, who specifically had inhabited a well-determined territory in an immemorial period of time. The so-called "indigenity" lands in an historic occupation of a specific territory by the ancestry of the actual group[1]. Then, indigenous communities distinguish from national peoples and minorities by a specific lack of political (hegemonic or minor) power: the indigenous do not claim the right of secession from the central government, nor a proper federal or regional status, but only the right to translate their tradition and their custom in their own territories, possibly including juridical customs as the inexistence of the concept of private property or the occupation of ancestral lands[2].

Nowadays, the international doctrine tends to identify "indigenous people" as an entity *per se*, well-distinguished from the concept of "minority" and "national people", with a specific protection of the rights of indigenous peoples. In fact, even if in early XX century international law began to recognize the existence of some indigenous peoples, whose presence could be rather problematic during the dissolution of colonial empires, the common attitude was to catalogue these

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1 V.F. Palermo e J. Woelck, *Diritto Costituzionale Comparato dei gruppi e delle minoranze*, Cedam, Padova 2011, p. 48 e ss; F. Capotorti, *Il regime delle minoranze nel sistema delle Nazioni Unite e secondo l'art. 27 del Patto sui diritti civili e politici*, in *Riv. Internazionale dei diritti dell'uomo*, 1992, pp. 107-108. See also: C.M. Bröhmann, R. Lefeber, M.Y.A. Zieck (editors), *Peoples and Minorities in International Law*, Dodrecht 1993.

2 P. Pustorino, *Questioni in materia di tutela delle minoranze nel diritto internazionale ed europeo*, in *Studi sull'integrazione europea*, 2/2006, pp. 259-280.

groups as ancient tribes, not used to social and civic life and in need to be educated by European peoples in a paternalistic sense of duty to promote the civilization[3]. The situation gradually changed after the Second World War and the birth of United Nations in 1948. The difference and the actual definition of the term "indigenous peoples" and the protection of their rights were delineated by the ILO[4] Convention on the protection of indigenous peoples and other tribal peoples in the independent States n. 107/1957, the ILO Convention on the protection of indigenous peoples and other tribal peoples in the independent States n. 169/1989 and by the so-called "Cobo Report"[5], a study delayed by the UN Special Rapporteur José R. Martinez Cobo to the commission for the prevention of discrimination and the protection of minority[6].

Cobo was the first to identify the "indigenous peoples" as those communities, groups and nations in a "non-dominant sectors of society", considering themselves different because of their "historic descendant" with the populations that had lived in the same territory before the invasion and/or the colonization (the *criterion* of the historic continuity), in order to preserve, develop and transfer their ancestry, their ethnic culture and their traditional customs to the future generations[7]. The indigenous is who identifies himself (or herself) in an indigenous community, being accepted by the same community in a process of self-identification[8].

The ILO Convention n. 169/1989, referring to the key-points of the Cobo Report, confirmed the distinction between "people" and "population" and the peculiarity of the "indigenous peoples" that differences them from the mere concept of "minority". The ILO Convention introduces the identification criteria of the common ancestry, the traditional and not interrupted occupation of a well-defined territory and the peculiar and different culture and institutions to be preserved from the rest of the national population. As it is written, the Convention applies to tribal peoples, whose conditions distinguish them from the national community and whose status is partially or wholly regulated by traditions, and to peoples, who are regarded as "indigenous", because of their descent from the populations which inhabited the country at the time of the conquest, the colonization or the establishment of the present boundaries and who retain some of their social, economic, cultural and

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3 The Covenant for the Society of Nations 1920 described "indigenous peoples" as populations " *[...] not yet able to stand by themselves under the strenuous conditions of the modern world [...]*" and whose "*well-being and development [...] form a sacred trust of civilization and [...] securities for the performance of this trust should be emobodied by this Covenant*" (Art. 22, par. I).

4 Acronynm for I*nternational Labour Organization* (also known as OIT, acronynm of *Organización Internacional del Trabajo*).

5 Resolution n.1589/1971, UN Economic and Social Council. The document known as "Cobo Report" was published in UN Doc E/CN.4/Sub.2/1983/21/Add.8.

6 R. Pisillo Mazzeschi, *La normativa internazionale a protezione dei popoli indigeni*, in A. Palmisano e P. Pustorino (editors), *Identità dei popoli indigeni: aspetti giuridici, antropoligici e linguistici, Atti del Convegno Internazionale (Siena 4-5 giugno 2007)*, IILA, Roma 2008, pp. 19-31.

7 Cobo Report, par. 379 and 381.

8 G. Palmisano, *Nazioni Unite e autodeterminazione interna*, Giuffré, Milano 1997, p. 262.

political institutions (Article 1, par. 1). According to this definition, indigenous peoples are the ones who can claim a common ancestry in a specific territory before of a particular event (invasion, colonization, etc...) and actually inhabiting it with an own juridical and political status. It's a special type of minority, a *tertium genus* between "minority" and "people", entitled to the collective rights of any community, as protected both like an ethnic minority and like a specific people with an historic land[9]. Otherwise, since indigenous peoples are constituted by individual persons, they shall enjoy the full measure of human rights and fundamental freedoms without any discrimination, as it was written in the UN Declaration of Human Rights 1948 and in other international covenants (Article 3). National governments have the responsibility of developing measures to protect the rights of those peoples and to guarantee respect of their integrity, as ensuring the equality of rights and opportunities, promoting the full realization of their identity (including their customs, their traditions and their institutions) and eliminating the socio-economic gaps that may exist between indigenous peoples and national sectors of society (Article 2), while special measures shall be adopted for the safeguard of persons, institutions, cultures, environment, labour and propriety of those peoples (Article 4). In application of these provisions, national governments have the responsibility to previously inform and consult the indigenous peoples concerned and to establish and grant means of free participation during the decision-making phase, with the aim to develop the rights of initiative, to construe the more appropriate procedure and, finally, to achieve the agreement or the consent to the measures proposed and planned before (Article 6). It also refers to measures of cooperation and participation to improve the conditions of those peoples, in order to protect and preserve the environment and the territories they inhabit and to assure the integrity of their social and cultural identity (Article 7). The Convention specifies that those indigenous peoples have the right to retain their own customs and institutions, where not incompatible with fundamental rights defined by the national legal system and internationally recognized human rights, while specific measures concerning the protection and the safeguard of indigenous life shall be applied by national governments in a cooperative procedure with the indigenous peoples (Articles 8-9).

As said, the Convention comprehends and protects all those indigenous rights concerning the social, cultural and economic life of the communities, particularly referring to their diversity in traditions and ethnicity. One of the most important differences between indigenous legal tradition and the national systems is the concept of "propriety": indigenous peoples do not mean "property" of lands as the European private property, but as a general right to possess, use and manage the territories they inhabit and the resources existing in them, because of the strict connection between

[9] J. S. Anaya, *International human rights and indigenous people: the move toward a multicultural State*, in *Arizona Journal of International and Comparative Law*, 2004, p. 56.

people and nature and the interdependence of every indigenous community with the "ancestral" land it traditionally occupies (Articles 13-20). For the term "lands", the Convention means the whole environment of the areas the indigenous peoples traditionally occupy and use (Article 13) and introduces the anthropological *criterion* of the "ancestry", already identified in the Cobo Report, in order to distinguish the historic lands of indigenous peoples and grant them their ownership and/or their possession (Article 14). In applying these provisions, governments have the responsibility to identify traditional lands, guarantee their protection and legally solve land claims by indigenous communities, since, whenever possible, these peoples have the right to return to their traditional lands and, when it is not possible, they shall be provided with lands of equal quality and legal status of the lands previously occupied and claimed or with a money compensation under appropriate guarantees (Article 16)[10].

ILO Convention n. 169/1989 became immediately the reference point for the incorporation of the rights of indigenous peoples in national legal systems (particularly, about the land rights) and the reintegration in the traditional lands[11]. It also has the key influence in the international *scenario* during '90s and 2000s for the formation of the UN Declaration on the Rights of Indigenous Peoples 2007, based on the concepts of self-determination, self-identification and decolonization provided to protect the rights of indigenous peoples and their possession of traditional lands.

The UN Declaration emphasizes the double nature of the indigenous peoples, as groups of individual persons and collective communities, granting that the indigenous peoples have the right to the full enjoyment, as collective or as individuals, of all human rights and fundamental freedoms as recognized in the international law (Article 1). Indigenous peoples have the right to self-determination, meant as the right to freely determine their political and social status, but also to autonomy and self-government in their internal and local affairs and the right to maintain their diversity in political, economic, cultural and institutional life assets (Artt. 3-4-5). They also have the right to live in freedom as individuals and as collective groups (Art. 7) and not to be subjected to forced assimilation or to destruction of their culture (Art. 8). They have the right to self-identification, in accordance with their customs and traditions, and to determine their specific institutions, in accordance with their way of life (Artt. 33-34). They also have: the right to self-identification and to belong to an indigenous community or nation (Art. 9); the right to maintain, protect and develop their culture, their traditions, their language, their education and their religious manifestations (Artt. 11-14 and 16); the right not to be discriminated, even in economic, social and

[10] For money compensation and reintegration in traditional lands, see also: F. Lenzerini (editor), *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Oxford 2008.

[11] M. Ozden (editor), *The right to land*, Human Rights Programme of the Europe-Third World Centre (CETIM), p. 53.; R. Stavenhagen, *The ethnic question. Conflicts, development and human rights*, United Nations University Press, Tokyo 1990, pp. 2-3.

labour sectors (Artt. 15, 17, 20, 21).

The Declaration specifically refers to indigenous traditional land, granting to indigenous peoples the right not to be removed from the territories they historically occupy (Art. 10) and the proper indigenous ownership of the land on the base of the historic continuity and ancestry and the special relation of the indigenous peoples with lands and natural resources. In the detail, Article 25 deals with the right of the indigenous peoples "*to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied or used lands*", while Article 26 underlines the right of indigenous peoples "*to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership*", to which "*States shall give legal recognition and protection [...] with due respect to the customs [...] of the indigenous peoples concerned*". In application of it, indigenous peoples have the right to be freely integrated in their traditional lands without any payment or, when it is not possible, to be justly and fairly compensated (Artt. 27-28). Indigenous peoples have the right to the conservation and the protection of the environment (Art. 29) and, consequently, the States have the duty to consult and cooperate with the indigenous communities in order to obtain their free and informed consent prior to the approval of any project affecting their lands and other resources existing in them (Art. 32).

The Declaration provides the measures the States shall adopt in application of these provisions and in order to preserve indigenous communities and culture on the lands that they have traditionally owned[12].

2. Latin American *scenario*: from the democratic transition to the theory of *Nuevo Constitucionalismo*.

In the late '80s and in early '90s, almost all the Latin American States lived a phase of transition from the previously dictatorships and authoritarian regimes to a democratic and constitutional state. We are speaking about the so-called period of "transition to democracy" or "third wave of democratization"[13] that involved a large range of States in the world and implied a new wave of constitutionalism, often breaking with the constitutional models known before. We use to talk about "*democratic transition*" meaning a general phenomenon that underlines the gradual

[12] P. Pustorino, *Sviluppi sulla protezione internazionale dei popoli indigeni: la Dichiarazione ONU del Consiglio sui diritti umani*, in A.L. Palmisano (a cura di), *Identità linguistica dei popoli indigeni del MER.CO.SUR. come fattore di integrazione e sviluppo*, Quaderni IILA, n.31, Roma 2007.

[13] Historically, the "third wave of democratisation" had involved almost thirty countries from 1974 (April 25th, day of the end to fascism in Portugal) and 1990.

passage of a country from a previous authoritarian regime to democracy because of a series of events and deeds that had changed the socio-historical context of the country. Every transition stands in a generally not long range of time and is constituted by three different phases: the *liberalization,* in order to reaffirm and define rights and freedoms; the *democratization,* in order to change the political institutions of the country; and the *socialization* or the consolidation and stabilization of the new political and economic asset[14].

In Latin America, this democratization was characterized by the participation of the peoples in claiming rights and liberties and opposing to the previous military regimes. Popular groups, as bearers of individuals' and groups' interests, took to the streets, demanding a more incisive protection of their rights and overthrowing, at the same time, the dictatorial élite. As in every democratization process, peoples were requesting the constitutional recognize and protection of human rights and fundamental freedoms, to be granted to everyone without any discrimination or difference, and the democratic participation in social, economic and political life. All the social boundaries had to be removed and all the differences had to be comprehended not as a negative factor for a social division, but as an enrichment of the society.

Actual Latin-America looks like a "*living sociological lab*" and a "*democracy of dialogue*", involving all the types of human and political life and granting fundamental rights[15]. The strong influence of all the sectors of society and ethnic diversities also implied a re-qualification of the constitutional theory in Latin-American *scenario* and a re-thinking of the differences constituting the Latin-American societies, a clear milestone for the future generations of lawyers. In fact, this process of democratization began from the people and led to a new self-responsibility of the peoples themselves, a new awareness, from which it was no longer possible downgrade. It implied a re-writing of the fundamental rights in the new Latin-American democracies, even considering rights of new generation and collective rights[16].

Lawyers are used to call this phase as "*constitutionalism of decolonization*", due to the fact that it deals with a proper liberation from the schemes of Western constitutionalism (a real decolonization from the past regimes).

Historically, the Latin-American political asset in XX century had been characterized by a

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[14] G. O'Donnell e P.C. Schmitter, *Transitions from authoritarian rule. Tentative conclusions about uncertain democracies*, The John Hopkins University Press, Baltimora/Londra 1986, pp. 4-5, 13 and 131. See also: T. Carothers, *The end of the transition paradigm*, in *Journal of Democracy*, vol. 13, n.1, 2002.

[15] H.R. Horn, *Generaciones de derechos fundamentales en el Estado constitucional cooperativo. Contribuciones iberoamericanas al constitucionalismo*, in A*nuario iberoamericano de justicia constitucional*, pp. 251-288.

[16] L. Mezzetti, *Transizioni costituzionali e consolidamento democratico in America latina agli albori del XXI secolo*, in *Diritto Pubblico Comparato ed Europeo*, 2006, 4. See also: L. Mezzetti, *America latina*, in P. Carrozza e A. Di Giovine (editors), *Diritto Pubblico Comparato*, Laterza, Roma-Bari 2009; G. De Vergottini (editor), *Le transizioni costituzionali*, Il Mulino, Bologna 1998.

bureaucratic-authoritarian model and a never-ending state of emergence, whereas constitutional freedoms and rights had been temporarily interrupted because of extraordinary measures from the military corps: due to this fact, dictatorships were vested by an institutional legitimacy thank to temporary and executive measures that actually modified constitutional rules. Indeed, democratic transition in the '80s generally brought to life previous rules and procedures, where not incompatible with democracy and fundamental rights, but changed the spirit and the values of the political system, in accordance with a new constitutional attitude[17].

Not everywhere new constitutional charters had arisen, but everywhere there had been an attitude for a constitutional reforming. For instance: in Chile the constitution of 1980, enacted under the Pinochet regime, is still alive, but deeply changed by a series of constitutional reforms from 1989 to 2015; in Argentina, after a long period of democratic transition from 1983 to 1994, the liberal constitution of 1853 was completely reformed in 1994; in Uruguay, the old constitution of 1967 stands still, but totally reviewed in 1989 and 1997. In other countries, the democratic transition happened with a contemporary "constitutionalization", as in the case of Colombia (1991), Paraguay (1992) and Peru (1993), while the more recent cases of Bolivia (2009) and Ecuador (2007) opens to a more incisive progressivism and an attitude to materially intervene in social, cultural and economic aspect, with a general will to create a new way of life.

In reforming constitutional dispositions or enacting a new constitution, Latin-American countries has been demonstrating a peculiar attention to ethnic and cultural differences in Latin-American societies in order to avoid the return of an authoritarian regime. The old constitutions were European inspired with a strong liberal background and based on the legal positivism. According to it, the unique effective law was the one approved by the legislative power and incorporated in written acts, not including the uses and customs of the population, even if they had been characterizing political system in Latin-America since the colonial conquest[18].

The general attitude in new Latin American constitutionalism is highly critical of the previous liberal constitutionalism, unfortunately connected to the authoritarian regimes. In fact, the European constitutional system is criticized for it is affected by the constitutional doctrine of "legal positivism", that tends to consider in a legal meaning only the *positum jus* (positive law), i.e. only the acts approved by the legislative power, and totally exclude a wade range of rules and juridical customs derived from a not legislative power and, particularly, connected to the social and cultural

[17] B. Gaddes, *Initiation of New Democratic Institutions in Eastern Europe and Latin America*, in A. Lijphart e C.H. Waisman (editors), *Institutional Design in New Democracies: Eastern Europe and Latin America*, Boulder, Oxford 1996, p. 30.

[18] The reference is the Spanish colonial period, during which political system were constituted by the harmonisation of different types of law: the Spanish law, the colonial rules, specifically approved by colonial institutions, the indigenous rules and customs, integrated and interpreted by the principles of roman and canonical law.

composition of the society. Otherwise, this attitude does not consider the complexity of Latin-American societies and the peculiarities derived by the indigenous presence and the troubled historical processes in the formation of these States. Then, it obliges to conform the Latin-American legal system to the strict schemes of the European constitutionalism.

Consequently, another strong criticism is about the lack of "flexibility" towards the social composition of the States' populations. Latin-American national populations aren't uniform and homogenous, indeed strongly composite, boasting high percentages of European origin and, at the same time, still preserving a significant number of indigenous groups. For instance, indigenous peoples have always been the best keepers of natural resources and earth and are now the bearers of instances (e.g. the protecting of nature and common propriety of lands) where any specific law had never been taken before[19].

Last but not least, the inexistence of institutions in the social field has been quite critical since the period of military regimes and the old legal systems do not seem to comprehend the needs and necessities of the actual society. Therefore, popular movements requested a new phase of constitutionalism to have a further more revolutionary change: from social democratic state to a participatory solidarity and, so on, from the *welfare state* to the *bien vivir state*[20].

The basics of the *Nuevo Constitucionalismo* leave from a reinterpretation of constitutional values in a participatory and plural point of view[21]. As a famous scholar in constitutional theory and philosophy of law has written, the *Nuevo Constitucionalismo* "leaves the shores of the *lex* in order to draw in the sea of *jus*"[22].

This new reinterpretation of the constitutional values culminated in the recent constitutions of Bolivia (2009) and Ecuador (2007), the so-called Andean neo-constitutionalism. Despite the European constitutions, which have a common basis of fundamental rights, the Andean neo-constitutionalism focuses its importance on the cultural diversity and unevenness of the population, whereby a more peculiar protection of individual rights, as well as collective rights of groups, is required. Groups and individuals are altogether subjects of a new participatory democracy. At this

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19 A. Colajanni, *Derechos de los pueblos indígenas y derechos indígenas en América latina. Un punto de vista antropologico- jurídico sobre el futuro de los pueblos originarios del continente*, in A. Palmisano e P. Pustorino (editors), *Identità dei popoli indigeni: aspetti giuridici, antropologici e linguistici*, International Conference of IILA (Siena, June 4th-5th 2007), Roma 2008.

20 E.R. Zaffaroni, *Pacha Mama, Sumak Kawsay y Constituciones*, in *Diritto Pubblico Comparato ed Europeo*, 2012, 2.

21 M. Carducci, *Epistemologia del Sud e costituzionalismo dell'alterità. Il nuevo constitucionalismo andino tra alterità indigenista e ideologia ecologista*, in *Diritto Pubblico Comparato ed Europeo*, 2012, 2; M. Petters Melo, *Neocostituzionalismo e "Nuevo Constitucionalismo" in America latina*, in *Diritto Pubblico Comparato ed Europeo*, 2012, 2; G. Rolla, *La nuova identità costituzionale latino-americana nel bicentenario dell'indipendenza*, in *Diritto Pubblico Comparato ed Europeo*, 2012, 2.

22 A. Reposo, *Nascita, morte e trasfigurazione del costituzionalismo. Appunti di un comparatista*, in *Anuario Iberoamericano de justicia constitucional*, 8/2004, p. 401.

point, we can talk about a transition from the concept of a constitution as a mere programmatic document to the concept of a constitution with a normative strength, directly entering into force in political and social life of the states. Democracy becomes a paradigm for a new model of governance and promotion of social life.

It is a decisive step ahead of formal equality in the nineteenth-century liberal state and also a decisive step forward from the substantial equality in the postwar social-democratic state. It is a real and genuine equality, which is based on the Latin value of *libertade-igual*, in order to grant an equal treatment of citizens and an equitable distribution of wealth and solidarity.

In this new constitutional reinterpretation, there is a discovery of the cultural and spiritual dimension of law. The people's active and direct participation to the political dynamics of a state raises a new awareness, starting from the peculiar and the particular to get the general view: from the specific diversities to get an unique protection of rights.

3. New Latin-American Constitutions and the role of indigenous law: the question of indigenous land right.

The constitutional reinterpretation and the new awareness of the cultural pluralism, which every State's social fabric is based on, grows and overflows in inserting the plural dimension within the law. The *Nuevo Constitucionalismo* characterizes for an indigenous peculiarity. In this context, relationship with indigenous peoples has changed direction. Natives are now the bearers of collective rights and interests, protected and almost "brought into life" by the constitution itself[23].

The Latin American model of constitutionalism, as including the participation of every single group of people and focusing the richness of the state in social and cultural diversity, leads to re-discuss the paradigm of *multiculturalism* in a legal key. In every Latin-American state, law becomes now a composition of instances coming from the popular base, with a strong valorization of the indigenous component in the national territory[24].

From now on, the sources of law are to be re-written, also incorporating what comes from

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[23] For instance, Paraguay Constitution defines indigenous peoples as "*grupos de cultura anteriore a la formación y organización del Estado*" (art. 62); indigenous peoples are granted to "*participar en la vida económica, social, politica y cultural del país, de acuerdo con sus usos consuetudinarios, ésta Constitución y las leyes nacionales*" (art. 65).
Argentina Constitution grants that one of the legislative duties is "*reconocer la preexistencia étnica y cultural de los pueblos indígenas argentinos*" (art. 75, inc. 17), ensuring not only the juridical status and the cultural identity, but also the effective participation in the political and economic life of the State as owners of proper and peculiar interests.

[24] M. Carducci, *Le integrazioni latino-americane nei "flussi giuridici" fra "protesto" europeo e "metatesti" locali. La semisfera della nazionalità latino-americana*, in *Diritto Pubblico Comparato ed Europeo*, 2013, 1.

the indigenous law. It deals with an oral and customary law, based on the way of life of the ancestral peoples in Latin America and strongly connected with nature and environment, as usual habitat of the natives.

In that way, most of the new Latin American constitutions – enlightened by the principles of the *Nuevo Constitucionalismo* – welcomes the basics of the theories of *indigenismo* and *indianismo*[25]. Indigenous customary law is now considered as a source of the state law, *pari passu* with the other ones. The only limit is that of the respect of fundamental human rights - as contained in the Constitution and in the international treaties. The plural and multicultural system is declined in a legal pluralism that totally emancipated chthonic populations: no longer need to deny the existence itself of indigenous peoples, nor to talk about a forced integration of the indigenous in the national society. The natives are now claiming their existence, but also their peculiar rights to self-determine and government of their own life, policy and society, saving their proper identity and integrity.

Today, almost all Latin American constitutions recognize indigenous peoples and, as it follows, their existence, but even their culture, language and characteristic peculiarities. The very decisive step forward, then, is the one of a legal recognition of indigenous custom as a law for governing and ruling indigenous relations, whereas not in contrast with human rights.

As a fundamental part of the indigenous law, it is also integrated in the legal discussion the land issue and, in particular, the identification of the lands claimed by indigenous peoples as ancestral lands. The state is asked to reintegrate native communities in the lands where the ancestors used to live before of the European arrival and the colonization of the territory.

Indigenous lands are today the principle focus of the "constitutionalization" of the indigenous customary law. In the lands, where the *indios* are actually integrated, indigenous custom is taken as law. According to it, the lands shall be returned to indigenous peoples by following the *criterion* of ancestry, that is not a legal *criterion*, as rather a cultural and anthropological guideline. The historical indigenous occupation of the land for a not-interrupted time also integrates the proper ownership of this land to the indigenous community that has been inhabiting in it since its ancestors (and, *vice versa*, the connection of the population to the land). It is a *quasi*-legal figure: a *fictio* to possession and ownership of the lands as a legal property of the indigenous community, granting, without any dependence of titles and securities, the reintegration of indigenous peoples in the ancestral lands they have been claiming for.

Indigenous customary law is also referring to the manage and the governance of natural

[25] F. Marcelli, *I popoli indigeni come soggetto emergente nell'ambito della comunità internazionale e dell'area regionale latinoamericana*, in F. Marcelli (editor), *I diritti dei popoli indigeni*, Aracne, Roma 2009.

resources in indigenous lands. In fact, according to the harmonic vision of indigenous culture with the Earth, natural resources are an interest of everyone in the community and of the group itself, for its existence and its survey, because earth is everybody's and nobody's at the same time. This governance of *commons* rather differs from the model of private property, even if it has the same constitutional importance, because of the fact that indigenous custom is considered as a law in the inner relationships of the indigenous groups.

All the new (or reformed) constitutions in Latin-America recognize the existence of indigenous peoples as an important component of the national society and grant them fundamental rights and freedoms as individual rights and collective rights at the same time. In many constitutions, the right to indigenous land is openly indicated in a proper section or article about the indigenous issue, as in other constitutions, the indigenous rights are related to a general Magna Charta – often, at the beginning of the constitution – as part of the fundamental rights granted by the State (Nicaragua 1987, reformed in 1995; Colombia 1991, reformed in 2005; Guatemala 1993)[26].

For instance, Paraguayan constitution (1992) defines Paraguay as a representative, popular and multicultural republic (art.1), recognizes Spanish and Guarani as national languages (art.40) and identifies indigenous communities as "*grupos de cultura anterióres a la formación y organización del Estado paraguayo*" (art.62), granting the use of indigenous customary law in inner relationships when not in contrast with human rights (art.63) and the ownerships of ancestral lands (art.65)[27]. The right to indigenous land and the indigenous collective manage of natural resources are properly affirmed, while the State shall give ancestral lands to indigenous communities without any payment or taxation (art.64). An *Estatudo Agrario* (n.1863 of 2002) defines the administrative process for a correct identification of the indigenous lands and a free distribution of them, in order to preserve biodiversity and environment[28].

The reformed Argentina constitution (August 22nd 1994) recognizes the previous ethnic and cultural existence of indigenous peoples, in order to grant the protection of their cultural and linguistic diversity: legal personality, collective ownership of ancestral lands and participation to the governance of the natural resources are assured to every indigenous community in the Argentina territory, according to their *desarollo humano* (human development); executive dispositions need to be acted by the Federal Congress and the States (art.75, inc.17)[29].

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[26] M. Carbonnel, J. Carpizo, D. Zovatto (editors), *Tendencias del constitucionalismo en Iberoamerica*, Messico 2009.

[27] A. Torres de Romero, *Cultura y educación indígena en el marco jurico en Paraguay,* in A. Palmisano e P. Pustorino (editors), *Identità dei popoli indigeni: aspetti giuridici, antropologici e linguistici*, International Conference of IILA (Siena, June, 4th-5th 2007), Roma 2008, pp. 301-337.

[28] E. Prieto, *La repubblica del Paraguay e i diritti dei popoli indigeni*, in S. Lanni (editor), *I diritti dei popoli indigeni dell'America latina*, Edizioni Scientifiche Italiane, Roma 2011, pp. 195-224.

[29] About Argentinan case: M. Rosti, *Terre ancestrali e risorse naturali: i diritti indigeni nell'Argentina odierna fra tutela e sviluppo economico,* in *Rivista dell'Istituto di Storia dell'Europa mediterranea*, n.11/2, December 2013; M.

Peru approved in 1993 a democratic constitution that recognizes the existence of indigenous peoples in the national territory and generally grants them the participation to environment policy and the reintegration in ancestral lands (art.17), nothing saying about individual and collective rights and freedoms of indigenous communities. Actual legislation is trying to full fill the constitutional gaps with a reference to the ILO Convention n.169/1989[30].

Constitutional reformation in Mexico (2001-2011) involved the full recognition of rights and freedoms to indigenous communities, as entities of public law. Federal government and parliament shall promote indigenous rights by approving a legislation and a complex of executive acts in order to preserve the protection of the rights to indigenous communities and the use of their custom in inner affairs (art. 2 lett. A). Customary law is considered the more effective law to redeem property law suits and litigations relating to the governance of the natural resources in indigenous lands (art. 2 lett. B). Indigenous communities are recognized by the so-called "path of identity and ethnicity", an inverted procedure by which every indigenous person self-declares his/her belonging to a specific indigenous group as identifying in a proper culture, language and land before federal authorities (art.27). Federal law recognizes the indigenous rights to ancestral land, while state and district law have the duty to complete and uniform federal legislation by a series of executive acts to effectively reintegrate indigenous communities in the lands they have claimed[31].

Constitution of Panama 1972 formally recognizes indigenous rights and freedoms, but not their custom in inner affairs, nor the right to return to ancestral lands. By the way, the first constitutional reform in 1983 and the subsequent legislation was inspired by the '70s theory of *indigenismo* and *indianismo*. For this aim, a specific economic fund was instituted to compensate and refund all the indigenous families in Bayano whose lands were violated and/or spoiled. Today, after the return to democracy and the fall of dictator Noriega, the formal protection granted by the constitution is completed by a series of laws and acts that enlarged the constitutional parameter. Indeed, Panama Supreme Court in 1993 was the first judge to pronounce on the "intimate relationship" between the indigenous people and the earth, a connection that must be protected by the law. On these grounds, a federal legislation has been approving in order to recognize the indigenous title on the historical lands, the indigenous manage and governance of their lands and of the resources existing in them and the participation of indigenous communities in the decision-

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Rosti, *Gli indios e la terra nell'attuale costituzione argentina*, in M. Losano (editor), *Un giudice e due leggi. Pluralismo normativo e conflitti agrari in Sud America*, Giuffré, Milano 2004, pp. 75-121.

30 J.F. Gálvez, *Lo sviluppo dei diritti indigeni in Perù*, in S. Lanni (editor), cit., pp. 245-269.

31 J.A. González Galván, *Los sistemas jurídicos indígenas y los derechos humanos. Paradojas en el discurso del movimiento índio en México*, in *Boletín Mexicano de Derecho Comparado*, 123, D.F., IIJ-UNAM, Mexico 2008, pp. 1191-1207.

making procedures[32].

A particular case is represented by Brazil with its own legislative story about the protection of indigenous peoples. The presence of indigenous differences and their protection as individuals and as groups were firstly recognized by the *Estatudo do Indio* in 1973, while the constitution 1988 was generally inspired by the principles of indigenous political movements. Though there isn't any specific paragraph in the text referring to indigenous rights, nor a Preamble manifesting the indigenous characterization of the constitution, an accurate awareness of the social difference in culture and policy stands in all the articles of the charter. For instance, the indigenous law, which is oral and customary, is already considered as a proper source of federal law because of its logical and historical preexistence above all the acts and laws approved by the legislative power and enacted by the executive (art.225). Indigenous communities are seen as social associations, with the same legal discipline and guarantees, including the protection of social and cultural rights and procedural rights (artt. 231-232). Indigenous lands are located as their previous occupation by the historical and native communities before of the European colonization. These territories are organized in natural reserves, formally in federal ownerships, but managed by indigenous communities that have identified their historical connection to them: the only limit is the social aim of every type of property, as the constitution says[33].

The revolution has happened with the enactment of Bolivian and Ecuadorian constitutions (respectively, in 2009 and in 2007). Both those constitutions were elaborated from the key concept of *nuevo constitucionalismo* (plural democracy and participation, every community as bearer of rights granted by constitution) and give today a new development of the indigenous issues. Particularly, Bolivian and Ecuadorian constitutions not simply recognize the indigenous custom as state law, applicable to indigenous communities; indeed, they look for the indigenous *paradigm* as to rebuild across the state law[34].

Bolivian constitution recognises the self-determination and the self-government of the indigenous communities (art. 2: "*Dada la existencia precolonial de las naciones y pueblos indígenas originarios campesinos y su dominio ancestral sobre sus territorios, se garantiza su libre determinación en el marco de la unidad del Estado, que consiste en su derecho a la autonomía, al autogobierno, a su cultura, al reconocimiento de sus instituciones y a la consolidación de sus entidades territoriales, conforme a esta Constitución y a la ley*"). It grants the protection of individual and collective rights (even in the usage and management of ancestral lands and natural

[32] A. Valiente López, *I diritti dei popoli indigeni nella legislazione panamense*, in S. Lanni (editor), cit., pp. 337-361.

[33] V. Lauriola, *Terre indigene, beni comuni, pluralismo giuridico e sostenibilità in Brasile*, in *Rivista Critica di Diritto Privato*, 2011, 3.

[34] A. Ciervo, *Ya basta! Il concetto di comune nelle Costituzioni latino-americane*, in M.R. Marella (editor), *Oltre il pubblico e il privato*, Ombre Corte, Verona 2012.

resources) to indigenous peoples, relating the term "indigenous" to the historical identity and culture of the peoples that had been inhabiting the national territory before of the Spanish colonization (art. 30 par. I: "*Es nación y pueblo indígena originario campesino toda la colectividad humana que comparta identidad cultural, idioma, tradición histórica, instituciones, territorialidad y cosmovisión, cuya existencia es anterior a la invasión colonial española*").[35]

The Preamble of the Ecuadorian constitution is a *manifesto* of indigenous inspired neo-constitutionalism, with the references to the anthropological concept of *Pachamama*, the model of the *bien vivir* state (from the indigenous *Sumak Kawsay*) and the will to build a legislation based on the principles of solidarity and cultural diversity ("*[...] Decidimos construir: una nueva forma de convivencia ciudadana, en diversidad y armonía con la naturaleza, para alcanzar el buen vivir, el sumak kawsay; una sociedad que respeta, en todas sus dimensiones, la dignidad de las personas y las colectividades; un país democratico, comprometido con la integración latinoamericana [...], la paz y la solidaridad con todos los pueblos de la tierra; [...]*"). The constitution grants the protection of the indigenous peoples, their individual and collective rights and the right to land (artt.56-60).[36]

One of the purposes of these recent constitutions is to translate models and institutions of the indigenous custom into the ordinary state law, with a peculiar care to particular issues. First of all, due to the actual question concerning *commons*[37], it is to consider the possibility to apply the specific no-propriety governance of indigenous communities in managing lands and resources.

In order to make possible the indigenous way of governing lands, there are two important steps to take: firstly, it's necessary to build a neo-constitutionalism model, based on pluralism, democracy and participation and concerned to the importance of the communities and of the principles of subsidiarity and solidarity, focus of the new constitutional theory (whereas either individual rights either collective rights have the same protection); secondly, there must be an obvious arise of legal and cultural pluralism of society (the key word is *multiculturalizar*), so that there isn't only an unique positive state law, but rather a composition of sources of state law, as well as a composition of cultures, strongly connected with the protection of people, individuals and communities.

Typical principles of the indigenous culture have now earned their legal emancipation: Bolivian and Ecuadorian constitutions specifically include in constitutional protection also the

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35 C. Proner, *El estado plurinacional y la nueva Constitución Boliviana*, in *Diritto Pubblico Comparato ed Europeo*, 2012, 2; O. Oliver, T. Lewis, *Cochabamba! Water war in Bolivia*, South End Press, Cambridge 2004; C. Storini, A. Noguera, *Processo costituente e costituzione in Bolivia. Il difficile cammino verso la rifondazione dello Stato*, in *Diritto Pubblico Comparato ed Europeo*, 2008, 3.

36 F. García Serrano, *La situazione giuridica dei popoli indigeni nella nuova costituzione ecuadoriana*, in S. Lanni (editor), cit., pp. 290-291.

37 About the theory of *commons*, see also: E. Ostrom, *Governing the commons*, Cambridge University Press 1980.

rights of nature, considering nature in a personal and spiritual key as a proper subject of rights.

Earth, always identified by indigenous in Mother Earth (the so-called *Pacha Mama*, as in a *quechua* definition), is now the matrix of a whole new set of rights, concerning the protection of nature and environment and the sustainability of natural resources: indigenous custom is the applicable rule to all of these rights, in an harmonic way with nature itself.

We deal with an important key of interpretation for the whole legal system in Latin America, because this justifies and gives effect to the myth of *bien vivir*, which the new "indigenous" state is based on: the harmonization between state law and indigenous custom leads, in fact, to a sustainable and responsible manage of natural resources as effective means for protecting the rights of Nature (subject of rights) and, consequently, human rights of peoples who live within (and with) nature itself. We can say it's a real experiment of communities and society to directly participate to political and legal decisions of the state, whereas the institutions are declined in the plurality (the governance and manage by a community, which claims the same culture and identifies itself in a peculiar ancestral land).

Neo-constitutionalism gives new life to human needs and rights, concerning either the individual either community to which a single person belongs. It aims to give a legal solution to actual issues, without neglecting the strong cultural foundation which is inspired by new constitutionalism.

Therefore, the scarcity of resources and commons is approached from the indigenous land issue. Finding a solution to the latter is a response to the first one. In fact, indigenous peoples claim for the ownership of their ancestral lands and the managing of them in a common governance, perfectly harmonious with nature and environment.

Then, the characteristic of the *common* is well expressed, as a common resource, governed and ruled by the community, the centre of social relationships based on cooperation. It's a real and proper way of "constitutionalizing" *commons*.

4. Reintegration in ancestral lands: actual problems

The new Latin American model, thus, includes the reintegration of indigenous communities into their ancestral lands and the subsequent governance according the indigenous custom. Almost every Latin constitution cares about indigenous lands in these terms, so that these lands are to be placed out of the private property regime, as well as of the public ownership, without any title and

security, able to be only managed by indigenous communities as commons[38].

Instead, the actual question concerns the real distance from theory to practice. Although Latin American constitutionalism looks like to be an open-minded vision for an entirely new protection of minorities, introducing in a legal point of view the indigenous land issue as a common, in reality there is still much to be done in order to actually make these rights active. In fact, it's often difficult to identify the real ancestral indigenous lands and, then, to place them out of private property regime. Ancestry is a quiet abstract *criterion* with anthropological basis and not legal references.

Only few indigenous communities are in possess of securities granting the effective ownership of those lands (custom does not concern any written title, as well as any written law). This makes more difficult the identification of the territories as indigenous lands, able to be subdued to a series of complex events: for instance, they are lands already purchased to thirds or expropriated by public authorities. They are usually lands rich of natural and energetic resources. This fact would be more stimulant in practicing the governance of commons, but, instead, tends to create a situation of capitalism.

These states had been often governed for a long time by dictatorships that economically impoverished them (as, for instance, the case of Paraguay); several of these states, then, were in the middle of an economic crisis in the last years (as what it happened in Argentina in the first 2000s). An easy way to revive the economy of the country is the one to use the natural resources, by nationalizing or selling them to thirds (in particular, to foreign companies) in order to gain the greatest economic benefit possible. And denying the indigenous ownership of these lands, the traditional and customary manage of commons and the innovative governance of natural resources is the best way to make this benefit possible, in spite of the fact that companies tend to impoverish and exploit the environment. States are often before the *dilemma* if it's better a decisive economic liberalism for gaining immediate benefits or if it's more virtuous the path of the new alternative economy, whose benefits are hypothetically of such value in the long term, but are able today to make the situation quite fragile[39].

At the same time, the indigenous paradigm about the constitutional environment collapses and so does the proper identification of nature as a subject of law too, with all new rights referring to nature and environment.

The non-application of the Andean constitutionalism, despite its innovative importance, is quite often the product of weak institutions and politics, fragmented into multiple interests and with

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38 S. Schipani, *Codici civili nel sistema latinoamericano*, in *Digesto discipline privatistiche*, V, Utet, Torino 2010.

39 L. Mezzetti, *La dottrina latino-americana in tema di forma di stato*, in *Diritto Pubblico Comparato ed Europeo*, 2000, 2.

great difficulty to put them back together in a single and unique point of view. Institutions are also more often subjected to the centralism and protagonism of the presidential figure. Even when there would be an actual policy of reintegration of indigenous peoples in their lands (and the subsequent common manage of them), the very decision is of the president himself (or herself) as a proper identification with the whole State, in order to be the *artifex* of a new policy in contrast with the Western model (as the case of Venezuela).

There are other further problems in Latin America: the corruption of institutions and public authorities (a real plague in Paraguay); the presence of *narcos* (so that governability is almost impossible in many places); the landowner logic predominant for decades (that was advantaged by dictatorships and is still quite dominant).

Particularly well-known is the case of *Mapuche* people, living in Patagonia, in the border lands across Argentina and Chile, and its long-standing dispute with the Benetton company, concerning the ancestral Mapuche lands which the Italian company owned[40].

Some of these last cases are partially solved by the jurisprudence of the Courts: constitutional oriented interpretation, but also judgments based on the international law and the Inter-American Court decisions led to refer to indigenous law (and indigenous rights) as a well-integrated part of the Latin American democracy.

In some cases, constitutional judges of a single state intervene with an *amparo* judgment in order to affirm the ownership to the indigenous peoples of its ancestral lands and their customary governance as a fundamental and constitutional right, not to be violated by an act of the state. In other cases, instead, it is the ordinary jurisdiction of national Courts to intervene and, in federal states, federal Courts and state Courts do their best to reintegrate the indigenous peoples (e.g., the present case of Argentina).

So, while we are expecting the results of the recent Bolivian and Ecuadorian constitutions, according to whom indigenous land is a "very fundamental" right, the greatest steps forward are the ones taken by doctrine and jurisprudence.

In Brazil, for instance, while there is not any formal recognition of the indigenous lands in the constitution (they are part of the federal heritage), it is stated that indigenous lands must be in the possess and exclusive usage of indigenous peoples, according to the fact that the property – as in the constitutional definition – must have a social aim as the indigenous customary of common land. There's an explicit reference of the indigenous land as a common land. It's the specific Latin American doctrine of "goods of common use of the people", able to be used and owned only

[40] C. Benitez Trinidad, *El rol de los Estados frente a las multinacionales: Argentina y el caso Benetton*, October 22nd 2012, August 20th 2013, www.iwgia.org.

according the indigenous custom. In such cases, a timid legislation begins for making actual the constitutional lecture as a fundamental and human right of both communities and individuals.

5. The decisions of Interamerican Court of Human Rights in the indigenous land question.

Despite the difficulties of national policies to integrate the indigenous land right and the system to own in community, national courts (and federal courts too) welcome a new attitude of opening towards indigenous rights, in accordance with the Interamerican Convention of Human Rights and the jurisprudence of the Interamerican Court.

The Convention was signed in San José, Costa Rica, in November 22nd of 1969 and entered into force in July 18th of 1978 among 25 countries of Latin America region[41]. It aims to strengthen democratic institutions, freedom, justice and human rights in every country that had ratified it. The Convention filed the fundamental human rights to be protected in the countries that had applied it. In order to promote and monitor the protection of human rights in the Interamerican region, it created the Interamerican Commission of Human Rights, as a filter and examiner of the cases to be judged, and the Interamerican Court, as a supreme judge to intervene with decisions applicable among peoples and countries of the Interamerican region (Art.33 Interamerican Convention).

The Interamerican Court is an international tribunal of regional value, with the competence to know about actions brought by the Interamerican Commission of Human Rights and petitions led by individual persons against public authorities concerning a violation of human rights. It is composed by seven judges, elected in a secret ballot by the general assembly of the member states among lists of lawyers, judges and academic professors with an high moral profile and an excellent competence concerning human rights. The decisions are taken by a *quorum* of five judges. The Court is partially elected every 3 years; every judge member stands for a period of 6 years and can be elected again only once (Artt.52-55). Every judge does not represent any national policy, but must be in service for all the peoples inhabiting the region in order to take decisions about rights and interests as protected by the conventional parameter. Interamerican Court's decisions cannot be appealed, since it constitutes the last grade of appeal, as it is usually defined an interamerican appeal or a particular type of a*mparo internacional* (Art.67).

What stated by a decision of the Court assumes automatically value in the concerned country, but also among all the member States, in accordance with the principle of "inter-

[41] States that signed and ratified Interamerican Convention are: Argentina, Barbados, Bolivia, Brasil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad and Tobago, Uruguay, Venezuela.

constitutionalism". It concerns an integration to the law of a state through the work of the supranational judges and their subsequent asymmetrically operating, based on common constitutional standards. In this way, international law directly enters "inside" the constitutional law of a state and the Court's decisions create a level of law made by regional treaties with the purpose of building an internal "constitutionalization" of the Interamerican jurisprudence. Member states are obliged to apply what stated in an Interamerican Court's decision, even in the case of an emergency ordinance to prevent irremediable damages for peoples (Artt. 63.2, 68).

As concerning indigenous rights and land rights, the decisions of the Interamerican Court have been gradually operating a constitutional opening in the whole region. Supranational judges, inspired by international law (i.e. ILO Convention n.169/1989 and UN Declaration on Indigenous Peoples 2007), finally recognize the spiritual connection between indigenous peoples and their ancestral lands, concerning their survival and the preservation of their culture and tradition.

The first decision to broke though the wall of the disparity in indigenous land right has been the case ***Comunidad Mayagna (Sumo) Awas Tingni vs. Nicaragua***, August 31st 2001, accordingly known as the leading case decision about the reintegration of indigenous peoples in their ancestral lands[42]. The Court firstly decided in a case concerning the traditional indigenous ownership of historic lands. In particular, the Court judged Nicaragua responsible since it had violated the right to private proprierty, as protected by Article 21 of the Convention: according to the Interamerican judges, there isn't a restrictive definition of private property since it also means the general right to use and enjoy one's own goods as not in contrast with public and social interests. In the specific case, the ownership of the historic lands by an indigenous community (the common property) did not corrupt any public and social interests. On these bases, the Court recognized the existence of a strong connection between indigenous peoples and their historic lands, as derived from a close relationship with nature and earth, whose national governments should have care[43]. In accordance with the decision of the Interamerican Court, the connection between indigenous peoples and nature (*elemento natural y espiritual*) entitles indigenous communities with the collective ownership of their own historical lands, according to their traditional custom[44]. This relationship is given a new legitimacy, since the decision has strength among all the countries of the Interamerican region as a

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[42] Fondo, Reparaciones y Costas. Sentencia del 31 agosto 2001, Serie C n°.66 e n°.79.

[43] "*[...] Entre los indígenas existe una tradición comunitaria sobre una forma comunal de la propiedad colectiva de la tierra, en el sentido de que la pertenencia de ésta no se centra en un individuo sino en el grupo y su comunidad. [...] la estrecha relación que los indígenas mantienen con la tierra debe de ser reconocida y comprendida como la base fundamental de sus culturas, su vida espiritual, su integridad y su supervivencia económica. Para las comunidades indígenas la relación con la tierra no es meramente una cuestión de posesión y producción sino un elemento material y espiritual del que deben gozar plenamente, inclusive para preservar su legado cultural y transmitirlo a las generaciones futuras [...]*" (par.149).

[44] "*Entre los indígenas existe una tradición comunitaria [...] de la propiedad colectiva de la tierra. [...] tienen derecho a vivir libremente en sus propios territorios*" (par.150).

fundamental right to be protected by the every country's inner law. Consequently, every indigenous community has the right to claim the ownership of the ancestral lands, to return in them without any payment or taxation and to possess them as a common property. No written title is needed, according the Interamerican Court, because indigenous custom is defined as a preexistence law.

The Court was of the same advise in other further decisions concerning the indigenous right to land. E.g., we should remind the case ***Yakye Axa vs. Paraguay***, June 17th 2005[45], and the case ***Sawhoyamaxa vs. Paraguay***, March 29th 2006[46]. In the first case, concerning a forced movement by state authorities of a 300-people indigenous community because of a legitimate deed of sale on the indigenous historic lands, Paraguay was judged responsible to have violate international law. Particularly, the Court recognized the indigenous right to the ownership of historic lands, provided the preexistence of the indigenous presence and the indigenous custom above national law without any legal registration of a juridical personality to the indigenous community. In fact, according to the Court, the spiritual relationship between indigenous peoples and their ancestral lands is of a special nature: indigenous lands are to be considered not only as material goods, but also as immaterial goods, cultural heritage of the indigenous people. For these reasons, indigenous land right could not be limited without an adequate economic or land compensation.

In the *Sawhoyamaxa* case, the Court judged Paraguay responsible to have violated not only international law but also national law when it had not granted to Sawhoyamaxa indigenous peoples the ownership of their ancestral lands. According to the Court, the attitude of Paraguay government had violated the indigenous community's right to property, as protected by the Constitution. The strong relationship of indigenous peoples with their ancestral lands is part of their cultural "cosmovision" and fully legitimates their ownership of historic lands without any written title. This relationship also legitimates a different way to own land and goods, since indigenous peoples do not comprehend the concept of private property: it might deal with a *modus possidendi uti dominus* (an ownership-like status), legally recognized by national and international law. In affirming the right to indigenous common land, the Court also referred to the protection extended by ILO Convention n.169/1989.

Other important cases concerning the indigenous right to ownership of historic lands were: ***Pueblo Saramaka vs. Suriname*** (November 28th 2007), ***Comunidad Indígena Xákmok Kásek vs. Paraguay*** (August 24th 2010), ***Pueblo Indígena Kichwa de Sarayaku vs. Ecuador*** (June 27th 2012), ***Masacres de Río Negro vs. Guatemala*** (September 4th 2012), ***Pueblos Indígenas Kuna vs. Panama*** (October 14th 2014).

[45] Fondo, Reparaciones y Costas. Sentencia del 17 junio 2005. Serie C n°.125 e 142.
[46]Fondo, Reparaciones y Costas. Sentencia 29 marzo 2006. Serie C n°.146.

Interamerican Court's decisions have given strength to national policies and laws for making effective the constitutional dispositions. They are also creating a new political and economic parameter in the protection of the rights of indigenous peoples and the rights of nature, as a subject of fundamental rights.

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