COMPARATIVE REPORT

ON DEVELOPMENT OF THE RIGHTS TO PRIOR CONSULTATIONS, TERRITORY, HEALTH, EDUCATION, RECOGNIZED IN CONVENTION 169 OF THE INTERNATIONAL LABOR ORGANIZATION:

BOLIVIA, BRASIL, COLOMBIA, ECUADOR, VENEZUELA AND PERU

COORDINATOR OF THE INDIGENOUS ORGANIZATIONS OF THE AMAZON BASIN-COICA

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Índex

Introduction

The Amazon is shared by nine countries (Venezuela, Colombia, Ecuador, Peru, Bolivia, Brazil, Guyana, Suriname and French Guyana) and has an estimated population of 44 million people, including approximately 2.6 million indigenous inhabitants, grouped in more than 390 towns, including 60 groups living in voluntary isolation (COICA, 2016).[1]

Indeed, with these numbers, conducting a study of the implementation of the obligations of these countries in relation to compliance with the rights of indigenous people is a complex task. However, this Regional Report (regarding implementation of the rights to prior consultation, land, education and health in Bolivia, Brazil, Colombia, Ecuador, Peru and Venezuela) has taken up the challenge, not only to evaluate the level of development for each aforementioned country, but also to provide some proposals to further optimize the rights of indigenous people.

We cannot ignore that indigenous people have been victims of a dehumanizing system which, since colonial times, has created a dividing line of an ontological character (civilized /barbarian) through which indigenous people, as well as their form of life, have been labeled regressive. (colonialism of being and knowing);[2] a situation which, by the way, did not end with the advent of the republics (inequality in access to health services, cited in this report, is a clear example). Therefore, it is necessary to act, to go one step beyond the declaratory level of development (the signing of treaties like the C169) and join efforts towards effective implementation of the rights of indigenous and tribal people.

In this way, references to the rights of health and intercultural education are not random, but rather point to their visibility in a context in which development has been meager, even more so given a context of repeated environmental disasters, which have exerted a clear impact on multiple rights. Consider, for example, that Peruvian official figures indicate that between the years of 2009 and 2015 there were 150 oil spills, and the greatest percentage of these occurred in the Amazon. What doubt can exist on the incidence of a spill on the health of affected children, adolescents and adults? However, will that be the only kind of impact? Should we also consider the existence of cultural impacts?[3] The idea of this report is to understand, from a holistic perspective, the rights of indigenous people and the specific requirements of these rights, which must be defined by a process of intercultural dialogue.

The update of this report was made possible through a dialogue and exchange carried out in October 2016 as part of the Third Regional Summit of the Amazon, which brings together the Amazonian indigenous people and national organizations from nine countries: Bolivia (CIDOB), Brazil (COIAB), Ecuador (CONFENIAE), Colombia (OPIAC), Guyana (APA), French Guiana (FOAG), Peru (AIDESEP), Venezuela (ORPIA) and Suriname (OIS), with representatives from these states as well as international organizations. The event concluded with the Order of the III Amazon Summit whose first article

1 Available at the following link: http://coica.org.ec/web/iii-cumbre-amazonica- octubre-2016/ (Visited 11/18/16)
2 Please read (Suggested reading): Quijano, Aníbal. Cuestiones y horizontes: de la dependencia histórico-estructural a la colonialidad/descolonialidad del poder. Selección y prólogo a cargo de Danilo Assis Clímaco (2014, 1st Ed.). Buenos Aires: CLACSO. pp. 805-ss
3 División de Supervisión de Hidrocarburos Líquidos del OSINERGMIN. Available at the following link http://www.numero-zero.net/2016/06/30/peru-mas-de-150-derrames-de- petroleo-en-los-ultimos-siete-anos/ (Visited on 07/07/16).

proposes: "Intervention by the ILO and UN in response to complaints of violations in the Amazon countries, especially Venezuela (Health, Education, Arco Minero of the Orinoco and illegal mining), Bolivia (division of organizations, TIPNIS), Brazil (regression in indigenous rights with PEC215, PL 1610, PEC 241) and Colombia (Amazonian indigenous participation in the peace process).

Certainly, this study has allowed us to confirm the survival of a system based on what David Harvey called *accumulation by dispossession*,[4] manifested through the forced assimilation of indigenous people; their forced displacement as with the Shuar Arutam people in Ecuador, or the Guaraní families displaced in Bolivia; the delivering of concessions and the start of mining activities on their ancestral lands without any consultation process, generating impacts that will be irremediable and even lethal, as is also happening with groups in isolation on whose territory concessions have been granted with knowledge of their very vulnerable: Case of the Kugapakori Indian Reserve, Nahua, Nanti of Peru.

A frequent problem is related to the territorial order, or rather, its quasi-null advance as in the case of Venezuela where, according to the national demarcation process and its official results, for the last 15 years only approximately 12.4% of habitats and indigenous lands have been demarcated, even though that obligation stems directly from the Constitution of 1999. It has also been common that the implementation of international standards regarding indigenous people have suffered certain distortions (adjustments); for example, Brazil only recognized the right of possession and the right to property, with the National Congress legislating without specific regard to the right to prior consultation. On a macro level, the problems have been reiterated and even transcended the boundaries of each of these countries; in the Brazilian case, there was the case of the construction of the dam in Belomonte that led to an confrontation between the Federative Republic of Brazil and the Inter-American Commission on Human Rights who threatened withdrawal from the Inter-American System. Meanwhile, in the Venezuelan case, there were frequent exchanges between government representatives and representatives of indigenous organizations in relation to the Mining Arch of the Orinoco project, which has been militarized since March 2016.

As is well known, this is a structural problem and addressing it in its entirety is an extremely complex task. However, this report aims provide some insight on the current state of the rights to health, education, consultation and territory, with the objective of effectively promoting the implementation and empowerment of indigenous people, as it is the duty of each state to enforce their human rights from an intercultural dialogue that goes beyond the usual, paternalistic, impositions which have characterized the process for many years.

Preliminary study

Latin America is the site of deep-rooted social inequities that have resulted in the exclusion of much of its population. These equalities are exacerbated if we focus our attention on the most vulnerable social groups whose fundamental rights (such as education, health, political participation, equality before the law, etc.) and basic services (like water systems and drainage, electricity networks, access to local businesses, among others) have been denied for a long time.

4 Harvey, David. El "nuevo" imperialismo: acumulación por desposesión (2005). Buenos Aires: Clacso. Available at the following link: http://biblioteca.clacso.edu.ar/clacso/se/20130702120830/harvey.pdf

Even though almost half of the region is protected by various legal mechanisms and more than a quarter of the territory qualifies as "indigenous", these arrangements obscure the real and concrete guarantees that indigenous people can assert as their rights, even within protected areas.[5]

This reality is reflected in a good proportion of indigenous people and, even more acutely in those children and adolescents in vulnerable situations. In fact, 88% of indigenous children under 18 do not have access to basic health and education services,[6] which is critical when implementing public policies to close gaps in social inequality.

Moreover, the Amazon basin houses the highest concentration of ethnic and linguistic diversity in the region. In Bolivia, for example, there are 114 indigenous groups who speak 33 official languages in addition to Spanish. In Brazil, 241 indigenous groups speak

186 languages within the education system. In Colombia, there are 83 indigenous groups with 65 official languages alongside Spanish. Ecuador has 32 indigenous groups, who speak 13 languages. In Peru, there are 55 indigenous groups with 47 regional languages in use. In some cases, the percentage of indigenous identification is higher than the percentage of people who speak an indigenous language.[7]

This cultural wealth, however, has not been translated into inputs for the formation of plurinational states that in practice respect indigenous customs and world views as vital to understanding the development from a multicultural point of view. On the contrary, these views have been ignored, while ideas of modernization and progress (nuclear positivist dogmas) have won the day.

Faced with the historical conditions of abuse, discrimination and contempt against indigenous people by those who mostly felt that the modern and civilized world was superior to what they called native barbarism, large amounts of indigenous groups organized in favor of expanding rights. Supported by international legal provisions, such as the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1976), and the International Covenant on Civil and Political Rights (1976), they created the conditions that years later, in 1989, resulted in International Labor Organization Convention 169 (hereinafter 169), the treaty that ultimately would be signed and ratified by 22 countries, 14 in Latin America (ILO, 2011).

Since 1990, more than a few states in our region have begun to restructure their legal frameworks governing indigenous people. In particular, the countries discussed in our study, Brazil, Venezuela, Bolivia, Colombia, Ecuador, and Peru, have articulated laws for the protection of the rights of indigenous people, among other human groups in vulnerable situations, from the passage of C169 and in some cases like Colombia or Brazil, started that way even before the entry into force of C169 (September 5, 1991). It is also worth noting that all countries that are part of the study have ratified the same treaties and international agreements on indigenous rights. This helps standardize the analysis of the internal implementation of standards and public policies related to these agreements.

Thus, among them we can mention not only C169, but also the Declaration of the Rights of Indigenous People, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination Against Women, the Convention on Biological Diversity, the Convention on International Trade in

5 Cf. World Bank. 2015. Latinoamérica Indígena en el Siglo XXI. Washington, D.C.: Banco Mundial. Licencia: Creative Commons de Reconocimiento CC BY 3.0 IGO.
6 CEPAL & UNICEF. 2012. Los derechos de las niñas y los niños indígenas. Desafíos (14), 1-12, p. 2
7 Cf. World Bank. 2015. Latinoamérica Indígena en el Siglo XXI. Washington, D.C.: World Bank. Licencia: Creative Commons de Reconocimiento CC BY 3.0 IGO.

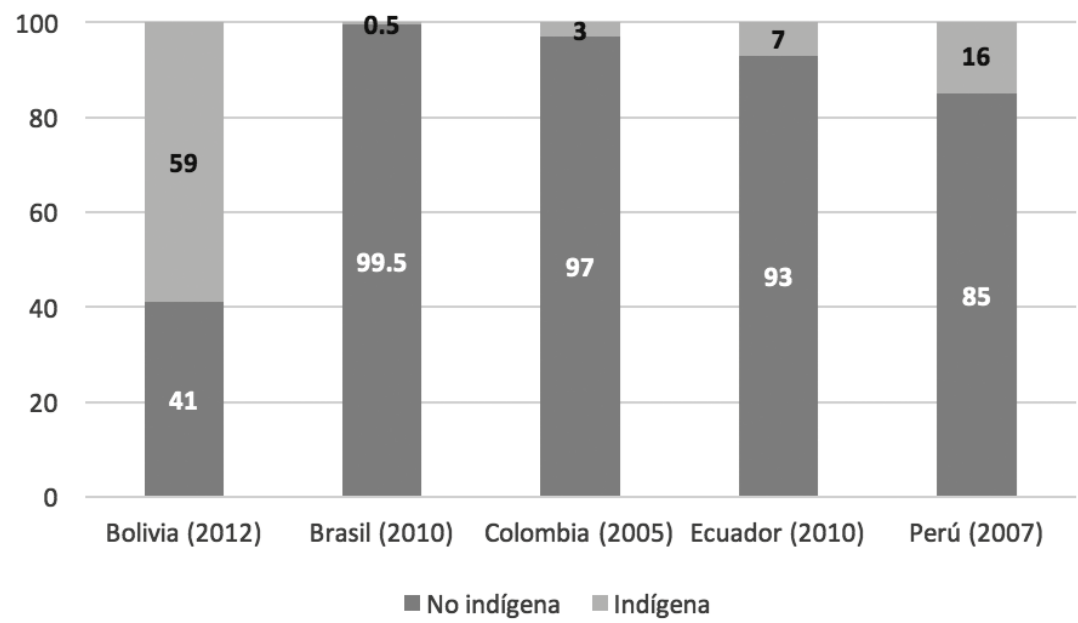
Endangered Species of Wild Fauna and Flora[8] and the recently passed American Declaration on the Rights of Indigenous People.

In this context, this paper presents information on the implementation of certain rights contained in the C169, such as Free and Informed, Prior Consultation; the Right to Territory; Intercultural Health; and Bilingual Intercultural Education. Thus, the main objective of this research is to verify (with information compiled from each country studied, as well as reports of specialized international organizations and civil society) the general situation with respect to the aforementioned rights, including the existence and implementation of public policies, plans, standards, and the existence of social unrest to analyze the implementation of C169 in the region.

Regarding the methodological framework, this research relies on qualitative and quantitative methods of analysis. The report made use of semi-structured interviews with subject-matter experts in each country, a socialization of the document to various civil society as well as indigenous organizations to supplement the information addressed, as well as a review of documentary databases, archives, and official statistics. In order to more reliably assess the implementation and impact of C169 on indigenous groups and communities, this report evaluates the official census of each of the states.

Finally, the report considers the heterogeneity of indigenous demographics between the countries that are part of the document. As can be seen in the chart below, while in Peru the percentage of population that identifies as native varies between 30% and 45%, in Ecuador the number hovers between 20% to 40% of the total population, in Venezuela it is 2.7% (724,592 inhabitants of a total of 26,503.338 people), while in Colombia you get just 1% of a total of 39 million people and beyond in Brazil it is only 0.2% of a total of 170 million people.[9]

Chart 1: Percentage of indigenous people by country according to latest national census.



Source: World Bank Group 2014.

8 Source: International Working Group on Indigenous Affairs. Cf. World Bank. 2015. Latinoamérica Indígena en el Siglo XXI. Washington, D.C.: World Bank. License: Creative Commons de Reconocimiento CC BY 3.0 IGO.

9 Wade, P. (2006). Etnicidad, multiculturalismo y políticas sociales en Latinoamérica: poblaciones afrolatinas (e indígenas). Tabula Rasa, January-June, pp. 59–81.

The huge variation in the percentages indicated in the previous paragraph, rather than objective and unquestionably accurate, are in fact subjective and partly volatile. They reflect local debates around how to determine who is indigenous and, consequently, what criteria should be used by States to classify indigenous heritage at the time of the census. Thus, the percentages are not just taken from state sources, but also consider alternative reports.[10]

10 Wade, P. (2006). Etnicidad, multiculturalismo y políticas sociales en Latinoamérica: poblaciones afrolatinas (e indígenas). Tabula Rasa, January-June, pp. 59–81.

1.

Free and Informed Prior Consultation

Foto: Ministerio del Ambiente

1. Free and Informed Prior Consultation

1.1 At the Constitutional level

Of the six countries analyzed (Bolivia, Brazil, Ecuador, Colombia, Venezuela and Peru) the country that has undergone the most constitutional changes (including at the regional level) since the 1980s is Bolivia (1995, 2004, 2008- 2009). Bolivia was one of the first countries that sought to adapt its Constitution to C169 standards after ratifying the treaty; a clear example of this is reflected in its Constitution of 1995, which includes the concept of multiculturalism and recognizes indigenous groups as holders of rights.

Certainly, **Bolivia** ratified the C169 under its 1967 Constitution, in which no reference was made to multiculturalism, or to the indigenous people who have always been the majority in that country. It was only with the 1995 Constitution that Bolivia declared itself a multiethnic and multicultural Republic, in particular Articles 127 and 171. The former article included the figure of the Ombudsman with the mandate to ensure the defense, promotion and dissemination of human rights and guarantees of persons in relation to administrative activity, without, however an express reference to an independent institution to specifically ensure the rights of indigenous people. Nonetheless, the Ombudsman became a space where members of the public could seek redress for violations of their rights. Secondly, the aforementioned Article 171 recognized the legal personality of indigenous and peasant communities. However, in practical terms, the scope of this article has been rather limited, especially considering the disorderly regulatory progress for realizing the rights of these populations, as discussed below.

The 2009 Constitution for the first time includes prior, free and informed consultation, specifically a chapter on the rights of Original Indigenous People and Peasants, in which states have the right to be consulted through appropriate procedures, including through legislative or administrative measures. The chapter also guarantees the right to prior consultation on a mandatory basis, to be agreed upon and carried out by the State in good faith, regarding the exploitation of nonrenewable natural resources in inhabited territory.

In the case of **Colombia**, C169 was ratified on August 7, 1991. Its constitution of the same year does not include consultation as a right. However, this and other rights of indigenous and tribal people have been included from a joint interpretation of Articles 93 and 94, which gives constitutional status to human rights treaties, including the ILO C169. This means that the Convention is an international standard for direct application that has the same level of importance as the Constitution. Therefore the rights that are part of, or recognized, within the "block of constitutionality" cannot be suspended under any circumstances. It is certainly appropriate to emphasize that, in the case of Colombia, this right has developed through the jurisprudence of the Constitutional Court, which will be discussed below.

The case of Brazil is unique because its current Constitution (1988) predates C169 (1989) itself. The document devotes a chapter (VIII) to the rights of the "Indians" (name used verbatim), recognizing their social organization, customs, language, beliefs, traditions, and indigenous rights. Additionally, it notes that in the case of the use of water resources, and mining of mineral resources on indigenous lands, it is expected that they can only be carried out with authorization of the National Congress, after hearing the affected communities and being assured of their participation in the process of resource extraction.

While this cannot strictly be considered as a "consultation" under the terms of C169, it bears emphasis that the particular reference to the concept of indigenous participation in earlier stages of decision making in investment projects is not included in any other constitutions of the countries analyzed in this report. The fact that the Constitution entered into force before C169 is also relevant. That said, and as a result of the dynamic characteristics of a country like Brazil, it was the last country (of those

included in the analysis) to ratify C169 (May 25, 2002). Thus, the right to consultation as a general principle was incorporated in domestic law only in 2002, through Legislative Decree No. 143, which also extends protection to tribal people, in this case the quilombolas people.

Regarding the legal status of the right to prior consultation in Brazil, under the terms of C169, through section 45 of the 2004 Constitutional Amendment, was incorporated into Article 5 of the Constitution. The third paragraph stipulates that "international treaties and conventions on human rights that are approved in each chamber of Congress, in two sessions, three fifths of the votes of the respective members will be equivalent to constitutional amendments." As interpreted by the Supreme Federal Court of Brazil, the human rights treaties ratified by the country are hierarchically superior to ordinary laws, but below the Federal Constitution. Therefore, only those human rights treaties to be ratified by the Congress under a quorum comprised of three-fifths of the votes of both the Senate and the Chamber of Deputies have hierarchical constitutional status. It follows that in Brazil the C169 does not enjoy the same status of constitutional law as the Bolivian and Colombian cases.

Ecuador ratified C169 on May 15, 1998; while its Constitution of the same year came into force after the ratification of the Convention. Influences from the ratification of C169 are obvious, especially when one reviews the aforementioned Constitution of 1998, which in several articles provides for a wider range of protection and respect for the rights of indigenous people. For example, in article 84, paragraph 5, reference is made to the right of indigenous people to be consulted on plans and programs of exploration and exploitation of nonrenewable resources found on their lands, which could have environmental or cultural effects on lands; that section also calls for the sharing of reported profits.

The Constitution of 2008 also includes the right to prior consultation, participation and institutionality, adding to the pre-legislative consultation. It stipulates that no law can restrict the content of rights or constitutional guarantees; and that this content should be developed progressively. Therefore, any rules that restrict or limit the exercise of the right to consultation, or any act or omission that diminishes or abolishes the exercise of rights, shall not be legally applicable because it would be at variance with the constitutional provisions in force.

Finally, the Constitution makes reference to "environmental consulting" which is a term not included in any other Constitution of the countries that are part of this report. However, despite expectations that may be generated from the mere mention of the term, it should be noted that more than a consultation with indigenous people, the latter refers to public participation in general, not necessarily with respect to the particular situation of indigenous and tribal groups, afro-descendants and other citizens.

In **Venezuela**, the current Constitution (1999) incorporates a series of rights that until now had no support, especially at the constitutional level: to name a few: the right to territory (Article 119); to prior, free and informed consultation (Article 120.); cultural identity (Article 121); traditional health (Article 122); economic practices (Article 123); the right to collective intellectual property (Article 124); political participation (Article 125.). Generally speaking, the document recognizes that indigenous cultures have ancestral roots, are part of the Nation, the State, and the Venezuelan people, and also stipulates that the term "people" cannot be interpreted in this Constitution within the meaning given to it in international law (Article 126). Based on this, the dimensions of self-determination of the rights of indigenous people in Venezuela would be: spatial dimension (Article 119); political dimension (Article 119); participatory dimension after consultation (Article 120); cultural dimension, cultural identity (Article 121.); economic dimension (characteristic economy) (Article 123); legal dimension (own right) (Article 260), but always subject to the common interest of the Venezuelan nation as a whole.

Also, Article 23 specifically states that treaties, agreements and conventions on human rights that are signed and ratified have constitutional status and precedence in domestic law, insofar as they contain provisions concerning the enjoyment and exercise of rights that are more favorable than those established by its Constitution and the law of the Republic and are immediately and directly

applied by the courts and other bodies of the public. Therefore, we can assume that in Venezuela the C169 is within the block of constitutionality.

Indeed, the Constitution of 1999 introduced a greater recognition of rights of indigenous people, reaching what has been called the second stage of Latin American indigenous constitutionalism: the multicultural constitutionalism period, characterized by post- ratification processes of Convention 169 of the ILO by several countries in the region (Peru and Colombia are some of these cases), and a growing recognition of the role of the people in controlling their own institutions, ways of life and development, and seeking to strengthen their identities, languages and religions, within the framework of the state.11[11]

It may be noted, in the case of Venezuela, whose 1961 Constitution mentioned the rights of indigenous people, it must be recognized that we were dealing with an isolated recognition whose main intention was to progressively assimilate indigenous people. A prime example is Article 77 of the Constitution (1961):

> Article 77.- The State strives to improve the living conditions of the rural population. The law establishes emergency rule that requires the protection of indigenous communities and their progressive incorporation into the life of the nation.

It bears special emphasis that this country ratified Convention 107 in 1983, on par with the approval of a Missions Act by which members of indigenous groups depended on the Catholic Church. It was only on May 22, 2002 that the country ratified Convention 169, nullifying Convention 107, thus recognizing the indigenous, multiethnic, multicultural and multilingual nature of Venezuelan society.

Certainly, we must admit that this increased recognition has not been free, nor was it the result of an act of generosity on the part of the state. The representative indigenous organizations of that country (Organization of Indigenous People of the Amazon - ORPIA and the Socio-Environmental Working Group of the Venezuelan Amazon -Wataniba), achieved these results through a very difficult struggle with the heterogeneity of the government.

In the case of **Peru**, the Convention was ratified in 1993 and entered into force two years later. While the current Constitution (1993) makes no explicit reference to prior consultation, C169 is considered part of national law in accordance with Article 55 of the Constitution and the Fourth Final Provision of the Constitution. The former section states that "treaties concluded by the State and in force form part of national law" and the latter stipulates that "the rules relating to the rights and freedoms that the Constitution shall be interpreted in accordance with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Peru. Thus, in Peru it is prevailing theory of constitutional law. In other words, prior, free and informed consultation is considered a constitutional right and a parameter of legal interpretation. On a jurisprudential level, judgments of the Inter-American Court of Human Rights, by rule of the Fourth Final and Transitory Provision of the Constitution and Article V of the Preliminary Constitutional Procedural Code are binding for all of the national public, even in those cases in which the Peruvian State has not been involved in the process (See: Exp. No. 2730-2006-PA / TC, Fj 12). The standards established by the Inter-American Court on indigenous people are binding on our country.

1.2 At the policy level

Bolivia is the country with the highest regulatory variance on the issue of consultation. However, like Colombia, Ecuador and Brazil, this country does not have a law that specifically outlines the right to

11 See YrigoYen, Raquel. "El horizonte del constitucionalismo pluralista: del multiculturalismo a la descolonización". En: rodríguez, C. (Coord). El Derecho en América Latina: Un mapa para el pensamiento jurídico del siglo XXI (2011). Buenos Aires: Siglo XXI Editores. pp. 139- ss.

prior consultation under the terms of C169 (here we refer to a general law, not one by sectors). Among the most important rules implementing this law in Bolivia we can mention the Hydrocarbons Law (Law No. 3058) and its regulations (Supreme Decree No. 29033). The aforementioned Act expressly refers to C169 as a normative base, providing the following times when a request for consultation shall be made:

a. Prior to the tender, authorization, procurement notice and approval of measures, works or hydrocarbon projects, being a necessary condition for these.

b. Prior to the approval of the Environmental Impact Studies. In the event that the works, projects or activities overlap with native and indigenous people and peasant communities, and areas of high value diversity, the project will be categorized as Level 1 (Comprehensive Analytical Study of Environmental Impact).

The Regulation of the Act provides that every moment of consultation should include four phases:

1. Coordination and information.

2. Organization and planning consultation.

3. Running the query.

4. Coalition.

Moreover, the potential for a challenge by indigenous groups and peasant communities is included, when in this second moment the results of the consultation and participation are not duly incorporated. At that point, the competent authority has the power to initiate an administrative proceeding against the company responsible for the Environmental Impact Assessment Study.

For its part, the Law of Mining and Metallurgy, Law No. 535, provides a binding character to the agreements that arise from the consultation process, making reference to C169. However, in practical terms, this is very distant from the standard of free, prior and informed consent because, among other things, it is general and does not provide mechanisms to ensure obtaining that end. It bears special notice that the aforementioned regulatory device was not properly consulted; contrary to that mandate, it was the result of negotiations with the cooperative mining sector (small and medium private groups) and sector organizations including the collective of water users from the department of Cochabamba. On the other hand, there is no regulatory provision of this law that details the procedure to be followed in relation to consultation in the mining sector.

In short it has been reported that in the case of Bolivia, the existing rules on consultation, referred to above, present some possible contradictions that must be resolved as soon as possible; for example, "the Hydrocarbons Law states that the results of the consultation should be respected; in turn, the Constitution recognizes right of nations and native indigenous people to "be consulted through appropriate procedures, through its institutions, whenever legislative or administrative measures which may affected are foreseen. (...) However, the Electoral Law states that the results of the consultation are not binding, though they must be taken into account. Therefore, another challenge for prior consultation in the country is to clarify the regulatory framework surrounding prior consultation, particularly the issue of mandatory compliance by the State" (KAS, 2012, p. 40).

In the case of Colombia, the development of legislation regarding the right of consultation started with Act No. 99 of 1993, Article 76 of which states that the exploitation of natural resources should be done without impairing the cultural, social and economic integrity of indigenous and black communities, according to Law No. 70 of 1993 and Article 330 of the Constitution. In addition, decisions on the matter should only be made after consultation with representatives of such communities.

Supreme Decree No. 1320 of 1998 regulates consultation with indigenous and black communities for the exploitation of natural resources within their territory. While this regulation marks a clear procedure

for consultation with indigenous and black communities, it is very restrictive, because it states that the purpose of the consultation is to analyze the economic, social, cultural and environmental impact of the exploitation of natural resources of a project, work or activity.

On the other hand, the Presidential Directive No. 01 of 2010 outlines the mechanisms for the implementation of Law No. 21 of 1991 (a provision that was challenged for limiting the regulated content and because communities were not consulted). The Presidential directives alluded to have been criticized for regulating rights of people, without the prior realization of a corresponding consultation processes.

The Code of Administrative Procedure and Administrative Disputes, in Article 46, states the obligation of prior consultation, establishing nullity if time limits are not complied with.

Other important rules on the issue of consultation in Colombia are Law No. 1444/11 and Decree No. 2893/11 (establishing the competencies of the Ministry of Interior on Prior Consultation). Under these rules, the Interior Ministry will aim, within the framework of its powers and the law, to formulate, adopt, coordinate and implement public policies, plans, programs and projects in consultation. This law makes no other reference to the issue of prior consultation.

Also, Presidential Directive No. 10/13 created the Guide for the realization of prior consultations and Directive No. 2613/13 adopts the Protocol to the realization of prior consultations.

Regarding the time of the consultation, according to the Directorate of Prior Consultation of the Ministry of Interior, any natural or legal (domestic or foreign) person of public or private character, who wishes to implement any project, work or activity in Colombia (there is no sectoral difference according to the ministry) must first apply to the Directorate after consulting with the Ministry of Interior regarding the procedure for certification of the existence of ethnic communities; he must also verify the existence of these communities in the area of the project, work or activity. If the existence of ethnic groups in the area of interest is certified, he should request the initiation of a prior consultation.

In the case of **Brazil**, although there is no federal law regulating the consultation, we can highlight some decrees establishing obligations related to those provided in the C169. Most notably, Decree No. 4887 of November 20, 2003 regulates the land rights of *quilombolas* as ethnic and racial groups, according to the criteria of self-identification; the law treats the *quilombolas* as having their own historical trajectory, endowed with specific territorial relations and therefore a rightful part in all stages of the administrative procedure for identification, recognition, delimitation, demarcation and titling of claimed lands claimed. Decree No. 6040 of February 7, 2007 establishes guidelines for the National Policy on Sustainable Development of Traditional Groups and Communities (Article 3, I and II). Decree No. 7747 of June 5, 2012 provides the National Territorial

Policy and Environmental Management of Indigenous Lands (PNGATI). In the same year, a Ministerial Working Group (IWG) was established to drive the design of PNGATI, culminating in five regional consultations with representative organizations of indigenous groups. These consultations involved approximately 1,250 indigenous representatives from 186 nations. (DPLF, 2015, 21-22).

In addition to federal regulations, some Brazilian states have sought to regulate certain aspects of prior consultation. By way of example, Decree No. 261 of 22 November 2011, supplemented by IDESP Normative Instruction No. 001, of August 6, 2013 – both from the State of Pará - establishes the competence of the Pará Social and Environmental Economic Development Institute for the consultation process "Plan for Utilization and Sustainable Socioeconomic and Environmental Development."

In **Ecuador**, in mid-September 2004 the Environmental Management Act was published, which among other things reflects the levels of participation of the public and private sectors in environmental management, as well as mechanisms of social participation, especially articles 28 and 29 which govern any natural or legal person, including consultations, public hearings, initiatives, proposals or any association between the public and private sectors. The reference to indigenous people is clear

from the mention in Article 88 of the Constitution then in force (1998), noting that failure to consult will be grounds for annulment of the relevant contracts.

However, it should be noted that Article 88 does not comply with the comprehensive approach on prior consultation established by the C169, as it is limited to an informative and search process in accordance with the needs of the people.[12]

This has been reflected in the Rules of Participation of the Law on Environmental Management cited above, Executive Decree No. 1040 of May 2008 (passed a few months before the enactment of the current Constitution). That decree includes a procedure for the regulation of participation for indigenous people and Afro-Ecuadorians, noting that the foreseen process of social participation will be applied without prejudice to the special arrangements granted in articles 84 and 85 of the Constitution (1998) to indigenous and Afro-Ecuadorian groups. In principle, this does not create major problems for the mechanisms that said regulation provides, though they are quite limited to the extent that they do not provide any distinction between the rights of indigenous groups and of citizens in the consultation process.

When the 2008 Constitution entered into force in mid-April 2010, the Organic Law of Citizen Participation was enacted as the textual reference of the right to free, prior and informed consultation in favor of communities. indigenous, Afro-Ecuadorian and *montubio* people, in terms of planning, prospecting, exploitation and marketing of nonrenewable resources found in their territories. The law indicates that their organizational forms will be respected as will the exercise and representativeness of authorities that are developed in accordance with their own procedures and internal rules, provided they are not contrary to the Constitution and the law. That body of law also provides for environmental consulting figure as part of a broader objective to provide mechanisms for citizen participation in governance.

Even if the above regulatory devices were intended to be general in nature, in Ecuador there is no prior consultation law that is applicable to all sectors. For example, within the hydrocarbons sector a hydrocarbons law remains in force whose text states that before the implementation of plans and programs on exploration and exploitation of hydrocarbons that are found in territories of the Ecuadorian state that belong to indigenous, black or Afro-Ecuadorian group and that might affect the environment, Petroecuador, its subsidiaries or contractors or partners should consult ethnic groups or communities. They must conduct assemblies or public hearings to explain and expose the plans and purposes of their activities, the conditions under which they will develop, the timelines and the possible direct or indirect environmental impacts on the community or its inhabitants. After the consultation, the Ministry is responsible for making the decisions that are most suited to the interests of the Ecuadorian State.

Also, Presidential Decree No. 1247 of July 2012 establishes, "Regulations for the implementation of free, prior and informed in the bidding process and allocation of areas and hydrocarbon blocks consultation." The Hydrocarbons Secretariat is responsible for carrying out the consultation, determining the mechanisms of participation, identifying the actors who intervene, as well as administrative procedures, and determining the social benefits that will be received.

We may add that this regulation was not subject to prior consultation by indigenous people and nationalities, and thus reflects several patterns similar to previous instruments, which occurs when the consultation process is equated with general information processes regardless of cultural barriers. For example, Article 13 section 5, refers to the distribution of materials on the block or area to be tendered or assigned. It does not provide that they be delivered in the language of the people, or address accessibility mechanisms to facilitate their understanding. It was notable that the issuance of regulations under review, preceded by a few days the publication of the judgment of the Inter-

12 Constitution of 1998, article 88.- Every state decision that may affect the environment must comply with the criteria of the community, which must be duly informed. The law guarantees their participation.

American Court on Human Rights in the Sarayaku case where the Ecuadorian State was condemned for failing to comply with prior consultation of the indigenous Kichwa people of Sarayaku.

Finally, it is pertinent to note that the 2008 Constitution incorporates a duty to consult not only for measures, plans or programs related to extractive activities in indigenous territory, but also for legislation that may affect any of their collective rights (Article 57, section 17). This measure was further detailed by the National Assembly in mid-June 2012 when it issued the Pre-Legislative Instructive Application Consultation, whose purpose is "(...) regulate the exercise of the right to free, prior and informed consultation of the communities, indigenous groups, the Afro-Ecuadorian and *montubio* people, holders of collective rights." It ruled that the responsibility for the implementation of the pre-legislative consultation rests with the National Assembly and is exercised through the respective permanent or occasional Specialized Committee.

As such, it provides four phases for implementation:

1. Preparation Phase, to delimit the substantive items and their proper foundation for undergoing pre-legislative consultation mechanisms.
2. Public convocation of registration phase, which aims for the representation of organizations at local and national levels who hold collective rights and are linked to substantive issues to register and participate in the consultation.
3. Completion of the consultation, which addresses internal discussion between different levels of the organizations on the subject of consultation in accordance with their customs, traditions and procedures of deliberation and decision-making.
4. Analysis of results and closure of the pre-legislative consultation, which includes the receipt of documents and compilation of results for provincial public hearings in order to socialize results and identify consensus and dissent. A final report will be published with the results of the consultation that should be sent to the Presidency of the Assembly for the closure of the consultation.

It bears considering that under the principle of hierarchy this "Instructive" category occupies the role of legislative resolution. It doesn't have the character of a decree with the force of law because it is not dictated by the executive. It certainly does not have the force of law because it was not passed according to parliamentary procedure. Nevertheless, it sets basic parameters for the application of the pre-legislative consultation, obviating in some respects the guidelines derived from the constitutional block (eliminating competencies linking fundamental rights that should not be regulated by Decree).

It is no less important to point out the rejection of different institutions representing the indigenous movement, as occurred with the ECUARUNARI (Peasant Movement of Ecuador, translated from *Quechua),* who expressed their rejection to the "Instructive" through an assembly of members from the indigenous party Pachakutik. They said that the instructive was un-consulted and would not comply with the standards established in the Constitution nor with international human rights instruments relating to the subject and object of consultation; it therefore would not be binding.

Venezuela operates with an Organic Law of Indigenous Groups and Communities[13], enacted in 2005, which defines the obligation and mechanisms to follow for the conduct of free, prior and informed consultation. However, contrary to that mandate, it is appropriate to highlight that it does not define the obligation to report on the completion of the consultation process, or pinpoint the agency responsible for keeping track of these procedures. This absence should lead us to demonstrate the difficulty of monitoring some consultation processes that are carried out. In this sense, they are working on the promulgation of regulations defining the obligation to report, to the Ministry of Popular Power for

13 Organic Law of Indigenous Groups and Communities: Entered into force and published in the Official Gazette of Venezuela No. 38 344, December 27, 2005.

Indigenous People, all consultation processes that are performed, including the effects of consultation and reparations for damage caused by the lack of it or by inadequate consultation in other respects.[14]

Indeed, in light of the aforementioned omissions, some Amazonian groups are considering the development of their own manuals. The tendency of government is "no consultation", but there are specific cases where it has sought indigenous participation in the formulation of policies (the case of the right to health of the Yanomami, for example). This may be an isolated case, but it demonstrates an opportunity within the framework of a government with political projects.

Finally, **Peru** is the only country of those included in this document that has implemented a Prior Consultation Law as a general framework. Indeed, in 2011, sixteen years after C169 entered into force, the country enacted the Law of the Right to Free, Prior and Informed Consultation for Indigenous or Native people (Law No. 29785), which about year later was regulated (by Supreme Decree No. 001-2012-MC). This consultation law established guiding principles for the conduct of free, prior and informed consultations, overcoming the fact that before its enactment, some sectors established internal rules for participation and protocols of understanding for projects that may affect territories or rights of communities, which cannot be properly considered consultations.

Under the Act, the specialized technical body in indigenous affairs is charged with arranging, articulating and coordinating the implementation of the right to consultation by the various state entities of the Vice Ministry of Interculturality of the Ministry of Culture.

As a result, the consultation activities in the different branches of activity should be carried out in coordination with the promoter (which may be the Presidency of the Council of Ministers, ministries and/or public bodies, through its competent bodies) and the Vice Ministry of Multiculturalism.

In order to enforce compliance with the right to consultation, Article 26 of Supreme Decree No. 001-2012-MC stipulates that each promoter must define administrative procedures that will be applicable to the prior consultation process, the competent body and the moment in which it will be realized.

For example, in the case of prior consultation in the hydrocarbon industry, Ministerial Resolution No. 209-2015-MEM/DM of May 4, 2015, details the administrative procedures to be consulted, the time of implementation, and the management in charged, as indicated in table 1 below:

14 Working Group on Indigenous Affairs of the University of the Andes (ULA). Situation of the Right to Prior Consultation in Venezuela (2016), p. 32.

Table #1

Administrative Procedure	Opportunity of the consultation process	Division in charge
Concession for the transportation of hydrocarbons by ducts.	Prior to granting concession.	General Division of Environmental Energy Affairs.
Concession for the distribution of natural gas by duct network.	Prior to granting concession.	General Division of Environmental Energy Affairs.
Modification of the Concession (only if it deals with an expansion).	Prior to granting modification.	General Division of Environmental Energy Affairs.
Authorization of installation and operation of the duct for principal and personal use.	Prior to granting authorization.	General Division of Environmental Energy Affairs.
Modification of transfer of authorization for the installation and operation of the duct for personal and principal use (only if it deals with an expansion of territory for the operation of the duct.)	Prior to granting modification of the authorization	General Division of Environmental Energy Affairs.
Supreme Decree that approves the ratification of Contracts for the Exploration and Exploitation of petroleum and gas plots.	Prior to emitting the Supreme Decree.	General Division of Environmental Energy Affairs.
Favorable Technical Report for the installation of Refining Plants and Processing of Hydrocarbons and Service Stations.	Prior to publishing the authorization	General Division of Environmental Energy Affairs.

Source: RM N° 209-2015-MEM/DM

From the above it follows that the rules relating to prior, free and informed consultation in Peru are no more than five years old. That is also the case for the Ministerial Resolution No. 375-2012-MC, approving the directive regulating the procedure for registration interpreters of indigenous or native languages. Viceministerial Resolution No. 001-2012- MC with the register of interpreters and facilitators was also created around that time. The Ministerial Resolution No. 202-2012-MC creates the official database. Viceministerial Resolution No. 004-2014-VMI-MC provides guidelines and tools for collecting social information and sets criteria for the identification of indigenous or native groups. Finally, Viceministerial Resolution No. 010-2013-VMI-MC on the right of petition procedures of indigenous people for inclusion in a process of consultation or for the performance thereof, within the Ministry of Culture.

It is worth noting that this law has not been exempt from questioning. Roger Merino, among others, has questioned the aforementioned Law and Regulations states that "the result of the process is not binding unless it has been agreed (art. 1.5), i.e. if the result of the consultation is a resounding no, that decision has no legal value because the final decision belongs to the State (art. 23.1). Furthermore, as a requirement of consultation process, attentions should be drawn to the constant emphasis on the need for the "direct involvement" of indigenous rights (art. 3 i), 6, 19.1, 23), opening the door for interpretations that can unjustifiably limit these rights. "The various exemption from the consultation

process are also worrying. For example, the rules for tax or budget shall not be the subject of consultation (5, k), nor shall extraordinary or temporary decisions to attend natural disasters or "technological" health emergencies, and measures aimed at the control of illegal activities (art. 5L). One wonders what happens when the exceptional and temporary nature disappears? What happens when they cease illegal activities? Would it not be reasonable to discuss whether it is possible to return to the previous state of the involvement of indigenous rights? The standard is silent on that point."[15]

Finally, Peru also has a regulatory framework on the rights of indigenous groups in isolation and those in the situation of initial contact. Such is the case of the Law for the protection of indigenous or native people in isolation, Act No. 28736 (2006), which establishes the obligation of the Peruvian state to create Indian Reserves determined on the basis of the occupation of areas which have traditionally been accessed by groups in isolation and who may face initial contact, until they voluntarily decide their degree of participation. However, Article 5C draws attention to the intangible nature of Indian Reservations, with the following exception stated: "(...) if a natural resource susceptible to utilization whose exploitation is of public necessity for the state". This criterion is reinforced by the provisions of Article 35 of the Regulation of that Act (2007), which alludes to the use of resources by public need. Also, the First Supplementary and Transitional Provision provides for a time frame of six months, after its entry into force, for the adaptation of a Territorial Reserve to an Indian Reserve.

1.3 At the institutional level.

We believe that **Bolivia** is the country where competencies overlap the most because, although in theory each sector and level of government is responsible for carrying out consultation processes under their jurisdiction, in practice, we face the existence of various state agencies with scattered and ambiguous functions in this area.

In the hydrocarbons sector it is the Directorate General of Socio-Environmental Management (DGGSA) the Deputy Minister of Energy Development of the Ministry of Hydrocarbons and Energy (MHE) that participate in consultation processes in hydrocarbons, in coordination with the Ministry of Environment.

In the mining sector, it is the Deputy Minister of Energy Development of the Ministry of Mining. According to the Mining Law of 2014, the Jurisdictional Management Mining Authority - AJAM is the competent authority to carry out the consultation provided in the Act.

On the other hand, the Electoral Law grants the Intercultural Service of Democratic Strengthening (SIFDE) of the Supreme Electoral Tribunal the role of observation and accompaniment in the consultation process. This institution is more important in mining than in the hydrocarbon sector, because consultation processes in that sector are already under way. On the other hand, being assumed by the Electoral Board, the right to consultation is considered a right of citizen participation.

In this country, the Ministry of the Presidency has an Interagency Technical Commission for Indigenous People, and the Ministry of Justice has the Vice Ministry of Common Law Indigenous as well the Ministry of Health with the Vice Ministry of Intercultural Medicine both for the promotion and protection of the rights of indigenous people. This structure was created as a way to resemble the pattern of Colombian operation and does not do anything but superimpose responsibilities.

Finally, the explicit reference to the inclusion of the regulatory framework on rights of indigenous people of C169 in the block of constitutionality was achieved thanks to the jurisprudence of the Plurinational Constitutional Court.

15 Merino, Roger. "Perú: Consulta previa: Mecanismo de inclusión para perpetuar la exclusión". See: https://www.servindi.org/actualidad/67334 (Visited 08/18/16)

An important observation is that in 2005 joint responsibility for the implementation of consultation process was shared by the Ministry of Hydrocarbons, Ministry of Sustainable Development and the Ministry of Indigenous Affairs and Native People. However, after the abolition of the Ministry of Indigenous Affairs and Native People by President Evo Morales, there was no direct coordination space between the state and indigenous organizations.

In the case of Colombia, the institution in charge of the consultation process is the Ministry of Interior, specifically the Directorate of Prior Consultation. This division is organized into three areas:

a. Certification Area, responsible for issuing administrative acts relating to the certification of presence or absence of Ethnic Groups in the area of influence of a project, work or activity;

b. Management Area, responsible for executing the processes of consultation with each of the communities that are recorded in projects, works or certified activities; and,

c. Legal Department, responsible for legal support for each of the actions of the Directorate of Prior Consultation.

In addition, other institutions involved in the consultation process are the Ombudsman, the Indigenous Territorial Entities, the Constitutional Court and the State Council.

In the case of **Brazil**, pursuant to Article 49, paragraph XVI of the current Constitution, the National Congress is the competent body to "authorize exploration and exploitation of water resources and exploration and exploitation of mineral wealth in indigenous lands" prior to dialogue with affected communities. To this end, in order to develop rules for the consultation the Inter-ministerial Working Group (IWG) was instituted. However, this has failed to materialize due, among other reasons, to the low presence of indigenous representatives in that group.

Also, in cases of consultation, given that there is no specific legislation that regulates or delineates the entity or unit that is responsible, it has been proposed that the entity of the Federal Public Administration responsible for the project notify the Cultural Foundation of Palmares (in the case of involvement of quilombo communities) or FUNAI (in cases of affected indigenous communities) for the creation of a Commission of Prior Consultation.

Regarding the institutional mechanisms of environmental management, according to Law 6938, which regulates National Environmental Policy, jurisdiction is granted to the National Environment Council (CONAMA) to establish, by proposal of the Brazilian Institute of Environment and Natural Resources (IBAMA), the rules and criteria for licensing potential polluting to be granted by the Member States of the Federation activities. In addition to determining when considered necessary, conducting studies on possible environmental consequences of public or private projects and can supervise federal, state and municipal bodies and private entities, all essential for assessing information studies environmental impact. However, it should be noted that the preparation of the above reports and/or studies for licensing is not conducted under C169 standards of "prior consultation." On the contrary, its configuration postulates participation mechanisms aimed at the citizenry in general (which according to its guidelines receives the name "public consultation").

In **Ecuador**, through Executive Decree #1522, of May 2013, the National Secretariat of Political Management was created, whose work consists of publicizing the political projects of the government. For these projects, the Secretariat is responsible for designing adequate strategies for the application of sectorial policies defined by the Political Council, as well as citizen participation in the design, management of monitoring. It has a General Coordination of Social and Political Actors that is responsible for promoting and strengthening mechanisms of dialogue between social and political actors for the construction of the Plurinational and Intercultural State.

Regarding coordination with indigenous people, we have the Council of Development of the Nationalities and Indigenous People of Ecuador (CODENPE), created in 1998, the year in which Ecuador ratified C169, through Executive Decree #386, as a public organism belonging to the Presidency of the Republic,

and responsible for carrying out policies to strengthen Nationalities and Indigenous Groups, as well territorial planning through the coordination of the processes of formulation, design and follow-up of the life plans of the nationalities.

By constitutional mandate in articles 156 and 157 as well as the sixth transitory disposition, and through the Organic Law published in Official Registry #283 on July 7, 2014, the National Council for the Equality of Nationalities and Indigenous Groups was created, CNINP. As a result, CODEBPE finds itself in a process of transition towards this new entity.

It bears mentioning that, similar to the situation in Brazil, in Ecuador there is not one entity that is centrally responsible for the prior consultation; in this way, the prior consultation is implemented in a sectorial manner. Thus, for example, in the area of hydrocarbons, the responsible entities are the Secretariat of Hydrocarbons and the

Ministry of Non-Renewable Natural Resources under coordination with the Ministry of the Environment, the Coordinating Minister of Social Development and the Secretariat of Indigenous People.

This sectorial character is also reflected in the institutional arrangements for the approval of the Environmental Impact Studies which, in accordance with Article 21 of the Environmental Management Law, means that every Ministry of the corresponding branch (Hydrocarbons and Environment to cite a couple of examples) will be in charge of delivering or refusing the corresponding license, prior to the systemic study of environmental management (which includes the evaluation of the baseline study, evaluation of the environmental impact, risk evaluation, management plans, monitoring systems, mitigation and contingency plans, environmental audits and abandonment plans).

In **Venezuela**, there is a Ministry of Popular Power for Indigenous People, that is the governing body of governmental policies relating to their rights of indigenous groups. It is responsible for facilitating and promoting the strengthening of indigenous communities, while also serving as a vehicle for the diffusion of policies - created in a grassroots collective manner – to provide responses in the short and medium term to the most pressing needs of the communities. Likewise, with respect to indigenous institutionality, there are indigenous communal counsels that serve as focal points for the reception of direct benefits from the state. Nonetheless, despite such good intentions, this has had a strong impact on a cultural level – in terms of the indigenous part – because traditional authorities do not participate in decision-making (especially in the application of public policies.)

Through the aforementioned Organic Law of Indigenous People and Communities, Official Gazette #38.344 of December 27, 2005, the National Institute of Indigenous People (INPI) was created as a decentralized and autonomous body with legal status, and its own budget independent from the National Treasury, financial, functional, organization and technical autonomy. The body will also enjoy the privileges and prerogatives provided by the Constitution of the Bolivarian Republic of Venezuela.

Venezuela also has what has been called the Homeland Plan, which arose out of the anniversary of 200 years of republican life, and which in general terms provides a series of strategic objectives – political, economic, social and cultural – for the 2013-2019 period. Additionally, in relation to the rights of indigenous people, it provides important orientations for the protection of their rights, including the need to operate with a swift process of demarcating indigenous territories through the delivery of property titles to communities, or the need to develop programs related to intercultural bilingual education.[16]

Specifically, in contrast to normative and institutional developments, some concrete cases demonstrate the alluded to incompatibility of implementation. A clear example is what occurred in the middle of

16 Plan de la Patria: Segundo Plan Socialista de Desarrollo Económico y Social de la Nación, 2013-2019. Available online: h t t p : // w w w. a sa mb l e a n a ci on a l . g ob . v e /u p l oa ds / b ot on e s/ bot_90998c61a54764da3be94c3715079a7e7 4416eba.pdf

2011 when the government proposed the Orinoco Mining Arco project and agreed with the Chinese multi-national company "Citic Group" to launch a process of exploration in the south of Venezuela. This brought about a situation in which indigenous organizations presented diverse public documents demonstrating their worry and rejection, questioning mineral exploration and prospecting of different minerals in the Amazonas State. To this date, representatives of indigenous organizations realize the pressures against them. However, the government has no initiated concrete actions to provides a solution to this serious problem.

In the case of **Peru**, as has been previously mentioned, the institution responsible for following the implementation of the right to the consultation is the Ministry of Culture, through the Viceministry of Interculturality and specifically, through the General Division of the Rights of Indigenous People and the Rights of Prior Consultation.

This ministry is also the governing body in the area of the protection of Isolated Indigenous People or those facing Initial Contact in the Peruvian Amazon (PIACI). Among its responsibilities are the coordination, evaluation and supervision of public policies of the other sectors of the state oriented towards protected the PIACI in the exercise of their rights.

In terms of legal framework, there is Law #28736, the Law for the Protection of Indigenous People in the Situation of Isolation or Initial Contact, in force since May 18 2006, and which recognizes the obligation to protect the life and health of the PIACI, respecting their decision to not have contact with the rest of the national society or their particular ways of achieving this.

Likewise, Supreme Decree #001-2014-MC has recognized six indigenous groups in a situation of isolation (Isconahua, Mashco Piro, Machiguenga (Nanti), Mastanahua, Murunahua, Chitonahua), and three indigenous groups in the situation of initial contact (Yora (Nahua), Machiguenga (Nanti y Kirineri), Amahuaca), as well as three indigenous groups in a situation of isolation whose ethnic background has not been identified.

1.4 Involved Indigenous Institutions

On the other hand, the existing indigenous institutions in the region have C169 as a guarantee for their formation and strengthening. Some of these organizations have been key actors for the implementation of the agreement in the analyzed counties through the formation of dialogue tables, mobilizations and normative proposals with an intercultural focus, among others.

In **Bolivia**, we can identify the following organizations:

- CIDOB – Confederation of Indigenous People of Bolivia
- APG – Assembly of the Guaraní People.
- COPNAG – Center for Guarayos Native People.
- CPIB – Center for Indigenous People of the Beni.
- CIRABO – Indigenous Center for the Amazon Region of Bolivia
- CIPOAP – Indigenous Center for the Amazon People of Pando
- CPITCO – Center for Indigneous People for the Tropic of Cochabamba
- CPILAP – Center for Indigenous People of La Paz
- ORCAWETA – Organiation of the Wehenayek Tapiete Captaincy.
- CSUTCB – Singular Union Confederation of Peasant Workers of Bolivia

- CSCB – Union Confederation of Colonizers of Bolivia

In the case of CIDOB, after the conflict that arose from the construction of the highway from Villa Tunari to San Ignacio de Moxos (TIPNIS), a CIDOB was formed with support from the state, considering that the group that had participated in the protests against the construction of the TIPNIS was acting illegally.

Here an important theme emerges. In Bolivia, there is a fund for the strengthening of indigenous organizations. Between 2005 and 2010, there was a change in the use of funds – note the context of the first government of Evo Morales; now the indigenous organizations are the ones in charge of executive projects. However, an examination of their implementation displays, as a result, a number of issues linked to the use of these funds to coopt organizations, which has resulted in the creation of parallel organizations financed with these resources (e.g., the case of CIDOB).

Regarding the political representation of indigenous people, something peculiar occurred. In accordance with the Law of Political Parties, indigenous people can only become members of congress (diputados) through their nomination within a political party. This situation can be considered injurious to the right to political participation, as it promotes a situation in which the elected official doesn't respond (and is not accountable) to the people in a direct way, but rather to the political party.

In **Colombia**, four ethnicities are recognized: a) Indigenous; b) Black, mixed and afro- Colombian; c) *Raizales* and d) Rom.

In the case of peasant communities, it is debated whether they should be considered part of the ethnic communities. It has been indicated that they are not able to claim the right to the prior consultation. The basis of this right to participation has been article

79 of the Constitution while the participation of the ethnic communities is based on the materialization of the right to the prior consultation contained in C169.

Within the main indigenous organizations in Colombia, we can mention:

- CRIC – Indigenous Regional Council of the Cauca
- ONIC – National Indigenous Organization of Colombia
- OPIAC – Organization of Indigenous People of the Colombian Amazon

In **Ecuador**, among the most important organizations, we should mention:

- The Interprovincial Federation of the Achuar Nationality of Ecuador (FINAE), legally recognized through Agreement # 5842 of the Ministry of Social Wellbeing, and which is part of the Confederation of Indigenous Nationalities of the Ecuadorian Amazon (CONFENIAE).
- The Confederation of Indigenous Nationalities of Ecuador (CONAIE).
- The Confederation of Indigenous Nationalities of the Ecuadoroian Amazon (CONFENIAE).
- The Kichua Confederation of Ecuador (ECUARUNARI); the Achuar Nation of Ecuador (NAE).
- The Andoa Nationality of Ecuador (NAPE).
- The Indigenous Federation of the Cofán Nationality of Ecuador (FEINCE).
- The Organization of Indigenous People of Pastaza (OPIP).
- The Federation of Organizations of the Kichwa Nationality of Napo (FONAKIN).
- The Federation of United Communities of Natives of the Ecuadorian Amazon (FKUNAE).

- The Federation of the Organizations of Kichwa Nachionality of Sucumbíos of Ecuador (FONAKISE).
- The Indigenous Secoya Organization of Ecuador (OISE); the Shiwiar Nationality of Ecuador (NASHIE).
- The Provincial Federation of the Shuar Nationality of Zamora Chinchipe (FEPNASH-ZCH).
- The Organization of the National Indigenous Siona of Ecuador Ecuador (ONISE).
- The Waorani Nationality of Ecuador (NAWE) and;
- The Zápara Nationality of Ecuador (NAZAE). In **Brazil**, the principal indigenous organizations are:
- The National Coordination of Collaboration of the Quilombolas Black Communities (CONAQ).
- The Coordination of the Indigenous People of Brazil (APIB).
- The Coordination of Indigenous Organizations of the Brazilian Amazon (COIAB).

In **Venezuela**, the principle organization that represent the rights of indigenous people are:

- Organization of Indigenous People of Amazonas – ORPIA.
- Socio-environmental Working Group of the Venuezelan Amazon – Wataniba

In the case of **Peru**, we can mention:

- The Interethnic Association of the Development of the Peruvian Jungle (AIDESEP)
- The Peasant Confederation of Peru (CCP)
- The Confederation of Amazonian Nationalities of Peru (CONAP).
- The National Agrarian Confederation (CNA)
- The National Federation of Women Peasants, Artisans, Indigenous People, Natives and Wage-earners of Peru (FENMUCARINAP)
- The National Organization of Indigenous and Amazonian Women of Peru (ONAMIAP)
- The National Union of Aymara Communities (UNCA)

On this point it is important to mention the Coordinator of the Indigenous Organizations of the Amazon Basin (COICA), that groups together the organizations of the Amazons countries, including those that form part of the present document: Interethnic Association of Development of the Peruvian Jungle, AIDESEP; Association of Indigenous People of Guyana, APA; Confederation of the Indigenous People of Bolivia, CIDOB; Coordinator of the Indigenous Organizations of the Brazilian Amazon, COIAB; Confederation of Indigenous Nationalities of the Ecuadorian Amazon, CONFENIAE; Federation of Amerindian Organizations of French Guiana, FOAG; Regional Organization of the Indigenous People of Amazonas, ORPIA; Organization of Indigenous People of Suriname, OIS; And Organization of the Indigenous People of the Colombian Amazon, OPIAC.

1.5 Principal conflicts and rulings

An important case both in **Brazil** and internationally is the conflict generated from the delivery of a construction license to the Belomente dam, which would have a serious impact on the indigenous communities and ecosystems close to the space where the project would occur.[17]

In 2005, the National Congress of Brazil approved Legislarive Decree #788, authorizing the Executive to begin the licensing process for the project to construct a hydroelectric dam. It bears mentioning that this approval was carried out with any prior consultation.

The dam will be constructed around the Xingú river,[18] located in the northern state of Pará and it is predicted that it will have capacity of 11,233.1 megawatts, which will represent the third biggest damn in the world – after the Three Gorges Dam in China and Itaipú, which is managed jointly by Brazil and Paraguay.[19] Its execution is part of the framework of the Accelerated Growth Program (PAC) promoted by the Brazilian government which, in summarized terms, involves the construction of a series of hydroelectric plants in the Amazon basin (see the case of the Hydroelectric Complex of Tapajós, as another example) with the objective of growing the energy security of the country.

Up to that point, the initiative of promoting a project was seen as an activity that went hand-in-hand with the improvement of the quality of life of many people. Nonetheless, the social cost and the irreversible impact on ecosystem and on indigenous people that traditionally inhabited these territories represents a serious step back in terms of the obligations of the Brazilian state concerning the protection of human rights. Among the main problems, we could mention the diversion of a good part of the Xingú river and its tributaries, the more than 20,000 people that will be displaced, as well as an estimated migration of approximately 100,000 people to the region, which will create threats for the indigenous people in voluntary isolation, largely because of the possibility of introducing illness and epidemics.[20]

These irregularities extend to the public forums carried out by IBAMA (Brazilian Institution for the Environmental and Renewable Natural Resources) which aimed to discuss the Environmental Impact Study (EIA) of Belo Monte. The level of participation was negligible, and the event was contrary to the state's duty of good faith, given the forced convocation through police repression, and information that was distorted, incomplete and not provided with proper notice.

Despite the aforementioned issues, on February 2, 2010, the President of IBAMA published the Prior License N.° 342/2010 of Belo Monte. Furthermore, despite the fact that two days before the technical team of the same institution emitted the Technical Note # 04/2010, informing that "there is not sufficient proof to demonstrate the environmental viability of the project." This resulted in the intervention of diverse PCAs (Public Civil Actions) that pushed for the suspension of the project. Nonetheless, by petition of the General Lawyers of the Union (AGU), the President of the regional Federal Tribunal of the 1st Region (TRF-1) unilaterally suspended the preliminary matters in favor of the PCAs, at the eve of the licensing process, making use of the "Security Suspension" prerogative, which is a legal artifice that allows the federal government to request the suspension of judicial decisions based on supposed threats to national security and to the "social and economic order" of the country.[21]

17 Regional Tribunal of the Region regarding authorization the National Congress for the Construction of Hydroelectric Plan of Belo Monte to be implemented in the Xingú river.

18 The Xingú river basis extends for more than 450,000 km2 and is known as a live symbol of the cultural and biological diversity of Brazil, housing 29 indigenous lands that comprise 198,000 km2, and inhabited by close to 20,000 indigenous people of 28 ethnicities. See: https://www.internationalrivers.org/files/attached-files/137_casos_paradigmaticos.pdf p. 33. (Visited: 02/20/16).

19 According to the following source: http://www.bbc.com/news/world-latin- america-12643261 (Visited: 02/20/16).

20 The following link can be consulted: http://www.survival.es/noticias/7184 (Visited: 02/15/16).

21 "The mechanism has been used in particular to suspend demands that favor the rights of indigenous people to the consultation and to prior, informed and free consent, which has allowed controversial projects such as the Belo Monte hydroelectric damn to continue despite violations to the Brazilian constitution and to international conventions. The

The displacement and flooding that resulted from the commencement of activities principally affected the indigenous territories of Kayapó, Araweté, Assuriní y Arara, who facing the lack of protection from state omission were forced to become displaced populations, heading to the city and substantially modifying their way of life.

The current situation is quite problematic, in the sense that in addition to the aforementioned, multiple instances of forced underage labor have been identified. Young people are captured to work as "cheap labor" in construction activities, or are driven to bordellos where they become victims of human trafficking.

Unfortunately, the problems do not end there, as according to the public prosecutor Thais Santi (Federal Public Ministry, Altamira, Pará State), there is a confluence between the interests of the State and the private sector in bringing forth a program, even though it means serious damage to indigenous people and to the environment.

Thus, for example, in relation to the Emergency Plan proposed by FUNAI for the "Promotion of Ethno-development" in the area related to the conflict in mention, the aforementioned prosecutor noted in an interview that:

> "The Emergency plan's objective is to create specific programs for each ethnicity, so that the indigenous people can be strengthened in relation to Bela Monte. The idea was the Indians gain power, so that they do not remain vulnerable in relation to the project. And I can say with complete tranquility that there was a deviation of resources in this Emergency Plan. I saw the Indians lining up in a counter of North Energy, an imaginary counter, when the plan said that they would stay in their homes. I began to perceive that this was happening when I made that visit to indigenous lands in Cachoeira Seca and I met the Arara, a group of recent contact. And it was a shock. I saw the amount of garbage that there was in that area, I saw the destroyed houses with holes in the rooves, with rain coming inside. And they slept there. The women Indians, on the riverbanks the kinds completely vulnerable to the fishermen that passed by. When Belo Monte began, this community of recent contact was without a chief of post. Thus, the Indians were faced not only with Belo Monte, but were also without an office of Funai (the National Foundation for the Indian) within the town. From one day to the next, they were alone(...)"22.[22]

As a result, following the above discussion, the Emergency Plan created a dependency on business, who was position as the universal provider of infinite goods. "North Energy created a dependency and did so deliberately. And this added to the incapacity of the Funai, because the foundation should have been strengthened by the process, but instead became each time weaker. The Indians distrusted the Funai while they established a dependency on business interests. It became a clientelistic situation."

As indicated by the above discussion, the problem became much more conflictive, even more so with the beginning of construction activities. It was even studied at the level of the Inter-American Commission on Human Rights (IACHR), as a result of which on April 1, 2011 cautionary measures were granted in favor of the members of indigenous communities in the Xingú River basin, including the order to suspend work. Nonetheless, the Brazilian state, instead of complying with these

decisions based on "Security Suspension" cannot be appealed until the final phase of court appeals, effectively blocking legal due process and paving the way so that controversial megaprojects can advance as done deals. See: "Abusos judiciales en Brasil, cuestionados en el aniversario del golpe militar: Comisión Interamericana de Derechos Humanos recibe información que cuestiona el uso que el Estado hace de instrumento legal de la época de la dictadura". March 31, 2014. http://www.aida-americas.org/sites/default/files/press_rel/ Comunicado%20CIDH%20Brasil%20ESP%2014-03-31.pdf (Consulted 02/2016).
See also:
https://www.internationalrivers.org/files/attached-files/137_casos_paradigmaticos.pdf p. 37 (Consulted: 20/02/16).

22 See the following link:
http://internacional.elpais.com/internacional/2014/12/03/actualidad/1417630644_275569.html (Visited: 02/20/16).

measures, demonstrated its rejection by proclaiming the measures "an undue interference affecting sovereignty." Later, the IACHR withdrew the request to suspend work and maintained the request to procure guarantees for the affected communities.

On October 25, 2013, the judges of the Fifth Room of the Federal Court of the 1st Region (TRF-1), which headquarters in Brasilia, unanimously revoked the license and the installation of the hydroelectric plant, suspending the work. This way, according to judge Antônio de Souza Prudente, who presided over the case, the obligation of the prior and informed consultation – determined by the Federal Constitution and C169 – was not carried out by the National Congress. Nonetheless, days later, the President of the same tribunal, judge Mario César Ribeiro, suspended the effects of the prior decision, signaling that as long as there wasn't a final judgment on the process, only the Special Tribunal of TRF-1, the Superior Court of Justice or the Federal Supreme Court could provide for a new cautionary measure to suspend the construction activities of the hydroelectric plant.

As a result, the project has continued. Nonetheless, on January 11th of this year, a judge in Altamira, in Pará Norte, ordered the stoppage of the reservoir for the hydroelectric plant, and imposed sanctions on the construction company Norte Energía SA as well as the Government of Brazil for failing to assist indigenous people affected by the construction.

The judicial order provided for a timeframe of five days from the judicial notification for the company and the National Environmental Institute (IBAMA) to stop the filling of the reservoir which had 87% of its civil works completed and was in the filling phase.

Another example is the decision of the Federal Regional Tribunal of the First Region – Judicial Subsection of Itaituba, Pará State, from June 2015, which prohibited the federal government from emitting the license for the construction of the São Luiz do Tapajós Hydroelectric plant until a free, informed prior consultation was carried out with the communities affected by the project.

The presiding magistrate based his decision on the referential framework of C169, signaling that "it not be ignored that this document and article 231 of the Constitution stipulates the duty to consult with indigenous people, leaving aside the assimilations and integrationist practices of the colonial period, imposed by the will of a dominant culture to the detriment of the ways of knowing, living and doing of indigenous people."

It bears mentioning that in this process, a number of government bodies – such as ANEEL (National Agency of Electric Energy) – and the involved companies, Electrobras, Electronorte – signaled that there would not be impact on indigenous people because these were not areas demarcated in the area of impact of the project and thus there was no need to carry out a consultation. It bears emphasizing that the Sawré Muyby and the Munduruku people live in the zone of activity.

In **Bolivia**, we note that the jurisprudential development demonstrates an interesting change in the protection of rights of indigenous people, influenced by the creation of the Plurinational Constitutional Tribunal (TCP) through the 2009 Constitution.

First of all, it can be observed that the decisions of the Constitutional Tribunal, are in a number of ways are contrary to the obligations stemming from C168. Secondly, with the incorporation of TCP, we have rulings that reverse the past and reinforce the international obligations derived from C169 and the jurisprudential standards development from the Inter-American System on Human Rights. Nonetheless, even citing the rulings as "advanced", it would not be prudent to omit mentioning that this body has also had its share of shadowy processes, like for example, the ruling related to the conflict over TIPNIS.

In ruling # 0045/2006 of June 2, 2006, the Bolivian Constitutional Tribunal adopted a restrictive interpretation of Article 15 of C169, signaling that "the analyzed law imposes the duty of consulting what the damage maybe relates to their interests, so that it can be duly and equitably indemnified" and "not that this consultation is of such a determinative or definitive character to achieve the

acquiescence of these people, without which it is not possible to exploit underground resources that are a property of the State."

In the same ruling, the TC added that "the consultation (…) even less so should be extended a means of impeding the exploitation of the richness of underground that belongs to the state, because **above the interest of a group of whatever nature, is the supreme interest of the majority, expressed by the authorities of the state.**"[23] (Emphasis added)

As can be deduced, the jurisprudential development of the right to the consultation as well as the recognition of its minimum contact would not come to have support in the jurisprudence of the previous body, which reflected a predominant patrimonial vision of this right, as well as a unidimensional and homogenizing vision of the concept of the "nation."

Contrary to what was previously described, the Plurinational Constitutional Tribunal, in sentence #2003/2010-R of October 25, 2010, indicates that the consultation should be carried out in good faith and in a manner that is appropriate to the circumstances of the following cases:[24]

a. Before adopting or applying laws or methods that may directly affect indigenous people (articles 6.1 of C169, 19 of the United Nations Declaration on the Rights of Indigenous People, 30.15 CPE);
b. Prior to approving any project that affects the lands or territories and other resources (article 32.2 of the United Nations Declaration on the Rights of Indigenous People);
c. Prior to authorizing or undertaking any program of prospecting or exploiting national resources found in the lands where indigenous people live (articles 15.2 of C169, 32.2 of the United Nations Declaration on the Rights of Indigenous People, 30.15 and 403 of the CPE); and,
d. Prior to using indigenous lands or territories for military activities (article 30 of the United Nations Declaration on the Rights of Indigenous People).

Additionally, **it must be developed with the objective of achieving either agreement with the communities or their free, prior and informed consent** (in contrast to the prior decision in which the interest of the "majority" was placed ahead of the rights of indigenous people.)

Furthermore, consent represents a byproduct of the consultation, but not a right in and of itself, except in two situations called for by both C169 and the United Nations Declaration on the Rights of Indigenous People:

a. Moves of lands that they occupy and their relocation (articles 16.2 of C169 and 10 of the United Nations Declaration on the Rights of Indigenous People); and,
b. Storage and elimination of elimination of dangerous materials in the lands or territories of indigenous people (article 29 of the Declaration).

A third situation can be added to the aforementioned two, which was legally established by the Inter-American Court of Human Rights in the Case of the Saramaka People v. Suriname, which recognized the right to consent "(…) in cases involving developments or investments plans of a large scale which would have a great impact within the Saramaka territory, the State has the obligation, not only to consult with the Saramakas, but also to obtain their free, informed and prior consent, according to their traditions and customs. The Court considers that the difference between "consultation" and "consent" in this context requires greater analysis."

As mentioned, even through the aforementioned forms part of an important judicial advance, it would not be prudent to omit mention of those sentences in which the Plurinational Tribunal has decided

23 Ruling # 0045/2006, June 2, 2006. Part II.5.2
24 Ruling # 2003/2010-R, October 25, 2010. Part III.5.

in a "questionable manner." In order to better understand, we must revise the case of the highway project "Villa Tunari-San Ignacio de Moxos" that would affect the Indigenous Territory National Park Isiboro Sécure (TIPNIS), Decision # 300/12, whose discussion is immersed in two actions of unconstitutionality proposed in contrast to two existing laws, that contradict each other.

On the one hand, we have Law #180, promulgated October 24, 2011, Article 1 of which proclaims the untouchable character of TIPNIS in terms of sociocultural and natural patrimony, as a zone of ecological preservation, historical reproduction and habitat of the indigenous Chimán, Yuracaré and Mojeño-trinitario communities, and signaling that the highway will not run through there. Nonetheless, on February 10, 2012, Law # 22 was promulgated, the law of Consultation of Indigenous People of TIPNIS, which convoked an ad hoc consultation whose objective was: i) to define if the indigenous territory of TIPNIS should be an untouchable zone or not, in order to make viable the activities of indigenous people as well as the construction of the aforementioned highway; ii) to establish safeguard mechanisms for the protection of TIPNIS indigenous territory.

In a decision dated June 18, 2012, the Tribunal declared as improper the action for abstract unconstitutionality of Law #180, for protection of TIPNIS, and established the "conditioned constitutionality" of Law #222 with regards to the convocation of the consultation, its application, procedure and protocol of the consultation, as well as the participants and times, subject to a "pact" with the indigenous people of TIPNIS who were to be consulted. The complaints made by magistrate Gualberto Cusi, who claimed that the text of the ruling constituted governmental interference, are worthy of mention.

Finally, it is important to call attention to the situation of the isolated indigenous groups within the Communal Land of Origin (TCO) TACANA I (presumably Toromonas), because having initiated extraction activities it is important to consider the plans for protection of these people and thus to avoid a situation brought up in number of documents of indigenous organizations such as the Confederation of Indigenous People of Bolivia Oriente Chaco and Amazonía (CIDOB), that demand effective compliance with the legal framework of indigenous people (for example important advances such as Law #450, "Law of protection to the original nations and indigenous people in a situation of high vulnerability," as well as their Constitution), even more so in situations where sightings have occurred on a number of occasions. Certainly, it is urgent to bring visibility to this problem because for certain state representatives – such as the President of the state business Yacimiento Petrolíferos Fiscales Bolivianos (YPFB) – there are no uncontacted communities in the Bolivian Amazon; on the contrary, any reference to such groups would be a distortion of information with the goal of impeding the continuation of productive activities.[25]

In the case of Colombia, jurisprudence produced the so-called "Clash of trains" relating to the protection action, specifically, the protection action against judicial rulings (decisions of the Supreme Court of Justice and the Council of State) that are arise in the Constitutional Court in many cases in a manner that is distinct from the decisions in the ordinary headquarters.

There, for example, in its jurisprudential development it has been notable that one the one hand the Constitutional Court operated with a 'guarantee-focused' approach, which focused on the protection of the rights of indigenous people (from the analysis of the Law of restoration of lands, the Court has also pronounced on the rights of peasant communities). Meanwhile, on the other hand, the Council of the State (which is responsible for the administration of justice in the contentious administrative field), has demonstrate a certain tendency towards favoring the interest of the states in its administrative decisions.

25 Source: Letter directed to CIDOB from the Leadership of the International Labour Organization for the Andean countries. Received on October 31st, 2016.

In order to understand the conflict that arose, it is important to keep mind that the Constitutional Court and the Council of State operate on the same legal level; in other words, neither is supreme to the other.

Regarding the protection of the rights of indigenous people, we cannot fail to mention the rulings T-768 of 2009, T-129 of 2011 and T-376 of 2012, in which the Constitutional Court considered that, facing an especially intense effect on the collective territory of indigenous people, the duty to assure their participation did not end with the consultation. On the contrary, the obtaining of free, informed and express consent represents a condition for the procedure of the measure.

For its part, in **Ecuador**, it has also been very common that the conflicts between extractive companies and indigenous people have arisen as a result of the beginning of unconsulted activities with state acquiescence. Here the role of the Constitutional Tribunal, and later the Constitutional Court (incorporated by the 2008 Constitution) has been fundamental and confusing in a few cases that we will mention below.

For example, in the case of the Independent Federation of the Shuar People of Ecuador v. ARCO Oriente Inc.[26] provoked by a pact between the government and a private oil company regarding the exploitation of hydrocarbons in an area that comprised 70% of the territory of the Shuar indigenous community that, incidentally, recently gain knowledge of the same through the entrance of an oil company in its territory. With the objective of "legitimizing," different representatives of the oil company tried to sign agreements with members of the community who did not have representative powers in the Indigenous Federation, and thus looked to make use of acts of blackmail and the use of force to accomplish their goals.

First of all, protection was conceded, and confirmed by the Constitutional Tribunal, whose reasoning involved important arguments in accord with obligations derived from C169, regarding, for example, the identification of an indigenous community as a bona fide owner of collective rights. They claimed that "it is these groups that have maintained the occupancy and tenancy of these lands in which they development 'their traditional forms of living and social organization, of the formation and exercise of authority,' as expressly determined by number 7 of article 84 of the Supreme Charter."

The negative impact of non-consulted activities is also reflected in the damage to the organization of the community. Involvement in blackmail or acts of corruption by different members of the group with the objective of "legitimizing" the non-consulted act, "provokes a division at the heart of the group, confrontations that lead to social fracturing that is prejudicial and dangerous to the interest of the community."

We also have the case of Ernesto López Freiré v. President of the Republic and the President of the National Congress.[27] This complaint of unconstitutionality presented by approximately 1,000 citizens questioned the validity of Executive Decree #383, of December 3, 1998, whose objective was regularizing the conformation of the Council of Development of Nationality and Indigenous Groups of Ecuador (CONDENPE).

According to Article 2 of that decree, CONDENPE is made up of the following way: a representative of the following nationalities: Shuar, Achuar, Huaorani, Siona, Secoya, Cofán, Záparo, Chachi, Tsa 'chila, Epera, Awa; a representative of the following Quicha "Groups" Saraguro, Cañari, Puruhá, Waranka, Panzaleo, Chibuleo, Salasaca, Quitu, Cayambi, Caranqui, Natabuela, Otavalo; two representatives of the Quichua community of the Amazon and one representative of the Manta and Huancavilca communities.

26 Ruling of March 16, 2000, Constitutional Tribunal of Ecuador (994-99-RA).
27 Ruling of November 21, 2000. Exp. #020-2000-TC

The emphasis on the words "nationalities" and "communities" is not gratuitous. On the contrary, the use alludes to the object of the process of institutionality. As the complainants said, the distinction between each term is arbitrary and implies unequal treatment of certain indigenous groups with regards to the composition of CODENPE.

They further add that article 83 of the Constitution does not establish any distinction between indigenous communities and nationalities. As such, as the President would be overstepping his authority to effect such a distinction, and use it to establish the proportions of representatives in the Council.

One of the important aspects of this ruling is that the Constitutional Tribunal interpreted the terms employed by Article 83 of the Constitution in accordance with Article 1.2 of C169. As such, it declared the challenged law as unconstitutional, accepting that this established a differentiation, which resulted in a damaging of both terms.

As alluded to, although on the one hand there were important jurisprudential developments, on the other hand there has been negative criteria, as occurred in the case of the Huaorani Nationality Organization (Exp. N.° 0054-2003-RA) where the Constitutional Tribunal outlined the following criteria as having a negative connotation, and as such (i) outfitting the agreements promoted by the companies (including those that accept the existence of previously inexistent consultations) with indigenous nationalities in civil contracts whose legitimacy needs to be supposed; (ii) in case of allegations that the information was insufficient, which resulted in error by the community, this must be demonstrated by a civil, rather than constitutional process.

Under the authority of the 2008 Constitution, the Constitutional Tribunal was replaced by the Constitutional Court, which in the ruling related to the Mining Law, addressed a study of the right of the pre-legislative consultation in the adoption of said law (as its constitutionality was being challenged) In its analysis, the Court considered that in the process of promulgating this law, mechanisms were implemented of information, participation and reception of criteria of one segment of the communities, groups and nationalities through their leading representatives.

As such, given the lack of infra-constitutional regulation on the subject, an application was made directly to the Constitution. As a result, the process of information and dispatch of the Mining Law was developed in direct application to the Constitution.

In this case, the Court makes reference to four phrases of a pre-legislative prior consultation:

a. Preparation phase for the consultation
b. Convocation phase
c. Information and execution phase
d. Analysis of results and closing phase of the consultation.

The Court indicated that mining activity could not be carried out in the territories of the indigenous communities, groups and nations, nor those of afro-Ecuadorians or montubios without the realization of a consultation process as established in Article 57.5 of the Constitution until the National Assembly published a corresponding law in virtue of the principal of reserving the law. One substantial aspect that the Court determine was the substantive rather than formal character of the pre-legislative context.

One case of special importance, for the levels of conflict that it achieved, and for being the object of a ruling of the Inter-American Court of Human Rights, is the case of the *kichwa* community of Sarayaku, whose territory was affected in 1996 by a contract signed by the State Oil Company of Ecuador with a consortium of two oil companies.

As such, despite the negative aspects for the community upon the initiation of the exploration phase (which consisted of dynamiting the area to locate the areas in which the ground would perforate),

these activities were carried forward with the support of the State through the militarization of the zone, such that the "common exercise of labors" would not be interrupted.

After continuous years of conflict, 2002 was perhaps the pinnacle of these, in the sense that the seismic exploration phase was reactivated, which resulted in the community paralyzing its activities with the aim of reinforcing the borders of its territory and impeding the entrance of the company equipment. In this context, there were elevated complaints of threats and harassment against the leaders of the community, members of that community and even a lawyer who was advising them.

In this time period, December 19th 2003, the case was presented before the Inter-American Commission of Human Rights which pushed the Ecuadorian state into the adoption of a series of measures to guarantee the rights of the affected communities. That was partially accomplished, and allowed the case to be pushed to the jurisdiction of the Inter- American Court, which in a ruling in 2012, declared that Ecuador had violated the rights to the consultation, to the indigenous communal property and to cultural identity, as well as being responsible for placing in grave risk the lives and personal integrity of members of the *Kichwa* indigenous people of Sarayaku.

It bears mentioning that despite the fact that a number of years has passed since the publication of the aforementioned ruling by the Inter-American court, in material terms, the situation was not far away from the aforementioned situation. Thus, for example, there were still complaints about non-consulted projects and of the criminalization of institutions that worked together with the communities. Such is the case of the Pachamama Foundation, an organization that accompanied the Sarayaku people in the process before the Inter-American court, which was dissolved in December 2013 under allegations of participating in the incidents that occurred during the Eleventh Petroleum Round.

Special relevance should also be given to the licensing processes of the Petroleum Rounds, announced in 2010 by the Ecuadorian government. Despite their effect on the indigenous territories of the Provinces of Pastaza, Morona Santiago, Napo y Orellana, they didn't allow for the indigenous nationalities and people of this project to be real participants until after April 2012, when a "prior consultation" was announced, in a timeframe of 6 months, to consult 7 indigenous nationalities, 10 organizations, and 719 communities with a population of 69,114 people.

In the Yasunidos case that "deals with the Yasuní ITT proposal, announced by President Rafael Correa before the United Nations General Assembly, consistent with the commitment of Ecuador to maintain indefinitely unexplored reserves comprising 846 million barrels of oil in the ITT (Ishpingo, Tambococha-Tiputini) equivalent to 20% of the reserves of the country, located in Yasuní National Park. This initiative would avoid the emission of 407 million tons of carbon dioxide, the main gas that generates global climate change.

In exchange, the Ecuadorian state would receive, as support from the international community, 50% of the resources that the state would have gained had they opted to exploit their oil reserves. The support would total approximately $3.6 billion USD to be delivered over a period of 12 months.

After an international campaign, that was highly questioned, to collect these funds in August of 2013, President Rafael Correa announced the elimination of the Yasuni-ITT initiative because the world "had failed." "The initiative was ahead of its time and the international community either couldn't or didn't want to understand." The president signaled that "the fundamental factor is the failure (of the project) as that the world is a global hypocrisy." (CDES 2016, pp. 5-6)

In the case of **Peru**, it is also possible to find rulings that back reference to the right to a prior consultation and to the rights of indigenous people in general, within the context of interculturality. Some of these rulings are politicized in the sense that they arose out of a context of high levels of social convulsion, and their validity was put to the test; for example, there was one ruling that stated that the recent prior consultation would be required as of June 2010 according to the standards of the ruling, and not as of February 1995 when C169 entered into force.

In the "Cordillera Escalera" case,28[28] there is no express mention of who will carry out the consultation, but there is mention of indigenous people as the leaders of the right to the consultation. Likewise, the realization of the prior consultation must occur before initiating the activity (according to the particular case, extractive activity).

Despite the aforementioned, the Tribunal clung to an administrative/technical discussion as a solution to the case, by proclaiming a prohibition on any activity without a Master Plan that contemplated the possibility of taking advantage of the natural resources found in the Conversation Area of the Cordillera Escala Region, subjecting the endeavor to the norms of environmental protection as well as the predicted limitations and restrictions on the objectives of creating the area and its zoning. In cases in which these activities were already taking place, they should be suspended until there was a Master Plan developed.

In the Exp. #00022-2009-PI/TC, the Constitutional Tribunal carried out a detailed study of the right to the prior consultation, its elements, principals and characteristics, and indicated that the responsible party for carrying out the consultation was the State and the holders of the right were indigenous people. In addition to insisting that the prior consultation take place prior to initiating the activity (according to the particular case, the extractive activity), it also was in no way implying a right to veto. At the same time, it ruled invalid that argument that the state is exempt from the responsibility of consultation given the lack of a legal regulatory framework, as it is not within the discretion of the state to decide whether to comply with fundamental rights.

Ruling # 06316-2008-PA/TC indicated that companies with valid and current contracts and MINEM (according to the particular case, the state in general) who are responsible for carrying out the prior consultation. Furthermore, it denoted indigenous people in voluntary isolation as the holders of the right. Regarding the moment of the consultation, they indicated that it can begin without stopping the extractive activity and may occur after that activity has begun. As can be observed from this ruling, there was complete confusion regarding the timing of the consultation.

Additionally, in ruling # 0022-2009-PI/TC, minimum general principles were developed regarding the right to the consultation. As a result, it must be taken as a factor the fact that it is permitted, from that point on, the complete efficacy of the right to a consultation. In simple terms, what the Tribunal indicated was that the right to a consultation would only be required as of the date of the publication of ruling # 0022-2009-PI/TC, i.e. June 2010, as opposed to February 1995 with the coming into fore of C169 in our internal legal order.

That ruling was so serious that, in the next opportunity the Court had, it had to rectify the situation. Thus came about ruling #00024-2009-PI/TC in which the Tribunal "clarified" what had come before by returning to the point from which it originally departed by referring to the incorporation of C169 in the constitutional block.

The Court mentioned that "this rule has not gone unrecognized by our jurisprudence." "It could not have happened as the responsibilities derived from international obligations brought by the ratification of an international treat are determined by the rules of International Public Law, which integrate the normative aspects into the decisions of internal courts.

In that sense, the effect of ruling #06316-2008-PA/TC was limited to establishing the fact that from the moment of publication of ruling #0022-2009-PI/TC there were legal criteria to resolve cases that involved the right to the consultation. [Ruling #0025-2009-PI/TC, Fj. 24]

Ruling #05427-2009-PC/TC indicated that it is the state that has the obligation to carry out the consultation. The holders of the right are the indigenous people and the consultation needs to occur before beginning any extractive activity. As a result, in the resolution of this case they decided to order

28 Exp. # 03343-2007-PA/TC

the Ministry of Energy and Mines to publish, as part of its competencies, a special regulation that governed the right of indigenous people to the prior informed consultation respecting the principles of C169.

This sentence was given in the context of serious conflicts that took place in Bagua in 2009, in an event known as the "Baguazo" whose origin, at least in the short term, can be traced back to the promulgation of a series of Legislative Decrees related to the application of the Free Trade Agreement (FTA) between Peru and the United States, which regulated intervention in the Amazonian territory, with the peculiarity of not complying with processes of prior consultation. This prompted the immediate rejection of the indigenous leaders and organizations. As a result, from August 2008, throughout the Peruvian Amazon and with the participation of a large part of ethnic groups that live there, there were mobilizations and protects actions that provoked a declaration of a state of emergency in various districts. Thus, on June 5 2009, the most serious confrontation between indigenous people and the police took place, in the area known as Curva del Diablo, in which 33 people died (23 police, five residents, and five indigenous people), 83 people were arrest and more than 200 people injured.[29]

As can be observed, the jurisprudence of the Constitutional Tribunal of Peru, in the area of consultation has been rather confusing and variable, from the identification of the holders of the rights and obligations until activities related to the moment of the entry in force of the right in the country.

Even when we refer to the advances and setbacks in the jurisprudence that has development by the chief interpreter of the Peruvian constitution, we cannot fail to mention some important developments at the level of the Supreme Court of Justice and those of hierarchically inferior courts.

In ruling #2232-2012 of May 23, 2013, the Constitutional and Permanent Social Rights Division of the Supreme Court of Justice ruled unconstitutional the dispositions of the Supreme Decree of the Ministry of Energy and Mining which had only proposed informative workshops on the consultation process (Supreme Decrees #028-2008-MEM y 012-2008-MEM that regulated citizen participation in the area of Hydrocarbons and Mining) because according to the division a prior consultation with indigenous people that is based on C169 cannot be reconciled with the process of citizen participation authorized by article 31 of the Constitution.

Furthermore, a ruling of the Mixed Judges of the Province of Loreto-Nauta, of October 17, 2014, (Record #00091-2013-0-190I-JM-CI-0), ordered the suspension of the "Amazon Waterway" project until the Ministry of Transport and Communications of that entity carried out the prior consultation to the affected communities, Kukama del Marañón.

Certainly, the litigation aimed at protecting the rights of indigenous people is a constant in the face of multiple extractive and large infrastructure projects that do not comply with the minimum standards of protection of their rights. A recent example arose from the complaints of different indigenous groups towards the Ministry of Energy and Mining with reaction to the thrust towards the Moyobamba-Iquitos Transmission Line whose construction would affect the Ikitu, Kandozi, Achuar, Kichwa, Urarina and Kukama Kukamiria communities, among others, as well as the Abanico del Pastaza wetlands complex, which would change the countryside and the means of subsistence of those communities, by deforesting sensitive zones and even opening up a path for the entrance of illegal hunters and woodcutters.

This complaint was supported by the Defender of the People through Official Document # 055-2016-DP/AMASPPI-PPI, which indicated to MINEM the reasons why a consultation was needed for the Moyobamba-Iquitos Transmission Line Project, including:

29 Humanitarian Actions realized by the Defender of the people related to the events of June 2009, in the Provinces of Utcubamba y Bagua, Amazonas Region, in the context of the Amazonian strike. Department Report #006-2009-DP/ADHPD.

a. It would affect the collective rights of indigenous people: the right to the earth and to territory that includes the impact of migration and the conservation of their customs

b. MINEM recognized in previous opportunities the need to carry out a prior consultation of the project as with the case of the Ministerial Resolution #350-2012 MEM/DM, and

c. The project does not directly benefit indigenous people within the area of influence of the project.

As a result, the current case would not be applicable to the exception. Thus, MINEM attempted to disparage the prior consultation for this project, alleging that it was a public service that benefited indigenous people.[30]

Finally, it is important to mention the problematic situations that exists with regards to the Kugapakori Territorial Reserve (Indigenous Reserve), Nahua, Nanti, that through Ministerial Resolution #046-90-AG-DGRAAR of February 14, 1990 was declared a State Reserve in favor of the indigenous people in isolation and facing initial contact (Kugapakori y Nahua ethnic groups), located in the Echarate and Sepahua districts, in the provinces of Convención and Atalaya, in the Cusco and Ucayali regions, totaling land of 443,887 hectares. Nonetheless, through Supreme Decree # 021-200-EM, the state signed an exploration and exploitation contract relating to Lot 88 with Camisea Consortium, corresponding to a total of 143,500 hectares. A total of 106,500 hectares of that area is within the Reserve, representing a total of 23.2% of the land. IN other words, 74% of lot 88 is within the Reserve.

Formally, on July 25 2003, through Supreme Decree #028-2003-AG, they created the Kugapakori Territorial Reserve, Nahua, Nanti (RTKNN) with the purpose of preserving the rights of the aforementioned groups on the territories that they occupied in a traditional manner, as well as their right to take advantage of the existing natural researches for purposes of subsistence. It was resized to encompass 56,672.72 hectares. From the date of its publication, several indigenous groups have been identified in the interior of the reserve, including the Yora or Nahuah people of Pano linguistic family; the Nani, Kirineri and Machiguenga of the Arawk linguistic family among others that have not been identified.

It bears emphasizing that Article 3 of the decree establishes the right to guarantee territorial, ecological and economic integrity of the lands that comprise the interior of the RTKNN, such that "it is prohibited to establish human settlements different from those of the ethnic groups mentioned in article 2, within the territorial reserve. Economic development is also prohibited. As such, the granting of new rights that entail taking advantage of natural resources is prohibited."

Furthermore, the incompatibilities (almost contradictions) between the role of the protection of the rights of indigenous people in isolation and the practices of the state through the delivery of verified concession in this case are notable.

1.6 Official Reports (National and International) regarding prior, free and informed consultation

In the case of **Ecuador**, we have the observations and recommendations made by the Committee Against all Forms of Racial Discrimination in October 2012.[31] These observations also mentioned the approval of the Organic Law of Intercultural Education of 2011, the National Plan of Well-Being 2009-2013 and the Plurinational Plan to Eliminate Racial Discrimination and Ethnic and Cultural

30 For additional reference, please visit the following link: http://www.dar.org.pe/noticias/defensoria-del-pueblo-recomienda-al-minem-que-realice-la-consulta-previa-del-proyecto-linea-de-transmision-moyobamba-iquitos/ (Visted on 01/25/17).

31 Committee for the Elimination of Racial Discrimination. 81st Period of Sessions. Ecuador, CERD/C/ECU/CO/20-22. Available on line: http://www2.ohchr.org/english/bodies/ cerd/docs/CERD.C.ECU.CO.20-22_sp.pdf

Exclusion, and the scant participation of indigenous groups and nationalities in the development of these instruments.

With respect to the prior consultation, the Committee lamented the absence of advances in the approval of the Law of Consultation for the National Assembly. Adding that the lack of the law for the application of achieved rights is no excuse. In other words, independent of the absence of a norm of development (which would be preferable), that does not excuse the state of its obligations. It added the economic development – present in the discussions that sought to promote extractive activities – cannot justify the violation of human rights to execute these projects. On the contrary, they should seek reconciliation with human development, which doesn't happen with the imposition of a "majoritarian interest."

As such, the Committee Report on Economic, Social and Cultural Rights of December of the same year,[32] demonstrate the worry over Executive Decree #1247 of July 19, 2012, that regulated the consultation procedures of indigenous people with respect to hydrocarbon activities, which was published "in the absence of consultation with indigenous groups and nationalities."

On the other hand, the "Thematic report on the prior consultation: The right to participation," published in 2011 by the Defender of the People of the same country, realized the situation of the exercise of the right to participation and consultation at the legal level, as well as its application in practice. It evidences the response that the Ecuadorian state offered to comply with this international and constitutional mandate.

With respect to **Peru**, the Commission of Experts in the Application of Conventions and Recommendations of the ILO (CEACR) in its 2013 report[33] highlights the adoption of the Ley of the Right to Prior Consultation and it regulations, as well as the creation of a Methodological Guide published by the Viceministry of Interculturality to orient and serve and manage the activities of the public sector with indigenous groups.

At the same time, it can be observed that the fiscal or budgetary norms (article 5.k of the regulations), the state decisions of extraordinary or temporary character directed at emergency situations derived from natural or technological catastrophes (article 5.1 of the regulations), as well as the complementary administrative measures (12th Complementary, Transitory, and Final Decision of Regulation), would not be matters for consultation.

In the 2014 report, with respect to the adoption of the observations indicated in 2013, the CEACR receives information regarding the investigation undertaken by the Peruvian State on the events that occurred in the province of Bagua (Amazonas). Likewise, the committee invited the Government to demonstrate that the measures adopted to avoid a situation in which force or coercion would be used in violation of human rights and of the fundamental liberties of the indigenous people, resulting in the criminalization of the acts involving the indigenous people.

Regarding the consultation, the CEACR also invited the government to provide information on the consultation, specifically with regard to proposed administrative and legislative measures that may directly affect the collective rights of indigenous people.

32 Committee on Economic, Social and Cultural Rights. Final observations of the committee on the third periodic report of Ecuador, approved by the committee in its 49th period of sessions, November 14-30 20102. Available online: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCu W20%2bcOfdvJEUdqkza02UbxYrVWRGWI2wh%2fMelMaF4e5qjeC4I5s7ZEKHX80qB DHboj6beJevQIzfc%2fV20UDF8P8UJ3HDWWBAmCUlG6wven%2f2 (Ecuador, E/C.12/ ECU/CO/3).

33 Committee of Experts in the Application of Conventions and Recommendations. Observation (CEACR) – Adoption: 2012, Publication: 102nd Reunion CIT (2013).

In addition to including in their following periodic report examples of projects presented to the Ministry of Energy and Mines that had require a prior consultation and the participation of affected communities in the benefits reported for these activities, the Commission asked the Government to reveal the measures that it adopted, both at the national and regional levels, to ensure that the funds earmarked for indigenous communities had a positive impact on the lives of those communities.

In a direct request of the same year the CEARC requested that the government, in its next periodic report, include precise information on: the regional governments' processes of titling and registration of affected lands, the titled surfaces and the beneficiary communities in each region of the country. It further requested that it provide examples of the way in which it had resolved the difficulties it encountered with indigenous communities to resolve the titling of territories.

In the case of **Brazil**, according to the 2015-2016 CEARC report, the country indicated that the regulation of the right to the prior consultation had already begun by January 2012, a process that had evolved in a gradual manner through the expansion of time frame and the participation of communities, particularly the quilombolas (with whom the government had nine informative meetings).

Nonetheless, the committee recognized that the conditions were not favorable for the continuance of the negotiation process with indigenous people, even more so with the growing distrust that arose from the decision of the Attorney General of the Union to publish Resolution #303, that attempted to apply "safeguards" to all of the indigenous territories, established by the Supreme Federal Tribunal in relation to territorial conflicts and public safety, mining exploitation, environmental rights, and the use of the surface ground, which in various ways is contrary to C169.

It also indicated that the General Secretariat of the Presidency aimed to relaunch dialogue and establish a positive agenda. As a result, taking into account the process that developed with the consultation over the Tapajós Hydroelectric Factory, the Government analyzed the possibility of proposing, on the basis of a concrete case, an eventual consultation mechanism.

In that respect, the Commission requested that the Government redouble its efforts to establish appropriate procedures and to include regulations that would allow the exercise of the rights of consultation and participation that the Convention requires. In this way, the government would have to attempt to inform the way in which it aimed to ensure the effective participation of indigenous groups in the decisions that would directly affect them.

With respect to **Bolivia**, in the 2012-2013 CEARC report, the government indicated that from February 2012 until August 2013 it carried out a process of participation and consultation regarding legislative proposal of prior consultation that enjoyed the participation of indigenous and first nations peasant groups as well as intercultural community and afro-Bolivian organizations, as well as representatives from the Executive, Legislative and Electoral branches.

It further resulted the sixth meeting of the National Commission (August 2013), they agreed upon a proposal of "law of a prior free and informed consultation," which would be presented to the President of the Plurinational State and transmitted to the Plurinational Legislative Assembly for its approval.

The Commission invited the government to include information about the recourse it had taken regarding the new mechanism of consultation and to add indications that would allow for the examination of the way in which the new legislation would assure the effective participation of indigenous groups with respect to the decisions that would affect them directly, thus giving full effect to the corresponding dispositions of articles 6, 7, 15, and 16 of the Convention.

In the case of **Venezuela**, the complaints that questioned the way in which the State was implementing the rights of indigenous people were not isolated. They were reflected in the examination process before the Committee on Economic, Social, and Cultural Rights of the United Nations High Commission on Human Rights, regarding the level of compliance of this country with the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which was carried out on June 2015.

In this examination, the Executive Secretary of the National Human Rights Council of Venezuela maintained that:

"The other issues that has been the source of concern, during this afternoon session, is linked to the prior consultation. They have asked us questions that go beyond the established legislation of our country, about practical examples of the application of the prior consultation. The consultation with indigenous groups and communities is a permanent practice of all of our government, and particularly of our Ministry of Popular Power for Indigenous Communities and People. For example, in the case of the actions undertaken for the construction of housing in indigenous communities and with the aim of respecting their ancestral customs and way of living, they have developed tasks of prior consultation in each community with the aim of proposed a project and obtaining the approval of this people of indigenous community. But also, to define the characteristics of the design of the housing, its location on which families will be the beneficiaries of the construction."[34]

As can be noted, with such declarations, the Executive Secretary of the highest levels in the area of Human Rights in Venezuela, in a similar manner to the functionaries of the Ministry of Indigenous People, they confused "prior consultation" with mere participation.

Around a mount after the aforementioned evaluation, the Venezuelan state was the subject of a new examination, this time in relation to the levels of compliance with the International Covenant on Civil and Political Rights (ICCPR) before the United Nations High Commission on Human Rights, also in the city of Geneva. In this evaluation, the issue of guarantees of the right to the prior consultation was discussed. Here, the questions were more direct, like the one formulated by the Israel commissioner Yuval Shany:

"We are also worried about the participation of indigenous groups in the decisions that have to do with their lands. It is not clear to us, and we would like to know, which procedures exist already in order to ensure that the rights guarantee by article 120 of the Constitution are applied. For example, you can explain to us what type of consultations were initiated with indigenous people with respect to: the concession of the exploitation of gold by the China City Group company in 2004 in the Las Cristinas quarry, an rea inhabited by a series of groups such as the Warao, Pemón y Kariña; the concession of carbon in the Sierra de Perijá in the State of Zulia. There were hardly sufficient consultations with the Yupka and the Wayu of this zone; these are the subjects that I would like to address. Another thing that can be explained to us, and I apologize for having a question regarding the 30th President, and the creation of a military district in Guajira, where they have hardly been consultations with the Wayú with regard to the designation of this military district."[35]

According to different sources from civil society, and with regards to the previously mentioned issues, this cannot be traced back to a simple case of confusion. On the contrary, "it does not escape our notice that there is not one single case at the national level of good-faith prior, free and informed consultation in conformity with regional and international standards on the subject."[36]

With the aim of contrasting this information, we reviewed the interpretations of the right that different Venezuelan institutions have been carrying out. For obvious reasons the main institution to follow was the Indigenous People's Ministry, a space in which merely six pieces of information related to the right to a process of prior consultation can be found, presented as equivalent to the participation in the design of public policies. Furthermore, even though the term "consultation" is used with frequency (in the "Memory and Story" Reports corresponding to 2013, 2014 and 2015) in practical terms this right has been reduced to a mechanism of participation and access to information below the international standards of the rights of indigenous people.

34 Working Group on Indigenous Matters of the ULA. Op Cit., p. 30
35 Working Group on Indigenous Matters of the ULA. Op Cit., p. 31
36 Working Group on Indigenous Matters of the ULA. Op Cit., p. 31

Precisely, with relating to this issue, the same Human Rights Committee, responsible for supervising compliance with the ICCPR indicated that:

"The Committee observes with satisfaction the significant normative development by the Member State in the area of rights of indigenous people, including the recognition of the right to be consulted. However, the Committee laments the fact that it has not received sufficient information regarding the application of the practice of the right to the prior consultation with regard to the granting of exploration and exploitation licenses within its territories. Likewise, while we take note of the information provided by the Member State that they have granted titles of collective property in relation to a significant percentage of the total number of requests for demarcation, the Committee observes that the process of demarcation progresses very slowly. The Committee further expresses its concern about the information that indicates that some indigenous people have been victims of acts of violence by state and non-state actor alike (Arts. 1, 2, 6, 7, and 27)."

With respect to Colombia, in its 2015-2016 report, the CEARC referred to information provided by the Colombian government with relation to plans of ethnic safeguards for 32 groups affected by the internal armed conflict, adopted in order to comply with the dispositions of edict #004 by the Constitutional Court in 2009. Nonetheless, according to the indications of the National Indigenous Organization of Colombia, transmitted by the Confederation of Workers of Colombia (CTC), they claim that displacement of the Emberá people continues to occur in the department of Chocó, placing them in a serious situation of vulnerability. In response, they added that the government had indicated that Division of Indigenous, Rom and Minorities of the Interior Ministry would be taking actions to make efficient and effective progress in the safeguarding of indigenous people. In this respect, the CEARC asked the government to continue present information on the execution of ethnic safeguarding plans and their impact, in particular for the protection of the most vulnerable indigenous people.

Regarding the right to a prior consultation, special emphasis was placed on two normative instruments; first the adoption of Decree #2613, on November 20, 2013, which approved a protocol of inter-institutional coordination for the prior consultation, with the dual objective of facilitating the link between the responsible public bodies and guaranteeing the circulation of information that serves as support for the certification of the presence of ethnic communities in the conducting of the prior consultation. In this way, the Prior Consultation Division (DCP) of the Ministry of the Interior would have the exclusive power to certify the presence of ethnic communities and the Colombian Institute of Rural Development (INCODER) would be the body responsible for providing information relative to the legally constituted and in-development protections for indigenous communities and in relation to the collective titles of black communities. The protocol also anticipated that the representatives of indigenous communities would form part of the follow-up committee for the verification of the commitments made by the consultation.

Second is the adoption of presidential directive #10, of November 7, 2014, that contains the guide for the realization of the prior consultation with ethnic communities. According to this guide, the consultation process involves five stages: 1) certification of the presence of communities based on the criteria of the Convention; 2) coordination and preparation of the consultation, with the participation of the communities; 3) pre-consultation; 4) prior consultation, and 5) monitoring of agreements.

It further establishes that the consultation has as a final objective a dialogue between the State, the executor of the project, and the ethnic communities regarding the impact of the exploitation and infrastructure projects in the communities with regards to the formulation of measures to prevent, correct, mitigate and compensate the negative effects that the project may generate.

In that respect, the General Confederation of Labor (CGT) indicated that only those communities that are registered in the Interior Ministry database can be considered for the effects of the consultation. Nonetheless, in response, the Government indicated that they would not just consult the communities registered in that database, but also other sources that would allow them to have more certainty about the presence or not of ethnic communities in the project area. As a demonstration of this,

they indicated that during the period between 2003 and 2015, they have carried out a total of 4,891 processes of consultation with ethnic communities, of which 4,198 culminated in agreements.

The CEARC asked the Government to continue providing information regarding the functioning of the aforementioned measures and to present examples that would allow them to examine the way in which the protocol of interinstitutional coordination for the prior consultation and the guide for the realization of the prior consultation would assure that indigenous people would be consulted prior to the beginning or authorization of any program of prospecting or exploitation of existing resources within their lands. They were also interested in the way in which they assure the participation of ethnic communities in the benefits reported by the enterprises.

FINAL CONSIDERATIONS ON PRIOR CONSULTATION

The six countries studied (Peru, Colombia, Brazil, Ecuador, Venezuela, and Brazil) have ratified C169. However, we can classify them into the following groups according to time they ratified the treaty: on the one hand are counties whose current Constitution preceded the ratification of the Convention. In that group, we have **Colombia, Peru, Venezuela and Brazil**, with the caveat that the Constitution of Brazil (1988) precedes even the date of the adoption of C169 (1989). On the other hand, we have two countries that ratified C169 under a Constitution that has since been replaced. This is the case of Bolivia that ratified the Convention within the framework of its 1967 Constitution, and Ecuador that did so under its 1978 constitution.

Regarding the reception and implementation of C169 in each judicial order of the studies counties; on the one hand, we have those States that have progressively incorporated the right to free, informed, and prior consultation into their Constitution. That is the case of Bolivia and Ecuador (and to a lesser extent, Venezuela), which also do not foresee consultation mechanisms for administrative disposition that affect the rights of indigenous people, but rather do so for any legislative measure. As a result, it bears emphasis that both countries (Ecuador and Bolivia) demonstrate a higher level of development of this right in their respective constitutions, with interculturality as the main focus.

In the case of **Bolivia**, the Constitution in force during the ratification of the Convention did not make any reference to the rights of indigenous people. After ratification in 1991, the country looked to adapt its Constitution, replacing in in

1995. This new Constitution included indigenous groups are rights-holders and declared the Republic as multi-ethnic and plurinational. Later, in the Constitution of 2008, Bolivia proclaimed itself a Plurinational Republic and expressly included the right to free, prior and informed consultation in a chapter exclusively dedicated to that issue.

In the case of Ecuador, they adopted a new Constitution shortly after ratifying the Convention (1998). This document included the right of indigenous people to be consulted on programs to exploit the non-renewable resources that were found in their lands. Later, in the Constitution of 2008, it again included the rights of prior consultation, participation and institutionality as well as a pre-legislative consultation.

On the other hand, the constitutions of **Colombia, Peru and Brazil**, that were in force upon the ratification of C169 and that still govern the countries, do not expressly include the right to the consultation. In the Colombian case, the biggest development of this right occurred through the jurisprudence of its Constitutional Court. In Peru, the process occurred through legal norms. In the Brazilian case, in conformity with the regulations of its Constitution, the prior consultation would be equivalent to the right to participation; it is not understood as a consultation per se but rather a "search for consensus," as the final decision belongs to the National Congress.

Furthermore, of the six countries, **Brazil** is the only one grant C169 constitutional status.
According to the Supreme Federal Tribunal, human rights treaties are hierarchically superior to ordinary laws, but inferior to the Federal Constitution. However, those human rights treaties ratified by the Congress of the Republic with a three-fifths majority, both in the Senate and the Lower House, do enjoy constitutional hierarchy; but that is not the case for C169.

Regarding the normative development of the right to a prior consultation in each legal framework of the countries studies, we can place to one side a group of four countries (Bolivia, Brazil, Ecuador, and Colombia) that regulate the prior consultation in a sectorial manner. On the other hand, only one country (Peru) has a general law that specifically details the right to the prior consultation. The Peruvian law mandates adaptation of the law to distinct sectors.

It bears mentioning that the mere existence of sectorial and/or general legislation does not necessarily mean that the legal framework accords with the standards established in C169. As a result, the

majority of normative developments deviate somewhat from C169. The most recurring is that the legal framework governing the consultation was not itself consulted. The development of this right has not been subject to a process of participation or disseminating regarding the "benefits" of any activity.

Bolivia is the country with the most dispersion with relation to the subject of the consultation. It has legislation in the area of Hydrocarbons, Mining and Metallurgy. However, despite making reference to C169, it does not comply with the essential standards of that convention: namely being prior, free and informed. Furthermore, as happened with the Mining law, the legislation on the rights of indigenous people in many cases has not been duly consulted.

Another recurring mistake is that countries adopt a restrictive interpretation of the standards of C169 as conditions for consultation. As a consequence, it is normal that the legal framework of these countries operates with a largely limited concept of "prior consultation."

This is the case of Supreme Decree #1320 (1998) of Colombia, which states that the object of the prior consultation is analyzing the economic, social, cultural and environmental impact for any exploitation of natural resources. In comparison with the Convention, it does not consider, in general, that the consultation should include any legislative or administrative measure capable of affecting these populations.

In a similar way, Ecuador, has established participation procedures for indigenous people and afro-Ecuadorians but at the cost of restricting the content of the consultation and information-transmission procedures regarding the underlying activity (see Decree #140). Even worse, as occurred with the "Regulation for the execution of the prior consultation," it doesn't account for cultural barriers. Ideally, the process and the underlying information should be adapted to the cultural context of the people in order to better facilitate understanding and dialogue.

In Brazil, several decrees are of note, particularly those that established obligations related to those provided by C169 on the issue of prior consultation. It is relevant to emphasize that in this country the legal dispersion is greater, in the sense that each state within the federation has its own legal framework on the issue.

Lastly, as previously indicated, Peru is the only country of those included in this study that has implemented a Prior Consultation Law. And it did so sixteen years after the Convention was ratified, in 2011 (Law #29785), approximately one year after it was regulated. Despite this fact, serious criticisms have arisen and persisted against both the law and its regulations, which, in establish more restrictive requirements than the Convention (for example, the requirement of uninterrupted presence of the people in the territory). Furthermore, according to several indigenous organizations such as Aidesep, the law does not reflect the agreements that were reached in the process of dialogue prior to its adoption.

Various actors participated in the consultation process. It is relevant for us to indicate, for each country, if there is a centralized specialized institution, or if the work is dispersed among different entities.

In Colombia and Brazil there is an institution that is responsible for carrying out the consultation and/or another that is responsible follow-up activities, and that serves as an intermediary between the State and indigenous representatives.

In the case of **Colombia**, the institution in charge of implementing the consultation process is the Ministry of the Interior, through the Division of Prior Consultation, acting in conjunction with the Defender of the People, and the Indigenous Territorial Entities. Meanwhile, in **Brazil**, the National Congress is responsible for authorizing the exploration of natural resources, prior to dialogue with the affected communities. Likewise, the Federal Public Administration responsible for a project that affects indigenous territory must notify the Fundação Cultural Palmares (in cases where quilombolas communities are affected) or FUNAI (in cases which indigenous communities are affected) to create

the Commission on Prior Consultation and to carry out the same; that way both institutions act as intermediaries.

In a second group - Bolivia, Ecuador, and Peru - competencies overlap. There is not one entity that centralizes the execution of the consultation; it is segmented. In Ecuador, because there is no centralized institution responsible for the process, prior consultation is implemented in a sectorial manner (for example, in the area of hydrocarbons, the responsible bodies are the Secretariat of Hydrocarbons and the Ministry of Non-Renewable Natural Resources in coordination with the Ministry of the Environment, the Coordinating Ministry of Social Development and the Secretariat of Indigenous Groups).

In Bolivia, in theory, every sector and level of government is responsible for consultation. However, because various state entities have diverse unspecified functions in this area, that is not possible in practice. (That is what happens, for example, in the hydrocarbons sector, where the General Division of Socio- Environmental Management of the Ministry of Hydrocarbons and Energy participates in consultation processes with hydrocarbons, in a coordinated way with the Ministry of the Environment).

Likewise, the Intercultural Service of Democratic Development of the Supreme Electoral Tribunal plays an observation and accompaniment role relatved to consultation processes (according to the Electoral Law).

In Peru, the institution responsible for monitoring the implementation of the prior consultation is the Ministry of Culture, through the Viceministry of Interculturality and, specifically, the Division of Prior Consultation and the General Division of Indigenous People's Rights. Nonetheless, the actual execution of the consultation is carried out in a sectorial way (i.e. each sector has its own laws that govern the process).

It is important to emphasize the role of a number of indigenous organizations, which have become key actors, in a number of situations, in achieving greater recognition of their rights. Nonetheless, on the other side of the coin, there also have been cases in which there was state interference with their activities which delegitimized them.

The most noteworthy case is that of Bolivia, where there is a fund for the strengthening of indigenous organizations which was received as a positive initiative, destined to empower organizations. Nonetheless, recently it has been revealed that these funds have been used by the government to co-opt these organizations, which has resulted in the creation of parallel organizations financed by government resources.

In Brazil, a unique problem occurred. In light of the conflicts that arose from the construction of the Belomonte hydroelectric plant, FUNAI proposed the implementation of an Emergency Plan called the "Promotion of Ethno-Development" geared towards people affected by the project. This plan called for the creation of specific programs for each ethnicity in order to empower indigenous people generally. Nonetheless, these resources were deviated towards unrelated needs (such as requests for soccer balls, and non-traditional commercially branded foods). As a result, the initiative not only failed to strengthen the community, but ended up exacerbating their vulnerability.

In Peru, Brazil, Ecuador and Bolivia it is imperative that the formal recognition of indigenous groups by state authorities be of declarative, rather than constitutive. In other words, the rights that concern indigenous people are not subject to an express recognition, but rather they should enjoy the rights that are inherent to their condition.

In this sense, we must call attention to the situation of peasant communities; in a number of countries they are not included in the concept of indigenous communities. As a result, they receive distinct treatment with respect to the prior consultation, as well as with other rights. For example, in Columbia, peasant communities receive differentiated treatment compared to indigenous communities; according to the Constitution (article 79) the former has the right to participate in concrete cases of environmental protections, while the ethnic communities are recognized as having the right to be

consulted (which has developed, over all, in a legal way). In Peru, something similar has happened, as different experts indicate that peasant communities are in fact indigenous communities, based on a historical argument that appeals to the Agrarian Reform Law, which replaced the concept of "indian" with "peasant" based on the derogatory nature of the former term. As a result, according to them, the problem is only related to the nomenclature used. Nonetheless, the fundamental point is to mirror the criteria established in C169 (article 1).

In the six countries studied a recurring problem that has resulted in serious conflicts with indigenous people has been the licensing concessions for extractive activities in indigenous territory without a process of prior consultation, or alternatively, situations in which even complying with this step, the mechanism has been reduced to a formal procedure to inform the community of the benefits that the particular activity will bring.

In Brazil, for example, a tendency of its courts – particularly, certain Regional Federal Tribunals – is to overturn lower court decisions that order the suspension of extractive activities in cases in which it is proved that there was non-compliance with a process of consultation of indigenous people. This manifests itself in the form of a "Suspension of Security" which is a legal artifice that allows the government to request the suspension of judicial decisions based on supposed threats to national security and the "social and economic order" of the country.

In the Bolivian and Ecuadorian cases, a notable improvement can be perceived in relation to the jurisprudential criteria set by its High Courts through the promulgation of its current constitutions (dated at 2008 and 2009 respectively). As a preliminary matter, the Constitutional Tribunal of each country adopted contrary criteria to the standards of C169, which have been damaging to indigenous rights, and placing greater emphasis and priority on the economic development of the country.

Thus, for example, in a previously mentioned ruling (#0045/2006), the Bolivian Constitutional Tribunal indicated that the consultation cannot be understand as a way of impeding the exploitation of the richness of the undersoil belonging to the State, and that because the supreme interest of the majority, as expressed by State authorities, surpasses the interest of any particular group of any nature. This criterion was later reversed by the Plurinational Tribunal, which in difference rulings (# 2003/2010-R, for example), indicated that the consultation of indigenous people must seek to obtain their consent and cannot merely be a formal process of consultation (understood as the provision of information).

Nonetheless, the new High Courts of both countries (Constitutional Court for Ecuador and the Plurinational Court of Bolivia) have also committed several errors and have been the subject of criticism based on certain decisions they have adopted (as occurred with the Yasuní case in Ecuador and the Tipnis case in Bolivia). Furthermore, even when they have apparently acted in good faith, attempting to align themselves with the protection of indigenous rights, they have adopted decisions that not only collide with, but even distort the content of these rights.

This occurred with the content of the principal of sumac kawsay, incorporated into the Ecuadorian Constitution of 2008, and translated as "good living" (although the correct translation of the quichua is "living together harmoniously"). According to the Constitutional Court the general interest should be prioritized over the particular. They thus associated progress (understood as the "good living" of all Ecuadorian citizens) with greater industrialization of the country. (# 001-10-SIN- CC).

In the case of the jurisprudence of the Constitutional Court of Colombia, in a number of rulings (T-769 of 2009, T-129 of 2011, and T-376 of 2012), the Court indicated that facing an especially intense effect on the collective territory of indigenous people, the duty to ensure the participation of such people is not exhausted with the consultation, but rather it requires the procurement of free, informed and expressed consent.

Lastly, in the case of Peru, the Constitutional Tribunal, through a numer of ruligns, has developed a framework for the elements of any prior consultation must contain, as well as the responsibilities of those who implement the consultation. Nonetheless, this body had one of its most pivotal moments

when it indicated that the right to the prior consultation of indigenous people would only be required from the date of the publication of ruling # 00022-2009-PI, that is from June 2010 and not from February

1995 when C169 entered into force within our legal framework. This decision was so grave, that in the next opportunity they had to rectify this criterion.

2.

Land and Territory

Foto: Pablo Puertas

2. Land and Territory

2.1 At the Constitutional level

In **Bolivia**, the concept of communitarian land was introduced with the 1995 Constitution. However, the 2009 Constitution for the first time included a specific chapter on the rights of indigenous people and first-nations peasants; specifically Chapter 4, article 30 recognized the right to participation in the benefits of the exploitation of natural resources in indigenous territories, the right to autonomous indigenous territorial management , and to the exclusive use of existent renewable natural resources in their territory without detriment to the rights that were legitimately acquired through third-parties.

In this same Constitution, the right to territory is not addressed in an isolated manner; on the contrary, the document calls for the Special Peasant Regimen with the Regiment of the Environment and Natural Resources. Likewise, it introduces the concept of Indigenous Peasant Territory (TIOC), recognizing territorial integrity (not just of lands), at the same time that it establishes a *new* legal subject or identity: the native indigenous peasant. It also recognizes the autonomous faculties linked to uses and customs and integrated territories made up of communities, which must be translated into Native Indigenous Peasant Autonomous Regions (AIOC). Unfortunately, the procedures to transition from TCO to TIOC and later from TIOC to AIOC are long and complicated.

In that sense, an important matter in this section is that that refers to territorial rights of Indigenous People in Voluntary Isolation and Initial Contact. Bolivia is, together with Ecuador, one of the only two countries mentioned in this study that address directly in their constitutions the rights of indigenous people in voluntary isolation. As such, the Bolivian constitution recognizes the right of indigenous people to exist freely, and to free determination and territoriality.37[37]

In the case of Colombia, the issue of land and territory was included in the 1991 Constitution, which ordered Congress to "issue a law that recognizes black communities that have been occupying barren lands in rural riparian areas of the of the Rivers of the Pacific Basin, in according to with their traditional practices of production, as well as the right of collective property on the areas that will be required by this law." This must be applied to similar zones (according to Article 55).

As such, the document treats indigenous territories as territorial entities, together with the departments, districts and municipalities. These indigenous territorial entities are subject to the Organic Ley of Territorial Order and their demarcation is carried out by the National Government, with the participation of representatives from indigenous communities, previously the responsibility of the Commission of Territorial Order.

On the other hand, in this country there is the figure of "shelters," which are considered inalienable collective property. Precisely, regarding this figure, the Constitutional Court of Columbia has emphasized "the importance of expanded the concept of ethnic community territory at the legal level, so that it comprises not only land that is titled, inhabited and exploited by the community, "but also those area that constitute the traditional ambit of their economic and cultural activities, in order to facilitate the strengthening of the spiritual and material relation of the people with the earth and to contribute to the preservation of past customs and their transmission to future generations." (T-009-2013).

37 Cfr. CIDH, OEA/Ser.L/V/II. Doc 47/13, December 30, 2013; Pueblos Indígenas en Aislamiento. Voluntario y Contacto Inicial en las Américas: Recomendaciones para el pleno respeto a los derechos humanos)

It is important to emphasize that in Colombia, according to the Constitution (article 330), indigenous territories are governed by councils that regulated according to the uses and customs of their communities.

In Ecuador, the right to property in communal lands is constitutionally recognized, as is the right to possession of ancestral lands and territories, participation in the use, administration and conservation of renewable natural resources, the participation in the benefits of this exploitation, the conservation of the management of biodiversity, the conservation and development of its forms of social and political cohabitation within their territories, the right to not be displaced, to maintain collective knowledge on the use and management of territory and the protection of territorial rights of groups in isolation (article 57, parts 4 5, 6, 7, 8, 9, 10, 11, and 12). Furthermore, it establishes the figure of indigenous or afro-Ecuadorian territorial areas to exercise the competencies of the corresponding territorial government. (article 257)

Furthermore, as has been indicated, together with Bolivia, Ecuador is one of the only two counties to address the right of indigenous people in voluntary isolation at the constitutional level. For example, Ecuador indicates in article 57 of its current constitution that "the territories of people sin voluntary isolation are of irreducible and untouchable ancestral possession and that includes the prohibition of every type of extractive activity." In addition, it signals the obligations of the State with respect to their self-determination and will to remain in isolation.

In the case of **Brazil**, according to the Constitution and the Indian Statute, indigenous groups have the right to the use and possession of the land, but in no case do they have the right to property. The Constitution (articles 20 and 22) establishes that lands traditionally occupied by Indians are goods of the State, which is also responsible for legislating on indigenous lands. As a result, the Brazilian constitution determines that the use of hydrological resources in indigenous territories, as well as the prospecting and exploitation of minerals in those lands, can only be carried out with the authorization of the National Congress.

In the case of **Venezuela**, article 119 of its current Constitution stipulates that the National Executive, with the participation of indigenous groups, is responsible for delimiting and guaranteeing the collective property of its lands, which have the character of being inalienable, imprescriptible, not subject to seizure and non-transferrable in accordance with the Constitution and the law.

In the following article, art. 120, reference is made to the use by the State of natural resources in indigenous habitats shall be carried out without harm to the cultural, social and economic integrity of those habitats, and as such as it subject to prior information and consultation by the respective indigenous communities. The benefits of this use by indigenous people are subject to the Constitution and to the law.

Likewise, according to the Twelfth Transitory Disposition of its Constitution, they foresee a timeframe of two years from the moment when the 1999 Constitution is in force, in order to complete the process of delimitation and delivery of ancestral territories, referred to in article 119. Nonetheless, despite that fact, to date many representative organizations of indigenous people realize the deficiencies at the level of implementation of the recognized rights and aforementioned mandate. This deficit has materialized with the growth of social conflict, like for example, what occurred in Zulia State with the exploitation of carbon in the Perijá Sierra or of gold, coltan and other minerals on the States of Bolivar and Amazonas under what has been called Arco Minero.[38]

Among the different aspects of the case, it is noteworthy that the Venezuelan state pushed for the ARCO mining project despite not having an Environmental Impact Study that supported the viability of

38 This obligation to delimit indigenous territory has support through an interpretation of article 120 of the Venezuelan constitution, and in articles 53 to 61 of Chapter 6 of the Organic Law of Indigenous Groups and Communities.

the project. This has been signaled by the delegation of this country to the 159th Period of Sessions of the Inter-American Commission of Human Rights, which took place in December of last year.[39]

Lastly, in **Peru**, article 88 of the current Constitution stipulates that the State provide preferential support to agrarian development, guaranteeing the right to property in land in its communal for as well as its private form. Likewise, the law indicates the limits and extension of the earth according to the peculiarities of each zone. Specifically, it adds the Native and Peasant Communities have legal existence and are legal persons, but their recognition in a single registry has declarative but not constitutive character. Property in land is imprescriptible, except in cases of abandonment, in which it would pass to the dominion of the State for adjudication by sale.

2.2 At the normative level

In Brazil, the Indian Statute of 1973 establishes a typology of current indigenous territories. It regulates the juridical situation of "Indians" with the objective of preserving their culture and integrating them, progressively and harmoniously, into the national community. It states that any work contract with isolated Indians will be considered null. Other must be approved by the body of Indian protection.

It is relevant to mention that the Statue follows a principal established by the Civil Code of 1916, in the sense that it considers indigenous people as "relatively incapable," and thus a state indigenous body should serve as their guardian (a function that was carried out, between the years 1910 and 1967, by the Indian Protective Service (SPI) and currently exercised by the Indian National Foundation – FUNAI) until they are integrated into the national community. Thus, it indicates that indigenous lands, by initiative and under the orientation of the federal body of assistance to the Indian, will be administratively delimited. Furthermore, article 65 indicates that the Executive Power will carry out, in a period of five years, the demarcation of those indigenous lands that have not yet been demarcated.

The 1988 constitution in a certain sense breaks from this criterion in recognizing that Indians also have a right to maintain their own culture. However, as mentioned before, it also maintains a series of criteria of an integrationist character.

With Decree # 99 971, adopted in January 199, a special commission was created to promote the revision of norms and criteria relative to the demarcation and protection of indigenous lands (reforms to the Indian statute and its corresponding legislation). Thus, in February 1991, through Decree #22, it was established that the demarcation of lands would be preceded by identification, led by a technical group designed by the federal body of assistance to the indigenous.

The involved indigenous group can participate in all phases of the process. Other public bodies, members of scientific communities and specialists are also allowed to participated, by proposal of the technical group. It is possible to consider the works of identification and delimitation previously carried out as objectives of demarcation. In the same way, once the technical group report has been approved by the head of the federal body of assistance to the Indian, it will be published in the Official Gazette to be passed to the Ministry of Justice for its definitive approval.

The federal body of assistance to the indigenous proceeds, within the timeframe of one year, to the revision of indigenous lands considered insufficient for the physical and cultural survival of indigenous groups. On the other hand, the Ministry of Justice, by request from the head of the federal body of assistance to the indigenous, can decided the provisional interdiction of the lands in which

39 The session can be found in the following link: https://www.servindi.org/actualidad- noticias/07/12/2016/venezuela-reconoce-en-cidh-que-no-ha-realizado-estudio-de- impacto
The hearing can be found here:
http://www.oas.org/es/cidh/sesiones/docs/Calendario-159-audiencias-es.pdf

the presence if isolated indigenous people can be proven. In others, the interdiction is necessary to preserve the integrity of indigenous people and their respective territories.

Decree #22 was repealed by Decree #1775/96 – Law of Indigenous Lands (January 1996) that regulates the demarcation of indigenous territories. Specifically, it establishes timeframes so that interested parties can present their complaints for demarcations according to the prior regimen, excluding those lands that were previously demarcated or made equivalent by supreme decree. It further indicates that FUNAI is able to discipline the entrance or transmission of third parties in areas in which isolated groups have been identified.

On the other hand, through Decree #4 887 of 2003, the procedures for the titling of quilombola territories was regulated, and *Portaría* #98 of 2007 established the system of registration and inscription of the quilombola communities in the State archives.

With Decree #7.747 of June 5, 2012, a national policy of territorial and environmental management as established for indigenous lands (PNGATI), as well as other dispositions such as the realization of Basic-Course-Modules in Territorial and Environmental Management of Lands, in which indigenous leaders as well as Funai representatives participated. This measure came under questioning by different representatives of indigenous organizations, because, among other things, it took away from the Federal Government the ability to delimit indigenous and quilombola lands as well as protected areas.

The questioning of this proposal lead to a situation in which different indigenous groups went out to protest and even blocked highways. Such is the case of the Wassu Cocal that blocked highway BR-101 (Alagoas State, in the Joaquim Gomes municipality) as well as the members of the Kariri-Xocó ethnicity who blocked the same highway at the Porto Real do Colégio municipality.

In the case of **Bolivia**, the legislation that regulates the right to indigenous people's territory is disperse. For example, it has been said that the National Service of Agrarian Reform Law generates an extensive, complicated bureaucratic apparatus where functions overlap and in a number of cases can be seen as inefficient. At the same time, it is observed that the law is important insofar as it recognizes the rights of indigenous groups over their original communal lands; nonetheless, it limits transactions to the use of the customs of indigenous communities and provides them with free land, preferring donation to adjudication. Lastly, this law consolidates the independent agrarian legislative framework with the ordinary system of justice.

With relation to the titling of the property of indigenous people, it is not a requirement that in the case that an indemnification of damages and prejudices is necessary with respect to the activities that affect communitarian lands (title or not), according to an interpretation of the Hydrocarbons Law (Law #3058, May 18, 2005). As such, it must the drawbacks derived from the loss of benefits must be contemplated, with respect to productive activities, traditional knowledge and the use of natural resources.

Chapter III, on the intangibility of sacred sites and areas of special natural and cultural value, establishes that agricultural, hunting, forest and conversation land, of individual or collective property that belongs to indigenous peasant communities or people, without regard to the type of organization or property, cannot be subject to a process of expropriation which a law that declares the public necessity and utility of the activities, projects or other hydrocarbons to be extracted on these lands or where they are pre-constituted rights of native, indigenous and peasant communities or groups. This law thus aims to adapt the national legislation to conform to C169, specifically article 5.b on institutions and article 14.1 on indigenous property. Furthermore, articles 121-127 are adapted to article 16,2 of C169 through the text, "removal and relocation can only be carried out with the consent [or] the culmination of adequate procedures established by national legislation.

Law #31, the Legal Framework of Autonomous Regions and Decentralization (July 2010), develops the concept of indigenous autonomy included in the Constitution of 2009. For its part, the Law of the

Rights of Mother Earth (December 2010) is characterized by its principled approach without clearly defined obligations, except for those contained in Article 8 of this law (Obligations of the Plurinational state, in all its levels and territorial ambits and through all of its authorities and institutions), of which we can emphasizes the duty to development public policies and systematic actions geared at prevention, early alert, protection and precaution to avoid situations in which human activities lead to the extinction of these populations, the alterative of the cycles or processes that guarantee their live, or the destruction of life systems, including the cultural systems that are part of the Mother Earth.

It can be extracted from the Mineral Law (May 2014) that all national territory has been declared a fiscal area and susceptible to being licensed for mineral exploitation, without regard to whether these areas of ecologically fragile or otherwise protected by law.

In Colombia, law #70 of 1993 recognizes the right to collective property, arising from the mandate of the Constitution of 1991. In 1994, Law #170 established the duty of the National Government to provide lands that are "indispensable and to facilitate the settlement and development" of indigenous people and to study the titles that these communities present with the aim establishing legal safeguards (article XIV). Decree #

1745 of 1995 regulates law #70 of 1993 and establishes the mechanisms and procedures that communities and state entities, particularly INCODER, must carry out tin order to effectuate titling.

In 2014, Decree #2333 established mechanisms for the effective protection and legal security of lands and territories occupied and traditionally possessed by indigenous people. Among other things, it created a system of interinstitutional coordination for the unification of property information regarding indigenous territories and the creation of their information system.

With the aim of guaranteeing their legal security in terms of collective indigenous property, this law establishes procedure for protective measures for the possession of ancestral or traditional territories. It also establishes the creation of a code of the measures of protection of the possession of traditional or ancestral territories under the auspices of the Superintendence of Notary and Registration.

In **Ecuador**, the Mining Law of January 2009, in Article 90, calls for a special procedure of consultation to the people, which must be based on principles of legitimacy and representativeness, through its institutions, for those cases in which mining exploration or exploitation takes place in ancestry lands or territories or when said labors can affect their interests; in conformity with article 398 of the National Constitution. In its Sixth General Disposition, it prohibits any type of mining activity in the zones declared as ancestral territories of people in voluntary isolation, in according with criteria of the National Constitutional.

Despite the fact that the Ecuadorian Constitution recognizes the Human Right to Water (article 12), through the mining law and its reforms, as well as the recently approved Water Law, regulations permit obligations to the mining industry, especially to encourage the commencement of metallic mining on a large scale.

On the other hand, in August 2010, the Ley of the Organic Code of Territorial Organization, Autonomy and Decentralization (COOTAD) was passed, establishing the regimen of the different levels of autonomous decentralized governments and special regimens with the aim of guaranteeing their political, administrative and financial autonomy.

Additionally, it developed a model of progressive and obligatory decentralization through the national competencies system, the institution responsible for the administration, financing and policy definition and mechanisms to compensate for inequalities in territorial development. Likewise, it realizes important developments with respect to the rights of indigenous, afro-Ecuadorian and montubio nationalities and communities, establishing that territorial circumscriptions are to be exercised in a manner in accordance with the collective rights indicated in the Constitution and government by the principle of *sumac kawsay* or good living (article 99).

On the other hand, in relation to ancestral territories found in protected natural areas, there is indication that these remain occupied and administered in a communitarian form, with policies, plans and conservation programs in accordance with the conservation plans and policies of National System of State Protected Areas (article 100).

With respect to the communities in initial contact, who have special socioeconomic characteristics derived from their dependence on the ecosystems present in their territory, they have the right to organize themselves and administer their territory in the way that best serves them to maintain their culture and their way of subsistence, in accordance with the Constitution and the law (article 101.)

Another impact aspect is the figure of the pre-legislative consultation with respect to those norms that direct and objectively can affect the collective rights of communes, communities, groups and nationalities of indigenous, afro-Ecuadorian and montubio people with respect to their territorial circumscriptions; this also establishes a procedure to be followed (article 325).

In the case of **Venezuela**, they have a Law of Demarcation and Habitat Guarantee of Indigenous People's Lands, published in January 2001[40], whose objectives is regulated the formulation, coordination and execution of policies and plans relative to the demarcation of the habits and lands of indigenous communities with the ultimate goal of guaranteeing the right to collective property of lands, in conformance with what is established in the Constitution.

Thus, this disposition refers to the fact that the process of delimiting the habitat and lands of the indigenous communities and groups will be carried out by the National Executive through its Ministry of the Environment and Natural Resources, in conjunction with the legally constituted indigenous groups, communities, and organizations.

Now, one of the principal problems that has been identified is that despite the existence of fully-developed internal legal framework the level of implementation has been restricted. As indicated, despite the existing legal framework and institutions, high levels of participation of groups, the creation of an Indigenous Ministry, and of a Presidential Commission for Indigenous Groups or Indigenous Communal Councils, among other important advances and institutions, there are still structural problems related to territorial demarcation rights (according to the National Delimitation Process and its official results, during the past 15 years, only 12.4% of the habitats and indigenous lands have been delimited, using the number of communities counted in the census as a reference). The rest of the demarcations that the government has completed are parcels (private property) that allow companies and the State to negotiate directly with certain families; as such, the level of implementation of the right to the consultation has been very much below the expectations that arose from the legal framework.

Lastly, in **Peru**, in July 1995 Law #26 505 was promulgated, relating to private investment in the development of economic activities in the lands that belong either to the national territory or to native and peasant communities. This law adopts a more flexible posture with respect to communitarian property in that it accepts that the decisions will be made with a percentage of community members regardless of whether they are qualified. The only requirement established is that they have more than one year living in the place; as such, the first complementary disposition indicates that public necessity will permit proceeding to the expropriation of a property for the execution of works relating to infrastructure or public service, independent of whether these lands are occupied by indigenous people.

Through Supreme Decree # 011-97-AG, a regulation to the prior law was approved, which aimed to guarantee the integrity of territorial property of Native Communities, signaling the imprescriptible nature of that property. Likewise, according to the law, it is the Minister of Agriculture, through the special project to title rural lands and land registries – PETT, who is responsible for developing the registry of native communities and providing them with the corresponding property title free of charge.

40 Official Gazette of the Bolivarian Republic of Venezuela. Year CXXVIII. Caracas, Friday January 12, 2001. # 37.118

To date a number of decrees and laws have been passed that, in different ways, contravene the rights of indigenous people. For example, Supreme Decree # 054-2013-PCM increases the flexibility of administrative procedures for the protection of archeological cultural patrimony an the right to property for indigenous people; Supreme Decree # 060-2013-PC approves special dispositions to facilitate the execution of public and private investment projects and relaxes procedures for the evaluation of environmental impact; Law # 30025 provides the private investor with the acquisition of land for the execution of infrastructure work or the commencement of expropriation procedures. Law #30230 approves "special procedures" to facilitate the access to lands for investment projects seriously threatening the territorial rights of indigenous people and debilitating environmental institutions that monitor offenders such as the Organism of Environmental Evaluation and Audit (OEFA), and even reduces the amount of fines; through Supreme Decree # 001-20150EM it allows the Directive Bodies of the native and peasant communities to make use of their communal lands without consulting the General Assembly; Law #30327 adds flexibility to the procedures to create obligations on State *eriaza* lands, the rights of way and expropriation that affects them – using the ambiguous term "eriazas" - to refer to non-titled native community lands; D.L #1210 eliminates the exploitation of native and peasant communities from the application of norms on expropriations, which, allows for the expropriation of land from native and peasant communities.[41]

The former takes place within the context of what has been labelled "Environmental Frauds" understood as a series of dispositive norms oriented towards providing flexibility in environmental standards and in the protection of the rights of indigenous people and the environment. For example, with the first fraud (Supreme Decree #054-2013-PCM; Supreme Decree #060-2013-PCM; Law #30025) "Measures to protect the cultural patrimony of the nation have been debilitated… the ends, time frames, procedures and requirements for obtaining the Certificate of Inexistence of Archeological Remains (CIRA) and the Plans of Archeological Monitoring have changed, weakening the protection of archeological patrimony. In this way, investment projects can carry out their activities on territories where there is archeological patrimony, rapidly and without an exhaustive analysis of the consequences for the country. This goes against the untouchable, inalienable and indestructible protection of our patrimony protected by Article 21 of the Political Constitution of Peru, as well as Law #28 296, Law of General Patrimony of the Nation and its regulations, Supreme Decree #016-75, the Regulation of Archeological Investigations R.S. # 004-2000-ED, Supreme Decree # 009-2008-ED, the Singular Test of Administrative Procedures (TUPA) of the Ministry of Culture (MINCU), and the Directive # 001-2012/MC that establishes procedures for the presentation of plans of archeological monitoring, and R.M. # 127-2001-MC Updating of the TUPA of MINCU. The flexibility of its protection would be a serious loss for the history of the country and in terms of cultural riches."[42]

Something similar occulted with the second fraud (Law #30230) which overlapped with an action of unconstitutionality (Exp. # 00003-2015-AI/TC), which, among other things, paralyzed the sanctioning capability of the OEFA for the next 3 years (that is to say, until July 11, 2017) and promoted an exceptional sanctioning procedure that is only activated in cases in which the infraction persists and corrective or remedial measures are not taken, in which case the OEFA is only permitted to impose a 50% fine for the infraction and in those cases that involve effects to public health, then a 100% fine can be imposed. That is to say, through this normative disposition it is established that OEFA, in cases in which an infraction has been declared, must first of all resort to the dictates of corrective measures. If these measures are not complied with, then sanctions can be imposed.[43]

41 Read: Marco Huaco Palomino. El "vaso medio lleno", o de la ilusión de las políticas públicas pro indígenas en contextos extrahectivos (2015). Unpublished article.

42 Available at the following link: http://dar.org.pe/archivos/publicacion/107_agenda_ambiental_num_5.pdf (Visited 01/28/2017)

43 On Friday 01/27/2017, the Peruvian Constitutional Tribunal, in a Public Hearing, learned of the arguments of the complainants as well as those in the process of unconstitutionality. This hearing can be found in the history of recording of the CT: http://www.tc.gob.pe/tc/ audiencia/envivo/transmision

These measures have also been oriented towards the weakening of the concept of territorial integrity of the communities as for example with the Third (Supreme Decree # 001-20150EM) and Fourth Fraud (Law # 30327), which loosened environmental procedures and facilitated access to rural lands for investment projects through obligations, rights of way and expropriations. Not having clear which were the *eriaza* lands of the State, nor having a registry of these lands, imposing obligations on investment projects could generate territorial conflicts.

Finally, in the Fifth Environmental Fraud we call special attention to the Tenth Final Complementary Disposition of **D.L. # 1192**, which stipulates that "The Dispositions contained in Title VI cannot be applied to lands and territories of indigenous or native people, **nor can they affect the rights of property or possession of native and peasant communities.**" (emphasis added); nonetheless, through the only article of D.L. #1210, the cited Tenth Disposition was modified so that now it contemplates that "The Dispositions contained in Title VI cannot be applied to lands and territories of indigenous or native people, nor in areas of Territorial Reserve or Indigenous Reserve of Indigenous Populations in Voluntary Isolation and/or Initial Contact," omitted the considerations related to the rights of property and possession in peasant communities.

2.3 Regarding titled territories

The information is dissimilar; however, the common issue among all the countries analyzed is the lack of organized and updated information. For example, in the case of Bolivia, the information found dates back to 2011[44], and according to it in Bolivia there are 258 Indigenous Native Peasant Territories (TIOC) comprising 36,552,883 hectares. At that fact, they had only titled 190 TIOC, comprising 20,715,950 hectares while 54 TIOC was still in process, representing 1,705,628 hectares.

It is important to remember that the TIOC were incorporated, as indicated by the 2009

Constitution, in recognition of autonomous faculties linked with the uses and customs of integral territories comprised of communities. In theory, the TIOC should have translated into Native Indigenous Peasant Autonomous Regions (AIOC), but unfortunately in practice the procedures to transition from the Communitarian Area of Origin to a RIOC and then from a RIOC to an AIOC are long and complicated. It bears repeating that TCO have been legally recognized since 1996 and together with "communitarian property" constitute the two types of forms of agrarian property established by law.

In the case of Colombia, the information dates back to 2012.[45] According to this information, in Colombia there 691 indigenous safeguards, 1 Special Territory (Rio Puré Natural National Park), 64 colonial safeguards, 421 Communities outside of the Safeguard, 15 Urban Councils (Bogotá-Cali-Medellín), 1 Sacred Territory (Black Line). In total, 1193 territories have been mapped out. These statistics do not correspond to the total number of indigenous territories that exist in Colombia, but just to those territories that have mapping. According to the National Administrative Department of Statistics (DANE) there are 832 safeguards as of December 21, 2012 (including the colonial ones).

In the case of Brazil, the information dates from 2010 and 2012. Oriximiná (1995) is the first place in which the collective titling of quilombola indigenous territory took place. According to the data from the census of the Brazilian Institute of Geography and Statistics of 2010, in Brazil there are 305 indigenous groups, with 273 different languages of which 37.4% of those older than 5 years old speak an indigenous language.

The total number of indigenous people in Brazil equals 896,917 people, of which 324,834 live in urban centers and 572,083 in rural areas, representing 0.47% of the total population of the country. The

44 http://www.territorioindigenaygobernanza.com/bov_06.html
45 Please visit the following link:
http://geoactivismo.org/wp-content/uploads/2012/01/TI_2012b.png (Visited 03/18/16).

largest part of this population is distributed within 698 "indigenous lands" (106.7 million hectares), in which 57.7% of indigenous people reside. Of these indigenous lands, 84 are inhabited by less than 100 people. IN relation to the ethnicities, 29 find themselves in a situation of voluntary isolation. The indigenous land with the greatest indigenous population is the Yanomami, in Amazonas and Roraima, with 25,700 inhabitants.

Currently in Brazil there are around 305 indigenous groups whose population is equivalent to 0.5% of the Brazilian population. In this case, the Government has recognized 690 territories for its indigenous inhabitants, representing approximately

13% of the surface of the country. Almost all of this territorial reserve (98.5%) is found in the Amazon. According to a report from 2012, the Socio-Environmental Institute found the existence of 399 indigenous lands that were titled and duly registered. (ECLAC, 2014, p. 127)

In the case of **Ecuador**, there are 34 indigenous groups that add up to a total of 1,018,176, equivalent to 7% of the Ecuadorian population. Nonetheless, there is a disagreement among indigenous organizations with respect to the results of the 2010 census on the number of indigenous people. The organizations maintain that the indigenous population constitutes between 30% and 45% of the total population. (ECLAC, 2014, p. 103-105).

The Ecuadorian amazon is the region with the most territorial complaints in the country. With a population of 247,000 indigenous people belonging to diverse nationalities and groups, the indigenous organizations demand as indigenous territories a surface of 6,308,000 hectares, equivalent to 25% of the national territory and 64%of the Amazonian territory. Up this point, they have titled 3,703,497 hectares, while another 2,352,277 are in possession of nationalities and groups but without the due legislation through processes of delimitation and titling.

According to the mining survey carried out by the Ministry of Nonrenewable Natural Resources in early 2012, in Ecuador there are a total of 1,036 owners of mineral concessions (both registered and granted) and 2,257 registered concessions, either granted in or in process, that comprised 1.21 million hectares, or 45.5% of the total surface of the country. The proportion of territory granted by the provinces with the greatest mining potential in Ecuador is: Azuay 25% (193,569 hectares) and Zamora Chinchipe 26.8% (282,998 hectares).

Seven provinces contain the greater part of the land that has been licensed in the country for metallic and non-metallic mining activities. 72.8% of the concessions ae in Azuay, Loja, Zamora Chinchipe, Guayas, El Oro, Pichincha and Morona Santiago; meanwhile four provinces represent 66% of the granted surface area (Zamora-Chinchipe, Azuay, Loja, Morona-Santiago).

In **Venezuela**, a detailed d study of the National Process of Demarcation and its official results during the past 15 years, provided evidence that only approximately 12.4% of Indigenous Lands and Habitats have been delimited, going of the number of communities counted by the census. According to official data, in Venezuela there are approximately 3,101 indigenous communities and 2,788 other communities (National Institute of Statistics, Indigenous Census 2011), having delivered 80 demarcation tiles in the period of 2005-2013, plus 6 announced in October 2014, that benefited a total of 372 communities, for a total of approximately 2,841,518 hectares in the period from 2005 to 2014.

Departing from the approximate existence of 3000 communities in all of Venezuela,

87.6% of indigenous habitats and lands remain to be delimited. Likewise, information official about the demarcation process indicates that only 11 indigenous groups (Kariña, Cumanagoto, Pumé, Jivi, Cuiva, Warao, Yukpa, Hoti, Pemón, Mapoyo, and Barí) have benefited of a total of 50 communities. (Indigenous Census, 2011).

In the case of Amazonas State, they have only carried out a demarcation of the Hoti community of "Caño Iguana" with a reduction of 40%of its territorial space, according to the request based on its

self-limitation. As we indicated, leaving the majority of indigenous habitats in the Amazonian region without demarcation.

In Peru, the information dates from 2015, but it is not very clear. The Vice-Minister of Interculturality incites that there are 500 communities who still do not have property titles in the Amazon region. On the other hand, AIDESEP estimates that there are

1300 communities that still do not have property titles in the Amazon. For its part, the Common Good Institute indicates that there are 666 native communities that still do not have property titles in the Amazon and 3,303 peasant communities that still do not have property titles. The information is contradictory as there still is not a state registry of native communities.

2.4 Property in natural resources

In **Brazil**, indigenous people have "permanent possession" of their lands and the exclusive use of the riches from the ground, from rivers and the lakes that exist in their territories (article 231, sections 1 and 2). Nonetheless, the National Congress also has the power to manage the use of hydraulic and mineral resources in indigenous lands, and to define the exploitation of natural resources from the ground, the rivers and the lakes that exist in these territories. (article 231, sections 3 and 6).

On the other hand, the Indian Statute of 1963 establishes a typology of indigenous territories, according to which there can be occupied territories or those in the permanent possession of Indians or jungle-dwellers, as well as zones reserved for Indians and lands of indigenous dominion. Furthermore, in accordance with the statute, the State is allowed to intervene in indigenous areas through the federal body of guardianship of the Indians (FUNAI), as an experiment or for the following motives: fights between tribal groups, epidemic outbreaks, national security reasons, the realization of public interest works for national development and the exploration of underground riches for the national security and development.

In **Bolivia**, according to the 2009 Constitution, natural resources are the direct, indivisible and imprescriptible property and dominion of the Bolivian people. It is the responsibility of the state to administer them in function of collective interest. (Articles 311, 349, 351).

In **Colombia**, the Political Constitution of 1991 (article 332) indicates that the State is the owner of the undersoil and of nonrenewable natural resources, without prejudice to rights acquired through preexisting laws.

In **Ecuador**, in accordance with article 408, natural resources are the inalienable, imprescriptible and not-subject-to-seizure property of the state, as are nonrenewable natural resources and, in general, products of the undersoil, mineral and hydrocarbon deposits, substances whose nature is different from that of the earth, including those that area found in areas covered by territorial sea water and maritime zones; as well as biodiversity, genetic patrimony and the radio-electric spectrum.

It adds that these can only be exploited in strict compliance with the environmental principles established by the Constitution and that the State will participate in the benefits and use of these resources, in an amount that will not be inferior to those of the company that exploits them, guaranteeing that the means of production, consumption and use of natural resources and energy preserve and recuperate the natural cycles and permit conditions of life with dignity.

In **Venezuela**, there is strong pressure in the Amazon region with respect to the issue of access to natural resources. Up to the moment, the benefits of the undersoil are administered by the State and later distributed to indigenous people without consulting the application of public policies in accordance with their priorities.

An emblematic case is that of the project dubbed "Mining Arc of the Orinoco," which has generated a number of concerns due to its possible impact on the environment and in relation to the indigenous people that leave in those territories. In this case, the government neglected its obligation to carry out a consultation process and in its displaced created the Presidential Commission for the making of decisions.

It is in this context that on February 24, 2016 Decree #2,248 was published in Official Gazette 40855 which creates the so-called "National Strategic Development Zone of the Orinoco Mining Arc." Through this legal framework, the National Executive obtained a concession for the mining exploitation of 111,843 km2, which constitutes 12.2% of the Venezuelan territory.

In this way, the Mining Arc not only fails to comply with requirements established at the constitutional level to promote extractive projects of great magnitude, but also contravenes international human rights pacts and standards ratified by the Venezuelan government, thus violating different constitutional guarantees.[46]

It bears emphasizing that this project is sustained by what has been called the National Plan, which in the first instance, establishes the expansion of extractive mining border of the country and the deepening of the extractive model of development. Likewise, in Decree #1425 "Law of Integral Regionalization for the Socio-productive Development of the Nation" that establishes the creation of the so-called "Special Economic Zones" whose objective is the attraction of foreign capital through the creation of so-called "comparative advantages," like tax exemptions and the loosening of labor laws in these territorial areas.

The decision to create the Mining Arc was formalized in violation of constitutional obligations to carry out environmental and sociocultural impacts studies for activities susceptible of generating damage to ecosystems (article 129 CRBV), as well as consultation in a prior, free and informed manner for native people when the natural resources of indigenous habitats are being used (article 120 CRBV and C169). According to the 2011 census in the State of Bolívar there were 54,686 indigenous people, while according to the map edited in 2010 by the Ministry of Indigenous People, within the territory decree as Mining Arc, there were the Mapoyo, Eñepá, Kariña, Arawak, Akawako, Yekwana, Sanema and Pemoó, whose way of live would be seriously affected by mining activity.

On the other hand, in response to the serious events that occurred in the Tumeremo population, in Bolívar State, in which according to data from the Public Ministry, 14 people associated with mining activity were murdered, on March 8, 2016 President Maduro announced the creation of a Special Military Zone to protect mining municipalities from violent attacks.

The aforementioned can be corroborated through the terms of the Guyana Manifesto on the Mining Arc: "The Development Zone of the Mining Arc (ZDAM) has an area of 111,843.70 km2 (46% of the state of Bolívar), and occupies a large part of 10 of the 11 municipalities of the State, affecting practically all of the population, especially indigenous people. Within this zone is the Forest Reserve of Imataca and in its area of influence are the Areas Under the Special Administration Regimen such as natural monuments, biosphere reserves, national parks, wild fauna refuges, protected zones, other forest reserves and basins protected by international conventions including the Caroní basin, which provides the most important freshwater reserves in the nation and supplies the hydroelectric plans that generate 70% of the energy consumed by the country."[47]

In the case of Peru, the Political Constitution of 1993 does not make express mention of indigenous territory. Regarding natural resources, it indicates (article 66) "Natural resources, both renewable and nonrenewable, are the patrimony of the Nation. The State is sovereign in their use." Furthermore, "The State is required to promote the conservation of biological diversity and of the protected natural areas"

46 Working Group on Indigenous Affairs of the ULA. Op. Cit. p. 35
47 Working Group on Indifgenous Affairs of the ULA. Op. Cit. p. 36

(Article 68). In general, it establishes the inviolability of the right to property in Article 70 of the Political Constitution with exceptions for national security or public necessity.

2.5 Movement of indigenous populations due to investment projects and/or internal conflicts

The most emblematic case is without a doubt that of Colombia, where the Constitutional Court, in Ruling T-025 of 2004, indicated that due to the historic conditions of serious violations of the human rights of indigenous people, the armed conflict exerted a greater impact on these populations of special protection. Therefore, it is the obligation of the State to prioritize the assistance because "the greatest risk that looms over indigenous people, especially, is the extermination of certain groups, either from the cultural point of view because of the displacement and dispersion of their members or from the physical point of view due to the violent or natural death of their members."

That is the case, for example, of some Indigenous Populations in Voluntary Isolation and Initial Contact. The case of the Nukak population, the majority of whose territory has been declared indigenous territory, which has not implied their effective protection given that the region is the scene of armed conflict between the military and FARC guerrillas. "The guerrillas of FARC-EIP threaten them for their opposition to the occupation of their territories and for considering them a threat to their interests. Initially there were displaced towards the Calamar Guaviare region, and, pressured by the continuous threats, arrived towards San José del Fuaviare" (IWGIA, 2007).

In this context, in 2011 the Colombian State promulgated Decree Law #4633, which had the objective of "generating legal and institutional framework of public policy for the attention, protection, full reparation and restitution of territorial rights for indigenous people and communities as collective subjects and for their members considered individually." Likewise, that same year it published Decree Law #4635 with the aim of "establishing the normative and institutional framework for the attention, assistance, reparation and restitution of lands and rights of victims belonging to black, afro- Colombian, *raizal* and *palenquera* communities."

2.6 Institutions that fight for the respect of the right to territory

In **Brazil**, FUNAI is the entity in charge of promoting dialogue between representatives of the State and indigenous people, and is responsible for identifying indigenous people, for monitoring and auditing their lands and for coordinating protection policies for isolated groups and those in initial contact.

With respect to the last tasks, the responsible body, through the General Coordination of Isolated and Recently Contacted Indians (GIIRC), is the Ethno-Environmental Protection Fronts and its decentralized units, to guarantee the full exercise of their traditional activities without any need for contact (according to article 2, section II "d" of Decree #778/2012). Likewise, the Official Indigenous Organ is responsible for the exercise of the police power, by controlling the entrance and transit of third parties in areas occupied by isolated indigenous groups.

In accordance with this, the 2012-2015 Long-Term Plan of the Funai, in its Thematic Program of the "Protection and promotion of the rights of indigenous people" contemplates objective 951 which consists in the "promotion and protection of the rights of recently contacted indigenous people through the implementation of initiatives that consider their situation of extreme physical and cultural vulnerability."

In that respect, according to official information, Funai currently coordinates the support of protective and promotion actions of 19 indigenous lands inhabited by recently contacted indigenous groups, which are the: Zo'é, Awá Guajá, Avá Canoeiro, Akun'tsu, Canôe, Piripkura, Arara da TI Cachoeira Seca, Araweté, Suruwahá and Yanomami, among others.

In **Bolivia**, the National Institute of Agrarian Reform (INRA), which belongs to the Vice- minister of Lands, and that also forms part of the Ministry of Rural and Land Development, is a public institution create by the "agrarian revolution" that administers access to the earth "in an efficient, participative and transparent way, with priority for indigenous, native and peasant communities, seeking to achieve equity in the possession of the earth, guaranteeing legal security for the property and contributing to a real productive and territorial development, in harmony with nature."

In the case of autonomous regions, there is the Ministry of Autonomous Regions, the Vice- ministry of Indigenous Native Peasant Autonomous Regions and the National Service of Autonomous Regions. In addition, there is the National Coordinator of Indigenous Autonomous Regions.

In **Colombia**, INCODER – the Colombian Institute of Rural Development, as one of its functions, is responsible for studying the land needs of indigenous people, as well as those of the black, afro-Colombian, *raizal,* and *palenquera* communities, the totality of the diverse populations that make up the ethnic groups of Colombia. With respect to indigenous people, the institute has the duty to constitute, expand and repair safeguards, to restructure and clarify territories of colonial origin, for the benefit of the respective factions (Lay #1960 of 1993, article 12, section 18). Furthermore, it can decree the expropriation of land for indigenous communities that do not possess any land themselves.

In relation to the Indigenous Groups in Initial Contact and Voluntary Isolation, there is not an office or division within the Ministry of the Interior that is specifically responsible for the problem of the PIACI. Nonetheless, a methodological plan has been devised for the establishment of the "Ethnic Safeguard Plan of the Nükak Communities," a people in initial contact who are situation (in the date of their creation in the nineties) in an area (safeguarded) of approximately 945,480 hectares of rainforest.[48]

The Nukak are considered in the Colombian imaginary as the "Indians of the jungle" or the "only true Indians" as opposed to the "other Indians" who have already been influenced by the West. Considering the situation of vulnerability in which this group finds themselves, beginning with their initial contacts until the end of the 1980s, various aid and medical attention projects were developed by the State, specifically originating from the National Division of Indigenous Affairs and the National Institute of Health, as well as NGOs such as the GAIA Foundation, the Apincunait Foundation, among other national and international NGOs and indigenous organizations.[49]

It bears emphasizing that Colombia has established protected areas through the so- called "Indian shelters." Nonetheless these are not exclusive for the groups in voluntary isolation or initial contact.[50]

Also, with the objective of protecting the Yuri, Arojes and Carabayo people, in 2002 the Natural Río Puré National Park was created, where currently the existence of a people in isolation has been confirmed. In 2007, the Natural Río Puré National Park Management Plan was adopted by Resolution #035 of the Ministry of the Environment, Housing and Territorial Development to "contribute to the protection of its territory, its free determination of no contact, survival and identity." Likewise, according to information from 2013, that year that were reformulating the zoning of the Natural Río Puré National Park because they "discovered new settlements of isolated groups."[51]

In Ecuador, through the Viceministry of Rural Development and the Undersecretary of Land and Agrarian Reform, the Ministry of Agriculture, Livestock, Aquaculture and Fishing is the body responsible for the

48 Cfr. CIDH, OEA/Ser.L/V/II. Doc 47/13, December 30, 2013. Indigenous People in Voluntary Isolation and Initial Contact: Recommendations for the full respect of human rights.

49 The authors and the International Group on Indigenous Affairs. Indigenous People in voluntary isolation and initial contact in the Amazon and Gran Chaco, Copenhagen 2007. Available online: http://intranet.oit.org.pe/WDMS/bib/virtual/coleccion_tem/pueblo_ indigena/indigenas_aislamiento_voluntario.pdf (Visited on: 11/08/16)

50 Cfr. CIDH, OEA/Ser.L/V/II. Doc 47/13, December 30, 2013. Indigenous People in Voluntary Isolation and Initial Contact: Recommendations for the full respect of human rights.

51 Cfr. CIDH, OEA/Ser.L/V/II. Doc 47/13, December 30, 2013. Indigenous People in Voluntary Isolation and Initial Contact: Recommendations for the full respect of human rights.

legalization of ancestral lands, through a program of the same name as well as a few others that point towards a sustainable management of ecosystems, as occurred with the Agenda for Transforming Amazon Production. Among its policies, it has as a priority the full development of indigenous nationalities as well as montubio, afro-Ecuadorian and agrarian communities in general.

In Venezuela, the Law of Demarcation and Guarantee of Habitats and Lands of Indigenous People establishes the Ministry of the Environment and Natural Resources as the institution responsible for the coordination, planning, execution and supervision of all of the national proves of demarcation addressed by that law.

Likewise, it created the National Commission of Demarcation of Habitat and Lands of Indigenous People and Communities, that is comprised of the Ministries of the Environment and Natural Resources; Ministry of Energy and Mines; Ministry of Production and Commerce; Ministry of Education, Culture and Sport; Ministry of Defense, Ministry of Foreign Relations, Ministry of Internal Relations and eight Indigenous Representatives and other organizations designated by the President of the Republic, whose attributions and functions are determined in the Decree of its creation.

Lastly, the National Process of Demarcation of Habitat and Lands of Indigenous Groups and Communities addresses the following identified people and communities: Amazonas: baniva, baré, cubeo, jivi (guajibo), hoti, kurripaco, piapoco, puinave, sáliva, sánema, wotjuja (piaroa), yanomami, warekena, yabarana, yek'uana, mako, ñengatú (geral). Anzoátegui: kari'ña and cumanagoto. Apure: jibi (guajibo), pumé (yaruro), kuiba. Bolívar: uruak (arutani), akawaio, arawak, eñepá, (panare), hoti, kari'ña, pemón, sape, wotjuja (piaroa), wanai (mapoyo), yek'uana, sánema. Delta Amacuro: warao, aruaco. Monagas: kari'ña, warao, chaima. Sucre: chaima, warao, kari'ña. Trujillo: wayuu. Zulia: añú (paraujano), barí, wayuu (guajiro), yukpa, japreria. This process also includes insular spaces, lake systems, coastal areas and other places that are traditionally or ancestrally occupied by indigenous people, and is subject to the legislation that regulates those types of spaces.

In Peru, there is not an official body responsible for systematizing and publishing statistics on recognized and registered indigenous communities. The same situation occurs with official data on the number of hectares titled, or to be titled, by such communities (IBC- Territorial Security Report).

It is important to emphasize the initiative of civil organizations to organize this information. For example, SICNA – The Information System on Native Communities of the Peruvian Amazon has a "georeferenced database that contains tabular and geographic information about native communities. The use and diffusion of SICNA promotes territorial order as well as the defense of the rights of indigenous people, allowing for the titling of native communities and the protection of indigenous people in voluntary isolation."

2.7 Rulings of National Tribunals over the Right to Territory

In the case of "Joisael Alves e outros v. Diretor Geral do Centro de Lançamento de Alcântara"52[52] in **Brazil**, members of a quilombola afro-descendant community carried out a protest action in response to activities of an aerospace base being built near to their territory. According to the complaint, these activities affected their traditional forms of production, to the point where it impeded on the normal execution of their activities (they couldn't access their cultivation areas, to cite an example). Thus, they demanded a cessation of all activities that impeded their ability to sustain their way of life.

In its analysis of the case, the Tribunal held that the grievances were well-founded and thus assented to the protestors demands, ordering the defendant to abstain from affecting the cultivation and subsistence activities that were affecting the community. It justified its decision with C169 of the ILO and its incorporation into Brazilian law (article 3, IV of the current Constitution) through which "The

52 Ruling (Sentença) # 027/2007/JCM/JF/MA, Process (Processo) # 2006.37.00.005222-7, ruling of February 13, 2007.

State cannot ignore Constitutionally recognized protections as one of the fundamental objectives of the Federal Republic of Brazil."

Later, in the STF of April 2009, referring the Raposa Serra do Sol territory in the state of Roraima, inhabited by the Ingarikó, Taurepang, Patamona, Wapixana and Macuxi communities.[53]

Nineteen determinants were set for the establishment of "indigenous use," among them the following were of particular importance:

> 5 - Usage by indigenous people does not undermine the interest of the National Defense Policy. The installation of military bases, units and posts and other military interventions, the strategic expansion of transportation routes, the exploration of energy alternatives for purposes of strategy and the protection of by riches, by the competent bodies (the Ministry of Defense, National Defense Council) **will be implemented independently of the consultation of involved indigenous communities** and of FUNAI;
>
> 6 – The actions of the Armed Forces of the Federal Police indigenous areas, in the sphere of their attributions, will be guarantee and will be **done independent of the consultation of the indigenous people involved** and of FUNAI;
>
> 7 – Usage by indigenous people will not impede the installation, by the Federal Union, of public equipment, communication networks, highways and transportation routes, as well as construction necessary for the provision of public services by the Union, particularly of health and education. (Emphasis added).

As it is possible to note, the cited standards go against the obligations of the Brazilian state with respect to the rights of indigenous and quilombola people. That notwithstanding, tension grew when through *Portaría* no. 303, the Attorney General of the Union (AGU) requested that the 19 conditions apply only the case at hand, without effect on the relationship with other indigenous territories. Despite that, on February 7th 2014, the AGU published *Portaría* #27.2014, which affirmed the validity of *Portaría* 303. (DPLF, 2015, p. 43).

For its part, in the case of **Colombia**, since the approval of C160 in 1991, the jurisprudence of the Constitutional Court has repeatedly indicated that "the right to collective property of indigenous communities over the territory that they have ancestrally occupied, enjoys preferential constitutional protection, due to the fact that it is an essential element for the preservation of spiritual cultures and values of the nations, and to guarantee its physical subsistence and recognition as a culturally differentiated group."

This seems to have been the rationale of the courts. However, we can mention a case from the beginning of the nineties related to non-contacted indigenous groups and the line of oil exploration that crossed the Nukak territory. ONIC, the National Indigenous

Organization of Colombia filed a complaint with a court in Villavicencio in order to stop these activities. The suit was declared well-founded by the first and second instance, since the work undoubtedly affected the Nukak habitat. Nonetheless, despite the case, and due to the amount of time that had lapsed, the company was able to finish the exploratory phase in the heart of Nukak territory.[54] This is another example of a case that demonstrates, although conceptually the right of indigenous organizations to territory is recognized, in practice it is difficult to materialize.

53 Supreme Federal Tribunal (STF). Petição 3.388 Roraima. Relator: Carlos Britto, Data de Julgamento: 03/04/2009, Data de Publicação: DJe-071 DIVULG 16/04/2009. p. 94

54 The authors and the International Group on Indigenous Affairs. Indigenous People in voluntary isolation and initial contact in the Amazon and Gran Chaco, Copenhagen 2007. Available online: http://intranet.oit.org.pe/WDMS/bib/virtual/coleccion_tem/pueblo_ indigena/indigenas_aislamiento_voluntario.pdf (Visited on: 02/18/16)

Other rights-based pronouncement can be identified in the following rulings; T-188 of 1993, 1998; T-079 of 2001; SU383 of 2003; C-030 of 2008; T-909 2009, of 2010; T-433 of 2011; T-0092013.

The Constitutional Court has emphasized "the importance of expanding the concept of territory for ethnic communities at the legal level, so that it is understood no only as the areas that are titled, lived in, and used by the community, for example, under the figure of sanctuary, 'but also those areas that represent the traditional sphere of cultural and economic activities, in such a way as to facilitate the strengthening of the material and spiritual relationship of the communities to the earth and to contribute to the preservation of past customs and their transmission to future generations." (T-009-2013).[55]

In **Ecuador**, we have the following cases:

Project Mirador, in Zamora Chinchipe province. This conflict area is located in the El Pangui canton, within the Zamora Chinchipe province, an area of high biodiversity and rainfall and inhabited by the Shuar people, was licensed to Ecuacorriente S.A. (ECSA), a mining company financed with Chinese capital, under the "Mirador" project, consistent with a plan to extract copper and gold on a large scale and in an open-air fashion.

On February 24, 2012, the Ministry of the Environment of Ecuador, through Resolution #256 approved the Environmental Impact Study for the phase of exploiting metallic minerals for the project and granted the environmental license to ECSA. It bears mentioning that in this license corresponding to the exploitation phase, they established that the company was required to prevent a series of reports for the prevention of adverse impacts to flora and fauna. However, they did not determine the timeframe for the presentation of these documents.

As mentioned, in order to advance the project, ECSA has acted in two ways: first, through the purchase of land for community members and second, through the figure of the servitude. As can be intuited, the "sale" of property is not simply through a passive business located in the framework of a private autonomy. On the contrary, the probability is high that there is no agreement. Nonetheless, it has not been an impediment for the business, with the support of the State (ARCOM), to carry on with a plan that requires community members to deliver landed through the servitude that despite its "temporal" character, in practice "temporality" means at least 25 years of renewability (article 35 of the Mining law).

In such a situation, the community becomes corralled and in many cases – as occurred with the Tundayme parish, in the San Marcos neighborhood – has practically disappeared.

> "The destruction of the neighborhood began on May 12, 2014, when the operators of the Chinese mine, with police protection, razed the school and the church that were built with communal labor." (CDES, 2016, p. 36)

Likewise, CONAIE through its president Jorge Herrera in a press release on December 16, 2015 indicated that "It is unfortunate that the government uses the National Police to repress, harass, intimidate and displace its own brothers. With all these violent acts the government is sowing a terrible response in the citizenry, that provokes indignation and rejection by the public of the Government and its "allied friends;" indigenous communities and nationalities will not tolerate more outrages, and will defend their livelihood territories in every possible way. As CONAIE we categorically reject this violent extractive policy of the Government of Rafael Correa and we make ourselves responsible for everything that could happen in the future for the affected population." (CONAIE, 2015)

55 Note: On the application of the pre-legislative consultation we also have ruling #001-10-SIN- CC of March 18, 2010.

If we undertake the simple exercise of going over the number of conflicts and actors in which territory has been implicated, and involving the resistance of its members, we encounter a constant: the delivery of concessions without a prior process of consultation.

In this case, we can observe what happened in the zone of Íntag, in the province of Imbabura, comprise of seven parishes with a total surface area of 150,000 hectares, in which 17,000 people live in 76 disperse rural communities of low density, as small-scale agriculture is the economic base of the region. It is a place of constant conflicts that date from many years back. Thus, in the middle of 1997, the community expelled the Japanese business Bishimetals after it entered, with prior authorization from the State, to carry out its activities without having consulted the community. A little bit later, in 2004, the Canadian company Ascendant Copper restarted its operations, but was expelled in 2006. (Earth Economics, 2011).

Despite this history, in 2012 the Chilean company CODELCO and the National Mining Company of Ecuador signed agreements to resume mining activity in the zone without prior consultation of the community.

"In opposition to this new concession, the people carried out uprising and blockades so that the mining company could not enter the valley. Unfortunately, the socialization of the project did not begin until an environmental impact study was carried out through a "state site" imposed by the State under the auspices of ENAMI. Furthermore, according to the locals, the consultation was not prior and aimed to separate people through offering work that paid better than agriculture as well as the promise of development through public works throughout the area. (…) Neither did they respect access to information given that the environmental study carried out did not grant free access to community members; only seven days were granted to revise the study, which exceeded 900 pages in length. None of this was in the spirit of a prior consultation that provides free access to information and provides a reasonable time for information." (CDES 2016, 39).

Lastly we have the case of the Shuar indigenous people v. the ARCO oil company, from the middle of 1998, in which the Ecuadorian Government gave a series of concessions to the Atlantic Richfield Company oil company (ARCO), in Lote 24, located in the provinces of Pastaza and Morona Santiago, areas inhabited by the Shuar indigenous people (who also form part of the Independent Federation of the Shuar people of Ecuador (FIPSE)).

Suffice it to say that this contract between the government and the company was signed without the knowledge of the FIPSE, who once they found out, convoked an assembly to make a decision, concluding that they would not permit any individual negotiation between the company and the communities, and the assembly of the maximum authority would as a result also adopt the same decision.

Even so, the company proceeded with its intentions to negotiate separately with each member of the community. As a result, FIPSE – under the validity of the 1998 Constitution – filed a constitutional challenge, based on article 84, in reference to the individual negotiations of the company that were affecting the unity of the community. The judge, and later the Ecuadorian Constitutional court, ratified the complaint. Nonetheless, ARCO defied the ruling.

This motivated FIPSE to file a complaint with the ILO against Ecuador for violation of C169. As such, the ILO issued a series of recommendations that the Ecuadorian state would have to comply with in order to guarantee human rights. (CDES, 2016, 44).

Here, as well, the situation of indigenous people in voluntary isolation had special relevance. Due to the extractive oil activities and illegal deforestation, these groups were threatened with death. That is, for example, the case of the Tagaeri and Taromenane communities, who as of 2006 were the beneficiaries of cautionary measures granted by the Inter-American Commission.

In this respect, in 2007, the Ecuadorian government established the limits of the so-called Intangible Zone of the Tagaeri-Taromenane, within the Yasuní Biosphere Reserve. However, in 2009, it was indicated that the demarcated Intangible Zone did not cover the totality of the territory used by the isolated indigenous people, because members of the Tagaeri- Taromenane isolated indigenous people were found in areas outside of the borders of the Intangible Zone and, worryingly, within the limits of the oil area called Campo Armadillo.

In **Peru**, regarding the obligation of the State to delimit indigenous territories, the Constitutional Tribunal has determined, in Exp. # 0022-2009-PI/TC, that "it is of great relevance that the State strengthen and revitalize the work of delimiting indigenous territories with the objective of providing appropriate legal protection for indigenous people, through the firming up of the property rights of the territories occupied by these community."

Because "this right is promoting juridical security in the sense that by dividing the area into lots and carrying out studies with the aim of developing the exploration and exploitation of natural resources, will develop an adequate perspective of the reality and what will be the steps necessary to carry out these types of processes without threatening the fundamental rights of indigenous people." (Exp. # 0022-2009-PI/TC, Fj. 44).

An emblematic example is the case of the "Tres Islas" community (the *Shipibos* and *Ese´eja*) communities[56]. Given that for a number of years different people from outside of the community were entering the area to chop down trees and to carry out artisan mineral work, activities that were having an adverse effect on the environment and on the health of community members. In exercise of its indigenous jurisdictional functions, the community decided to take control of the vehicles that entered by the vehicular path from kilometer 24 of the Maldonado-Cusco highway and that passed by community territory.

The decision made in the Communal Assembly, consistent with restricting the access to the community, was adopted due to the presence and growth of informal miners, illegal wood-choppers and people dedicated to prostitution. Specifically, it established that it was due to the unauthorized entrance of two transportation companies in the territory: Los Mineros S.A.C. y Los Pioneros S.R.L., which would have the permits granted by the resolution of the management of Provincial Municipality of Tambopata to be able to travel by the route that enters the territory of the community, without this authorization having been consulted with community members.

Upon executing the communal decision, these companies presented a habeas corpus, which was declared founded in the first and second instance, ordering the immediate retirement from the gate. Dissatisfied with that decision, in November 2010, another habeas corpus action was lodged in favor of community members alleging threats to their right to exercise jurisdictional functions as the authority in the Tres Islas Native Community.

In this way, the case arrived in front of the Peruvian tribunal, which in relation to the guarantee of property in the earth of the native and peasant communities, indicated that:

> 21. (...) this civil vision of property needs to be reconfigured from a multicultural perspective, that is, taking into account their own cultural aspects in the case of indigenous people. Thus, this Tribunal has already established in prior rulings the relevance of the earth to indigenous people. In effect, in Exp. #0022-2009-PI/TC, this Body recognized and internalized the criteria established by the Inter-American Court of Human Rights in the *Yakye Axa vs Paraguay* case.
>
> In effect, in that case the Inter-American Court established the "the tight link between the indigenous people and their traditional territories as well as the natural resources linked to their culture found there, in addition to the intangible elements that are extracted from there,

56 Tres Islas Case: Exp. # 01126-2011-HC/TC. Ruling of the Constitutional Tribunal Constitucional, September 11, 2012.

> must be safeguarded by article 21 [right to private property] of the American Convention." [foundation 137 of the *Yakye Axa vs Paraguay* case].

And, while the Constitution makes reference to the protection of the lands of native and peasant communities [article 88 and 89 of the Constitution], without recognizing the concept of "territory" in an express form, C169 establishes in its article 13 that the use of the term "lands" must include the concept of "territories." (Fj. 22)

> 25. On the other hand, article 18 of C169 establishes that "The law must establish appropriate sanctions for any unauthorized intrusions into the lands of interested people as well as any unauthorized use of these lands by people external to these communities, and the government should take steps to impede such infractions."
>
> In effect, the Constitution establishes an express guarantee of the property of the earth in communal form or any other associative form [article 88].
>
> Furthermore, it mandates in article 89 that native and peasant communities have the faculty of decision-making with regard to the use and disposition of their lands, including the faculty of deciding who can enter their territories. Thus, such legal tools allow for the exercise of the right of property in their territory (...).

Considering the aforementioned, the TC declared that the complaint was well-founded with respect to the effect on the right to property in communal lands and the right to communal autonomy of the Tres Islas Native Community. As a consequence, they declared null Resolution #8, dated August 25, 2010, derived from File #00624-2010-0-2701-JR- PE-01, issued by the Mixed and Penal Division of Appeals of the Superior Court of Justice of Madre de Dios. This, they ordered this division to issue a new resolution in conformance with the bases of the current ruling. Lastly, it ordered the cessation of the acts in violation of the territory of communal property and of the autonomy Tres Islas Native Community linked to this case.

2.8 Cases before the IACHR

In the **Brazilian** case, we can point to cases in which cautionary measures have been granted by the IACHR in contexts in which indigenous people requested that the State delimit and title their lands, and in response, received threats that risks their lives and physical integrity.

Thus, on October 29, 2002, measures were granted in favor of Zenilda Maria of Araujo and Marcos Luidson of Araujo (Cacique Marquinhos), both indigenous leaders from the Xucuru People. It bears mentioning that, as referred to in their petition, they waited more than 13 years for the finalization of the process of demarcation of their lands.[57]

That is similar to another case, this time affecting the Ingaricó, Macuxi, Wapichana, Patamona and Taurepang indigenous communities in Raposa Serra do Sol, in the state of Roraima, whose process of delimitation has been pending since 1977.

Nonetheless, in spite of the time that has passed, the omissions have become attempts against the community, as occurred in November 2004 when an armed group entered these communities using chainsaws, tractors and fire, resulting in the death of one person, the disappearance of another, and the destruction of 34 homes, a school and a medical center in the area. It is because of these events that on December 6 of the same year, the IACHR granted cautionary measures in favor of the members of the aforementioned indigenous groups.[58]

57 Zenilda Maria of Araujo and Marcos Luidson of Araujo (Cacique Marquinhos), Xucuru indigenous leaders (Brazil) (2002).
58 Ingaricó, Macuxi, Wapichana, Patamona and Taurepang Indigenous People in Raposa Serra do Sol, state of Roraima (Brazil) (2004).

In **Bolivia**, that is the case of the Tacana Indigenous Community of Mirafelores (Riberalta) situated in the Multiethnic Indigenous Territory II (TIM II), Gonzalo Moreno municipality of Madre de Dios province Department of Pando, North Amazon of Bolivia, which is comprised of 53 families (approximately 270 people, according to the data from the IACHR). According to information provided by the IACHR, on December

17, 2004, different armed people entered the community, attacked and displaced 50 community combers, burning their homes, issuing threats and taking over part of their lands. It appears that these people were linked to the Riberalta Agroforest Association (ASAGRI) to joints small landowners who are looking to obtain larger parcels of terrain for commercial ends.

Notwithstanding what occurred, the attacks continued but not just against members of the community but also against Members of the Center of Legal Studies and Social Innovation (CEJIS), as on January 5, 2006, 30 people linked to ASAGRI entered their building, removed and destroyed relevant equipment and documents that proved the existence of a large estate in the north Amazon, as well as the threats the issued an ultimatum of "48 hours until CEJIS leaves Riberalta."

In response, the IACHR granted cautionary measures in March 2005, in favor of community members and CEJIS, requesting the adoption of necessary measures to guarantee the life and personal integrity of the community and the physical integrity of CEJIS, including the assignation of a police checkpoint for the indigenous community during the chestnut harvest as well as a permanent police vigilance point in CEJIS headquarters in the municipalities of Riberalta (department of Beni) and Cobija (department of Pando) as well as carrying out an exhaustive investigation of the threats and acts of intimidation that were reported.[59]

In **Colombia**, the well-known relationship of tension between Communities, the State, and Extractive companies must be understood in the context of the actions of guerrillas and paramilitary agents that on more than one occasion have been responsible for serious effects on human rights, as forced displacement of communities and the subsequent abandonment of land has been a constant.

That is the case of the Zenú indigenous people, located in the department of Córdoba, constantly threatened to the point where one of their leaders was assassinated in the middle of May 1996 by paramilitary groups, in addition to the assassination of the Secretary of the *Cabildo Mayor* of San Andrés and Sotavento. This motivated, in the middle of June of the same year, that the IACHR ordered the adoption of cautionary measures requiring the Colombian state to adopt measures destined to protect the life and personal integrity of community members in addition to investigating the facts, which were confirmed in March 1998 through the adoption of provisional measures ordered by the Inter-American Court of Human Rights.[60]

Similar attempts occurred in the areas in the north of the Cauca region, where the Páez indigenous community found itself being threatened by a paramilitary group[61] and had to retreat. In Santa Fé de Bogotá, the members of the National Association of Peasant and Indigenous Women of Colombia (ANMUCIC)[62] were victims of threats and aggressions that also resulted in forced displacement, exile or the suspension of the work of the Organization in certain regions of the country.

59 Tacana Indigenous Community of Miraflores, Riberalta and Bolivia (2005).
60 IACHR. Cautionary Measures: Case of Clemente Teherán and Others – Zenú Indigneous People (1996). Provisional measures relative to the Case of Clemente Teherán and others, Zenú Indigneous Community (1998).
61 IACHR. Cautionary Measures: Maximiliano Campo and eleven other leaders of the Paez Indigenous People v. Colombia (1998).
62 IACHR. Cautionary Measures: National Association of Peasant and Indigenous Women of Colombia – ANMUCIC (March 2001).

In the case of the Embera Katio Indigenous Community of Alto Sinú,[63]a number of their members were trapped in the town council and neighboring zones. In the department of Tolima, Pijoa[64]indigenous village, it was found out that paramilitary groups had a list of more than 100 indigenous people and peasants who were declared military targets. Thus, their lives, personal integrity and permanence in the area were in a situation of imminent danger. This was evidence by the events that occurred in September 2003 when indigenous man Iván Montiel was kidnapped by paramilitary groups and his body was found dismembered in the Punto Papagalá site.

The threats and attacks are not exclusive to the aforementioned cases. On the contrary, we can cite various additional cases that involved the need to request guarantees from international bodies, as on the level of internal legal order they do not have the necessary mechanisms for them. However, even when the international eye calls for favorable measures, in practice their implementation is a pending challenge.

In the case of the Embera Chamí[65]people, located in the sanctuaries and resettlements of Cañamomo-Lomaprieta, San Lorenzo, Nuestra Señora Candelaria de la Montaña, Escopetera-Pirza, Totumal, La Trina, La Albania, Cerro Tacón, La Soledad, which since the middle of June 2001 have been publicly denounced by State agents as collaborators of guerrillas. From this moment, the people began to suffer threats and acts of hostility by the United Self-Defense Forces of Colombia (AUC) that led incursions in the community that produced material destruction and the death of Leonardo Díaz (ex-town councilor of the sanctuary).

In light of those events, on March 15, 2002, the IACHR granted cautionary measures in favor of 40 Embera Chamí indigenous people. However, in April of the same year, they were informed of the murder of indigenous leader María Fabiola Largo as well as an attempt against the life of indigenous ex-governor Miguel Antonio Largo Pescador, both beneficiaries of cautionary measures.

Furthermore, there is the case of the Kankuamo[66] indigenous people, located in the Sierra Nevada de Santa Marta, who according to information from the IACHR, since the first half of 2003 suffered the loss of 44 of its members due to the incursions of the AUC paramilitary group. Cautionary measures were granted on September 24, 2003, but the attacks continued regardless which motivated the Inter-American Human Rights Court to issue provisions measures on July 6, 2004. Also, the wayúu indigenous community[67] in the department of La Guajira, suffered acts of violence from paramilitary groups commanded by "Jorge 40" with the collaboration and acquiescence of State agents.

There is the case of the directors of the Regional Indigenous Council of Cauca (CRIC)[68] and its advisors, targets of acts of violence, threats, and stigmatized for their activities as indigenous leaders. As occurred with the "presumed" forced disappearance of Hernán Henry Díaz[69], peasant leader and member of the Table of Social Organizations, Peasants, Afro-descendants and Indigenous of the Department of Putumayo, member of the Unified National Union Federation for Agriculture and Livestock and leader of the Patriotic March social and political movement.

63 IACHR. Cautionary Measures: Kimi Domicó and members of the Embera Katio Indigenous Community of Alto Sinú (June 2001).
64 IACHR. Cautionary Measures: Members of 15 councils and sanctuary s of the Pijao indigenous people (October 2003)
65 IACHR. Cautionary Measures: Members of the Embera Chamí Indigenous People v. Colombia (2002).
66 IACHR. Cautionary Measures: Kankuamo Indigenous People v. Colombia (2003).
67 IACHR. Cautionary Measures: Leaders of the wayúu Indigenous People v. Colombia (September 2004).
68 IACHR. Cautionary Measures: Leaders of the Regional Indigenous Council of Cauca CRIC and its advisors v. Colombia (January 2009).
69 IACHR. Cautionary Measures 131/12: Hernán Henry Díaz, peasant leader and member of the Table of Social Organizations, Peasants, Afro-descendants and Indigenous of the Department of Putumayo (June 2012).

That is also the situation of members of the Awá[70] indigenous people in the departments of Nariño and Putumayo, who – in additional to the attempts, threats and killings – found themselves in the middle of crossfire between guerrillas and paramilitary groups. This affected their right to territory not only through their forced displacement but also through impediments to demonstrate their condition, as there were anti-personal mines that had been left by actors in the armed conflicted. In the case of the Alto Guayabal-Coredocito[71] community, of the Emberá people of the Uradá Jiguamiandó Indigenous Reserve, in the Department of Chocó, it was noted that on January 30, 2010, two helicopters and one plane belonging to the armed forces had carried out a machine-gun attack and bombing 300 metros from the principal settlement of the community, causing serious injuries, as occurred with José Nerito Rubiano who was injured in the thorax, which ruptures his spine and left him a paraplegic. And we could mention various other examples of cases like these.[72]

In the case of Ecuador, we have the cautionary measure granted in favor of the president of the Confederation of Indigenous Nationalities of Ecuador (CONAIE), Mr. Leónidas Iza[73]and his family, due to the repeated threats he received in the course of his activities that culminated in an attempt with a gun in the CONAIR headquarters, which left him with serious injuries.

Another case is that of the Tagaeri y Taromenani[74]indigenous communities in voluntary isolation, who are in the Ecuadorian Amazonian jungle that borders Peru. In their case, that zone has been convulsed by conflicts between illegal woodcutters that invade the indigenous territory, and the fact that as a reprisal in April 2006 a several members of the Taromenani people were murdered in the Cononaco sector (Chiripuno river).

In Peru, we have the case of the San Mateo de Huanchor[75] community, composed of more than five thousand families, whose activities are affected by the presence of a deposit of mineral tailings that operates in the open-air near the community.

The IACHR mentions studies that were carried out by the Division of Environmental Health of the Healthy Ministry that indicate:

- The high risk to the community presented by the presence of tailings, giving the chronic effects of arsenic, lead and cadmium contained in these tailings.
- The damaging effect that the tailings have on the environment and health of the members of the community.
- The alarming level of concentration of lead present in the blood of the children.

In this case, the Commission asked the Peruvian State to carry out a public health program of assistance and attention to the population and especially to children, in order

to identify those people that may have been affected by the consequences of pollution and to provide them with pertinent medical attention; in addition to commencing operations to move the tailings in accordance with the technical conditions and best practices established by the corresponding environmental impact study.

70 IACHR. Cautionary Measures 61/11: Members of the Awá indigenous people in the departments of Nariño and Putumayo (March 2011)v

71 IACHR. Cautionary Measures: Alto Guayabal-Coredocito Community of the Emberá People (February 2010).

72 IACHR. Cautionary Measures 355/10: 21 families of the Nonam community of the Wounaan indigenous people (June 2011). Cautionary Measures: Holmes Enrique Fernández, Jorge Salazar and other members of the Cauca Association of Displaced People from Naya– ASOCAIDENA (October 2004).

73 IACHR. Cautionary Measures: Mr. Leónidas Iza, president of the Confederation ofIndigenous Nationalities of Ecuador (CONAIE) v. Ecuador (February 2004)

74 IACHR. Cautionary Measures: Tagaeri and Taromenani Indigenous Groups v. Ecuador (May 2006).

75 IACHR. Cautionary Measures: San Mateo de Huanchor Community (August 2004).

The case of the Mashco Piro, Yora y Amahuaca[76] indigenous communities in voluntary isolation, located in the river zone of Las Piedras, in Madre de Dios, was carried out in the context of threats to the integrity of the members of this community by people dedicated to the illegal lumber trade. The IACHE issued cautionary measures in favor of these communities in March 2007, but was later informed of the continuation of the illegal extraction of wood in a territory that was legally protected, thereby subjecting the indigenous people in voluntary isolation who lived there to the risk of extinction.

FINAL CONSIDERATIONS ON LAND AND TERRITORY

Colombia is the country where constitional and legal frameworks are the most developed in this area. In addition to recognizing property rights of indigenous people in sanctuaries, the country takes another step, imitating article 14 of C169 but expanding the concept of territory to encompass not only the areas that are titled, inhabited and exploited by the community, but also those that constitute the traditional sphere of their activities. On the other hand, in its constitution Ecuador recognizes not only the right to property but also the right of indigenous groups to possess their territory, with express references in the constitution to C169. The 1998 Ecuador Constitution was promulgated the same year that the country adhered to C169 even though the current valid constitution dates back to 2008.

Although Bolivia does not expressly recognize the right to property and possession of the lands traditionally occupied by indigenous people, this right can be deduced from the right to the collective titling of lands and territories included in the current Constitution, of 2009. This is considered a declarative action of a preexisting right and in no way is constitutive of that right. In addition, Bolivia recognizes the right to autonomy in indigenous territorial management, to participate in the benefits of the exploitation of natural resources in their territories, both titled and untitled. At the normative level, legislation in the country is more disperse and disorganized.

For its part, in the case of Peru, the right of indigenous people to property is recognized (which according to their valid Constitution includes native and peasant communities). It is clearly established that the formal recognition of this right through Registries is only declarative and not constitutive; that is true of all the countries studied.

Brazil on the other hand finds itself a step behind in the implementation of C169, as it only recognizes the right to possession but not the right to property, granting the power to legislate on these matters to the National Congress without expressly considering the right to a prior consultation. Nonetheless, there is a National Policy on Environmental and Territorial Management of Indigenous Lands.

With regard to indigenous people in initial contact and voluntary isolation, only Bolivia and Ecuador have given constitutional recognition to the right to territory, and issue that is of the utmost importance considering the state of vulnerability of these groups. In the case of Peru, there is legal recognition of the territorial rights of these groups, but, in practice, their rights continue to be infringed, even violating international commitments; for example, the 21 commitments of the Peruvian State to the Inter-American Development Bank that included respect for the Kugapakori Territorial Reserve, Nahua, Nanti, which overlapped with a hydrocarbon lot that later was used to expand the activities of Proyecto Camisea.

In general, independent of the constitutional, legal and institutional protection of the right to territory in these countries, we observe a situation of defenselessness in practice, related to social conflicts over territory. Likewise, the time for titling, as in the case of Bolivia, distorts the level of constitutional protection of the right to land, creating a tedious procedure that does not guarantee the right in practice. At the same time, rights such as property and possession, while constitutionally recognized, are distorted by figures that prioritize the collective interest (in its different variations) over specific

76 IACHR. Cautionary Measues: Mashco Piro, Yora and Amahuaca indigenous communities in voluntary isolation (March 2007)

interests. On the other hand, groups such as indigenous populations find themselves in a vulnerable situation that warrants a revision of the concept of public interest.

Although it is clear that the public interest is a constitutional principle present in all of the constitutions evaluated in this study, it is also equally clear that no principle is absolute. In some cases, when the life or health of indigenous populations is at play because of the indiscriminate interference of investment projects, the evaluation must be made on a case-by-case basis. In other words, whether the collective benefit is sufficiently important to justify violating the fundamental rights of indigenous people, including those in voluntary isolation and initial contact.

On the other hand, the quality of information on the titling of indigenous lands - the data is dissimilar with regards to dates and with regards to demographic differences between different countries – renders comparison difficult. For example, Bolivia is a step forward in a constitutional sense because its Constitution includes an innovative and broad concept of indigenous native peasant territories. In practice, however, the titling of these lands is somewhat tedious with regards to requirements and involves long timeframes and delays.

With regards to natural resources (C169 does not make a distinction between renewable and nonrenewable resources), article 15 of C169 includes the right to use, administration and conservation of these natural resources. In cases in which the property of said resources belongs to the State, the obligation involves the consultation indigenous populations. Brazil, on the other hand, grants the National Congress the responsibility for managing hydraulic and mineral resources of indigenous lands; furthermore, the State is allowed to intervene in certain indigenous areas in the interest of national development, thus restricting the scope of C169.

Bolivia, for its part, recognizes property in natural resources without making any distinction for indigenous populations. Once again, as with Brazil, there are exceptions in cases of public interest that limit the general application of the laws. In Ecuador, as with Peru, property in natural resources belongs to the State. While these norms do not establish the obligation to consult, in the case of Ecuador it can be understood that, if the use of these resources exerts a positive or negative impact on indigenous populations, there is an obligation to establish consultation procedures; this obligation stems from the constitution.

For its part, in Colombia reference is only made to property, of the State, in nonrenewable resources. C169 does not make a distinction between renewable and nonrenewable resources. However, in accordance with C169, there is a right to the use, administration and conservation

of renewable resources found in indigenous territory, as well as the right to be consulted in cases of projects that affect these populations. In the case of nonrenewable resources, the right is limited to consultation in accordance with the convention.

Additionally, in Colombia the internal armed conflict has influenced the implementation of plans and policies related to the protection of indigenous territory. In practice, the pressure of factors such as illegal mining, illegal logging, highways, coca plantation has reduced the Nuka population, one of the indigenous populations in voluntary isolation and initial contact that is most representative of Colombia. This forces us to reflect on the real effectiveness of these laws. In addition to promulgating such laws, it is necessary to systematically strengthen state institutions that promote territorial rights of indigenous people. For example, Peru is the only country that does not have an official institution that is specifically responsible for systematizing and publishing official statistics on the area of titled and untitled lands, according to a report by the Institute of the Common Good.

On the other hand, on a jurisprudential level, Colombia is the most advanced country in terms of the recognition of the right to land and territory. This is exemplified by the role of the Constitutional Court in guaranteeing constitutional rights and those codified in C169. Brazil represents an important albeit worrying case, due to the existence of the "Suspension of Security"procedure in which the Federal Government requests the suspension of judicial decisions based on possible threats to national

security or the "social and economic order" of the country. In other words, without regard to the protection emanating from a decision of a Regional Tribunal (for example), the Federal Tribunal of the corresponding state has the last word at the request of the same State that is pushing for the activity in question.

3.

Intercultural Health

Foto: Consejo Machiguenga del Río Urubamba

3. Intercultural Health

3.1 At the Legal and Constitutional Level

Progress in the area of intercultural health has been very uneven among the countries studied. For example, according to official reports we have Peru – a country with few advances with respect to laws on intercultural healthy, notwithstanding the elaboration of technical norms- who reported that in 2001 42% of the indigenous population enjoyed some kind of health coverage. On the other hand, its neighbor Bolivia, in 2002, claimed that it was assisting a little more than 14% of its indigenous population.[77] On that point it is important to clarify that this is due to the fact that ethnic demographics vary significantly among the countries.

In the case of **Brazil**, although their state apparatus, as is the case with the rest of the South American region, has enormous tensions with indigenous areas with respect to the application of intercultural health policies, the efforts to create a specialized bureaucracy in the area have been more systematic than in the other countries.

Certainly – its current Constitution (1988) dedicates a chapter (VII) to indigenous people – those who are assigned the category of "Indians"[78] – who are recognized as agents with native social organizations, language, believes and rights (article 231). Building off this text, Law #8080 (1990) was drafted which detailed the functions of the National Health System, which derived from Law #8689 (1993) which provided for community participation in the management of the Singular Health System – SUS- as well as aiding Law #9836 (199) that created the Sub-system of Attention to Indigenous Health. In 199 9 the National Policy of Attention to the Health of Indigenous People was developed, the regulation of which was promulgated via Decree #3.156/1999 with reference to 8080. The PNASPI proposed the creation of Special Districts for Indigenous Health.

Later, with Law #10 507/2002 the figure of the Communal Health Agent was created, who must live in the place to which they apply and have passed the course on Communal Agents and have completed primary school. Four years later, with Law #11 350/2006 more specialized criteria were established such as the promotion of health, the use of diagnostic instruments, the encouragement of the participation of the community in public health policies and the registry of community pathologies.

After law #10 507 in 2003, the Ministry of Justice recognized, through Law #10,683, that its body should guarantee the rights of Indians in addition to creating the figure of the General Defender of Indians. In the same document, in chapter XX, it was determined that the Ministry of Health should monitor the environment and the promotion of health, the protection and recuperation of individual and collective health, including those of workers and Indians. It also recognized that the Woman's Ministry, together with the Ministry of Justice, should supervise health-related actions taken in favor of indigenous communities.

Decree # 4727/03 was also published in 2003, approved the organizational structure as well as the functions of the National Health Foundation (FUNASA) – created in 1990- and specified that this body is responsible for guaranteeing the health of indigenous people, for which it created (Ch. III) the Indigenous Health Department, whose main function fell on the Special Sanitary Districts. Later, in 2009, Decree #6878 reformed and added Annex 1 to Decree #4727, which specified the rationale for the Sanitary Districts, which will be considered responsible for the coordination, supervision and execution of SUS activities. The decree was modified by Decree #7335 (2010).

77 OMS (2008). Una visión de salud intercultural para los pueblos indígenas de las Américas.Washington: OMS

78 Seemingly, the use of the word "Indian" in official documents in Brazil has to do with an idiomatic issue, as the literal translation of "indigenous" in Portuguese is "indiano."

In addition to FUNASA, the Ministry of Health participates in the coordination of policies of these Districts, while the Regional Coordination busies itself with the local administrative area of each unit, whose functions were also modified by Decree #7335.

In 2011 a new structure of the Ministry of Health was approved (Decree #7530). Here it was determined that the Indigenous Health Department would be redubbed the Indigenous Health Specialty, which would be subdivided into: a) Management Department of Indigenous Health; b) Department of Attention to Indigenous Health and c) the Special Indigenous Sanitary Districts. To these, we add the Special Secretary of Indigenous Health (SESAI) who is responsible for coordination the application of the National Policy for the Care of the Health of Indigenous People, as well as coordinating the process of managing the Sub-system for Indigenous Health. At the same time, the Department of Management of Indigenous Health is responsible for guaranteeing the conditions of minimum subsistence of the sub-system and the strengthening of the districts.

On the other hand, in the case of Peru, it bears remembering that it is the only country in the group that does not mention indigenous people in its current Constitution (1993), although the document does have a brief chapter that specifies that the State recognizes the existence and territorial rights of native and peasant communities, as well as the legal recognition of these groups. Nonetheless, this constituted a step back relative to the Constitution of 1979, which recognized, in addition, that the State prohibited the accumulation of lands – to avoid large colonization, one of the principal causes of indigenous conflict.

The laws relating to indigenous health of very recent if we consider that Peru ratified C169 in 1993, and that it took effect in 1995, notwithstanding the notable advances from the first legal texts. The law of the Health Ministry (MINSA) #27,657 (2002) established that decentralized organizations have as their objective the investigation, knowledge and diffusion of intercultural health (Art 33). Among these organizations are the National Institute of Health (INS) which has within its structure the National Center of Intercultural Health (Art. 22). "CENSI is the body responsible for developing the National Plant Collection and the Pharmacopeia of Medicinal Plants."

Later, R.M # 729-2003/MINSA approved the technical document "Public health, the commitment of everyone: A Model for Attention to Health," that recognized the absence of solidarity in the system, as well as the centralism in the vision of its application. It recognized that people are "multidimensional," in the sense that they come from different cultures and environments. Likewise, it talks about the promotion of citizenship.

Two years later, RM #111-2005/MINSA approved the technical norm "Guidelines for health policy," whose founding principles spoke of gender equity, and equity in health and interculturality. This led to RM #039-2005/MINSA, which created the Functional Technical Unit of Human Rights, Gender Equity and Interculturality in Health. These guidelines were formalized with RM #111-2005/MINSA.

RM #437-2005/MINSA gave birth to the first specific technical document regarding attention to rural and indigenous populations, the Technical Norm "Comprehensive health attention to excluded and dispersed populations," which was contemplated with RM # 598-2005/MINSA, which approved the Technical Norm for the Attention of vertical birth with intercultural adaptation, which aimed to empower people in relation to their culture, focusing on rural areas. It had the objective of importance the access of Andean and High-Amazonian people to health services and quality attention with intercultural adaptation. It is one of the first laws where "intercultural" is mentioned as a mainstreamed issue in health policy.

RM #437-2005 is supplemented by RM #792-2006/MINSA which approved the Technical Norm for the "Comprehensive health attention to excluded and dispersed populations," which is based on the experience of the Local Itinerant Teams of Extramural Work in Health (ELITES). It refers to intercultural health as a focus of work (as well as the registration and identification of dispersed populations), for which traditional medicine is taken into account. It has a rural and itinerant nature.

With RM #638-2006/MINSA, the "Technical Norm of Health for the mainstreaming of Human Rights, Gender Equity and Interculturality in Health" was approved. From that moment, no health policy in the country could ignore the perspective of equity. Later RM #799-2007/MINSA approved the Technical Norm on the prevention, contingency and mitigation of health risks in contexts of indigenous people in voluntary isolation or recent contact. For the first time, it incorporated concepts of national territoriality in the area of health and adhered to the concepts of "isolation" and "sighting" among others.

With RM #278/2008-MINSA, the Technical Document for the Cultural Adaptation of the Orientation/ Counseling of Reproductive and Sexual Health was approved. Building from concepts such as interculturality and traditional medicine, it trained medical personnel to understand different forms of culture and to adapt their discourse to these environments. The document was designed as if these concepts came up in the daily life of health professionals at primary care establishments (health posts and facilities).

Through RM #611-2014/MINSA, the Technical Document "Dialogues in Intercultural Health" was approved, as a kind of guiding document that condenses all of the technical documents developed by MINSA in the past decade with relation to interculturality in the direct application of public health.

Certainly, the *Defensorial* Report (ID) #169 entitled, "The defense of the indigenous Amazonian communities towards an intercultural vision of health", by the Public Defender of Peru, updating the information obtained in 2007 and 2008 through a study of the Ministry of Health and its regional health divisions in the departments of Loreto, Amazonas, Madre de Dios and Ucayali (captured in ID # 134, "The health of native communities. A challenge for the State," demonstrated that indigenous people form one of the human groups that is most forgotten and neglected by the state. It indicated that:

> "(…) attention to health is so defective that 51.2% of native communities lack some kind of establishment. According to the report of the National Agricultural and Farming Census of 2012, one of every two native communities in our country is not being served by these vital services." (Defender of the Public, 2015, 8)79[79]

It also demonstrates that health personnel do not speak their language or know their culture, and furthermore, are poorly paid. It adds that these people face the problem of pollution produced by extractive business that alter their territory, added to the problem of malnutrition, low education levels, the lack of systems of potable water and health services, among others, which exacerbate their situation of vulnerability.80[80]

In that respect, the Defender of the People formulated recommendations to the different relevant entities that could assist and contribute to solving the issue of lack of knowledge of the real health situation of indigenous people, as well as the actions (long and short- term) that should be employed to combat this problem.

In this way, among other institutions, it pushed the Congress of the Republic, through the Commission of the Budget and General Accounts of the Republic and the Commission of Health and Population, to progressively increase the annual budget of the health sector that was dedicated to the amazon region, with the goal of improved access to health services for Amazonian indigenous people. In

79 Defensorial Report (ID) # 169, La Defensa de los pueblos indígenas amazónicos a una salud intercultural. In another part, the report indicates that in 2012 the prevalence of chronic malnutrition among indigenous children represents almost double the rate of non- indigenous children in the Amazonian region, and more than triple the national average. (p.12) This is reiterated in conclusion #4 of the report under commentary. (p. 126)

80 Additionally, is the absence of infrastructure to provide health services. Furthermore, for example, in the case of reproductive and sexual health, the Defender gathered data from healthy personnel that indicated the following conclusions: "in 2013, 376 births were assisted. Of those, 225 (605) took place in homes, while only 76 (20%) took placed in a health establishment, and another 75 (20%) in a establishment with a higher level of resolution." P.53 of the Defensorial Report #169, previously mentioned.

addition to prioritizing dialogue with indigenous people, the discussion and approval of a law oriented toward recognizing traditional medicine and guaranteeing its exercise, and allowing traditional healers to be active participants in the strategies of the health sector.

Likewise, the Defender urged the Ministry of Health to prioritize attention to the health of indigenous people within the framework of the reform of the health system, with the goal of articulating, among all the levels of the health sector, a comprehensive health response with a focus on interculturality in aspects related to promotion, prevention, attention and rehabilitation of health.

On April 1, 2016, the Council of Ministers approved the Sectoral Policy on Intercultural Health (PSSI) echoing a series of complaints by the different indigenous organizations that participated in a process of consultation that finished 19 months before the adoption of the aforementioned policy. These complaints were added to a demand for protection presented by the Defender of the People against the Presidency of the Council of Ministers and the Ministry of Health.

Among other things, this policy involved the Creation of the Permanent Multi-sectoral Commission that would be in charge of issue a technical report with the Sectoral Intercultural Health Plan 2016-2012, as well as monitoring the implementation of the Sectoral Intercultural Health Policy and formulating mechanisms its effective compliance with the aim of creating a space of permanent intersectorial coordination and cooperation to permit the effective observe of the actions that were drawn up.

The PSI had the objective of regulating actions related to intercultural health at the national level, in order that compliance with this right was done in accord with inclusion and with equality of opportunities between men and women. Thus it looks to guarantee the exercise the right to health for indigenous, native, Andean and Amazonian people as well as the Afroperuvian population, by proposing the following:

- Achieving universal health coverage, as well as full access to health services that provide comprehensive attention, of quality and with cultural relevance, for indigenous, native, Andean and Amazonian people as well as the afroperuvian population.
- Ensuring that health centers located in areas inhabited by indigenous, native, Andean and Amazonian people as well as the afroperuvian population, articulate conventional as well as traditional knowledge in the framework of the recognition and revaluation of traditional medicine.
- Ensuring that the personnel that works in health establishments that provide services to indigenous, native, Andean and Amazonian people as well as the afroperuvian population, has adequate competencies and abilities in intercultural health.
- Ensuring that, at the national level and in priority regions, that institutional mechanisms of active participation for indigenous, native, Andean and Amazonian people as well as the afroperuvian population are implemented in the processes of management, provision and evaluation of health services.

This was important progress at the institutional level that, by the way, did not just address itself to indigenous and native people from the Andean and Amazon regions but also to the afroperuvian population, in addition to a gender focus and the necessity to encourage the relationship between community members and health services with the aim of recognizing and incorporating local health knowledge and traditions that these populations had developed over the course of their existence.

Nonetheless, in these cases caution is a virtue that we should value, in the case that I can't hide that my attention is continually called to the fact that in the political sphere, the participation of the representative from the six national indigenous organizations is dependent on invitations from members of the Multisectoral Commission to collaborate with that Commission.[81] In my opinion, this issue generates a certain suspicion, as the participation of indigenous communities– especially those principally affected – must be constant and cannot be dependent on being invited to collaborated. In the long term this can result in restrictions that empty the contents of the right that initially was being guarded.[82]

Furthermore, even when reference is made in general terms, I think that an excellent opportunity is lost to establish the guidelines of an effective guarantee of rights of indigenous people in isolation and initial contact (PIACI), most of all considering their condition of high vulnerability.

A good indication of what should be implemented for PIACI can be found in a recent report titled "Indigenous People in voluntary isolation and initial contact in the Americas," in which the Inter-American Commission suggest two core ideas: the existence of specialized prevention and contingency protocols, as well as the training on the special situation of the PIACI geared towards public officials and other actors that participate in the implementation of health protocols.[83]

In the case of Bolivia, it is characterized as being the country with the most complete laws with respect to intercultural issue, from the Constitution on down to its laws on health and education. Nonetheless the principal obstacle is the level of penetration of the State. In many case, its public policies have not become effective due to issues so essential such as the absence of sanitary personnel or facilities in the rural areas of the country. Despite these difficulties, progress has been notable, most of all in the integration of traditional health with biomedicine, as it is the only country where traditional medicine has a vice-minister, and where traditional doctors can register labs and where the career of traditional medicine is supported and endorsed by the Ministry of Health.

While Bolivia approved C169 in 1991, the progresses in the first phase were limited to territorial and judicial recognition of the indigenous. One of the first steps in health was achieved through the Medication Law #1737 (1996) which regulated among other things the production of natural and traditional medications (Art. 2). Despite that fact there is not mention of interculturality. The regulation would be published a year later. (D.S. #25235)

D.S. #26875 (2002) established the Health Management Model, integrating traditional medicine, whose care is designated the Health Departmental Service. In this decree, traditional medicine is established as the first level of case (together with the mobile brigades), in addition to the fact that in Section VI of Article No. 10 the Ministry of Health is deemed responsible for accrediting traditional medical providers.

The arrival of Evo Morales to power brought the creation of the Law of Organization of the Executive Power, D.S. #28631 (2006), that reorganized the ministries, creating the Viceministry of Traditional Medicine and Interculturality, while article 87 specified that the fundamental roles of this entity would

81 Article 5 of the PSI establishes that "The Multisectoral Commission can convoke as invitees to collaborate with the Commission (…) one representative of the six national indigenous organizations: the Interethnic Association of the Development of the Peruvian Jungle (AIDESEP); the Confederation of Amazonian Nationalities of Peru (CONAP); Peasant Confederation of Peru (CCP); the National Agrarian Confederation (CNA); the National Union of Aymara Communities (UNCA); the National Organization of Indigenous and Amazonian Women of Peru (ONAMIAP) that participated in the consultation process."

82 It is possible that this last point is only a theoretical impression and even editorializing. However, I think it is pertinent that despite the possibility of falling into one of the aforementioned suppositions, we cannot fail to bring attention to the not necessarily positive connotations that it brings with it.

83 Inter-American Commission of Human Rights. Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas, OAS (December 2013) OEA (OEA/Ser.L/V/II. Doc. 47/13. Available online: http://www.oas.org/en/iachr/indigenous/docs/pdf/Report- Indigenous-Peoples-Voluntary-Isolation.pdf. I suggest looking at recommendations 16-17

be to adhered to the health policies of traditional medicine. As a result, Law #3760 (2007) gives scope to the Law of the U.N. Declaration of the Rights of Indigenous People (self-determination of the people regarding their own political, social, cultural, and organizational criteria).

Supreme Decree #29601 created the Model of Intercultural Communitarian Familial Health (SAFCI) in 2008. SAFCI is a model that aims to create an environment of medical attention that takes into account the diverse cultures with which it interacts, as well as the traditional medicines that these groups take into account. It is governed by the principles of communitarian participation, intersectorality, interculturality and integrality. Within this D.S., various articles of D.S. #26875 (Model of Health Management) are repealed.

Nonetheless, it is with the Political Constitution of 2009 that interculturality transforms from a disperse issue within the legal framework to a mainstream tendency of the Bolivian state. The document recognizes Bolivia as a plurinational and intercultural state and calls on its legal organs, as well as those of state and education, to incorporate this understanding to promote new methods (of health) and reflections (of education) that adhered to indigenous visions. (Art. 18: health is a fundamental right; Art. 30: indigenous and native people and nations have the right to health; Art. 35: the national health system is singular and adheres to traditional medicine). This supposed a change in the rules of the game that was not well-regarded by 38% of the population. We must remember that approval was subject to a referendum, most of all because it decided that the version of the country to which the document made reference would be broader: quota of indigenous parliamentarians, indigenous people as owners of forest resources in their environment, as well as an indigenous judicial system and autonomy of the same.

This Constitution culminated its phase of health changes with the Law of Traditional Bolivian Medicine (2013), that integrated the traditional medicine of the indigenous people of Bolivia into the National Health System, in addition to those that provide such medicine (spiritual guides, midwifes, naturists, and traditional doctors). Likewise, its guiding principles are Ama Suwa, Ama Llulla, Ama Qhilla, ayni, taypi (meeting of wise men) and, among others, social interest.

Colombia is a particular case, as its first laws on intercultural health are much older than the rest of the countries, even preceding the approval of C169. While the first law dates back to 1981, the programs began to coalesce in 1979, in Caquetá, where the first workshop took place on the provision of health services to indigenous populations, by MINSA, using as a base the programmatic framework for the provision of health services in indigenous communities in Colombia.

In 1980, the Department of National Planning developed the Diagnostic of the Indigenous Situation in Colombia, which resulted in Resolution #10 013 (1981), which incidentally was inspired by the fights of central indigenous people. This resolution established that health providers that operated in indigenous areas needed to adapt themselves to their social, political, cultural and economic structure. However, the word "intercultural" was not used. That was contemplated in Resolution # 5 078 (1982), which established that traditional medical providers could and should be taken into account in terms of biomedicine, while the State would guarantee respect for their practices.

Decree #1811 of 1990 created a new format of health promoters, as the previous figure – the health promoter – according to investigations had not obtained the expected results. On the contrary, it had created a situation in which the gap between it and the general population grew, as receiving a salary and infrastructure from the State, they were able to differentiate themselves socially from the rest of the community, usually in terms of subsistence.[84] Decree #1811, furthermore, professionalized the attention to indigenous communities and made health free for indigenous people.

84 Suárez, Martha (2001). Una propuesta de modelo en salud para los pueblos indígenas de la Amazonía. En: Imani Mundo. Estudios en la Amazonía Colombiana. Bogotá: Universidad Nacional de Colombia, Instituto Amazónico de Investigaciones, p. 173-193.

Law #100 (1993), created the System of Comprehensive Social Security, which arose from the General System of Social Security in Health (SGSSS) whose subsidized regime (apart from that funded by contributions) was supposed to provide basic health services to people affected by the Internal Armed Conflict, rural populations, pregnant woman, senior citizens and the indigenous population whose status was regulated by Decree #2001. This reform created the Healthy Provider Businesses (EPS), the Familial Compensation Fund (CCF) and the Solidary Health Businesses, as well as declaring that service provider institutions became social businesses of the State, which allowed them to have negotiation capacity with private entities.

With Decree #330 of 2001, the creation of the Indigenous Councils (Decree # 1 008 of 1993) as a base for the Indigenous Health-Promoting Entities (EPSI). In addition to being a little bit later, Law # 691 of 2001 regulated the participation of ethnic groups in the General System of Social Security in Colombia, which required public health policies to take indigenous knowledge and practices into account, assure the universal access of indigenous people, guaranteeing their physical and social integrity and provided state institutional imprimatur to indigenous authorities.

After this, the only further relevant measure was Decree # 1973 of 2013, which "Created the Sub-Commission on Health of the Permanent Table of Agreement with indigenous groups and organizations, which was supported to guarantee the construction of a legal body for the creation of the Indigenous System of Intercultural Health. Its Constitution is mainstreamed and involves the Treasury, Interior, Planning Direction, SUNAS, ONIC, CIT, OPIAC, ATIC, among others."

Although the contemporary focal points of work on intercultural health and education in Ecuador revolve around Sumak Kawsay (plenitude of life of the people and nationalities, agreed by the Constitution of 2008), there are various antecedents that occurred in the framework of the adaptation to C169. Thus, in 1988, before its ratification, they had created the National Office of Indigenous Intercultural Bilingual Education, which a little bit later - in the framework of what was dubbed the "ethnic system" due to the wave of indigenous uprisings and conquests throughout the country – was taken by the Indigenous Movement of Ecuador (ECUARUNARI) and the Confederation of Indigenous Nationalities of Ecuador (CONAIE), organizations that delegated their intercultural educational criteria to the same indigenous organizations up until the arrival of Correa, who reverted this prerogative to his ministries.

But this seism allowed CONAIE to gain sufficient power to arrive at the Constituent Assembly of 1998 with 10% of members, which allowed them to place the indigenous agenda within the new constitution. Here, Ecuadorian languages were recognized and stimulated, giving official character to quichua and shuar in the areas in which those were spoken (art. 1). Furthermore, it guaranteed that indigenous communities had public defenders provided by the State (art. 24) and dedicated the first section of chapter 5 to the recognition of the rights of afro and indigenous people – the recognition of these rights as collectives had hardly happen at the level of the United Nations in 2008, with the Declaration on the Rights of Indigenous People – including the recognition of "Their systems, knowledge and practices in traditional medicine, including the right to the protection of ritualistic and sacred places, plants, animals, minerals and ecosystems of vital interest from their point of view."

Meanwhile, another achievement of indigenous pressure was the creation, in 1992, even before the approval of C169, of the National Secretariat of Indigenous, Minority and Ethnic Affairs (SENAIM), which served as the antecedent for the creation, in 1996, of the Ministry of Ethnic Affairs, that due its minimal influence among the central indigenous people was replaced in 1997 by the Council for the Planning and Development of Indigenous and Black People (COMPLADEIN). Later, in 1998, with Executive Decree #386, they created the Council of Development of the Nationalities and Indigenous Communities of Ecuador, valid since 2014, when the Organic Law (Official Registry #283) created the National Council for the Equality of Indigenous Communities and Nationalities (CNINP).

In the Ministry of Public Health, the first changes occurred with Executive Decree #1 642 (1999), which created the National Office of the Health of Indigenous People and Nationalities, with technical, administrative and functional autonomy. Later, it promulgated the Organic Law of the National Health

System (2012), which specified that this entity, in coordination with the National Health Council, should focus on the investigation oriented towards national priorities, with intercultural edge, that recognized traditional medicine as well as promoting ethno-cultural equity.

The Law of Free Maternity and Attention to Infancy, deserves separate mention. Promulgated in 1994 and modified in 1998, it has become a great tool to widen the rift in attention to expectant mothers as it recognizes that for their attention and that of their children, in addition to zero-cost, there must be recognition of alternative methods, including traditional ones, for medical attention aimed at this group of the population, implying that if a mother is assisted by a traditional midwife, the State should recognize symbolic fees for this work.

The National Office of Indigenous Health, with Law # 2007-86, evolved into the National Secretariat of Intercultural Health of the Indigenous Nationalities and Indigenous Communities of Ecuador, always assigned to the health portfolio. This would be abolished and replaced by the Organic Law of National Councils for Equality in 2014.

Nonetheless, the apparent speed of changes in the composition of the organization, bears some relation to the promulgation of the 2008 Constitution, approved by referendum with Rafael Correa as the principal promotor. This recognizes that Ecuador is a plurinational and intercultural state (article 1), recognizes the existence of indigenous communities, groups and nationalities, the montubio people, afro-Ecuadorians and the communes (article 57), promotes traditional health systems, sciences and ancestral knowledge, genetic diversity and traditional medicine, as well as guaranteeing the practice of ancestral medicine (article 363). But, more than anything, it recognizes that the central focus of all public policies must be *Sumak Kawsay*, or "good living," which in Bolivia is expressed as "living well" and that proposes a development model that takes the Andean criteria of reciprocity, complementarity and relationality into account. This Constitution also recognizes that the National Health System must recognize ancestral practices, as we specified two paragraphs ago. The logic of *Sumak Kawsay* was converted into a type of route map or technical norm a year later with the publication of the National Plan for Good Living 2009-2013.

It also bears mentioning that, in light of the new Constitution, the National Direction of the Legalization of the National Health System was created whose Sub-process of Interculturality, with support from the Center for Human Services published in 2010 a technical document called "Definition of the role of midwives in the National Health System of Ecuador."

With respect to **Venezuela**, the Organic Law of Indigenous Groups and Communities (2005) provides mechanisms of self-management for indigenous groups and communities, that is, the right to decide and assume the autonomous control of their own institutions and ways of life, their economic practices, their identity, culture, right, uses and customs, education, health, world view, protection of their traditional knowledge, and the use protection and defense of their habitat and lands.

It is important to focus on the substance of art. 95 section 8 of the aforementioned law, according to which the State has a duty to guarantee the use of indigenous languages in those services and programs of the national system of health directed to indigenous people.

Likewise, art. 111 of the same law stipulates that the right of the people to use traditional medicine and their therapeutic practices for the protection, encouragement, prevention and restitution of their health. The following act indicates that the State, through its organs, bodies and other competent organisms and in coordination with the indigenous groups and communities, will create the necessary conditions for the incorporation of traditional medicine and therapeutic practices of indigenous groups and communities into the services of the National System of Health directed at indigenous people and communities.

In a related matter, in order to more fully approach the magnitude of the problem, one must take into account that the data provided by the first Official Census of the population carried in 1873 included the indigenous population, although the registries were insufficient (because of the variables used

to identify them, the geographic gaps, among other reasons). An example of that is that they were classified according to ethnicity with no type of disaggregation.[85] It was not until 1926 when they counted the indigenous population and determined their distribution in the municipalities of the national territory. The total amount of the indigenous population was 136,147, of whom only 15,192 indigenous people were classified by sex, as the rest were included as "unspecified population."

In 1950, they carried out, within the census, a special study that allowed for the incorporation of the statistic of the indigenous population, classified at that point in categories established in accordance with their "integration to civil life," their place of habitat, and the results of the General Census of Population. The results generated the amount of 98,682 indigenous people of whom 41,977 were counted directly by the census while the remaining 56,705, inhabitants of jungle areas, were estimated, according to the opinion of the specialists participating in the program.

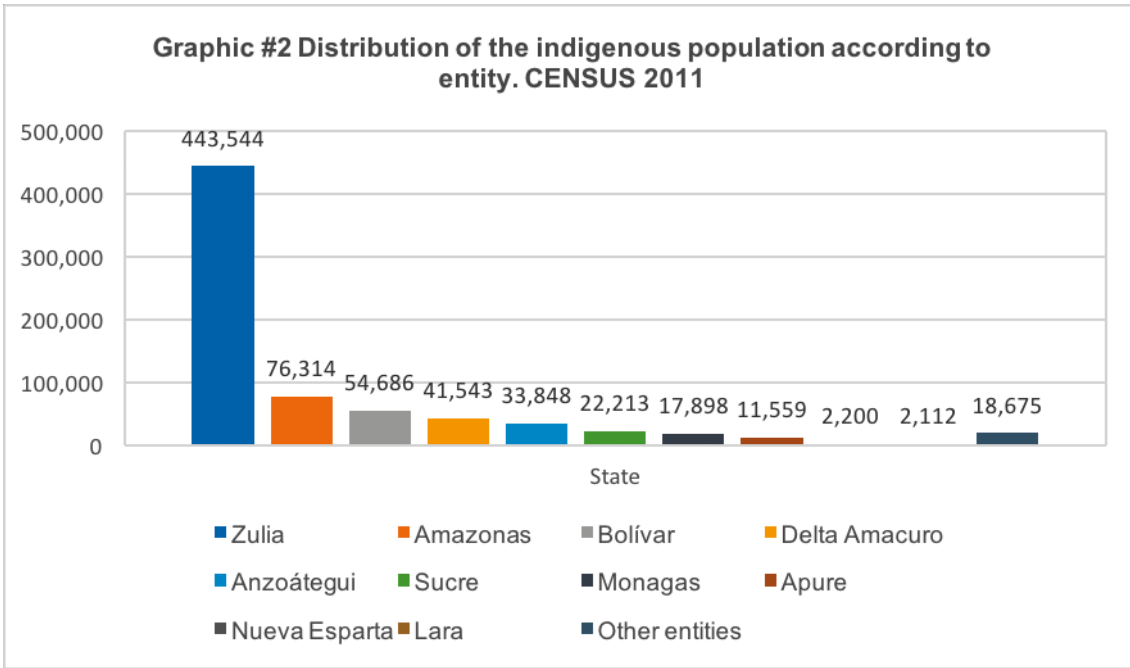
In the Indigenous Census of 1982, for the first time the national territory was divided into geo-ethnic zones and the program, which lasted two years, was carried out with the participation of the resident indigenous people in those areas, who were registered for the first time. Certainly, the results obtained in this case were much more trustworthy than in the preceding censuses due to fundamental elements such as the methodological design, the conceptual focus, and the evaluation techniques of coverage that were used.

In the Indigenous Census of 1992, ethnological specialists participated and incorporated the indigenous population into the work of registration and supervision of the registration process. There they counted almost the totality of the indigenous population present in rural and urban areas of the federal entities in which zones of traditional occupation of Indigenous People of Venezuela were found. This 1992 program was designed, planned and executed for the first time in the history of Indigenous Censuses, by the Binational Census of the Wayúu ethnicity, a population that represents 54.5% of the total of the indigenous population of the country, and that traditionally occupies within Zulia State, the strategic zone of the Guajira peninsula, on both sides of the border between Venezuela and Colombia.

In the 2011 census, capturing technology through Capturing Mobile Devises was used. The indigenous population living in their ancestral areas were simultaneously registered, though the same questionnaire on the characteristics of dwellings, homes and people for the first time they aimed to provide visibility to the population in the country that was considered afro-descendant.

Thus, from the data provided by the 2011 census, it was gathered that the indigenous population reached 725,592 people, which reflected an important increase that reached 2.7% of the total of the Venezuelan population. With regards to the distribution of the indigenous population by federal entity, as indicated in the following chart, Zulia state came in first place with 61.2% of the total national indigenous population, corresponding to 443,544 declarations of indigenous self-recognition of which 91.23% identified as Wayuu, the main population in the country.

85 Information provided by the portal of the National Institute of Statistics (INE) of the Bolivarian Republic of Venezuela can be found here: http://www.ine.gov.ve/CENSO2011/ menuindigena.html



Source: Created by authors based on the National Census of Population and Housing. XIV National Census 2011. Bolivarian Government of Venezuela. Ministry of Popular Power for Planning. National Institute of Statistics.

Federal Entities*	2011			
	Total	Indigenous	Not indigenous**	% Indigenous Population
Total	27.227.930	724.592	26.503.338	2,7
Amazonas	146.480	76.314	70.166	52,1
Delta Amacuro	165.525	41.543	123.982	25,1
Zulia	3.704.404	443.544	3.260.860	12,0
Bolívar	1.413.115	54.686	1.358.429	3,9
Apure	459.025	11.559	447.466	2,5
Sucre	896.291	22.213	874.078	2,5
Anzoátegui	1.469.747	33.848	1.435.899	2,3
Monagas	905.443	17.898	887.545	2,0
Nueva Esparta	491.610	2.200	489.410	0,4
Lara	1.774.867	2.112	1.772.755	0,1
Otras Entidades***	15.801.423	18.675	15.782.748	0,1

(*): The entities are ordered in accordance with the percentage of indigenous population residing in them.
(**): Including those not born in Venezuela.
(***): Groups population that identify as indigenous in the rest of the entities in the country.
Note: The question of indigenous identification was asked to the population born in Venezuela, totaling 26,071,352 inhabitants.
Source: National Institute of Statistics, INE.

Source: Created by authors based on the National Census of Population and Housing. XIV National Census 2011. Bolivarian Government of Venezuela. Ministry of Popular Power for Planning. National Institute of Statistics.

The census carried out in 2011 accounted for the percentage of indigenous population in Venezuela, though it did not specifically account for the existence of indigenous people in isolation; in relation to that, the Report on Indigenous People in Voluntary Isolation and Initial in the Americas of the Inter-American Commission on Human Rights (IACHR) of 2013 indicated that:

In response to the questionnaire received from the Ministry of Popular Power for External Relations, the State of Venezuela expressed that "in the Bolivarian Republic of Venezuela, there are not currently indigenous people in the condition of voluntary isolation of initial contact. Response of the State of Venezuela to the Consultation Questionnaire on Indigenous People in Voluntary Isolation and Initial Contact, received by the IAHCR on May 23, 2013 (Ministry of Popular Power for External Relations), p. 2. Nonetheless, the response received by the Public Defender of the Bolivarian Republic of Venezuela indicated that "in Venezuela there are communities that belong to three indigenous groups, that live in certain relative isolation or initial contact. These indigenous people live in the south of the country in the states of Amazonas and Bolívar; they are they Hoti, Yanomami and Piaroa." Response of the Bolivarian Republic of Venezuela to the Consultation Questionnaire on Indigenous People in Voluntary Isolation and Initial Contact, received by the IAHCR on May 28, 2013 (Public Defender of the Bolivarian Republic of Venezuela, p. 3).86 [86]

As a result, even when there is a contradiction between the information provided by the Ministry of Popular Power for External Relations and the Public Defender of Venezuela, the IACHR accounts for the existence of communities belonging to three indigenous people that remain in relative isolation or initial contact, and live in the south of the country in the states of Amazonas and Bolivar; they are the Hoti, Yanomami and Piaroa.

3.2 Entities responsible for the design and implementation of public policies on intercultural health

In Brazil, since the middle of 1991, the National Foundation of the Indian (FUNAI) was the only body responsible for administering public policies in indigenous environments, a function that it inherited from the Indigenous Protection Service (an institution founded in 1910) in the middle of 1967. Nonetheless, from 1990 onward, in the framework of the reorganization of the ministries (Education and Health, most of all), they received tasks in indigenous spaces, which took some influence away from FUNAI, whose principal function became the protection of the territories and the safeguarding of populations in voluntary isolation.

Within the Ministry of Health, there are two areas in charge of indigenous health, an administrative area (SESAI) and another with an audit function (*Defensoría*), although in the case of the later there is not a specific mission with respect to indigenous defense, but due to the fact that it is in charge of supervising SUS in its totality, it naturally has interests in the issue. In the case of SESAI, it is part of FUNASA, which has assumed the responsibility for indigenous health through the pressure of indigenous groups since 1980. The Union of Indigenous Nations (UNI) was the body that worked to have the indigenous chapter in the 1988 Constitution through a campaign called *Indigenous People in the Constituent Assembly* (Programa de las Américas, 2009), first as a public policy – creating the Special Districts in 2003 – and later assuming the role of at the level of Secretariat in 2011; we must remember that in 2003 it was only a Department. Nonetheless, there are reports that detail the conflicts between this foundation, the Central state and indigenous communities, particularly in the northeast of the country, due to two important situations: the politicization of space (controlled by the Brazilian Democratic Movement party) and of privatization. A clear example of the latter in that in 2004, the NGO Urihi Salud Yanomami was responsible for the health of 53% of the Yanomami

86 Inter-American Commission on Human Rights (IACHR). Report on Indigenous People in Voluntary Isolation and Initial Contact in the Americas. 2013. See footnote 24.

population in the north of Brazil (Adital, Noticias de América Latina y el Caribe, 2004). The conflicts derived from both points will be discussed in its respective part.

In the case of Peru, among the institutions responsible for the design and implementation of public health policies from the intercultural point of view, we can cite the General Health Office of People, in charge of carrying out the Technical Norm "Comprehensive health attention to excluded and dispersed populations." Likewise, the National Center of Intercultural Health (CENSI), responsible for the technological investigation and transfer regarding traditional and intercultural medicine; the Commission of Andean, Amazonian and Afro-Peruvian people of the Congress of the Republic, a commission in charge of defending and promoting legislative projects that favor ethnic minorities in Peru; the Public Defender and the DIRESA.

Due to the transversal nature, beyond the CENSI there is not a specific area of intercultural application. Rather each DIRESA must verify that the focuses are applied in its areas. However, despite the transversal nature, there exists, as we mentioned in the legal section, the Technical Functional Unity of Human Rights, Gender Equity and Interculturality in Health, whose principal function is investigation and coordination with CENSI for the creation of technical norms. To this must be added the Thematic Health Group of the Health of Indigenous People and the Technical Unit of Special Projects for Indigenous People, two dependencies of the General Division of Epidemiology (DGE) of MINSA.

The Viceministry of Interculturality, for its part, supports the discussion of CENSI and MENSA with qualitative information specialized on indigenous populations, populations in voluntary isolation and protocols of community relations, through the General Division of Indigenous People and its dependency, the Division of Indigenous Groups in Situations of Isolation and Initial Contact.

In the case of **Bolivia**, there is also a Viceministry of Traditional and Intercultural Medicine (belonging to the Health Ministry) and a General Division of Traditional Medicine and Interculturality (belonging to the VMTI).

From the academic point of view, the University of Mayor de San Andrés (UMSA) has a specialty in botany that houses specialists that participate actively in the debates on intercultural medicine.

Colombia, for its part, works on practically all of its intercultural health policies through the Ministry of the Health of People. Furthermore it is, together with Brazil, the country with the greatest quantity of postgraduates in Tropical Medicine, given its diverse geographical characteristics, which provide the principal inputs for the elaboration of public policies in intercultural health, having 13 universities that teach this specialty at the doctoral level, as well as one that provides a masters.

It has, as well, the "Antonio Roldán Betancur" Colombian Institute of Tropical Medicine, a private entity, and the Interest Group in Public Health of the National Faculty of Public Health of the University of Antioquia.

In Venezuela, in accordance with the aforementioned law on the rights of indigenous people, the ministry competent in the area of health, with the participation of the indigenous groups and communities, defines health policies directed at indigenous communities and groups. The execution of health programs and plans is carried out in a coordinated manner with the executive body of the indigenous policy of the country, with regional and municipal governments of entities with indigenous populations and with indigenous groups and communities.

Likewise, with the participation of indigenous communities and grouops, it guarantees the training of the personal in charge of attention to health of the indigenous communities and groups and promotes the incorporation, in the programs of study of universities and professional health institutes, of content related to indigenous medicine, respecting the indigenous worldview, knowledge, practices, uses, customs and traditions.

In **Ecuador**, that role falls om the National Division of Intercultural Health, which is the institution in charge of developing public policy related to intercultural health, the recuperation of knowledge of traditional medicine, training indigenous personnel in traditional health and adapting the National Health Plan to an intercultural logic.

For its part, the National Division for the Promotion of Health also has shared responsibilities with the aforementioned Division, with which it coordinates plans and projects that have intercultural health criteria. This work is also complemented, in the area of technical norms, by the National Division of Policies and Modeling of the National Health System, which is responsible for establishing guidelines for investigation into intercultural health; this division also receives significant support from the first Division, particularly in technical documentation on interculturality and qualitative analysis of the health of indigenous populations.

3.2.1 Plans, programs and projects

In **Brazil**, new plans, focuses and policies in relation to intercultural health are defined in the National Conference of Indigenous Health, which is the periodic meeting of the leaders of the Districts, Health Ministry and FUNASA.

Likewise, they have a National Policy for the Attention to the Health of Indigenous People (PNASPI), the route map of the SESAI and that of the possible future INSI.

On the other hand, there are the Indigenous Health Agents, who were recognized, as indicated before, in 2002. Many of them, nonetheless, recognize that in the introductory phase of the work, in 1983, they had many problems, as a large part of the tasks that the State demands of them were not completed in their entirety or they didn't know how to apply them, as they had never passed through a process of training in biomedical techniques or in intercultural theory. (Moura-Pontes & Garnelo, 2014).

In **Bolivia**, there is an Intercultural Familial Communitarian Health Plan (SAFCI) along with a model of shared management. This policy establishes that the community and health centers make shared decisions on health matters.

SAFCI doctors are selected through an evaluation of their capacity to interact with communities and to carry out intercultural medical practices in rural areas.

The Intercultural Hospital of Tinguipaya was the first intercultural hospital inaugurated in all of Bolivia, for the attention of approximately 30,000 citizens in Potosí. In relation

to traditional laboratories, through the approval of the Traditional Medicine Law, there are 14 authorized artisanal laboratories in the country, with three in La Paz, one in Santa Cruz, eight in Cochabamba, one in Oruro and another one in Tarija.

One of the biggest challenges in intercultural health in Peru was the introduction of vertical birth in the health establishments of MINSA. But this was not possible without the redefinition of the National Sanitary Strategies, whose reorganization occurred in

2004. Of the ten established, one was the Health of Indigenous People and other of Sexual and Reproductive Health. In the case of the first, coordinated by CENSI, they established as of the middle of the past decade the National Commission on the Health of Indigenous People, whose policies (insurance of disperse population, development of ethnic categories and adaptation of health policies for populations in voluntary isolation) were detailed in the first part, regarding the legal framework.

The "casas de espera" represented the first step in intercultural adaptation in rural areas, as the first were inaugurated in the city of Huánuco, with the hope that these would serve as the step immediately prior to birth, a space in which mothers could adjust and accustom themselves to the formal system of health, accompanied by traditional elements: midwife guide, preparation of infusions, familial

company. Nonetheless, there was no intention that births with midwives would necessarily occur in these spaces nor necessarily – though it wasn't explicit – but that at the end of the process with the actual birth that national medical personnel would enter the fray. From this experience, lessons were learned for the development of technical norms that arose, in the middle of the past decade, in spaces within health establishments in which midwives were not just involved in the steps leading up to the birth, but would participate actively together with biomedical personnel (Nureña 2009). One of the most interesting examples of this evolution was the maternal health service with intercultural adaptation of the Health Network of Churcampa (Huancavelica).

Another example of practical application is the Training Program of Technical Nurses in Amazonian Intercultural Health (PFETSIA), managed by the Interethnic Development Association of the Peruvian Jungle (AIDESEP) as of 2005, whose principal function was to train members of indigenous communities in intercultural health, as well as to disseminate knowledge of the health systems of these communities, and to service as liaisons with the State health personnel.

Furthermore, on September 22, 2006, INDEPA and the Regional Division of Health of Ucayali – as well as that of Cuzco – signed an agreement so that Teams of Comprehensive Health Attention to the Territorial Reserve of Kugapakori, Nahua, Nanti and Otros (RTKNN), making in this first stage, six entrances into the area. Later in coordination with PlusPetrol, they began to develop a Plan of Protection for the RTKNN. Later. the UNMSM was made responsible for the social base of the area, which established an office of coordination in Sepahua (Atalaya, Ucayali) (*Parellada*, 2007). In fact, a large part of this work was coordinated or executed by the General Division of Epidemiology, which assumed responsibility for the technical aspects of the relation between Health and Indigenous People in the Situation of Isolation or Initial Contact. (PIACIs).

Likewise, as has been alluded to, in April of this year the Sectorial Policy of Intercultural Health (PSSI) was adopted which, among other things, called for the Creation of the Permanent Multisectoral Commission which would be in charge of issuing the technical report of the Sectorial Plan of Intercultural Health 2016-2021, as well as carrying out the monitoring of the implementation of the Sectorial Policy on Intercultural Health and formulating the mechanisms for its effective compliance with the end goal of creating a permanent space of intersectorial coordination and cooperation that would allow for the effective compliance with the outlined lines of action. This policy proposed to:

- Achieve universal health coverage as well as full access to health services that provide comprehensive attention, with quality and cultural pertinence for indigenous people, Andeans and Amazonians as well as the afro-Peruvian population.
- Ensure that the health establishments located in areas where indigenous, native, Andean, Amazonian, and Afro-Peruvian people live articulate conventional and traditional knowledge in the framework of the recognition and revaluation of traditional medicine.
- Ensure that the personnel who work in health establishments that provide attention to indigenous, native, Andean, Amazonian, and Afro-Peruvian people, have adequate competencies and abilities in intercultural health.
- Ensure that at the national level and in priority regions that institutional mechanisms are implemented for the active participation of indigenous, native, Andean, Amazonian, and Afro-Peruvian people in the processes of management, provision and evaluation of health services.

In accordance with the law on the rights of indigenous people of Venezuela, the ministry responsible for health, with the participation of indigenous people and communities is also responsible for defining the health policies designed for indigenous people and communities. At the same time, the execution of health planning and programming is carried out in a coordinated manner with the executing body of indigenous policies in the country, with municipal and regional governments of entities with indigenous populations and with indigenous people and communities.

It is also expected that the participation of indigenous people and communities will guarantee the training of personnel in charge of attention to the health of indigenous people and communities, and will promote the incorporation in, the in the programs of study of universities and professional health institutes, of content related to indigenous medicine, respecting the indigenous worldview, knowledge, practices, uses, customs and traditions.

Specifically, they created the National Institute of Indigenous People (INPI) as a decentralized autonomous body with legal personality, its own budget, financial, functional, organizational and technical autonomy, and with its own Board of Directors, that among its offices would have one on Social Health and Development.

The experiences in Colombia are comparatively less, and the Jaibia San Lorenzo Traditional Medicine School is a key example, whose education is endorsed by the Ministry of Education, and which operates with a curriculum of approximately five years, and whose curriculum is directed by people who have completed their secondary education and who live within the sanctuary.

On the other hand is the construction of the Indigenous System of Intercultural Health, which takes one on of the most classic agendas of the indigenous struggles in Colombia: the recognition of the differences of indigenous communities with respect to the West, which in this context means obtaining access to a different system of health. This is all in response to what they call the privatization of indigenous health which is exemplified in the creation of the Providing Entities of Indigenous Health (EPSI) which were private entities administrated by the Indigenous Health Providing Institutes (IPSI).

The Uaiin Indigenous and Autonomous University (Popayán, Cauca) is another extra official step that the organizations affiliated with CRIC have taken. This operates with the Own Health Program, whose students are typically from the Nasa people. Created in 2012, it has a curricular plan that involves the study of body and territory, nature and transformation, language and thought in health and research. (SERVINDI, 2014).

3.2.2 Institutions that monitor policies

In **Brazil**, there is the Coordination of Indigenous Organizations of the Amazon (COIAB), created just a year after the promulgation of the Constitution, and which has become of the indigenous organizations that is most solid in guaranteeing the continuity of indigenous health services, as well as questioning the reach of the privatization of these services.

The Indigenist Missionary Council (CIMI), the missionary wing of the National Conference of Bishops of Brazil, has as one of its dimensions that defense of the indigenous intercultural health and education. In this framework, it has been a vocal defender of indigenous agendas in the face of those who promote a continual privatization of specialized health services.

In the case of Peru, the National University of Mayor de San Marcos has an Institute of Tropical Medicine, as does the Cayetano Heredia University that has a "Alexander Von Humboldt" Institute of Tropical Medicine, which the Intercultural University of the Amazon (Iquitos) has an Institute for the Investigation of Comprehensive Health.

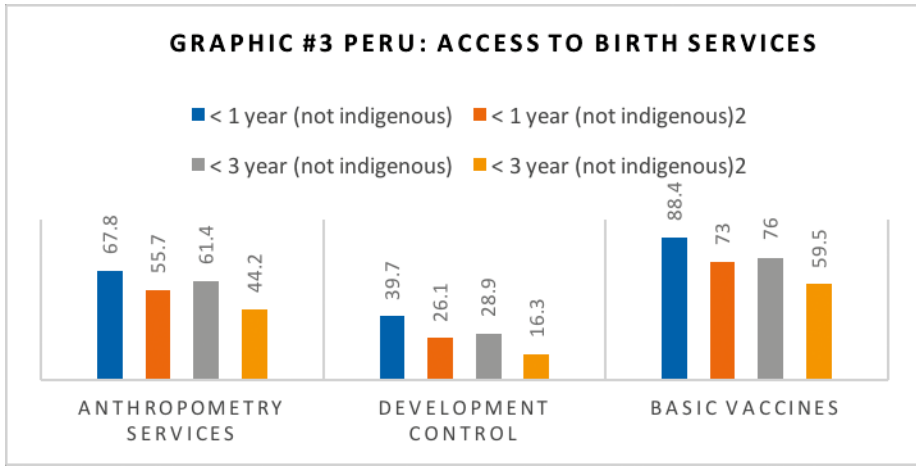
In the environment of NGOs involved in auditing are the Peruvian Association of Sanitary Rights, the Inca Tahuantinsuyo Movement – Incas NGO, the Amazonian Center of Applied Anthropology- CAAP, the Network of Communication and Information for Mutual Support Group - REDCOMDS, the Center of Indigenous Cultures of Peru – CHIRAPAQ, the Episcopal Commission of Social Action – CEAS, Health Without Limits, the Interethnic Association of Development of the Peruvian Jungle – AIDESEP, the Association Pro Human Rights – APRODEH and the NGO Medicus Mundi Navarra.

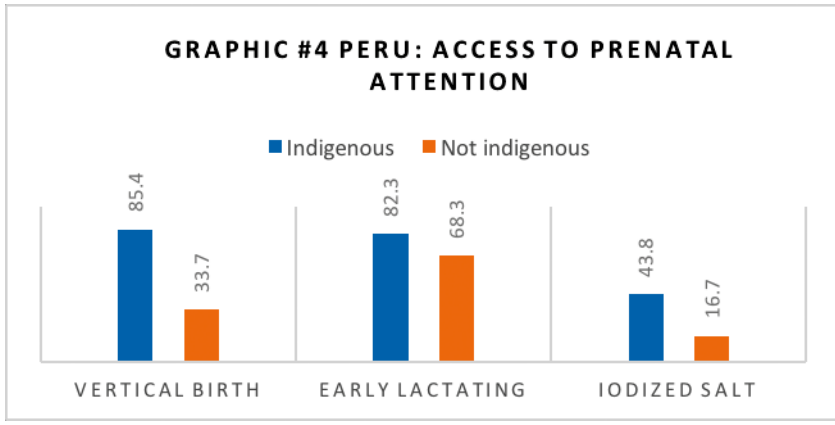
In the case of Bolivia, PRODECO, Doctors of the World Span and CEDEC. In Colombia, the principal monitoring entity has been the Regional Indigenous Council of Cauca which through its main offices has fought continually for the promotion of alternative and differentiated health systems (that the State should adopt, in response to what they consider a systematic privatization of public health through the ESE and the Health Providing Businesses (EPSs).

3.3 Coverage

In **Peru**, beyond the standards of ENDES, there is not a specific document in which the central State develops indigenous coverage, but through the reports of the Public Defender, we can know, always through indigenous information that "In the framework of supervision, 30% of the visited communities mention that the itinerant health brigades have never come and 40% arrive very rarely." (Source: Defensorial Report #134).

Furthermore, according to another report, the empirical model demonstrated that mothers in childbirth who speak Spanish have a 9% greater probability of receiving services in a Health Ministry establishment than those who speak a native language (Parodi, 2006). It bears adding that one of the principal problems of the forms used by the National Health Survey is that it does not specific the distance between people's homes and their respective health center, which doesn't allow for the appreciation of the relation between rural life and the problem of access to health, particularly in indigenous populations.



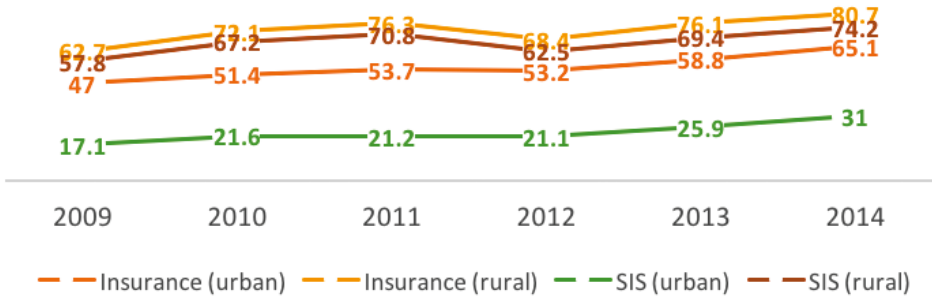


Source: Díaz, Vargas-Machuca & Antiporta, 2015

With respect to ENDES, information from 2005 indicated, contrary to the reports of the previous paragraphs, that there was largely equal access between Quechua- and Aymara- speaking women and those who speak in Spanish, as in the case of pregnancies with less than 4 prenatal controls, 94.9% of Quechua/Aymara women had access, compared to

87.6 of Spanish-speaking women. The statistic decreases in terms of institutional birth attention, of which only 41.8% of Quechua/Aymara made use. What is the explanation for this difference? It is probable that the State has done a good job in promoting health with respect to the access of indigenous/rural women to prenatal services (consumption of iron sulfate, fetal monitoring, etc.), but these women ultimately decided to birth their children with midwives, who inspire more confidence due to their horizontal treatment. As we saw in the section on cases, the MINSA had already began, since 1998, to treat the pregnant mother beyond prenatal attention, but it was only recently with the experience of Huncavelica that we could see a reduction in the statistical disparities.

GRAPHIC #5 PERU: WOMEN OF FERTILITY AGE WITH ACCESS TO SOME INSURANCE (2009-2014)

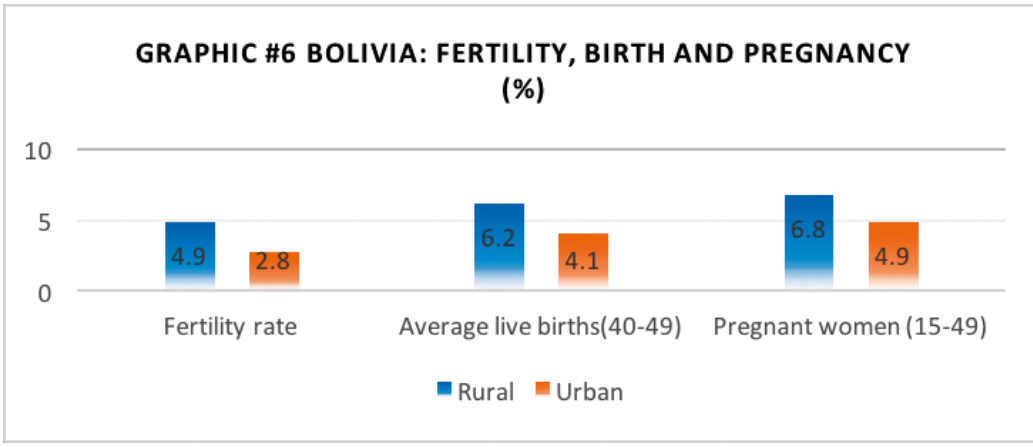


Source: INEI, 2015

In the case of **Bolivia**, as in Brazil, we only have data taken from reports or papers, as in this case, with reference to the Program for Extending Coverage to Rural Areas (EXTENSA) whose objective was to broaden the coverage in rural zones. This program in particular was based on the Mobile Health Brigades (BRISAS) that worked in a coordinated manner with communitarian health agents. According to the World Bank, the program in 2006 ha reached around 400,000 people, the majority of whom were indigenous, in around 3,000 communities. (Ledo & Soria, 2011). Furthermore, according to information from 2003, only 51.8% of the indigenous population consented to institutional birth – compared to 82.7% of those non-indigenous – while the pentavalent vaccine is administered to 68.4% of indigenous children, compared to 79.8% of children who are not indigenous.[87]

87 Please see the following link: https://es.scribd.com/doc/57048430/SI-ASIS-Andino-de- Poblaciones-Indigenas-Con-Enfoque-Intercultural

For its part, there are 1161 naturists, 249 midwives and 1608 traditional doctors registered.



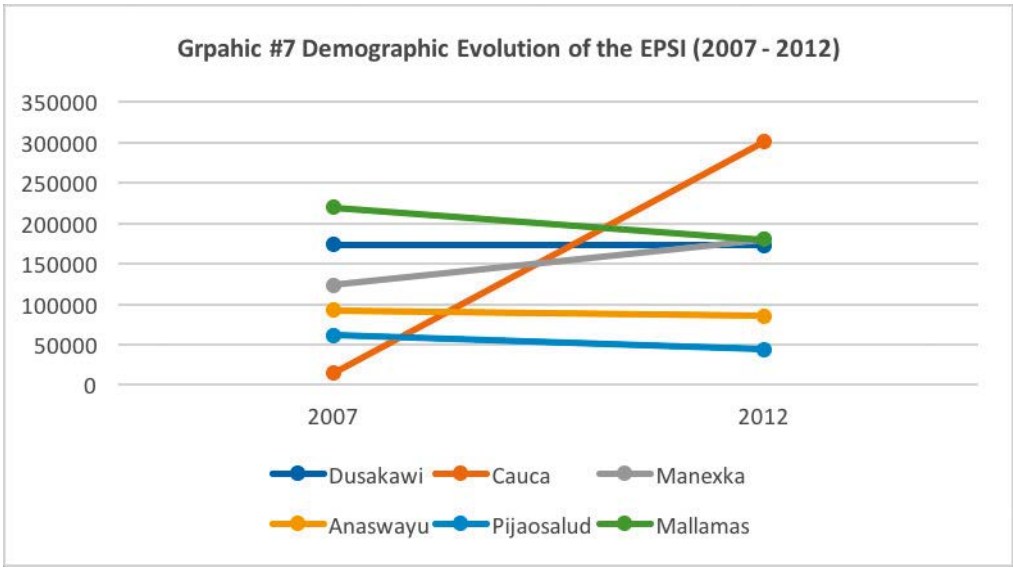
Source: Coa & Ochoa, 2009

According to information from the **Ministry of Health and Social Protection of Colombia**, "only 67.5% of the indigenous population is affiliated with the subsidized regime, that is 32.4% fund themselves out of coverage." (National Faculty of Public Health, 2012).

Given that EPSIs need an average of 20,000 indigenous people to function, in 2007 there were six of these institutions, which had an average of 685,000 affiliates, the largest being Mallamas (Nariño) with 220000 affiliates, Cesar – Guajira & Dusakawi (Cesar and Sierra Nevada de Santa Marta) with 173,472 and Zenú de San Andrés de Sotavento Córdoba- Sucre Manexka (Córdoba) with 123,212.

Chart #3

EPSI	Creation	Departament(s)	Affiliates (2007)	Affiliates (2012)
Indigenous Council Association of Cesar and Guajira-Dusakawi	1997	Cesar, Sierra Nevada de Santa Marta	173 472	173 202
Indigenous Association of Cauca	1998	Cauca	14 985	301 264
Council Association of the Indigenous Sanctuary of Zenú de San Andrés de Sotavento Córdoba-Sucre Manexka	1998	Córdoba	123 212	180 130
EPS Anaswayu	2001	Guajira	92 835	85 642
Pijaosalud	1997	Tolima	61 192	43 720
Mallamas	1996	Nariño	220 000	180 393



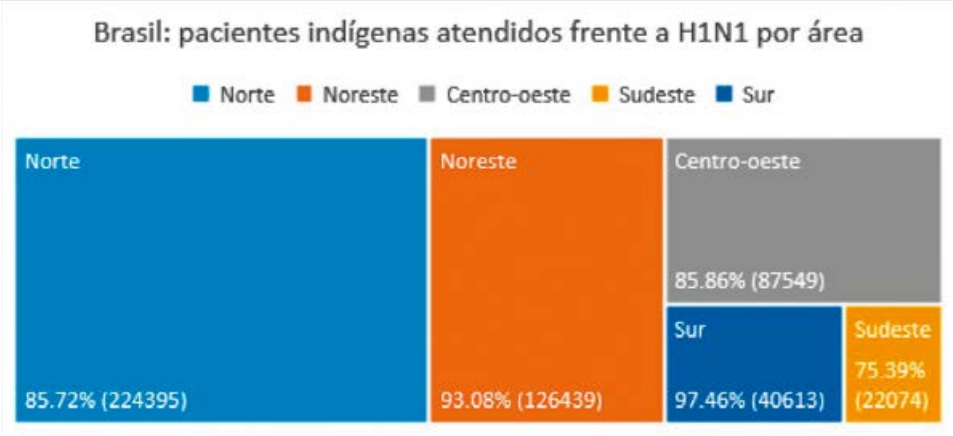
Source: Izquierda & Seikuinduwa, 2007; Campos, 2012

In the case of **Ecuador**, the inequalities registered by the Observatory of the Right to Childhood and Adolescence (ODNA) in 2007, achieved results more unequal than Bolivia in 2003: in prenatal control, only 61% of indigenous people accessed the service – compared to 87% non-indigenous; in attention to birth by qualified personnel, only 49% accessed it – 87% in the case of non-indigenous people. In the plan of complete vaccination before 5-years-old, only 32% of indigenous infants accessed the service.

Brazil has one of the richest datasets of advances with respect to the health of indigenous people. For example, infant mortality for every 1000 born into indigenous communities, dropped from 74.6 in the year 2000 to 41.9 in 2009, with the largest variation in the northeast (-64.5%) and the south-southeast (-67.5%) and the smallest advances in the north where 62.3 deaths in 2000 were reduced to 47.3 in 2009 (-24.1%).

Regarding the H1N1 flu, the State reported that the coverage to indigenous population reached, by region, 85.72% in the north, 93.08% in the northeast, 85.86% in the center- west, 75.39% in the south-east, and 94.46% in the south.

Graphic #8



On the other hand, with respect to the complete vaccination scheme, between 2006 and 2010 the coverage progressed from 51.1% (2006) to 63.80% (2007), 63.50 % (2008), 73.90% (2009) and 77 % (2010).

3.4 Conflicts

In **Brazil**, in 2014, the Indigenous Council of Roraima (CIR) protested the possible creation of the National Institute of Indigenous Health (INSI), a kind of evolution of the SESAI, as the proposal had been put to a vote among the secretaries of the District but had not been consulted or discussed for the local indigenous offices. The aggravating factor was the SESAI had defined the Institute as a public entity with private rights, with the background that practically all of the medical facilities of the Districts were already being administered by churches and NGOs, and furthermore, because in the Advisory Council, indigenous people were able to elect three of the thirteen members. Information from 2013 confirmed that the intention to create INSI with these characteristics had the support of Dilma Rousseff (Comisión Indigenista Misionera, 2015).

To confirm that this was not only a problem for the organizations in the north, in October 2014, Kaingang and Rio Grande do Sul Guaraní leaders decided to reject, under the same terms, the creation of INSI and advocated for the most important indigenous achievement in health: differentiated attention in health.

On the other hand, in Peru, Bolivia, and Ecuador, there are not registered social conflicts that have occurred specifically because of the application of intercultural health.

In **Colombia**, there are registries of conflicts related to the coverage of the State Social Businesses (ESE) in various points. For example, in Popayán, in May 2015, the Puracé indigenous community denounced that the fact that the local ESE gave poor services, did not comply with its commitments to indigenous people and did not agree to the political and administrative changes which may have forced these groups to take radical action.

FINAL CONSIDERATIONS ON INTERCULTURAL HEALTH

In all the countries studied, the national constitutions address the rights of indigenous people. Though all legally recognize such rights, there are pronounced differences. For example, in the case of **Brazil**, the Constitution recognizes indigenous people, their beliefs, and their forms of social and political organization, but does not go farther than that. We can thus identify a multicultural intention with respect to diversity. The document does not make explicit that the State should articulate a policy of recognition and adaptation of state mechanisms, something which is present in the constitutions of **Ecuador** and **Bolivia,** with the concept of "living well" or "well-being" being a principal focus.

While **Brazil** has FUNASA, which also administers the Department of Indigenous Health, **Peru** operates with a more transversal system with respect to the interculturality. While it has a research area in intercultural health – the CENSI

– it does not have a department or institute dedicated to the administration of intercultural health; this work is governed by a technical document developed by the Functional Technical unit of Human Rights, Gender Equity and Interculturality of MINSA, in coordination with CENSI. In **Venezuela,** although the law has created the National Institute of Indigenous People as a coordinating entity, it does not function in an optimal way in practical terms.

On the other hand, the body of law in intercultural health in **Bolivia** is of a more recent vintage, but it has grown precipitously. The the Medication Law dates to 1996, and by 2007 there was the Intercultural Communitarian Familial Health Model, which was reinforced in 2009 with the new Constitution that speaks of interculturality throughout its text. Nonetheless, achievements have been very limited due to the minimal presence of the State – health posts, medical bureaucracy and personnel, centers for health research and promotion – in relevant areas.

That is easily contrasted with the case of **Colombia.** Despite early progress with respect to intercultural health – it was a pioneer in creating technical tables to understand indigenous health – the state has not enjoyed recent advances beyond the institution of biomedical primary healthcare promoters, and Indigenous Health Providing Businesses (EPSIs). The lack of progress has caused permanent tension between indigenous offices and the State. The former complain that the national governments have subsumed their roles and have called for the end of the delegation of indigenous health to the private sector. A similar situation occurred in **Brazil**, where indigenous health, largely entrusted to NGOs linked to religious groups, has been strongly criticized for its limited scope.

The case of **Ecuador** is notbale because of the complexity of the legal and social evolution of intercultural health, with changes so heterogeneous that they share similarities with a number of neighboring countries. For example, regarding the importance of interculturality, Ecuador is similar to **Bolivia** in the sense that both constitutions mainstream the concept. The first steps in indigenous health mirror the history of Peru, given that the first approach of the subject was more technical than social; Ecuador also put the National Division of Health of Indigenous People and Nationalities in charge, later delegating part of the development of technical norms in intercultural health to the National Health Council, as **Peru** did with CENSI. Furthermore, **Ecuador** achieved a landmark in gender and interculturality that distinguishes it from the other countries: the economic and official recognition of alternative methods for attending pregnant women.

In this sense, although each country has different formal arrangements – whether legal, institutional, social or historic – for addressing intercultural health, it is notable that all of them have the following elements in common: a) States that have learned over time to understand their indigenous population; b) minimal reach of infrastructure – of the State, and of indigenous communities; c) minimal training in intercultural issues for those responsible for health – i.e. doctors trained in biomedicine as traditional medical practitioners; and d) evident backwardness with respect to other indigenous achievements – in education, territory and free determination.

As to the first point, with the exception of Colombia, all of the countries began to adapt their constitutions and bureaucratic apparatuses to the intercultural logic only as a result of the ratification of the Convention, perhaps due to pressure from interested groups, as well as the media attention the issue drew beginning in the 1990s among those countries that are part of the United Nations.

Thus, there are countries with a great interest in adapting their Constitutions to a mainstreamed intercultural plan – Ecuador and Bolivia, linked to the idea of good living. Nonetheless, as to the second point, the recent reforms from the first half of the past decade and the historically weak state presence – in the case of Bolivia – does not allow for a national evaluation of the effectiveness of health standards. That forces us into a situation in which we are limited to narrating the advances of formal legal mechanisms in the contemplation of interculturality.

On the other hand, countries such as Peru, Brazil and Colombia, with minimal explicit mentions of interculturality in their constitutions, have achieved more notable advances in practical terms, particularly in alliances with international cooperation groups – in the case of Peru – and the capacity of indigenous groups to decide how to manage the area – Colombia – or the decision to allocate funds to private institutions – NGOs or churches – so that these can be responsible for the coverage in indigenous areas – Brazil, and also Colombia.

But it is not sufficient to invest in infrastructure or fiscal reforms, if the workers in the field are not correctly trained This situation can create traumatic experiences in almost all scenarios: when a doctor comes from a metropolitan environment and has not been trained to understand and adapt to a new environment, when an indigenous person receives attention in an environment of otherness; when the person in charge of health is from the same location but uses western medical language, or when the responsible party – whether indigenous or an outsider – takes advantage of the power to obtain a stipend from the State that differentiates them socially and economically from the community and therefore from the local power structures. (Izquierdo & Seikuinduwa, 2007).

It is neither sufficient to invest in human resources. In basically all the Andean countries this takes place within the rural service, in which medical graduates must complete a year of work in rural and/or indigenous areas. This program has helped to allay the gaps in medical presence in rural areas, but also has increased the distance between indigenous people and biomedicine, as indigenous people in many ways feel that the rural medical facilities are places where one goes to die (Juárez 2004). In addition, there is the national and indigenous debates over differentiation in attention (Langdon & Diehl, 2007).

This exemplifies the importance of continuing to observe how each country learns and re-learns from its principal weaknesses: infrastructure, human resources, relationships with indigenous people, adequate legal frameworks, research centers and civil society.

4.

Intercultural Education

Foto: Global Humanitaria

4. Intercultural Education

Faced with the adverse conditions that afflicted – and afflict – the quality of life of indigenous people, the education of their youngest members becomes a variable that *per se* makes their productivity viable compared to previous years, even when this can be mean being foreign or contrary to the norms and knowledge that traditionally animated the community. Throughout the 20th century, facing the necessity of inclusion in the civil society dynamic, Latin American indigenous populations found themselves obligated to be the object of "Spanishization" and Westernization through educational programs that, necessarily, needed to be homogenous throughout the national territory. All non-western knowledge, norms, art, customs and traditions were, in broad strokes, considered retrograde, wild or uncivilized. Thus, education (homogenous, modern and civil) became the maximum bastion of the fight against *barbarian* ideas, among those that belong to the indigenous communities.

The battle to maintain the original knowledge of indigenous people fell on the International Labor Organization. It materialized in 1957, in Convention 107 and later in C169 signed by 22 countries of the world, of which 14 were Latin American. In this sense, C169 ratified the importance of designing and revaluing indigenous educational services in equality of conditions according to "their history, knowledge and techniques, their value systems and all of their other social, economic and cultural aspirations" (article

27, section 1). In light of these objectives, the Convention stipulated that signatory states must: i) ensure the participation of indigenous people in the formulation and execution of their educational programming, ii) recognize the right of indigenous communities to create their own educational institutions, iii) ensure that indigenous children learn to read and write in their respective languages while also speaking the national language; iv) providing knowledge of their rights and obligations and v) eliminating any backwardness of prejudice and discrimination against indigenous people through the diffusion of pedagogical material that described in an equitable, exact and instructive manner the societies and cultures of native communities.

In light of that, this last part of the report will focus on describing and analyzing the ethno- educative public policies – and their respective results – of the five countries in question. For this, we will frame out study under the concept of ethno-education as a component of the "principles of autonomy, communitarian participation, interculturality, linguistic diversity and social cohesion based on territoriality, uses and customs, autonomy, culture, worldview and their own reality."

At the same time, the section is divided into two parts. The first part will refer to the legal framework in intercultural education, its evolution and current perspectives, as well as the entities responsible for the design and implementation of public policies (policy makers) related to intercultural education. The second part, on the other hand, will address the plans, programs and projects relating to intercultural and bilingual education (IBE) operated by governments and that are consistent with C169. The study will come accompanied with statistics that emphasize the pending advances and tasks of the States in this area.

4.1 Legal Framework in intercultural education

In the case of **Bolivia**, the normative framework of the educational system is sustained, principally, by the Law of Educational Reform, Law #1595 of 1994, and the "Avelino Siñani - Elizardo Pérez" educational law, Law # 070 of 2010. Both openly mainstream elements of interculturality and communal participation in the execution in the plans and programs of the Bolivian educational system. Intercultural education is conceived as a space that provides students with technical and historical knowledge that, while recognizing and valuing the indigenous and peasant historical and technological development, also provides a national homogenous identity. The levels of Primary Communal Vocational Education, Secondary Communitarian Productive Education and Alternative

and Special Education, as well as the programs of Superior Formation of Teachers are consolidated in a multilingual and intercultural focus. Superior Technical Education, on the other hand, is responsible for highlighting indigenous technology and knowledge.

The participation of indigenous communities is viewed as a key component in the formulation, management and supervision of intercultural educational policies. This manifests itself in the agencies of Social Communitarian Participation. These are made up, initially, of the Plurinational Congress of Education, the highest-level agency of social participation that formulate and defines the plurinational educational policy; it is convoked by MINEDU every five years.[88] Following in the hierarchy of functions is the Plurinational Educational Council, in charge of evaluating the compliance with the agreements of the first institution. Next are the Educational Councils of Indigenous Communities and Nations, structured into CEPOs[89], which participate in the design and management of educational policy within the Plurinational Educational System in accordance with local interests. CEPOs are made up of Aimara, Multi-ethnic Amazonian, Quechua, Guarayo, Chiquitano, Guaraní, Mojeño, Yuracaré, Nación Uru, Tsimané and Afro-Bolivian educational councils, totaling 11. In this way, according to their worldview and identity, each one can develop regionalized curricula that serve as a base for the study plan of the schools in the respective populations where they sit.

On the other hand, it is important to distinguish the relevance and influences of certain pressure groups in the establishment of educational parameters according to indigenous cultures, languages and worldviews, namely indigenous communities, civil society, and, principally, the Catholic Church. In 1989, the teaching of Spanish as a second language was made official in the intercultural curricula for indigenous people. The Ministry of Education, in conjunction with UNICEF, managed and implemented the Bilingual Intercultural Education Project (BIEP), initially covering Aymara, Quechua and Guaraní settlements. Consistent with their traditions, the participation component was ingrained in the structuring of this policy: they had the presence of delegates from the National Confederation of Rural Education Teachers of Bolivia (CONMERB) and the Singular Union Confederation of Peasant Workers of Bolivia (CSUTCB).

In 2012, Supreme Decree # 1313 in accordance with article 88 of the Law of Education, regulated the functioning of the Plurinational Institute for the Study of Languages and Cultures (IPELC), a body in charge of generating research related to the multi- lingual and multi-cultural realities of indigenous communities and to promote the values and knowledges of these cultures within Bolivian society. Likewise, in August

2012, the Legislative Assembly issued Law #269, the General Law of Linguistic Rights and Policies, framed by the protection of the linguistic rights of "Bolivian indigenous groups," who were understood as those legal sanctuaries that protect and ensure the development of the Plurinational State of Bolivia, especially those in danger of being extinguished.

From the point of view of the state, it is the Viceministry of Regular Education who resolves the directives related in bilingual and intercultural education, in regular schools and in those managed by indigenous communities. The focus on interculturality, intraculturality and multi-lingualism are, at the same time, mainstreamed into the entire Bolivian education system. In this sense, the quality of education of all the pedagogical dependencies of the Plurinational Educational System is monitored and evaluated by the Plurinational Observatory of Educational Quality, while the Educational Councils

88 Official sources and the media have not reported significant activity of this body since 2010.

89 Active communal participation in the design and implementation of intercultural educational policy has materialized since 1994 in the Communal and Nuclear Educational Councils, known today as CEPOs. They have as their most remote antecedent the foundational of clandestine Aymara colleges, which arose in the 1920s in the face of the cacique regimen to legalize indigenous education. The initiative was followed and strengthened with the formation of the Ayllu de Warasita School, a project lead and managed by Avelino Siñani and Elizardo Pérez. The particularity of the project fell back on the importance of the active and decisive participation of the Amautas Council – made up or students, teachers and the community in general – in the articulation of educational directives in these centers. With the passage of the decades, these ideals were finally institutionalized within the framework of the CEPOs.

of MINEDU are constituted as consultation organisms among the social participation institutes and the State.

In the case of **Brazil**, Brazilian intercultural educational policy has, since 1970, dealt with the confrontation between perspectives that favor the autonomy and self- determination of indigenous people versus a conservative, integrationist focus. In the past few decades, its educational system has displayed a clear tendency towards opening greater space for indigenous participation in the institutions of the state that design and implement pedagogical plans in those areas. The first juridical norm refers, specifically, to the task of intercultural education in Brazil within the framework of Statute #6001 of 1973. Nonetheless, before privileging the pedagogical and cultural characteristics of each people for the formulation of study plans, these were structured with an integrationist, homogenizing and positivist focus. Under this paradigm, indigenous children and adolescents, in order to acquire the civic duties that adhered to all Brazilian citizens, needed to gradually adapt to the national system of education, the only pedagogical system in the country.

Until the middle of 1988, the Political Constitution included a series of legal mechanisms that allowed the recognition of indigenous communities as well as their customs, languages, believes, mode of social organization and traditions as autochthonous and independent of other people. In this case, the magna carta guarantee to indigenous communities the implementation of schools whose plan of study was imparted in Portuguese as well as the native language of the communities, and was also implemented according to their own methods of teaching.

Later, under the pressure of indigenous groups (a sector headed by the National Fund of the Indian) and the international community to promote the rights of self-determination of social minorities, the Ministries of Justice and Education, through Inter-ministerial Ordinance #559 of 1991, established the assurance and differentiation of an alternative system of education for those who formed part of indigenous communities. This disposition gained special importance as it was configured as the first legal mechanism that broke from the integrationist educational system to give rise a pluricultural one. Thus, the native customs, traditions, language, pedagogical methods, and rights of each community were treated as the pillars of the study plans. In this same line, the National Coordination of Indigenous Education was created with the objective of coordinating and supervising educational policies for the indigenous population. This entity was re- founded as the General Coordination of Support for Indigenous Schools. The National Committee on Indigenous Education was also created as a product of the interest of civil society, universities, indigenous representatives and the Ministry of Education (Álvarez,2008, 40).

In 1996, after recognizing efforts to promote intercultural education within the Brazilian educational system, Law # 9,394, the Law of Education was promulgated, providing criteria to generate spaces where interculturality could expand its roots. The law positioned *fundamental school* courses on history, culture, literature and art as the favored pedagogical spaces in which cultural aspects of certain communities of Brazil would be exposed and promoted. Its foundations were based on an indigenous, afro-Brazilian, black, African and European focus. It also established that the Teaching System of the Union and federal agencies would be responsible for development BIE educational programs with the objective of recuperating and reaffirming the traditions, language and knowledge of indigenous communities, and in parallel, to provide communities with tools for access to information and to science. Likewise, in 1998, the National Referential Curriculum for Indigenous School was created, which served as an archetype for the articulation of curricula in accord with indigenous worldviews.

On the other hand, Resolution #3 of the National Council on Education of 1999 established the functional delimitation of indigenous schools. Among its principal attributes, we would emphasize the active participation of indigenous communities in the scholastic organization of the educational centers under the jurisdiction of the law, as well as the promotion of pedagogical abilities among the members of the organization. The management of indigenous educational policy is the responsibility of the State Councils on Education and local municipalities. In this context, until 2001, through Law

10 172, the National Educational Plan (PNE) was promulgated, which established the key focuses of Brazilian educational policy (its most recent version is PNE 2014-2024).

The commitments assumed by the Brazilian state in international for a have also served as a catalyst for the production of norms in the area of indigenous rights. After the agreements developed in the Global Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the Presidency decreed the inclusion of a representative of the Indigenous Educational System in the National Council on Education, making Brazil consistent with the promotion of indigenous communities in the design and execution of educational policies that involved pedagogical tasks (p. 45). In this line, the National Council on Education, through Resolution #10 of 2002, agreed to promote the training of indigenous educators with intercultural trainings in the federal institutions of higher education.

In 2004, in order to close the gaps in educational quality, the Ministry of Education convoked the entities promoting educational policies in the most vulnerable social sectors, to form the Secretariat of Continuing Education, Literacy and Diversity (SESAD) (Álvarez, 2008, p. 45). For the first time, a single entity included the promotion of educational issues relating to indigenous and peasant communities, environmental matters, special education for young people and adults, literacy and racial and ethnic diversity, elements that were previously housed in particular secretariats. (Álvarez,

2008, p. 45). Presidential Decree # 5159 created an area of specific attention in the area of the indigenous educational policy, within SESAD, which was directed by the General Coordination of Support to Indigenous Schools. In the same line, in 2012, Parliament approved Law # 12711, a law that provided a minimum quota for *prieta, pardo* and indigenous communities within federal institutions of technical and higher education. Today, it is the Policy Division of Rural and Indigenous Education and Ethnic and Racial Relations, a dependency of the Ministry of Education, which is responsible for overseeing BIEE policies in Brazil.

In the case of **Colombia**, even when the government signed on to C169 in 1991, the presence of ethno-educational policies had been included in its normative framework since 1978, a year in which Decree #1131 was promulgated. That decree called for the respect for the cultural and traditions of native people and stipulated that the naming of indigenous instructors should be guided by the same criteria used to evaluate the hiring of the rest of school teachers. Thus, though the Constituent Assembly of 1991, the Constitution stated that the State would recognize and protect social diversity in its territory (article 7), would make indigenous languages official in the areas in which they are utilized (article 10) and would promote educational policies specific for indigenous groups in accordance with their own interests and ethnicity (article 68).

In 1994, Law #115, the General Law on Education was promulgated. It stipulated that ethno-education would be conceived as pedagogical services provided to Colombian groups or communities that have their own autochthonous culture, language, and traditions and as a consequence as distinct from the large mass of the population. As a fundamental aspect of its ethno-educational policy, it maintains that ethnic groups should be provided, in school, with the cognitive capacities that would permit them to develop in a bilingual fashion. To achieve this objective, in conformity and acquiescence to ethnic groups, the State guarantees the training of school teachers that, in parallel with developing the criteria programmed in the educational plan of the National Educational Ministry (MEN), would be equipped to give classes according to the language and culture of the indigenous communities (see article 62 of the statue of the law).

It bears emphasizing that in accordance with the idea that the will, participation, and acceptance of indigenous communities in contributing to the implementation of educational policy in their territory, the law maintains that the selection of ethno- educators and the signing of contracts for the management of ethno-educational projects will be the result of a process of agreement between the communities and state authorities. These faculties are supported, as well, by Law #152 of 1994, the Organic Law of Development Plan, that sustains that indigenous organizations are responsible

for developing, approving, executive, evaluating and following development plans in their respective territorial entities.

Decree #804 of 1995 dictates and establishes the parameters and scope of Law #115. It stipulates that instructors, just as administrative personnel in the educational centers within indigenous territory, must be named by the Elder Councils and/or the communities that make up the Regional or Departmental Consultative Commission. It makes the qualification, nonetheless, that those members of the community that are involved in the school instruction are exempt from superior academic grades. Law # 715 of 2001, however, seems to reverse Law #115 in the sense that it promotes the hiring of teachers according to coverage (and no strictly indigenous necessities), it implements a uniform system of school evaluation and conditions budgetary access to educational services based on the adaptation of these services to the universal educational programs. In light of this, Ministerial Directive #8 of 2003, ensures the validity and legitimacy of the normative framework for the protection for the rights of indigenous communities. Finally, in that same year, Decree #2582 was promulgated which determined the presence and acceptance of indigenous organizations in the application of performance evaluations for instructors within the territories. It is the Viceministry of Preschool, Basic and Intermediate Education – within the Advisory Office on Educational Attention to Ethnic Groups, under MEN, that is responsible for these measures.

The organizations that supervise all the design and implementation of BIE policies have, in Colombia, state as well as indigenous origins. The first is manifest in the Delegated Defender for Indigenous and Ethnic Minorities, a body annexed to the Public Defender. The second type include the National Indigenous Organization of Colombia (ONIC), the Organization of Indigenous People of the Amazon (OPIAC), Traditional Indigenous Authorities of Colombia "Elder Government", and the Tayrona Indigenous Confederation (CIT) among others.

In the case of **Ecuador**, Law #127 of 1983, the Law of Education, stipulates that the National Division of Bilingual Education is responsible for guaranteeing the participation of indigenous groups in the all of the offices of educational administration. In 1988, the central government promoted Executive Decree #203, which created and institutionalized the National Division of Bilingual Indigenous Intercultural Education – belonging to the Ministry of Education – as the state body responsible for executing educational policies that promote the academic development of indigenous people, a law that is consistent with constitutional article #2, which determines that Spanish, Kichwa and Shuar are official languages of intercultural relation, and article #347 (section 9) that guarantees the involvement of the State in BIE policies. Years later, in 2009, through Executive Decree #1585, *indigenous* directives of the Division were broadened, evolving towards the *intercultural*. In this way, the National Division of Bilingual Intercultural Education (DINEIB) was formed, a body specializing in aboriginal cultures and languages. It is the body responsible for designing and developing educational programs in the framework of cultural, linguistic and environmental diversity, so that Ecuadorian indigenous people can develop their capacities in conformance with the National Plan of Good Living. Its organization is technically, administratively and financially decentralized and guarantees the participation of indigenous people. It is responsible for evaluating the development of the Bilingual Intercultural Education System as well as bilingual intercultural community centers and position BIE within educational framework to the whole country.

Law #417 of 2011, the Organic Law of Intercultural Education, resulted in comprehensive educational policies as a result of the management and coordination of the elements of the National Education System (SNE), an organization that guarantees the formulation of proposals from an intercultural perspective. The SNE has as its governing body the National Education Authority (AEN) which is composed of four levels: the Intercultural Center, the intercultural and bilingual zones, the intercultural and bilingual districts, and the intercultural and bilingual educational circuits. Similarly, the AEN has as its body of consultation and orientation the National Council on Education, an entity integrated, among others, by the head of the Bilingual Intercultural Education System, a delegate from the Plurinational Council of the BIE System, a delegate from the indigenous communities, groups and nationalities, and a delegate from the montubio and afro- Ecuadorian communities.

In parallel to the intentions of the State to guarantee an intercultural focus in the study plans of common schools, Ecuador has demonstrated a notable effort to offer a particularized educational system in conformance with the values and traditions of each people of the indigenous communities. This model is set out under the directive of the Bilingual and Intercultural Education System (SEIB). As part of its objectives, it proposes to form a sense of self-identity in its students that nonetheless is not foreign to the knowledge and wisdom of other cultures and consolidates a program of bilingual education that provides the capacity to develop according to the native language, as well as using Spanish as a language of cultural connection.

The Organic Law of Indigenous People and Communities of Venezuela dedicates a section to addressing the right to education and its relationship with the culture of indigenous people, manifested through their own education standards instead of the imposition of external ones. A clear example of this is the creation of a bilingual intercultural regimen, that in accordance with article 76 of this law, must be implemented in all the levels and modalities of the educational system for indigenous people and will be completely free of charge. Furthermore, it requires that instructors be speakers of the indigenous language of the students, and that they know their culture and are training as bilingual intercultural educators.

It is important to clarify that despite the existence of this mandate, that dates from a 2005 law, the implementation of this policy has been slow to materialize, as evidenced by the fact that in August 2015, the Minister for the Indigenous People of Venezuela announced the creation of an Institute of Indigenous Languages, and that would be the body in charge of promoting the use of native languages throughout Venezuela.

Certainly, it is notable that article 52 of this law establishes the duty of the state, in coordination with indigenous groups and communities and their organizations, to promote and develop environmental education programs for the sustainable, management, use, and conservation of natural resources, with technical criteria adapted to conform with indigenous knowledge in the environmental context, of the management, use, and conservation of their habitat and lands.

In the case of **Peru**, Peruvian legislation, while receptive to the values and knowledge of the ethnic and cultural heterogeneity of the people that inhabit its territory, is also a promotor of intercultural educational policies. It is constitutionally stipulated that the State bears the responsibility for executing BIE policies and for disseminating cultural and linguistic within the country. Likewise, it protects the ethnic and linguistic diversity of its people by recognizing the right of communities to use their own language and establish aboriginal languages as official in the areas in which they predominate.

Law #28044, the General Law of Education of 2004, takes interculturality as the governing principle of education policy. It promotes diversity, intercultural dialogue and the knowledge of the history, customs, obligations and rights of indigenous communities. Furthermore, it establishes legal mechanisms so that indigenous people can assume, progressively, the leadership of their educational programs. Nonetheless, it does not make mention of the specific bodies and channels that would allow indigenous people to participate in their own educational systems.

On the other hand, it also ensures the learning of the mother tongue of native people and the learning of Spanish for aboriginal people and requires that instructors have command of the customs and native languages of such communities. This last point is specifically regulated by the Supreme Decree # 011-2012-ED, a law that approves the Regulation of the General Law of Education. It requires that interculturality be materialized in pedagogical processes so that students can recognize and value their culture as well as those of other people. For that need, it requires instructors to obtain training and to recognize the worldview and pedagogical treatment adequate for the development of their classes, whether in a native language or in Spanish. The rights of minors who are members of indigenous communities are also recognize in the Code of the Child and Adolescent.

The General Division of Bilingual Intercultural and Rural Education is responsible for providing regulations and orienting rural and EIB policy. Its functional and organic structure was approved in 2012 by Supreme Decree # 006-2012-ED, the Regulation of Organization and Functions (ROF) and the Chart of Personal Assignation (CAP). On the other hand, Law # 29735, the Law that Regulates the Use, Preservation, Development, Recuperation, Promotion and Diffusion of Native Languages of Peru stipulates that native

languages are recognized by the State and included in the National Registry of Native Languages and considered as official languages of the locality to which they correspond. Thus, students have the right to receive and diffuse their respective languages in the initial, primary, secondary and higher levels of their academic training. Thus, Supreme Decree # 013-2012-ED created a special space for the National Program of Educational Credit and Scholarships (PRONABEC), which provides scholarships to those students that aim to take professional BIE courses in universities and superior institutes.

Finally, the indigenous representations that supervise BIE policies are the Interethnic Association of the Development of the Peruvian Jungle (AIDESEP); the National Agrarian Confederation (CNA); the National Organization of Indigenous and Amazonian Women of Peru (ONAMIAP); Peasant Confederation of Peru (CCP); the National Federation of Peasant, Indigenous, Native and Salaried Women of Peru (FEMUCARINAP); the National Union of Aymara Communities (UNCA), the National Central Unit of the Peasant Rounds of Peru (CUNARC)

4.2 Plans, programs and projects (coverage and curricula that include BIE)

In **Bolivia**, we encounter:

Bolivian Education Strategy 2004-2015 (EEB)

The EEB, central focus of the design, formulation, and execution of public policies in the educational area, is the result of the Bolivian Strategy for the Eradication of Poverty (EBRP), the Plan Bolivia, and the Strategy of Bolivian Development. Principally, it aims to "improve the quality, pertinence, access and permanence of equitable education, to improve the life conditions and productive and competitive capacities of Bolivians." (EEB,

2004, 58), through the application of intercultural, bilingual and diversified curricula in all levels of school education as well as the efficient articulation of social literacy strategies and campaigns (EEB, 2004). Thus, as of 2007, the net rate of matriculation in primary school reached 94% (1,512,000 students), while the rate for secondary school was only 70%[90] (1,052,000 students) (UNESCO, 2011)[91]. On the other hand, with regards to the training of instructors for preschool and EIB-specialized schools, 11,334 professors were trained: 4,462 aymaras, 6,499 quechuas and 371 guaranís.

In addition to providing indigenous communities with a critical apparatus that is autochthonous and consistent with their cultural values and traditions, the promotion of BIE has the implicit mission of closing the socio-economic gaps that affect, principally, those communities residing in areas afflicted by poverty and rurality.[92] Thus, the BIE established that its programs were designed on the basis of

90 In contrast to these statistics, UNICEF (2008, p. 22), confirmed that given the data obtained through the Bolivian Educational Information System, the net rate of matriculation in secondary education did not reach 55%. That is to say, only 1 of every 2 children that began primary school was able to reach secondary school.

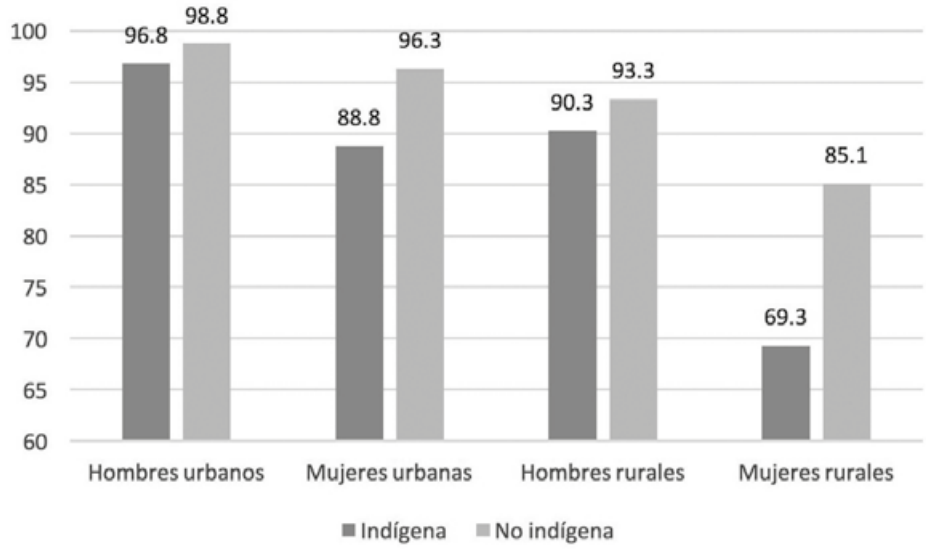
91 It bears emphasizing that the web portal of the Educational Information that houses official statistics on the advances and impacts of EIB politics is restricted to the exclusive use of public functionaries, which creates obstacles for the greater analysis of EIB policies by civil society and external bodies.

92 According to the results of the Center of Bolivian Documentation and Information, while the demographic density of the more than 40 indigenous groups grew by 35% from 2001 to 2012, growing to 5,064,9992 (50% of the Bolivian

generalized – rather than focused – policies for the eradication of indigenous poverty and conditions of inequality. Nonetheless, the environment in which indigenous families participate continues to be hostile. Such that 63.3% of the indigenous children from rural homes area poor, while in rural areas the statistic rise to the alarming rate of 99.2%.

Part of BIE promotion of bilingual reading and writing of indigenous people materialized in the policies to fight illiteracy, especially by the National Literacy Program, "Yes, I can." While in the past few years the rate of literacy of the population greater than 14-years-old has achieved remarkable results in urban non-indigenous areas, it is in the indigenous urban areas, the rural non-indigenous areas, and most acutely, rural indigenous areas where the indicators of success are less notable. According to the National Home Survey of 2009, the rate of literacy in urban areas was similar among indigenous and non- indigenous men and women: it hovered around 90%. Rural areas, on the other hand, are the most vulnerable to illiteracy, especially with reference to women. Of these, 3 out of every 10 people do not have common of written or spoken Spanish, which is considered as a serious aggravator of gender inequity and the inequality of opportunities between indigenous and non-indigenous citizens. (see graphic 1). Facing these conditions, being a woman, belonging to an indigenous community and residing in rural areas are three critical components that render individual Bolivian citizens defenseless to illiteracy, and those which, as a consequence, BIE programs should include and attend with urgency.

Graphic 9: Literate percentage according to sex and rural and urban areas between indigenous and non-indigenous populations, 2009



Source: National Home Survey, 2009. Created by authors

Institute of Language and Cultures (ILC)

The ILCs are configured as research centers specialized in the diffusion and preservation of the languages and traditions of native people. They are decentralized entities, distributed by departments, and indigenous and afro-Bolivian nations, and groups. They are in constant coordination with the Departmental Divisions of Education, bodies which, to this date, to which more than 130 items have

population), aboriginal self-identification registered a significant decrease of 21%. This, in 2001 the proportion of self-identified population vs. the non-self-identified was approximately 6 to 4; in 2011, the proportion was 4 to 6. The most representative cases of those of the Aymara and Quechua p opulations, communities that have registered, a decrease of 17.6% and 6.7%, respectively, of the population that identifies as such. (Centro de Documentación e Información Bolivia, 2013).

arrived (didactic material referring to the importance of BIE) (Ministry of Education of Bolivia, 2015a). To his date, 16 have been formed (Ministry of Education of Bolivia, 2015b).

The role of international cooperation agencies in the promotion of BIE values also bears mentioning. For example, the UNICEF program of Education for the Live and Citizenry offers technical and financial support for intercultural and multi-lingual education. It also involves research into the development of the takana, mosetén, tsimane, movima and moxeño languages, native dialects of the Bolivian Amazon. In addition, there are multilateral efforts to revitalize aboriginal languages in schools, work that has materialized in the program of Bilingual Intercultural Education for the Amazon, sponsored by the Embassy of Finland and UNICEF, and applied in Peru, Bolivia, and Ecuador.

Amazonian Program of Bilingual Intercultural Education of Bolivia

The objective of this program (inoperative since 2007) is to revitalize the native languages of the west side of the country through the active participation and coordination of indigenous communities, the Ministry of Education, the European Union and Ministry of Employment and Social Security of Spain in the design and management of BIE public policies. To this end, the program aims to stimulate the formation and training of students and instructors through the promotion of scholarships in higher-level study centers of the country, as well as through financing of the Material Production Centers, responsible for developing and distributing BIE pedagogical tools to the schools of the region.

Annual Strategy of the Sub-System of Regular Education

In the area of intercultural indigenous education, the Sub-System of Regular Education, delineated through the criteria and objectives of the Plurinational Educational System establishes that the Plurinational Educational Institutes of Language and Culture (IPELC) and the ILC, in accordance with the interests and opinions of CEPOs, shall be made up of support groups for the training and provision of pedagogical materials in municipal programs of intercultural education. Nonetheless, the Center of Legal and Research Studies (CEJI) contrasts the ideal norm with the reality of educational access and conditions. That group establishes that public education, especially rural public education, is hampered by the politicization surrounding municipal entities. Municipal distribution of items to schools tends to be, in greater or lesser part, conditioned on the identification of the party that administers the municipality with the indigenous population within the zone of school institutions; thus, there is also political pressure for the selection of professors based on their political affinities, rather than their pedagogical abilities (CEJI, 2005, p. 300). These illegitimate and clientilistic networks are seriously grave, even more so in a country in which a number of children are recurring victims of serious privation in educational systems. (see graphic 2).

Program of Bolivian Intercultural Schools of Music

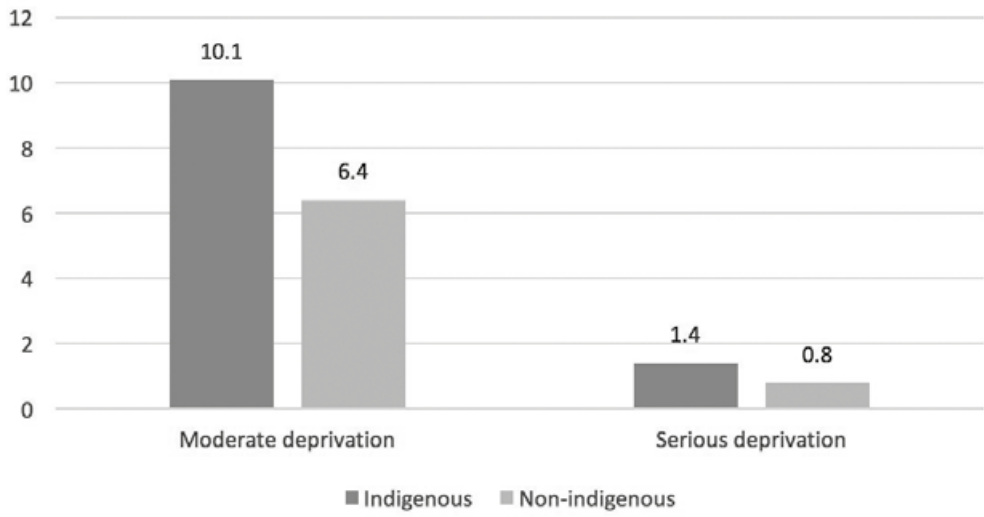
In 2009 the government pushed for the creation of the Bolivian Intercultural Schools of Music with the purpose of providing students with abilities and knowledge in music and dance styles that are autochthonous to the people of Bolivia. To date, there are already three replicas of the Intercultural Schools of Music.

Social and Economic Development Plan 2016-2020

Finally, it is important to also describe the new ways in which the Plurinational State has launched and focused efforts to promote intercultural education. The Plan has as its objective the registration of 90% of children and adolescents between 4 and 17 years of age into the Sub-System of Regular Education. Furthermore, it aimed to create four new Intercultural Bolivian Schools as centers of higher

education in fine art, theatre, dance, cinema and audiovisual studies. It aims, likewise, to incorporate the majority of the native peasant indigenous population as well as their respective languages, cultures and knowledge into the Plurinational Educational System through the foundation of more ILCs.

Graphic 10. Percentage of serious and moderate deprivation of educational services of indigenous and non-indigenous children



Source: National Home Survey, 2009. Created by authors

In **Brazil**, we find:

National Education Plan (PNE), 2014-2024

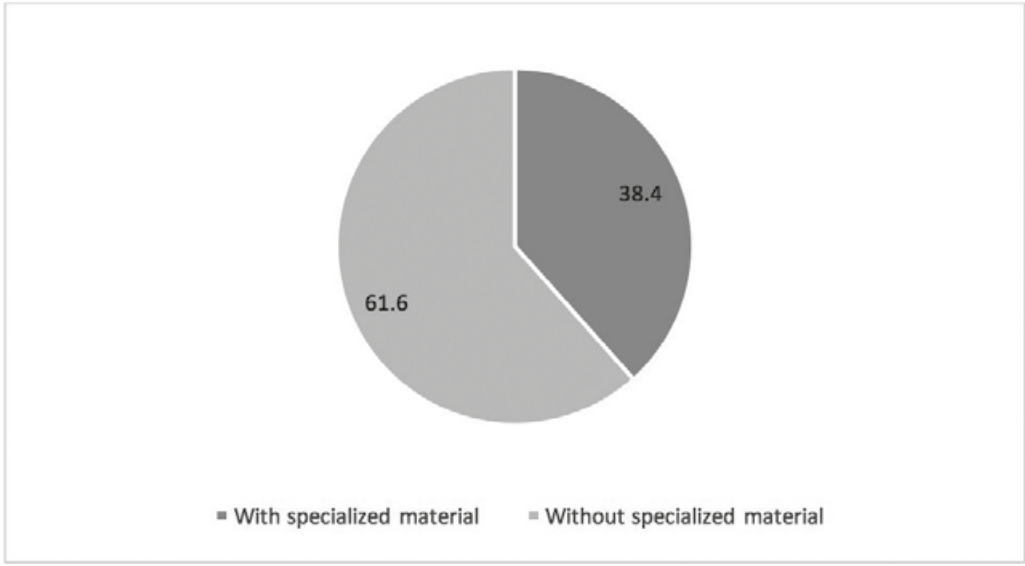
The principal objectives of the PNE for the empowerment and protection of BIE in indigenous communities are based on: i) reinforced the customs and languages of indigenous communities; ii) promoting training programs for instructors specialized in indigenous communities; iii) formulating study plans according to their own cultures. In the past few years, the efforts of the government have been notable in the provision of basic educational services to children and young members of indigenous communities. A display of this effort stands out in the School Census of 2013, statistics that show a persistent growth of indigenous school matriculation, achieving a rate of 88.5% (205,141) in 2013, growing from 75.1% in 2009 (PNE, 2014: 82).

The policy of diffusion of ethno-educational schools and consequently the notable growth in matriculation of indigenous students is one of the most valued bastions of the BIE strategy. Taking the statistics registered in the Indigenous School Census of 1999 and of 2008, the country demonstrates a growth of 93.8% in the number of indigenous schools: 2,698 indigenous schools were registered of which the States of Amazonas (904), Maranhao (302), Raraima (245) and Mato Grosso (200) top the list of the States with the greatest quantity of schools.

Even though some of the indigenous students in Brazil have adequate facilities for their school development (71%), there is a serious deficit in research investigation for indigenous centers. For example, while Amazonas is known as the State with the greatest quantity of indigenous schools, only 2.8% of these schools have libraries and literature rooms; the same can be said of the States of Acre (1.8%), Roraima (11%), Marañón (0.7%), Pernambuco (15.2%), Mayo Grosso (11%), among others. Furthermore, it bears making the clarification that not at all indigenous schools are established as bilingual institutions. In fact, 34% of the schools are monolingual (29.1% speak only Portuguese and

4.9% only aboriginal languages), while 66% are bilingual. Furthermore, only 4 of each 10 indigenous children have didactic material specialized in the world view and customs of the community to which they belong. (See graphic 11).

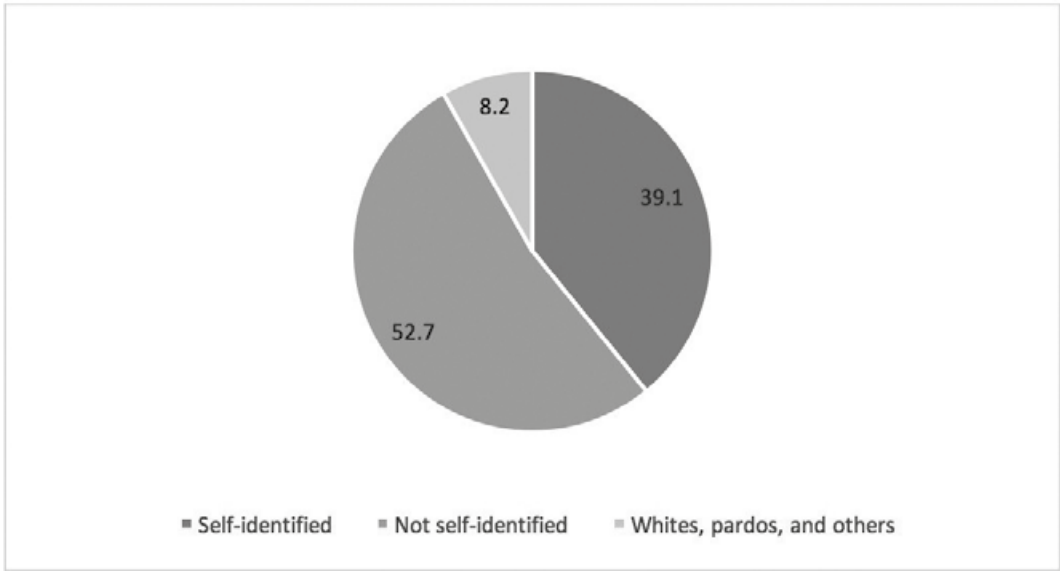
Graphic 11. Percentage of minors of less than 18 years of age with access to specialized material in BIE schools



Source: Basic Education Census, 2008. Created by authors

One fact to emphasize in the system of indigenous schools in Brazil is that they do not restrict access to their services to those communities that self-identify as indigenous, but rather are open to citizens that do not identify as such. Furthermore, those that do not self-identify represent the majority of the total number of students in indigenous schools (see graphic 11). The rest of the proportion is divided between those who identify as indigenous, white, *pardo,* or others.

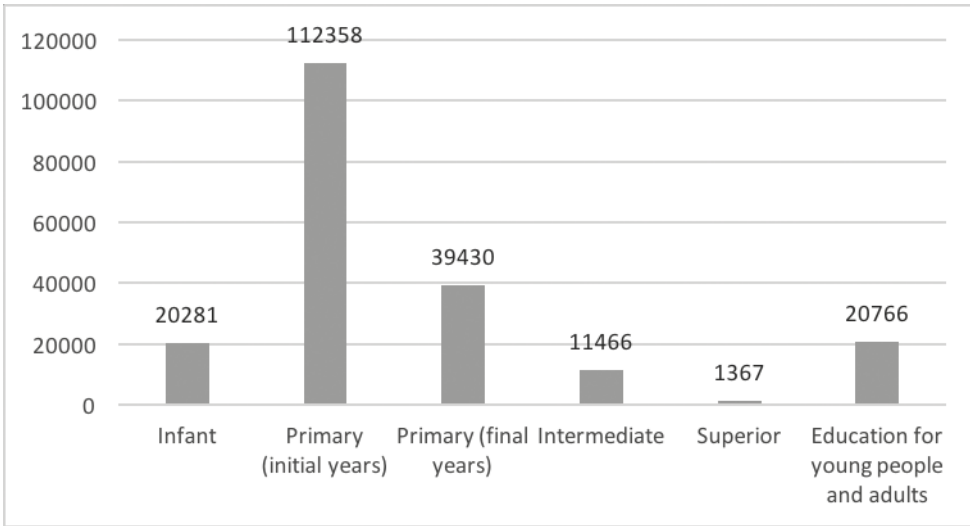
Graphic 11. Percentage of access to Indigenous Schools by ethnic groups, 2008.



Source: Basic Education Census, 2008. Created by authors

Even when this statistic seemingly indicates success in the promotion of the autonomous education system for indigenous people, the number of matriculations among the stages of regular education are not proportional, let alone homogenous. There is a discrepancy in each of the stages, which constitutes a high rate of desertion from the indigenous school system upon completion of primary education. According to data from the School Census of 2008, infant education is composed of approximately 20,000 students; primary education by more than 151,000 children and adolescents. Nonetheless the level of intermediate (secondary) education enrolls only 7.5% of the total population of the prior level (see graphic 12). This this fact indicates a relevant necessity to push policies of access to regular education, and as a consequence, strategies that facilitate the permanence of young indigenous people in the indigenous school system. In the following months, the National Program of Indigenous School Education (still in the design process) will include this data and incorporate the new strategies.

Graphic 12: Indigenous matriculation by education levels, 2008



Source: Basic Education Census, 2008. Created by authors

With regard to teachers, in infant education 1,068 instructors are registered; in primary, there are 9,703; while in intermediate there are 1,129, adding up to a total of 10,924. Nevertheless, in light of the student to teacher ratio, there is a factor that could represent a setback in the quality of teaching in indigenous schools: the level of technicality of the instructor. Only 21.2% and 51% of instructors in Primary and Intermediate Teaching, respectively, have a university degree.

On the other hand, the presence of illiteracy in indigenous communities remains persistent, principally with regards to people that live in indigenous areas. Thus, following the Demographic Census of 2010 of IBGE, the rate of illiteracy in indigenous lands rose to 32.3%, while outside of those areas the rate in 14.5%.

Program of Support to Superior Education and Indigenous Intercultural Education (PROLIND)

As a result of the statistics outlined in the preceding paragraph, Brazil created PROLIND. The objective of the program is to support specific projects for graduate courses for the training of indigenous teachers in order to work as teachers in indigenous schools, the integration of teaching, research and

extension, and the promotion of the recognition of the study of subjects such as native languages, and the management and sustainability of indigenous cultures and lands.[93]

Connections of the Program of Tutorial Education (PET)

The PET connections are constituted as an innovative program that aims to provide exchanges of knowledge and experience between rural, *marron,* and indigenous communities with vulnerable communities and young university students, especially those who come from public institutions. In this process, the importance of the revaluation of social minorities in the academic sphere is noted. Furthermore, they formulate projects of mutual development.

In the case of Colombia:

Characteristic Indigenous Education System

As a strategy to reduce gaps in access to and quality of education, the National Development Plan 2014-2018 registers bilingual intercultural education as one of the pillars of educational policy. A good part of the promotion of BIE is focused on the design and implementation of the Characteristic Indigenous Education System (SIRP), valid since 2014 through Decree 1953. SEIP is a national project that aims to re-valorize the particular language, worldview, customs, knowledge, and values of indigenous communities through pre-school attention – including also familial and health assistance thanks to the Seeds of Life project – as well as in specialized primary and secondary schools in Indigenous Territories as recognized by law.

With the objective of not offering students study plans that are alien to the worldly and spiritual perspectives of their respective communities, SEIP envisions an intense participation of the Certified Indigenous Territories in the design, planning, direction, administration, orientation and reorientation of the educational policies proposed by SEIP for each one of the communities. Nonetheless, despite the significant autonomy offered to indigenous authorities relative to the management of their educational policies, the state apparatus is not completely removed from the execution of SEIP programs. In the first instance, the State is responsible for funding all intercultural education programs. Furthermore, it has adopted the role of articulating the curricular and pedagogical principles of all levels of pre-school and primary education. In addition to that, and even more importantly, it has the power to evaluate and certify the Indigenous Territories to manage their SEIP programs, thus leaving in the hands of the State the recognition – or not – of the autonomy of communities.

As of 2013, more than 426,000 indigenous children had been registered in the Integrated System of Matriculation and the National Information System of Basic and Intermediate Attention, under the auspices of SEIP. Furthermore, thanks to the joint efforts of the Ministry of Education, the National Civil Service Commission and Afro-Colombian communities, that same year they were able to convoke more than 3,770 instructors, 301 instructor directives and 54 instructor orientation leaders for the provision of intercultural classes. Nonetheless, this model could be enriched by the experiences

93 PROLIND is not the first initiative for the training of instructors catered to members of social minorities. It has an antecedent the Program of Education of Education Teachers for the Teaching of Afro-Brazilian and African History and Culture and Quilombola education. It is directed towards the training of teachers in collaboration with public institutions of superior education. This offers courses at the level of the strengthening and specialization of instructors, whether through a long-distance module (through the Open University of Brazil) or through personal assistance in the institutions of the National Network for the Continual Training of Teachers in Basic Education. It is designed for Quilombola, Afro- Brazilian and African communities

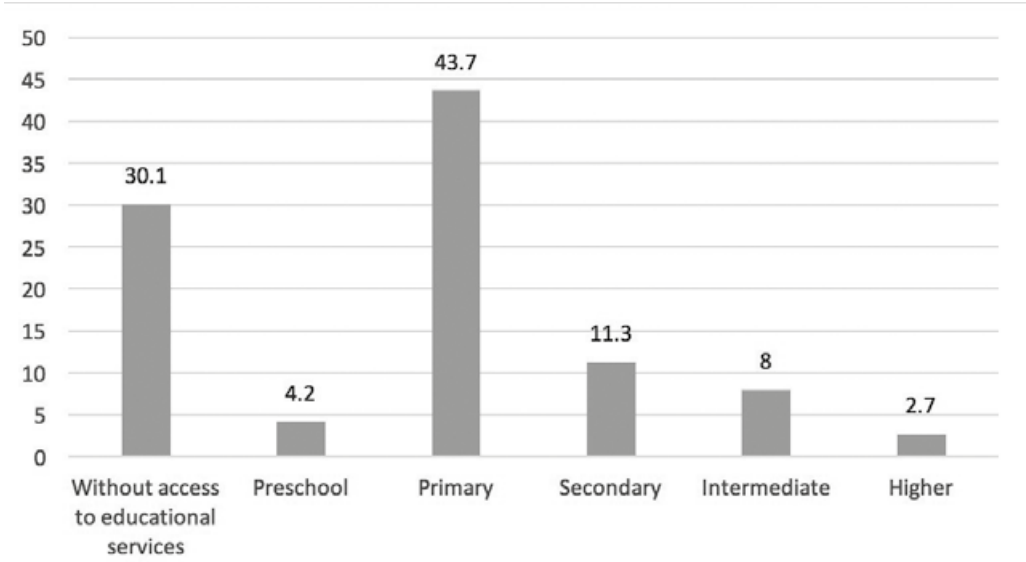
generated from the educational policies of social re-vindication for black communities that had been proposed months earlier.[94]

Project for the Strengthening of Intermediate Education and the Transition to Tertiary Education 2014-2021: Planning Framework for Ethnic Groups (MPGE)

The project had the aim of increasing of the rate of access to intermediate and tertiary (secondary and higher) education services of historically excluded young people, in general, and for those that belong to indigenous communities within Colombia. In this way, it aimed to "break the channels of intergenerational reproduction of poverty and the discriminatory barriers of gender and ethnicity." The project was based on the evident heterogeneity in access to education with respect to school levels. Thus, 4.2% of indigenous children had been able to finish at the pre-school level, 43.7% at the basic primary level, 11.3% at the basic secondary level, 8% the intermediate level, and 2.7% in higher education. (see graphic 6). On the other hand, the rest of the population (30.1%) had not been able to access any of these stages of education (DANE, 2005).

Nonetheless, the results in later years were not any more encouraging. According to the statistical projections of the National Administrative Department of Statistics (DANE), as of 2012, the indigenous population reached 1,597,741 people, of which 42.1% were children or adolescents, that is 714,748 minors.[95] Of these only 25,979 (3.6%) were matriculated in the intermediate education system as of 2012 (MinEducación 2014,13).

Graphic 13. Percentage of indigenous students by school level



Source: Created by authors based on data from DANE, 2005

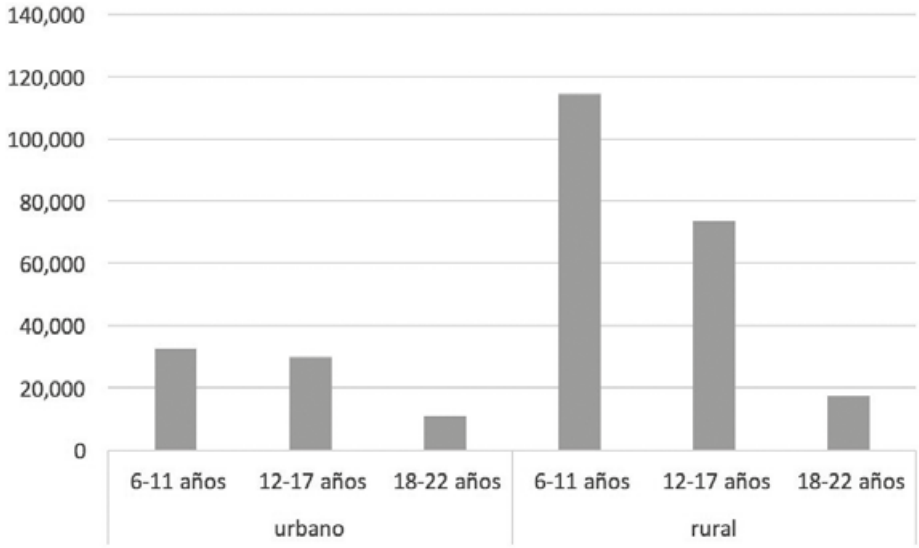
In the same way, the data regarding the young and indigenous population that attends educational institutions does not offer, at least as of 2005, an optimistic picture. The tendency in the rate of matriculated indigenous children and youths in the Colombian education system tends to be negative while that of youths is growing, a tendency which is exacerbated when we focus on the rural area.

94 This scheme was proposed by the Ministry of Education and the Special Education Fund for Black Communities and aimed to provide educational credits to Afro-Colombian citizens. Between 2012 and 2013, 3000 citizens were provided with student benefits for higher education. Additionally, by 2013, Decree #1122 created the Chair of Afro-Colombian studies as an obligatory course in 6 of 32 Colombian departments, covering more than 1200 schools and 204,000 students. (Colombian Education Ministry, 2013).

95 3.4% of the population (of a total of 32 million) is considered indigenous. (Annual Report 2014 p. 8) COLOMBIA

It is precisely in these zones in which 3 of every 10 children aged 6-11 years are not able to access educational services and where, furthermore, only 1 of 2 youths of 12-17 years old is able to matriculate in schools (see graphic 14).

Graphic 14: Percentage of indigenous population that attends educational establishments according to age and area of residence

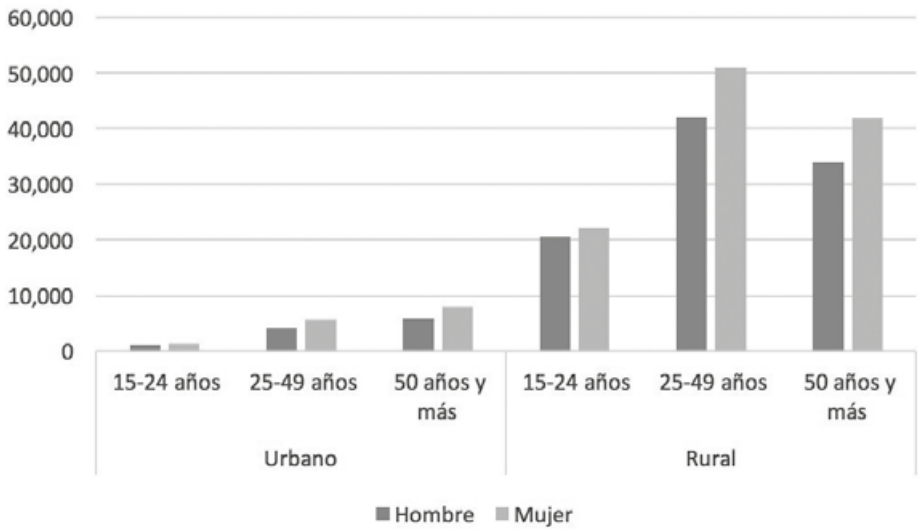


Source: CEPAL/CELADE, special processing of census microdata. Created by authors

There are more than a few factors why minors desert their schoolwork. Among these MinEducación (2014, p. 16) stresses three causes: economic, traditional-familial and access to drugs. As regards the first set of factors, it found that as families live in hostile conditions and continuous precariousness, the fathers of the family decided to involve their kids from an early age in work that generates some kind of monetary gain (even if it may be minimal); in relation to the second, it can be explained by the fact that mothers and men, from very young, have the communal duty to dedicate themselves to procreation and to the care of the familial economy, in the case of girls, and to work for economic sufficiency in the case of men; with respect to the third, and in connection with the first two factors, those young people who are obligated to work (usually in border and coca-growing zones) find themselves immersed in an environment characterized by the production and consumption of narcotics. To this must be added the indigenous migration towards urban centers due to the internal armed conflict in Colombia, although it has been pacifying of late.

Statistics from CEPAL and CELADE (2005) evidence a dour panorama for the promotion of linguistic training programs among indigenous people in Colombia. While 8.7% of indigenous people resident in urban zones are illiterate, 71% of those in rural areas are illiterate. Just like two prior case studies, mothers present the highest rates of illiteracy, with the most critical cases being those of people resident in rural areas between 25 and 49 years of age (graphic 15).

Graphic 15. Illiterate Indigenous Population according to age, sex and area of residence



Source: Created by authors based on data from CEPAL/CELADE 2005, special processing of census microdata.

In the case of Ecuador,

Bilingual Intercultural Education System (SEIB)

SEIB arose out of National Plan for Good Living 2013-2017 (Development Plan) and the Ten-Year Education Plan 2006-2015, which call for universalizing education at the initial, basic and secondary level from a multicultural and multilingual focus. Additionally, they promote intercultural dialogue as a pillar of the pedagogical model and educational space, and they reinforce the cultural and ethnic features of the Ecuadorian indigenous communities and nationalities.

SEIB integrates the efforts of the State to provide distinct ethnic groups with educational materials that develop their psychosocial and creative capacities and their ancestral knowledge together with the knowledge of other cultures in those students who belong to indigenous groups.[96] It conducts projects from early stimulation up to higher education. It was materialized with the Model of Bilingual Intercultural Education System (MOSEIB). This SEIB, consistent with the operative model of education promoted the inclusion of the teaching of Spanish and the native language of indigenous communities and pushed for professional development according to the sociocultural reality of the communes, communities, groups and nationalities. Its structure is made up of the BIE Plurinational Council, the EIB Sub-secretary with its decentralized levels, the National EIB Division and the Institute of Ancestral Languages, Science and Wisdom of Ecuador.

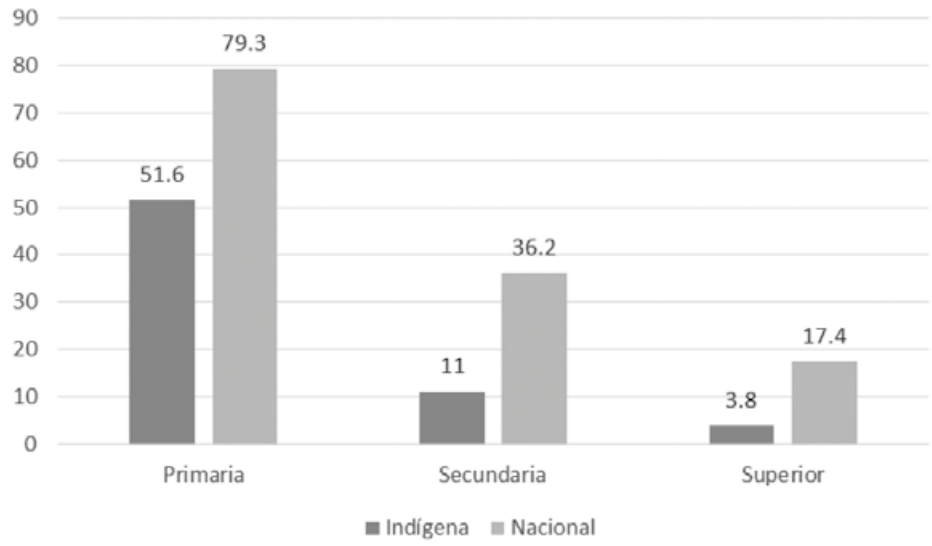
While since the 2000s the level of matriculations in bilingual intercultural schools has grown, the coverage of BIE educational programs still does not cover the totality of its target audience. In 2011, there were 129,500 students matriculated in the BIE subsystem. Between 2001 and 2006, the level of matriculations in basic and secondary education grew by 15.7%, with the number of matriculated

96 The last census carried out in Ecuador, the Census of Population and Dwellings in 2010, concluded that the population totals 14,483,499 inhabitants, of which 7% represent the 14 indigenous nationalities recognized by the National Development Council of the Nationalities of Ecuador (CODENPE) and of which approximately half are minors. (UNESCO, 2011, p.27).

students in the BIE system reaching 107,694, representing 13 indigenous nationalities (of which the Kichwa people represented 76%). Additionally, thanks for the Bilingual Intercultural Education program for the Amazon (EIBAMAZ) instituted in 2004, in the same period, the number of BIE school instructors increased by 19%, reaching a total of 5,595.

The healthy development of infancy tends to be crucial for the cognitive and productive capacity of people. Indigenous childhood in Ecuador, however, reached alarming levels in terms of the quality of life in which children grow up. UNICEF (s.f.) calculates that the qualification corresponding to health development (which includes the variables of infant mortality rate, vaccine coverage, malnutrition and access to basic home services) of the indigenous population of less than 5 years of age is 2.2/10; that statistics is contrasted with the rate of 4.7/10 for non-indigenous Ecuadorian children. Additionally, only 1 of every 2 children in the indigenous population between 6 and 11 years reaches primary school, a fact that corresponds to the proportion of matriculated indigenous adolescents in secondary school (UNICEF, s.f.) (See graphics 16 and 17).

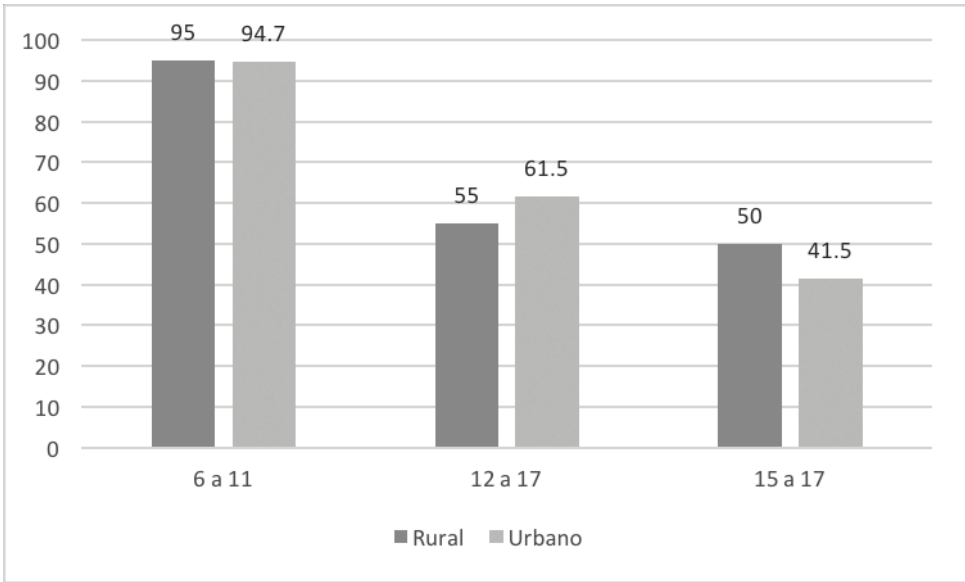
Graphic 16. Culmination of national and indigenous educational cycles in Ecuador



Source: SIISE based on INEC-ECV Fifth Round 2006. Taken and adapted from UNICEF (2011, 24).

Regarding Ecuadorian secondary education, it is important to emphasize the progressive importance of the concept of interculturality within university faculties. This manifests itself principally in the articulation of pluri-ethnic academic programs o access to members of indigenous communities to secondary education. These centers include the Universities of San Francisco de Quito, Técnica Particular de Loja, Estatal de Bolívar, Intercultural Kawsay (institutionalized also in Peru and Bolivia), Andina Simón Bolívar, de Cuenca, Intercultural de los Pueblos y Nacionalidades Indígenas, Politécnica Salesiana, as well as the Latin American Faculty of Social Sciences (FLACSO) for post- graduate ethnic studies.

Graphic 17: Access of indigenous youths to educational services by age group, 2010



Source: Created by authors based on CPV 2010

On the other hand, student continuity or desertion finds its origin in a number of diverse factors. In the particular case of Ecuador, a study by UNICEF and the Coordinating Ministry of Patrimony (2011, p. 28) revealed that 8 out of every 10 students of indigenous people and nationalities find that their principal obstacle in the access to education services are economic-familial factors. In this sense, educational policies must be accompanied by and interconnected with policies that alleviate the employment deficit faced by families belonging to indigenous groups, as well as for example, programs for school nutrition, free distribution of school uniforms and special exemption from fees, among others.97 [97]

Illiteracy remains a persistent problem that affects the Ecuadorian population, and even more acutely, to indigenous communities. While the percentage of illiterate Afro- Ecuadorian, mixed and white population hovers around 8%, 6% and 5%, respectively, the rate of illiterate indigenous people rose to 25.8% as of 2008, having diminished by only 3.6% since 2001. (see graphic 18).

Graphic 18: Percentage of Illiteracy in Ecuador, 2001-2008

Area	2001	2006	2008
National	9.0	9.1	7.6
Urban	5.3	4.9	4.0
Rural	15.5	17.2	15.4
Indigenous	28.2	28.2	25.8
Afro-Ecuadorian	10.3	12.6	8.3
Mixed	8.0	7.5	6.3
White	4.8	6.7	5.3

Source: Created by authors based on data from UNICEF 2011, 22

97 Because of migration for employment and academic reasons, to date, the process of urbanization of this age group is growing, a fact which leaves these individuals vulnerable to a greater probability of being victims of discrimination, overcrowding, malnutrition or familial and cultural estrangement. (CEPAL, Infant poverty in indigenous and afro-descendant communities in Latin America, 2012). More so, as of 2010, 9 of 10 indigenous family homes with minors live in a condition of poverty (INEC, 2010).

Notwithstanding, the unfavorable conditions reflected by the statistics on indigenous communities in the educational space, it is important to reflect on the compellingly positive tendency of monetary investment per student since the beginning of the 2000s. The general investment in BIE programs grew from $6.6 million to $31.7 million from 2000-2008 and, in an analogue form, investment per student that reached $94.08 grew by a factor of four, reaching $480.88. Together with this, the training and insertion of instructor and service person in BIE schools also grew between 1995 and 2008, reaching 7171 (from 1665) and 434 (from 120), respectively.

In the case of Venezuela:

Through the Organic Education Law of 2009 the country has begun to overcome its old 1980 Organic Law of Education in various ways. Thus, the new 2009 law reflects correspondence with the preamble of the Constitution, as it establishes as educational principals: aspects such as participative and protagonist democracy, social responsibility, equality between citizens without any kind of discrimination, the practice of gender equity and equality, among others. Likewise, it refers to education with a secular, multicultural, multi-ethnic and multi-lingual model, demonstrated by the valuing and recognition of the language, worldview, values, knowledge and mythologies of native people, indigenous communities and afro-descendants, which were aspects omitted from its 1980 predecessor. It is notable that there is a Viceministry for Bilingual Intercultural Training and the Ancestral Knowledge of Indigenous People, which belongs to the Ministry of Popular Power for Indigenous People. Nonetheless, very little relevant information was found by consulting primary sources on the advances and setbacks of this work.

In the case of Peru:

Sectorial Policy of Intercultural Education and Bilingual Intercultural Education (PSEIB):

PSEIB was adopted in July 16 through Ministerial Resolution # 006-016-MINEDU and it forms part of the initiatives of the Ministry of Education to implement bilingual intercultural schools as educational services of quality for children and adolescents. They are proposed as institutions whose structure and functions are in accord with the culture of the students and of the community, which develop curricula and proposals, an autonomous and participative system of management and values based on the relationship between school and family and community. Nonetheless, the PSEIB is not lacking for challenges. The matriculation deficit in BIE schools, school delays and desertions, the training of specialized BIE instructors, among other factors that we will discuss below, appear as challenges that the PSEIB as well as its projects must confront.

First of all, one of the most serious challenges facing the PSEIB arises from the thousands of indigenous children and youths (with the former group presenting the most critical challenges) that are not yet included in the Peruvian education system. Thus, as of 2007, more than 130,000 children and adolescents (approximately 9% of the total of indigenous minors) are not matriculated in any school (see chart 2). Along the same lines, it bears mentioning that the rate of school absence is inversely proportional to the age of the students: the older the students, the lower the probability that they will attend classes (even when they are formally matriculated). Thus, children of 14 years of age show a rate of absence of 7%; those who are 15, of 9%; those who are 16, 11%; and those who are 17 of

15% (ENAHO, 2007). As a demonstration of this, and in the framework of the analysis of quechua women, the results of the 2007 ENAHO suggest that the principal factors why students between 12 and 16 years of age do not attend schools is the lack of interest in studies (8.0%), family problems (9.7%), and principally economic problems (17.9%). As an analogue, among youths of 17 years of age,

the causes are led by academic disinterest (17.9%) and economic inconveniences (28.0%) (ENAHO, 2007).

Chart 4: Indigenous children out of the educational system

	3-5 years	6-11 years	12-16 years	Total
Quechua	55,355	11,937	30,356	**97,358**
Aimara	3, 974	558	2, 042	**6, 574**
Asháninca	3, 432	1, 192	2, 097	**6, 671**
Aguaruna	4, 585	1, 461	1, 354	**7, 400**
Shipibo-Conibo	1, 103	356	517	**1, 1976**
Otros	6, 125	2, 507	2, 301	**10, 932**
Total	**74, 573**	**18, 011**	**38, 356**	**130, 901**

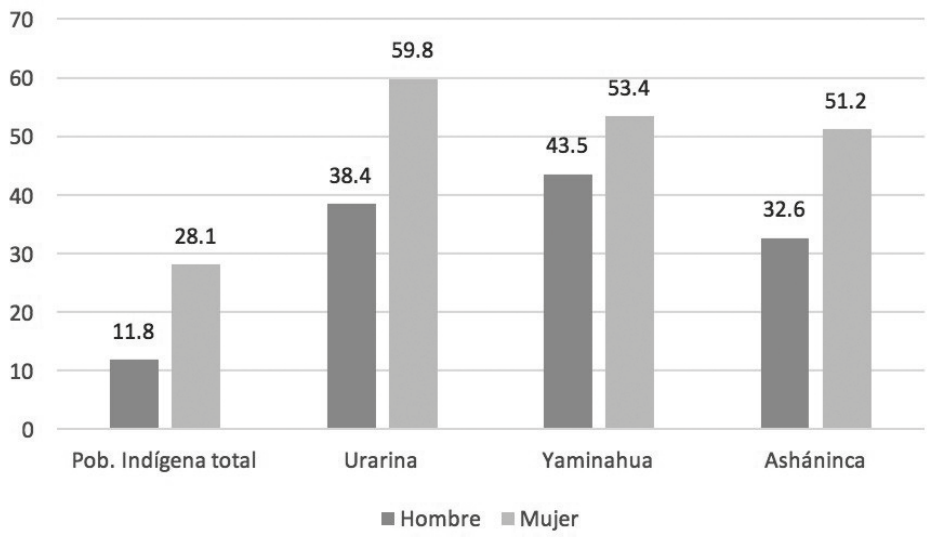
Source: INEI, 2007 – National Continuous Survey, 2006.

Conditions of inequity among students prevent them from obtaining the same intellectual capabilities. In Peru, this fact is reflected largely among those students that live in rural vs. urban zones. According to the Second Comparative and Explicative Regional Study, Peru is one of the countries with the lowest educational achievement in the region, as well as being the country with the largest difference in academic achievement between rural schools (where the majority of the indigenous population lives) and urban ones. In fact, a demonstration of this gap appears in the levels of academic backwardness among Spanish-speaking and indigenous students in primary and secondary schools. As of

2012, the percentage of students who were behind in primary school who spoke Spanish as compared to native languages as 18.8% and 32.8%, respectively. As an analogue, the corresponding numbers for secondary school were 22.8% and 35.7%, respectively.

Additionally, the extremely high levels of illiteracy create serious difficulties for the work originated by PSEIB, especially in relation to the family fathers who are responsible for reinforcing the lessons learned by their minor children in school. Even when the social programs to eradicate illiteracy have penetrated the social reality of the better part of the population that is just learning to read and write in Spanish, the gap of illiteracy by sex and indigenous population is still relevant. By 2007, in general, 1 out of every 10 indigenous men and 3 out of every 10 indigenous women older than 15 years-old were illiterate (see graphic 18). These conditions, however, are exacerbated in the urarina, yaminahua and asháninca communities, in which the levels of male illiteracy rise to 30% while that of women is 50%. To this, it bears specifying that the rates of illiteracy are also differentiated by region, as the high-Andean region (11.2%) tops the list compared to the cost (3.2%) and the jungle (7.2%) (ENAHO, 2013).

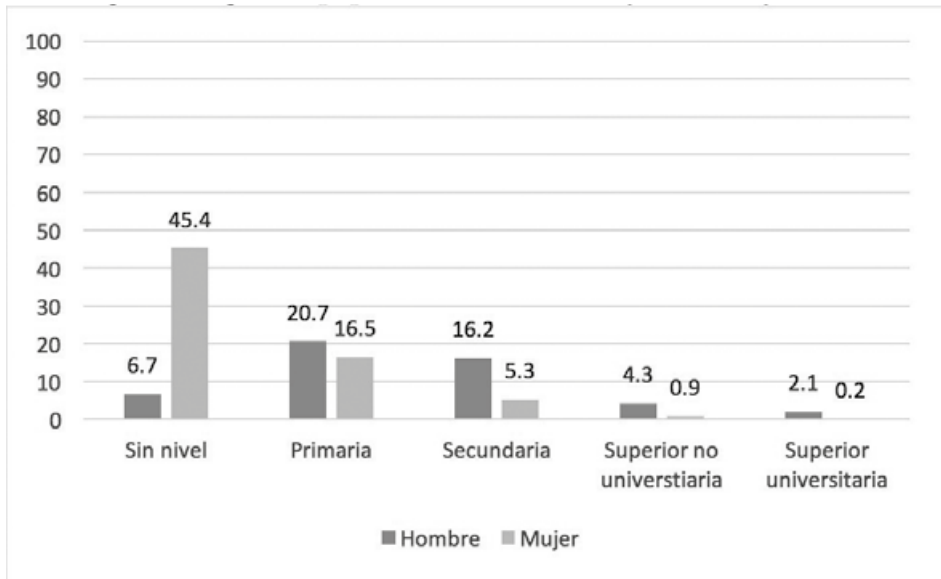
Graphic 19. Indigenous communities with highest rates of illiteracy by sex, 2007



Source: Created by authors based on INEI, II Census of Indigenous Communities of the Peruvian Amazon 2007

Likewise, the academic levels achieved by the good part of the population aged 15 and up is very precarious. Of Quechua, Aymara men as well as those from other similarly situated groups, approximately 1 out of every 5 has completed a primary education; 1 out of every 4 finished secondary school; and 1 out of every 100 has completed higher education. What is ever more critical is that out women of Quechua, Aymara and other origins 4 out of every 10 has not matriculated in any educational institution; 2 out of every 10 completed primary school; 5 out of every 100 finished secondary and 1 out of 200 completed higher education. (See graphic 19). In the same sense, of the children and adolescents who have been students since 2009, only 4.3% of those the Amazon, 27% of Aymara, and 10% of Quechua were able to finish their secondary studies. (Vásquez et. al, 2009, p. 21)

Graphic 20. Percentage of indigenous population more than 15-years-old by education level achieved



Source: Created by authors based on INEI, II Census of Indigenous Communities of the Peruvian Amazon 2007

Despite the results demonstrated, the work of the Ministry of Education stands out in terms of the promotion of policies for the training of EIB instructors. The Defensive Report #152 shows that in the period of 2007-2009, only 16 students had chosen to pursue a career related to interculturality and bilingualism in the Superior Pedagogic Institutes (ISP). In response to this situation, the Ministry of Education acted swiftly and efficiently to try to elevate the percentage of admitted students to the ISPs. Their strategy was bifurcated, initially, between lower the minimum of the required grade for admissions examinations, and secondly, raising the number of annual invitations for admission from 1 to 2 times. This brought as a result the explosive multiplication of admitted students to ISPs: in 2010, 79 students registered; 283, in 2011; and 695, in 2012. In total, there were 1073 admitted in the period of 2007-2012.

National Plan of Bilingual and Intercultural Education 2016-2021

The BIE National Plan was configured as the principal guideline for goals and objectives of BIE policies in Peru. Its general objective was to improve all of the stages, levels, and modalities of the national education system and to guarantee to access of children, adolescents, youths, and adult members of native communities to educational facilities that would accord with their roots. This was articulate through four objectives: i) to improve the access, permanence and timely graduation of indigenous students; ii) to formulate – together with the communities – BIE curricula and pedagogical proposals adapted to the system of life of indigenous people; iii) to train instructors that carry out their profession according to the BIE policies in educational institutions and Alternative Basic Education Centers; and iv) to promote the participative and decentralized management of the implementation of these strategies.

Notwithstanding the challenges facing Peru in reinforcing the strengths of EIB programs, it bears distinguishing the efforts of the Ministry of Education to provide for its citizens an information technology research tool that is very useful and detailed: the portal of Statistics of Educational Quality (ESCALE) (see more in http://escale.minedu.gob.pe/ web/inicio/padron-de-iiee). It was proposed as a cutting-edge initiative in which it is possible to monitor the advance of educational management in institutions where the native language is either Spanish or another indigenous language. Furthermore, it includes variables such as the rate of matriculations, departmental, provincial or district, geographic location, educational program employed, number of students, among others.

FINAL CONSIDERATIONS ON INTERCULTURAL EDUCATION

The principal educational milestones called for by C169 (participation of indigenous people in the formulation of their curricula, and the creation of their educational institutions, the eradication of illiteracy and the promotion of bilingualism, among others) have been implemented, though in different scales and formats, in the six countries studied. Evidently, each one of these countries has articulated distinct factor of indigenous participation in their institutions. This naturally involves the creation of educational curricula and systems of selection of instructors – within the interior of their administrative apparatuses. Among these countries, **Bolivia –** the state with the highest percentage of indigenous population– is the only one whose viceministry (of Regular Education) directly executes and supervises BIE policies, and furthermore emphasizes an intra-, inter-, and pluri-cultural focus in all of its school levels. While it is the country that has best integrated intercultural and bilingual components in its educational system, the underrepresentation of indigenous people is still latent: only a quarter of the communities have representation on the CEPOs, which can create difficulties in the formation of study plans that are tailored to each community. Furthermore, the meeting of the Plurinational Educative Council (in charge of evaluating compliance with BIE policies) has still not occurred through it was programmed, by law, for the year 2015. In **Brazil,** there is the particularity that BIE policies, are not formulated in a unisectorial fashion (as in the rest of the countries studied) but rather have an intersectorial character: the National Committee on Indigenous Education, under the Ministry of Education, includes civil society, universities, indigenous representatives and Ministry officials; on the other hand, FUNAI is as an indigenous pressure body within the Ministry of Justice. Meanwhile **Venezuela,** despite the projections of its Organic Law of Education (2009), has progressed little in practical terms, in which the deficiency of the communication of its work plans and its concrete achievements is notable.

Ecuador, like Bolivia, is one of the countries that has best integrated intercultural and bilingual components in its educational system by incorporating these features into all levels of the AEN. Nonetheless, its legal framework does not necessarily call for the participation of representation bodies in the creation of EIB curricula (as occurs in Bolivia). On the other hand, in **Peru,** policies geared towards indigenous and rural communities, which are intimately linked, are combined in the General Direction of Bilingual and Rural Intercultural Education. While legislation promotes indigenous involvement in the design of BIE curricula, there is no regulation that governs the participation of indigenous institutions in this area, leaving an important institutional gap. Finally, in **Colombia** BIE policies are carried out by the Advisory Office of Educational Attention to Ethnic Groups. Like Peru, there are very active Public Defender Offices. In fact, Colombia is the only country studied here with a special defensive entity for indigenous people, the Delegated Defender for Indigenous and Ethnic Minorities. This represents a cutting-edge initiative in the sense that it is like a state entity: it is outside of the implementation of BIE policies, but capable of continually supervising and monitoring compliance with the fundamental rights of indigenous communities.

Grounding the impact of BIE policies of the countries in question, statistics offer us a similar panorama (it is important to clarify that the data used in this study is official and as a result may not be updated, as in the case of Ecuador [2006], Peru and Bolivia [2007]). As was emphasized above, these statistics display more than a few indicators of inequality that repeat themselves in the reality of indigenous people. At the same time, they are esecailly relevant to the education of children and adolescents. We find that sex, age, residence, ethnic condition and ethnic group are the variables in which social inequality is more or less perceptible. In that sense, being a woman, being between 12 and 17 years of age, living in a rural area, being indigenous, and belonging to a minority group, are the principal risk factors for low access to quality educational services.

While all of the countries studied have proposed methods to increase indigenous access to BIE schools, in general, the capacity for an indigenous student to move forward in all of the levels of school is critical. The state that presents the best indicators in indigenous school access is Bolivia (90% matriculations in primacy school and 70% in secondary [55% according to UNICEF] as of 2007).

This, however, is explained by the fact that a large part of its population self-identifies as indigenous (approximately 40% according to the 2012 Census) and its school system brings in a good portion of this population in universal, homogeneous schools (i.e. not necessarily in BIE schools). In the remaining cases, the rates of access and desertion are (almost) the same. The primary level tends to present a net rate of 50% matriculations, while intermediate and secondarily level reach the worrying rate of 1 of every 10 adolescents. This crude reality not only affects short-term academic achievement, but also conditions these students to be less economically productive in the medium and long term, which results in limitations of salary and living conditions for them and their families in the years that follow.

NOTE: This last paragraph was based on:

Bolivia. As of 2007, only 70% (55% according to UNICEF) of adolescents are matriculated in secondary school (compared to more than 90% in primary school).

In Brazil, in 2013, more than 88% of indigenous minors were already matriculated in BIE schools. Nonetheless, only 7.5% of these finished primary school and entered secondary.

In Colombia, as of 2013, 462,000 indigenous children were already matriculated. 43.3% entered primary school and 11.3% to secondary school (2005). There are 717,748 according to DANE, 2012.

In Ecuador, 50% of indigenous children finish primary school and 11%

secondary school (2006).

In Peru, 9% of indigenous minors are not matriculated in schools. 27.3% Aymara, 10% Quechua and 4.7% Amazonian have finished secondary school.

Our analysis has identified certain factors that may help explain this phenomenon. The probability is low that minors in indigenous communities enter BIE schools because: i) families consider the non-indigenous system of education is better than the indigenous, ii) the infrastructure of intermediate indigenous schools and the routes to arrive at these schools are inadequate or inexistent, iii) the clientelistic relationships of the authorities with the instructors discourage families from sending their children to BIE schools and iv) the social traditions, norms and roles of indigenous family members conceive of their adolescents as individuals that are both capable of, and responsible for, assuming the economic burden of the family, and/or v) given the difficult conditions confronted by their families, indigenous adolescents are required to work and, progressively, to abandon their studies. The testimony provided by the minors, however, point principally towards this last point: thousands of young people are forced to work in risky and deplorable environments because of the conditions of poverty and extreme poverty faced by their families.

In this context, instructors have a leading role to play in the implementation of BIE policies. In light of the limited number of instructors that know the particular worldviews of indigenous students, States have promoted indigenous citizens with a vocation in pedagogical service into instructor positions in BIE schools. Nonetheless, these instructors don't achieve their real potential as they have not passed through the kind of rigorous professional training that would equip them with the pedagogical tools to address the need. As a result, in 2002, Brazil for the first time prepared a specific legal framework for the training of BIE instructors. Later, countries such as Peru, Bolivia and Ecuador replicated this formula and designed specialized institutions of BIE higher education. As of 2003, Bolivia led the training of instructors, achieving the professional training of more than 11,000 instructors (quechua, guaraní, aymara), followed by Brazil with 10,000 (2009), Ecuador with

6,000 (2011) and Colombia with 3,770 (2013). Peru, on the other hand, despite the remarkable efforts of the ISP, is the country with the least trained BIE instructors (1,073 as of 2009) with respect to its large indigenous population.

Additionally, at first glance, analyzing the macro-results of the politics of eradication of illiteracy in indigenous communities, the five countries analyzed demonstrate similar results (on average, 20- 30% of their population is illiterate). Nonetheless, taking closer look at the nuances of the characteristics of these populations, it becomes possible to draw out generalities. It is notable that inequalities in gender and areas of residence are crucial variables in the analysis of the factors that determine illiteracy in indigenous populations. Men present between 30% and 50% more probability than women in learning how to read and write in the official language of the country they live in. By the same token, those who live in non-indigenous territories have an approximately 25% greater chance of being literate. In that sense, the need to grow the coverage of literacy programs with an emphasis on women and rural or indigenous areas is extremely urgent.

The outdated nature of the statistics offered by States, or if lacking, the restrictions to state functionaries – i.e. not permitting access to civil society or external bodies – impedes the ability to reliably analyze the impact of BIE policies at this point. For example, Brazil is the country with the most updated indicators of access to educational services (2013), followed by Colombia (2012), Peru and Ecuador (2007) and Bolivia (2006), a trend that is repeated in demographic censuses or rates of illiterate population. Nonetheless, taking into account the data that has been presented, we can affirm that despite the fact that the States studied have enormous challenges to achieve totality in access of indigenous people to tailored and autonomous education systems, it is important to recognize and re-emphasize the particular efforts of those countries in providing indigenous communities with more and better-quality educational services that, in fact, should be replicated. Leaving aside the aforementioned statistics, it is important to highlight the work of the Ministry of Education of Peru, a body that has deployed its system of educational monitoring, SIRTOD, in an efficient and effective way to a large part of the territory, and provided it to the general public for analysis. Because of experiences like these, States, academics and civil society groups can join efforts and become strategic participants in the eradication of the abysmal social inequalities that plague our region.

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