INDIGENOUS PEOPLES VERSUS PEASANTS: LAND DISPUTES IN COLOMBIA AND THE SEARCH FOR AN ALTERNATIVE APPROACH

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ABSTRACT

Land disputes between indigenous communities and peasants in Colombia are not something new. The scenario is almost the same: aboriginal communities conflicting with peasants and farmers for a territory in which to live. The issue has not been completely explored. In fact, analysis regarding territorial conflicts between indigenous peoples and farmers in Colombia remains insufficient because it is conservative when criticizing the institutional approaches to the conflict; it does not consider international examples, and what is worse, it lacks objectivity because the author usually takes a position in the conflict (commonly pro-indigenous).

The specific case that I chose to study in this Article takes place in the northeast region of Colombia known as Catatumbo. The Barí peoples are an aboriginal group who have disputed farmers' claims since the 1990s in an effort to secure their property titles.[1] The land dispute reached such magnitude that it was studied by the Colombian Constitutional Court in 2017.[2] However, after many attempts to solve the territorial dispute, the problem persists.

In this Article, I explore alternative approaches to land disputes between farmers and native communities in Colombia. First, I give a general characterization of the conflict itself and the parties involved. Next, I present the existing theoretical and legal framework to approach the land dispute emphasizing my research on the disparity between the rights of indigenous peoples and peasants regarding land access. Also, I argue that the existing institutional framework is naively biased to favor indigenous claims over farmers' demands. Finally, I compare examples from common law countries that could be useful to approach proportionality tests differently.

I. INTRODUCTION

Land disputes between indigenous communities and peasants in Colombia are not something new. For example, in Meta and Guaviare, two departments of Colombia out of 32 total—the *Jiw* and *Sikuani* communities—claim that cattle

1. P.G. MCHUGH, ABORIGINAL TITLE: THE MODERN JURISPRUDENCE OF TRIBAL LAND RIGHTS 240–41 (2011).

2. Corte Constitucional [C.C.] [Constitutional Court], febrero 3, 2017, Sentencia T-052/17, Gaceta de la Corte Constitucional [G.C.C.] (art. 3.4.3) (Colom.).

farmers have taken their "ancestral territory" leaving the indigenous peoples starving and without fertile land.[3] For the purpose of this Article, "farmers" and "peasants" will be used interchangeably.[4] In Cauca, farmers and afro descendants claim that the twelve ethnic groups of that region are abusing their power.[5] Twenty-one percent of the population in *Cauca* are members of indigenous groups.[6] In Boyacá, *U´wa* communities claim that the state has not done enough to formalize their "ancestral land" inhabited nowadays by farmers.[7] Furthermore, in regions such as Caldas, *Embera Chamí* indigenous communities conflict with afro-descendants, *Cumba Quimbaya* indigenous communities, farmers, and businessmen.[8]

The scenario of these land disputes is almost the same: Indigenous communities conflicting with peasants and farmers for a territory in which to live, in a country that still depends substantially on agricultural development.[9] The aboriginals possess an identity that is different from the rest of the national population: a unique language[10] and their own living rules. The natives perceive the property of

3. Germán Gómez Polo, *Campesinos vs. indígenas: la pelea por las tierras en Meta y Guaviare*, EL ESPECTADOR (Apr. 11, 2019, 10:00 PM), https://www.elespectador.com/colombia2020/territorio/campesinos-vs-indigenas-la-pelea-por-las-tierras-en-meta-y-guaviare-articulo-857863 [https://perma.cc/K2CQ-YMT8].

4. *See, e.g.*, Joe Parkin Daniels, *Where it All Begins: Colombia's Peasant Farmers and the Pacific Drug Trade*, THE GUARDIAN (June 25, 2019), https://www.theguardian.com/world/2019/jun/26/where-it-all-begins-colombias-peasant-farmers-fuelling-pacific-drug-trade [https://perma.cc/S22K-63HQ]; *Colombia: The Killing of Peasant Farmers in Tumaco Underlines the Need to Implement the Peace Agreement*, AMNESTY INT'L (Oct. 6, 2017), https://www.amnesty.org/en/latest/news/2017/10/colombia-asesinato-de-campesinos-en-tumaco-subraya-necesidad-de-implementar-el-acuerdo-de-paz/ [https://perma.cc/TZ7D-5T6V]; Nicolò Giangrande, *Colombian Peasants Fight for Land Rights*, EQUAL TIMES (Oct. 1, 2013), https://www.equaltimes.org/colombian-peasants-fight-for-land-rights?lang=es#.YIEhFuhKjIV [https://perma.cc/X2DV-UZHR] (using "farmers" and "peasants" interchangeably).

5. Cynthia de Benito, *Campesinos frente a indígenas, el otro conflicto colombiano*, EL ESPECTADOR (Apr. 2, 2015, 12:21 PM), https://www.elespectador.com/noticias/nacional/campesinos-frente-indigenas-el-otro-conflicto-colombian-articulo-552931 [https://perma.cc/P3BN-JZS3].

6. *Id.*

7. Ana León, *La Pelea de Los U'wa*, LA SILLA VACÍA (July 30, 2016), https://lasillavacia.com/historia/la-pelea-de-los-uwa-57258 [https://perma.cc/6TZ5-HEKL].

8. *Resguardo Cañamomo Lomaprieta, trabaja en su proceso de legalización de tierras*, EJE 21 (June 28, 2019), https://www.eje21.com.co/2019/06/resguardo-canamomo-lomaprieta-trabaja-en-su-proceso-de-legalizacion-de-tierras/ [https://perma.cc/3DB7-Y8MF].

9. *See* OECD, OECD REVIEW OF AGRICULTURAL POLICIES: COLOMBIA 2015 (2015), https://read.oecd-ilibrary.org/agriculture-and-food/oecd-review-of-agricultural-policies-colombia-2015_9789264227644-en#page1 59 [https://perma.cc/RQ72-DXTC].

10. *See generally* Linda Light, *Perspectives: An Open Invitation to Cultural Anthropology*,

"the motherland"[11] in a collective way, and they claim immense areas of territory to preserve it:

> 'The earth is my mother, and on her bosom I shall repose.' Attributed to Tecumseh in the early 1800s, this statement is frequently cited to uphold the view, long and widely proclaimed in scholarly and popular literature, that Mother Earth is an ancient and central Native American figure . . . [12]

Peasants and most of the inhabitants of these rural areas, however, demand land to live on and work.[13] Farmers are not rich, and they also live far away from wealthy urban areas. Commonly, the situation is exacerbated by other factors, such as: a weak or nonexistent state presence, the existence of different armed actors, cocaine plantations, extreme poverty, and a lack of development opportunities.[14]

The issue has not been completely explored. In fact, analysis regarding territorial conflicts between indigenous peoples and farmers in Colombia remains insufficient because it: (1) does not focus its attention on solving the problem; (2) is conservative when criticizing the institutional approaches to the conflict; (3) does not consider international examples; (4) does not make proper use of comparative literature; and (5) lacks objectivity because scholars usually take a position in the conflict, commonly pro-indigenous.[15] However, some national scholars provide an

LUMENCANDELA (Oct. 7, 2022, 4:09 PM), https://courses.lumenlearning.com/suny-culturalanthropology/chapter/language/ [https://perma.cc/5KQY-G6BZ].

11. Sam D. Gill, *Mother Earth: An American Story*, UNIV. OF COLO. BOULDER, https://www.colorado.edu/rlst/mother-earth-american-story (Apr. 20, 2021), [https://perma.cc/3JDK-TBZK].

12. *Id.*

13. *See generally Deeply Rooted: Coca Eradication and Violence in Colombia*, INT'L CRISIS GRP. (Feb. 26, 2021), https://www.crisisgroup.org/latin-america-caribbean/andes/colombia/87-deeply-rooted-coca-eradication-and-violence-colombia [https://perma.cc/NH7S-BD2Y].

14. *See generally id.*

15. *See e.g.*, John Jairo Rincón García, *Diversos y comunes: Elementos constitutivos del conflicto entre comunidades indígenas, campesinas y afrocolombianas en el departamento del Cauca*, 65 ANAL. POLIT. 53 (2009); *see also* Geovanny Durán López, Conflicto socio-ambiental en el territorio U'wa: un análisis del conflicto entre indígenas y estado colombiano en torno al desarrollo, el medio ambiente y la cultura (2016) (Ph.D. dissertation, Complutense University of Madrid) (on file with author); Jessica Lisbeth Jaimes Navarro, ¿Es posible jurídicamente la creación de un territorio intercultural en el Catatumbo? (2018) (Student thesis, Free University of Colombia) (on file with author); Adriana Socorro Fenández Pinto, Conflictos Interculturales Por La Tierra Y El Territorio Entre Campesinos E Indígenas En Colombia. El Caso Del Puebelo Indígena Barí Y Las Comunidades Campesinas En La Región Del Catatumbo, Notre De Santander, 2009-2018 (2019) (Ph.D dissertation, Pontificial

objective analysis of land disputes between peasants and aboriginals in Colombia. In fact, national authors have explored topics such as (1) the right to the previous consultation of indigenous communities;[16] (2) the institutional articulation of legal typologies and topologies regarding the aboriginal topic;[17] as well as (3) environmental conflicts.[18]

The specific case that I chose to study in this paper invokes all the aforementioned factors. The *Barí* peoples are an aboriginal group of more than three thousand inhabitants,[19] who live in the northeast region of Colombia known as *Catatumbo* – named for the *Catatumbo* River. They have disputed farmer claims since the 1990s,[20] in an effort to secure their property titles. The *Catatumbo* region of Columbia has drug plantations, armed actors, an almost total absence of state institutions, poverty, and a lack of development opportunities.[21] The land dispute reached such a magnitude that it was studied by the Colombian Constitutional Court in 2017.[22] However, after many attempts to solve the territorial dispute, the problem persists.

This Article explores alternative approaches to land disputes between farmers and native communities in Colombia. In doing so, the first section provides a general characterization of the conflict itself and the parties involved: farmers and indigenous peoples. The second section presents existing theoretical and legal

Javierian University) (on file with the author); Christian Gros, *¿Indígenas o campesinos, pueblos de la selva o de la montaña?*, 49(1) REV. COLOMB. ANTROPOL. 45 (2013) (discussing intricacies in peasant ethnicities through an anthropology lens).

16. *See generally* GLORIA AMPARO RODRÍGUEZ, DE LA CONSULTA PREVIA AL CONSENTIMIENTO LIBRE, PREVIO E INFORMADO A PUEBLOS INDÍGENAS EN COLOMBIA (2018) (Colom.).

17. *See generally* Diana Bocarejo, *Legal Typologies and Topologies: The Construction of Indigenous Alterity and Its Spatialization Within the Colombian Constitutional Court*, 39(2) LAW SOC. INQ. 334 (2014).

18. *See generally* UNIVERSIDAD NACIONAL DE COLOMBIA, CONFLICTIVIDAD AMBIENTAL Y AFECTACIONES A DERECHOS AMBIENTALES (Gregorio Mesa ed. 2015) (Colom.).

19. CENTRO NACIONAL DE MEMORIA HISTÓRICA, SOMOS BARÍ: HIJOS ANCESTRALES DEL CATATUMBO: VOCES Y MEMORIAS DEL PUEBLO BARÍ 31 (2018), https://www.centrodememoriahistorica.gov.co/micrositios/catatumbo/descargas/somos-bari.pdf [https://perma.cc/6XSC-ZF6D] (Colom.) [hereinafter SOMOS BARÍ].

20. *See generally* L. 160/94, agosto 3, 1994, DIARIO OFICIAL [D.O.] (Colom.) (recognizing farmers' opportunity to claim specific portions of land with the name of "Peasant´s Reserve Zones" the same decade when the conflict begun).

21. *See e.g.*, García, *supra* note 15; *see also* López, *supra* note 15; Navarro, *supra* note 15; Fenández Pinto, *supra* note 15; Gros, *supra* note 15 (discussing intricacies in peasant ethnicities through an anthropology lens).

22. *See* C.C., febrero 3, 2017, Sentencia T-052/17, G.C.C. (art. 3.4.3).

framework to approach the land dispute, emphasizing the disparity between indigenous peoples' rights and peasants' rights to land access. Section two also includes a summarization of the constitutional case T-052 of 2017, which studied the land dispute between the *Barí* peoples versus peasants. The third section contains the argument that the existing institutional framework is naively biased to favor indigenous claims over farmers´ demands when land disputes are analyzed. The third section also includes a comparison of examples from Common Law countries which could be useful to approach proportionality tests differently.

II. GENERAL CHARACTERIZATION OF THE LAND DISPUTE AND THE INVOLVED PARTIES

A. Barí´s Indigenous Group

Colombia has 48,258,494 inhabitants, and 4.4% of this population are members of 115 different native groups,[23] identified as aboriginals.[24] The *Barí* people are a binational-indigenous group that has approximately 3,018 members in the country.[25] They live in the northeast region of Colombia known as *"Catatumbo,"* located in the department of Norte de Santander, [26] adjacent to Venezuela. There, they have two *resguardo* titles over 122,200 hectares (301,962 acres)[27] of forests and mostly unexplored tropical land. The collective property titles were officially recognized by the Colombian state in 1981 (Resguardo Catalaura – La Gabarra) and 1988 (Resguardo Motilón Barí) after an administrative process of delimitation and adjudication.[28]

23. *Población Indígena de Colombia. Resultados del Censo Nacional de Población y Vivienda 2018*, DANE 18, 54 (Sept. 16, 2019), https://www.dane.gov.co/files/investigaciones/boletines/grupos-etnicos/presentacion-grupos-etnicos-2019.pdf [https://perma.cc/62EB-4D6R] (Colom.) [hereinafter *Población Indígena de Colombia*].

24. D. 1071/2015, mayo 26, 2015, DIARIO OFICIAL [D.O.] (Colom.) (defining in its article 2.14.7.1.2. indigenous communities as "groups of families of amerindian descent that share feelings of identification with their aboriginal past and maintain the traits and customs of traditional culture, forms of government, and internal social control that differentiate them from other communities.").

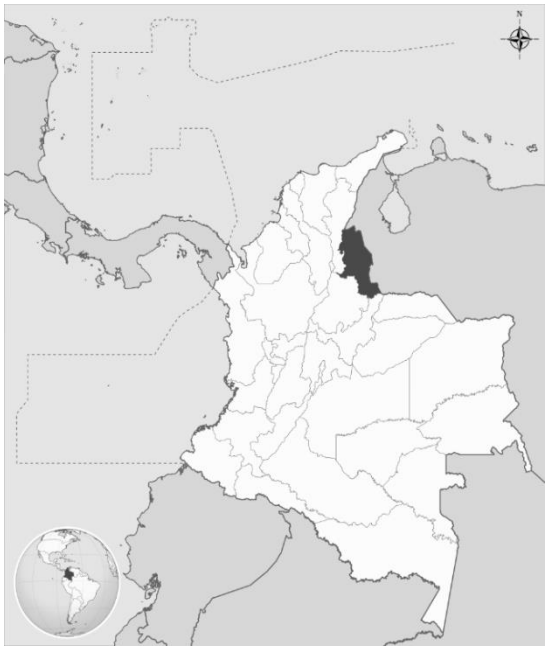
25. *Población Indígena de Colombia*, *supra* note 23, at 20.

26. *See generally Information About Departments of Colombia*, COLOMBIAINFO.ORG (Oct. 7, 2022, 12:18 PM), http://www.colombiainfo.org/en-us/colombia/departments.aspx [https://perma.cc/VTB8-38ZD] ("Department" is a politic-administrative figure in the republic form of government in Colombia. Colombia has 32 departments.).

27. *See* Res. Numero 105/81, diciembre 15, 1981, DIARIO OFICIAL [D.O.] (Colom.); Res. Numero 102/88, noviembre 28 de 1988, DIARIO OFICIAL [D.O.] (Colom.).

28. *See id.*

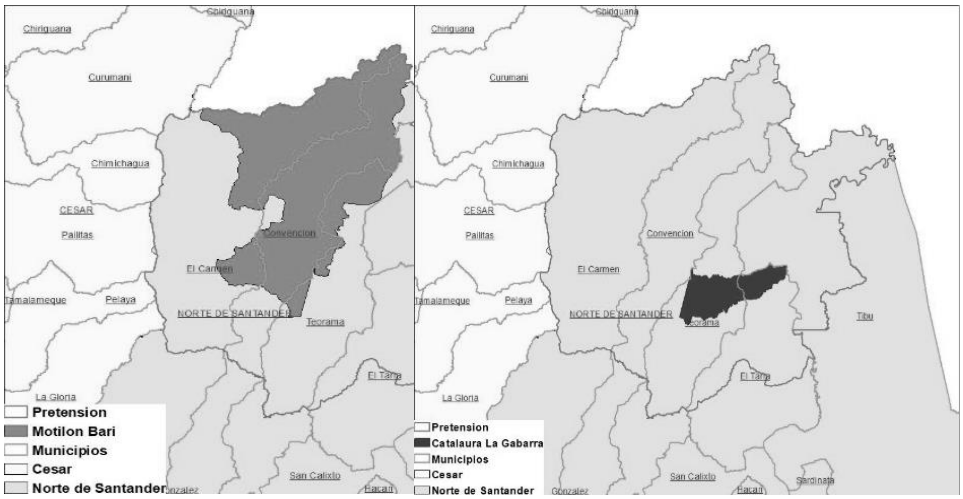
Map 1. Norte de Santander in Colombia.[29] **Map 2**. Catatumbo in Norte de Santander.[30]



29. *North Santander - Google Maps*, GOOGLE MAPS (Oct. 7, 2022, 12:27 PM), https://www.google.com/maps/place/North+Santander/@1.3175133,-74.0319696,5z/data=!4m5!3m4!1s0x8e6645769f19b07b:0x262938700944fc9e!8m2!3d7.9462831!4d-72.8988069?hl=en [https://perma.cc/T9F3-SKSY].

30. CENTRO NACIONAL DE MEMORIA HISTÓRICIA, CATATUMBO: MEMORIAS DE VIDA Y DIGNIDAD 18 (2018), https://centrodememoriahistorica.gov.co/wp-content/uploads/2021/12/4.-Catatumbo-memorias-de-vida-y-dignidad.pdf [https://perma.cc/PMG2-4Q9B] (Colom.).

Maps 3 & 4. Resguardo Motilón Barí[31] and Resguardo Catalaura LG in *Catatumbo.*[32]



As Jaramillo stated (*Pueblo motilón barí*, n.d.), this pre-Columbian indigenous group had a bigger portion of territory, which included almost the whole department of Norte de Santander, as well as part of Cesar.[33] The *Barí* territory (and its population) was diminished after the Spanish conquest, during the nineteenth century, and through the colonization process of the twentieth century, which pursued oil exploitation in the region.[34]

The *Barí* group has its own identity and culture differentiated from the rest of the national population. They speak the *Barí-ara* language,[35] although most of them speak Spanish as well.[36] Historically, the group was seminomadic and today they still move between the 25 different communities they have divided into.[37] As

31. ESTUDIO SOCIOECONÓMICO, JURÍDICO Y DE TENENCIA DE TIERRA PARA LA AMPLIACIÓN Y DELIMITACIÓN DEL RESGUARDO MOTILÓN BARI 238 (2018), https://tribunalsuperiordecucuta.gov.co/wp-content/uploads/2021/05/ANEXO-8-Estudio-Socioeconomico-Bari.pdf [https://perma.cc/JF6X-8NR7] (Colom.) [hereinafter JURÍDICO Y DE TENENCIA].

32. *Id.* at 240.

33. *See Bari, hijos de sabaceba y gente de los ojos limpios*, MINISTERIO DE CULTURA 3 (Oct. 7, 2022, 4:33 PM), http://www.mincultura.gov.co/areas/poblaciones/noticias/Documents/Caracterización del Pueblo Barí.pdf [https://perma.cc/2UCM-7RMS] (Colom.) [hereinafter *Bari, hijos de sabaceba*].

34. *Id.* at 4.

35. *Id.* at 1.

36. JURÍDICO Y DE TENENCIA, *supra* note 31, at 137.

37. SOMOS BARÍ, *supra* note 19, at 30, 52.

Arango and Sanchez noted, every community is formed of a group of monogamous families (predominantly), has its *cacique* –the most important political role, and has other social roles.[38] Economically, the *Barí* group subsists on hunting, fishing, and cultivating their lands with basic fruits of the forest (corn, pineapple, cassava, banana, cocoa, and sugar cane).[39] They also raise farm animals such as pigs and poultry.[40]

Although the *Barí* group had the influence of the Catholic evangelization, they do not consider themselves Catholic.[41] There are some religious differences between both *resguardos*, mainly due to a stronger process of evangelization within *Catalaura-La Gabarra*.[42] But, in general terms, the *Barí* people believe in a supreme deity.[43] They believe the god *Sabaceba* created the first *Barí* from the pineapple.[44] They believe that this god gave to the *Barí* the strength and the diversity of the *Catatumbo* region.[45] For the same reason, the *Barí* people respect and take care of their environment and *Isthana*, their motherland.[46] They think that their land and the resources it has (including oil and water) are sacred: "Without land there is no *Barí* and without *Barí* the land is not conserved."[47]

38. JURÍDICO Y DE TENENCIA, *supra* note 31, at 86.

39. SOMOS BARÍ, *supra* note 19, at 53-54.

40. JURÍDICO Y DE TENENCIA, *supra* note 31, at 114.

41. *Id.* at 81, 153.

42. *See Catalaura-La Gabarra: el resguardo más colonizado*, LA OPINIÓN (July 4, 2016), https://www.laopinion.com.co/region/catalaura-la-gabarra-el-resguardo-mas-colonizado-114787#OP [https://perma.cc/SF5C-7JJM] (Colom.).

43. JURÍDICO Y DE TENENCIA, *supra* note 31, at 81.

44. *Id.* at 103.

45. SOMOS BARÍ, *supra* note 19, at 39.

46. *Id.*

47. *Bari, hijos de sabaceba*, *supra* note 33, at 3.

Picture 1. *Barí* woman.[48]

Picture 2. *Barí* kids.[49]

B. Catatumbo´s Farmers

The Merriam-Webster dictionary defines *"campesino"* as "a native of a Latin American rural area, especially a . . . farm laborer."[50] In Colombia, *campesino* is a farmer that inhabits and works in rural areas of the country, who is culturally differentiated from the indigenous, and who has minimal protection before the law compared to the indigenous.[51] However, farmers and indigenous people share many characteristics: they are poor;[52] they have been traditionally unassisted by

48. Photograph of Bari Woman in Ichirrindakaira Community, *Registros Fotograficos Jornada De Socializacion Y Practica Censo Ingigena Motilon Bar – Catalaura La Gabarra Como Component Del Estudio Socio Economico En Razon A La Sentencia T – 052 De 2017*, EQUIPO ETNICO UGT – NORORIENTE CUCUTA – ANT. 164 (Oct. 7, 2022, 4:15 PM), https://drive.google.com/file/d/1JAh6YjN3KbYMPXynJkKkuVUJXYNC_eUk/view [https://perma.cc/936N-F6GE] (Colom.).

49. *Id.* at 171.

50. *Campesino*, MERRIAM WEBSTER (Oct. 7, 2022, 4:12 PM), https://www.merriam-webster.com/dictionary/campesino [https://perma.cc/YM24-Q2AF].

51. *See* G.A. Res. 73/165, Declaration on the Rights of Peasants and Other People Working in Rural Areas, at 5 (Dec. 17, 2018). Even though the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (2018) defines "peasant" as people who engage in "small-scale agricultural production," and includes indigenous peoples as "peasants," in Colombia, their cultural characteristics make them unique and different from the *campesino* group.

52. *See Extensas y arduas jornadas por $600.000 o menos: el salario de los campesinos colombianos*, NOTICIAS CARACOL (Oct. 7, 2022, 12:12 PM), https://noticias.caracoltv.com/economia/extensas-y-arduas-jornadas-por-600000-o-menos-el-salario-de-los-campesinos-colombianos [https://perma.cc/TE3F-C2PP] (Colom.) [hereinafter

the state;[53] they scarcely have access to basic services;[54] and they have been tremendously affected by the long-running, national armed conflict.[55] In fact, Human Rights Watch stated in 2019 during the armed conflict in the Catatumbo region, after the signing of "peace agreements"[56] between the Colombian state and the Revolutionary Armed Forces of Colombia (FARC):[57]

> In Catatumbo, in Northeastern Colombia . . . armed groups have committed a range of abuses against civilians, including killings, disappearances, sexual violence, child recruitment, and forced displacement . . . They have also sought to control the local population through threats, including those directed at community leaders and human rights defenders, some of whom have been killed . . . Government figures show that more than 40,000 people in Catatumbo have been displaced from their homes since 2017, the majority during

Extensas y arduas]. Differentiated from the wealthy landowner and the average urban inhabitant, the average farmer earns less than 150 USD per month (Colombian OER of March 27 of 2020) to sustain his/her whole family and does not have social security.

53. *Id.*; *see Bari, hijos de sabaceba*, *supra* note 33, at 6–7. Some authors argue the state has abandoned rural areas of the country for two reasons: excessively centralized model of development; and extreme difficulty to explore and access the complex topography of the country. *See* Salomón Kalmanovitz, *Recentralización*, EL ESPECTADOR (Sept. 15, 2019, 2:43 PM), https://www.elespectador.com/opinion/recentralizacion-columna-881226/ [https://perma.cc/7WKV-5YLB] (Colom.); LUIS ARMANDO GALVIS APONTE, BANCO LA REPÚBLICA, LA TOPOGRAFÍA ECONÓMICA DE COLOMBIA 16 (2001).

54. *Conflicto en Colombia: antecedentes históricos y actores*, CIDOB (Oct. 7, 2022, 12:17 PM), https://www.cidob.org/publicaciones/documentacion/dossiers/dossier_proceso_de_paz_en_colombia/dossier_proceso_de_paz_en_colombia/conflicto_en_colombia_antecedentes_historicos_y_actores [https://perma.cc/8AUM-RYT8] (Spain).

55. *See id.* (In Colombia, when talking about the "Armed Conflict," it usually refers to the fifty-year war that exists between the state and guerilla groups formed in the sixties (ELN – FARC), with the participation of paramilitary groups, and highly motivated by factors of land tenure.); *Bari, hijos de sabaceba*, *supra* note 33, at 7.

56. Although the state signed a peace agreement with the country's most powerful rebel group (FARC) in 2016, it has not been enough to end the longstanding conflict. *See generally* Juan Arredondo, *The Slow Death of Colombia's Peace Movement*, THE ATLANTIC (Dec. 30, 2019), https://www.theatlantic.com/international/archive/2019/12/colombia-peace-farc/604078/ [https://perma.cc/DL96-6K54]. The International Committee of the Red Cross (ICRC) states Columbia has at least five on-going non-international conflicts, with one centered on the Catatumbo region. *See generally Colombia: Five armed conflicts*, INT'L COMM. OF THE RED CROSS (Jan. 30, 2019), https://www.icrc.org/en/document/colombia-five-armed-conflicts-whats-happening [https://perma.cc/BGJ5-L9ER].

57. *See generally Who are the Farc?*, BBC NEWS (Nov. 24, 2016), https://www.bbc.com/news/world-latin-america-36605769 [https://perma.cc/L94E-6UJ9].

2018.[58]

The exact population of the *Catatumbo* region is unknown, due to the lack of a complete and actualized census of the region and security concerns.[59] In 2020, the estimated population of the region, including eleven municipalities of Norte de Santander,[60] was 295,000[61] however, that number may increase due to the Venezuelan exodus.[62]

The economy of the *Catatumbo* region is driven primarily by agriculture.[63] More than 20,000 families work on the same land they inhabit, growing and farming a wide range of products: oil palm (27,000 hectares), cocoa (13,000 hectares), coffee (5,600 hectares), onions, pineapples, tomatoes, bananas, corn, beans, and cucumbers (57,000 hectares).[64] However, this region of the country has 28,244

58. *The War in Catatumbo*, HUM. RTS. WATCH (Aug. 8, 2019), https://www.hrw.org/report/2019/08/08/war-catatumbo/abuses-armed-groups-against-civilians-including-venezuelan-exiles [https://perma.cc/EE2N-T6G4].

59. *Alcaldes de Catatumbo y Ocaña, inconformes con resultados del censo*, EL ESPECTADOR (Sept. 28, 2018, 2:42 PM), https://www.elespectador.com/noticias/nacional/alcaldes-de-catatumbo-y-ocana-inconformes-con-resultados-del-censo-articulo-814988 [https://perma.cc/DV5N-PWN7].

60. CONSEJO NACIONAL DE POLÍTICA ECONÓMICA Y SOCIAL, ESTRATEGIA DE DESARROLLO INTEGRAL DE LA REGIÓN DEL CATAUMBO 5 (Jan. 15, 2013), https://corponor.gov.co/publica_recursos/POBLACION_VULNERABLE/Conpes_3739_de_2013.pdf [https://perma.cc/7X8W-7DF5] (Colom.).

61. *The War in Catatumbo*, *supra* note 58; *Estimaciones de Población 1985-2005 y Proyecciones de Población 2005 – 2020*, GOBIERNO DE COLOMBIA (Jan. 18, 2023, 3:50 PM), https://www.dane.gov.co/files/investigaciones/poblacion/proyepobla06_20/Municipal_area_1985-2020.xls [https://perma.cc/8QB7-87VL] (Colom.).

62. *See generally Refugees and Migrants from Venezuela Top Four Million: IOM and UNHCR*, INT'L ORG. FOR MIGRATION (June 7, 2019), https://www.iom.int/news/refugees-and-migrants-venezuela-top-four-million-iom-and-unhcr?utm_source=IOM+External+Mailing+List&utm _campaign=e34c71ed9b-EMAIL_CAMPAIGN_2019_06_06_07_16&utm_medium=email&utm_term=0_9968056566-e34c71ed9b-43648581 [https://perma.cc/EH8V-GRD2].

63. *See* Jorge Andrés Ríos Tangua, *Catatumbo, una gran despensa agrícola por aprovechar*, LA OPINIÓN (May 2, 2018), https://www.laopinion.com.co/economia/catatumbo-una-gran-despensa-agricola-por-aprovechar-153845#OP [https://perma.cc/FH4L-UDF5].

64. *Id.*

hectares of cocaine plantation;[65] explaining why some authors state illegal plantations are the main source of income for *Catatumbo'*s families.[66] The lack of alternative development opportunities, poverty, and state absence may explain why some of *Catatumbo's* inhabitants have turned to lucrative cocaine farming.[67]

Picture 3. *Campesino* families farming basic products in the *Catatumbo* region.[68]

65. Jineth Prieto, *En el Catatumbo la Coca Aumentó, pero No Se Desbordó*, LA SILLA VACÍA (Sept. 20, 2018), https://lasillavacia.com/silla-santandereana/catatumbo-coca-aumento-no-se-desbordo-68037 [https://perma.cc/9MY6-5D9E].

66. *See* Sebastián del Corte, *Catatumbo: El Paraíso Bajo la Luz de la Tormenta*, UNIVERSIDAD DE LOS ANDES (Aug. 30, 2019), https://agronegocios.uniandes.edu.co/2019/08/30/catatumbo-el-paraiso-bajo-la-luz-de-la-tormenta/ [https://perma.cc/UZY4-R8HK].

67. *See generally* Tangua, *supra* note 63.

68. *Id.*

Picture 4. *Campesino* family preparing seasonal crops in the *Catatumbo* region.[69]

C. The Land Dispute: Resguardo Expansion Versus Peasant Reserve Zone

The Food and Agricultural Organization (FAO) defines a land dispute as "a disagreement over land rights, boundaries or uses . . . [which] occurs where specific individual or collective interests relating to land are in conflict."[70] Similarly, regarding the kind of "intersecting interests" that can exist within land tenure, the FAO classifies them as overriding, overlapping, complementary, or competing interests.[71]

In general terms, the land dispute between indigenous people and farmers in the *Catatumbo* region is "simple" to explain: aboriginals demand the expansion of their already existing *resguardo* property titles; while peasants demand the formalization of their land tenure, through the constitution of a Peasant Reserve Zone

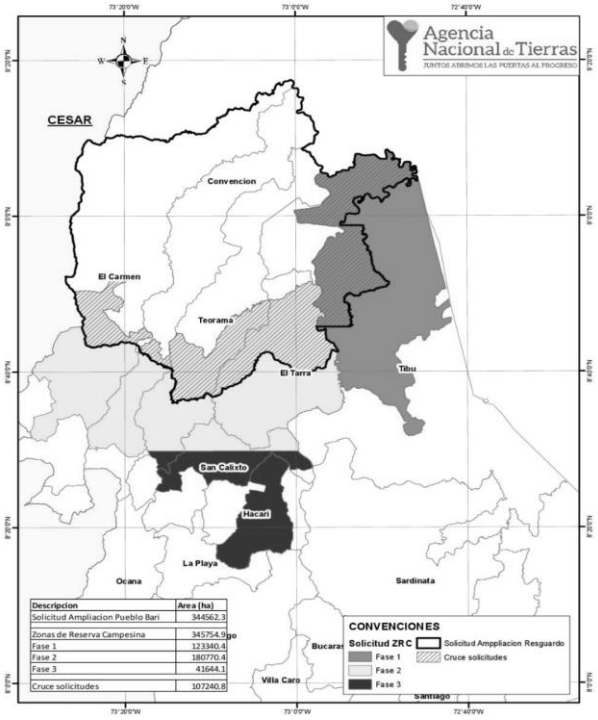
69. *Id.*

70. FOOD & AGRIC. ORG., LAND TENURE AND RURAL DEVELOPMENT 46 (2002), https://www.fao.org/3/y4307e/y4307e.pdf [https://perma.cc/B9WQ-MQ2S]. A Land Dispute is "a social fact where interests of at least two parties enter into a contradiction in relation to property rights and land use." Lorenza Belinda Fontana, *Indigenous Peoples vs Peasant Unions: Land Conflicts and Rural Movements in Plurinational Bolivia*, 41 J. PEASANT STUD. 297, 303 (2014) (internal citation omitted).

71. *Id.* at 7–8.

(PRZ).[72] Both claims partially overlap in big areas of territory, so that is the explanation for the conflict.[73]

Map 5. The black line shows the existing indigenous *resguardos* (122,200 ha) plus the expansion pretension for a total of 344,562 ha. Shaded areas are farmers' demands (345,754 ha). Indigenous pretentions and farmers' demands overlap in lined colors (107,240 ha).[74]



After the state's recognition of the *Barí* people of *resguardo* titles of property in 1981 and 1988, the aboriginals sought the "expansion" of their *resguardos* to additional vacant lands.[75] The expansion of the *resguardo´*s areas is completely

72. Helena Sanchez, *Así es la titánica Zona de Reserva Campesina del Catatumbo*, LA OPINIÓN (Mar. 12, 2016), https://www.laopinion.com.co/region/asi-es-la-titanica-zona-de-reserva-campesina-del-catatumbo-108403#OP [https://perma.cc/RSM9-CUTX].

73. *Id.*

74. JURÍDICO Y DE TENENCIA, *supra* note 31, at 266.

75. *Id.* at 265.

possible, considering that the same basic Agrarian Law that allows the constitution of *resguardos*, contemplates the possibility of their expansion.[76]

On the other hand, farmers' claims and demands are also covered by the abovementioned national Agrarian Law.[77] Colombian *campesinos* have the right to demand from the state the adjudication of property titles under the figure of a PRZ: an exotic legal figure contemplated in the abovementioned statute 160, which allows farmers to collectively demand large areas of vacant land, to be individually adjudicated.[78]

It is not clear when farmers' claims and aboriginals' demands began.[79] Indeed, some studies conclude that *Barí´s* pretentions have been so old, that even

76. L. 160/94, art. 43, agosto 3, 1994, DIARIO OFICIAL [D.O.] (Colom.); D. 1071/15, art. 2.14.7.1.1, mayo 26, 2015, DIARIO OFICIAL [D.O.] (Colom.).

77. L. 160/94, art. 12 agosto 3, 1994, DIARIO OFICIAL [D.O.] (Colom.).

78. The PRZ is a legal figure contemplated since 1994 in Colombia and is tremendously encouraged by the recent Peace Agreement (2016). *See Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace*, PEACE AGREEMENTS (Nov. 24, 2016), https://www.peaceagreements.org/viewmasterdocument/1845 [https://perma.cc/HWM3-AQ7C] (Colom.). Technically, the PRZ allows the farmers to economically organize themselves in areas where a group of families are given individual property deeds of equal portions of the reserved land. L. 160/94, art. 80agosto 3, 1994, DIARIO OFICIAL [D.O.] (Colom.); D. 1071/15, mayo 26, 2015, DIARIO OFICIAL [D.O.] (Colom.). Prior to 2017, the country had six PRZs: Pato-Balsillas, in Caquetá (1997), Calamar, in Guaviare (1997), Sur de Bolívar, in Bolívar (1999), La Perla Amazónica, in Putumayo (2000), Cabrera, in Cundinamarca (2000), and Valle del Río Cimitarra, in Antioquia and Bolívar (2002). Jairo Tocancipá Falla & Cristian Arnoldo Ramírez Castrillón, *Las nuevas dinámicas rurales en las Zonas de Reserva Campesina en Colombia*, 23 PERSPECTIVA GEOGRÁFICA 31–52 (2018) (Colom.).

79. An excellent description of the application of the principle of the Common Law right of possession or "first in time, first in right" may be found in the case of *Palmer v. Railroad Commission* (1914): "An analogy was found in the rules of the common law relating to controversies over the possession of land between persons who had no title thereto and in which the real owner did not interfere or intervene. (*See Katz* v. *Walkinshaw*, 141 Cal. 135, [99 Am. St. Rep. 35, 64 L.R.A. 236, 70 P. 663, 74 P. 766].) It was held that, since the real owner of the water-rights, that is, the United States or the state, permitted these diversions and was not in court to assert its rights or to be bound by the decision, the matter between the persons litigating was to be decided according to the rules of law in regard to priority of possession of land. The diversion of the water was declared to be the equivalent of possession and the doctrine was laid down that he who was first in time was first in right." Palmer v. R.R. Comm'n of California, 167 Cal. 163, 170–71 (1914).

before the constitution of the existing *resguardos*, indigenous communities pursued additional areas of territory, claiming to have an "aboriginal title"[80] over it.[81] In other words, large areas of territory currently claimed by the indigenous peoples remained untitled when the *resguardos* were constituted in favor of the aboriginals.

On the other hand, considering that farmers seek to formalize their land tenure over the territories they already inhabit, it could be argued that these farmers also have a historical basis for their claims. Here, the factor of informality in land tenure in Colombia comes into play.[82] Farmers' fights for their land titles in the northeast region of the country has been a long-running battle, and it has been pursued under different strategies, legal tools and political actions.[83] However, regarding the specific pretention of constitution of the *Catatumbo* PRZ, institutions have commonly accepted one of the following time frames:

1. This pretention could not have existed before the agrarian statute which contemplated the creation of a PRZ (Statute 160 of 1994).[84]

2. It is possible that this demand could have started in 2005, when *Catatumbo´s* farmers created La Asociación Campesina del Catatumbo (ASCAMCAT): an organization to represent *Catatumbo´s* peasants legally before the institutionalism.[85]

Whatever the time frame recognized, the conclusion commonly accepted by Colombian institutions is that indigenous claims preceded peasants' demands in

80. Just for comparative purposes, in Canada: "Aboriginal title is an inherent right, recognized in Common Law, that originates in Indigenous peoples' occupation, use and control of ancestral lands prior to colonization. Aboriginal title is not a right granted by the government; rather, it is a property right that the Crown first recognized in the Royal Proclamation of 1763. It has been subsequently recognized and defined by several Supreme Court of Canada decisions."
Robert Irwin, *Aboriginal Title*, THE CANADIAN ENCYCLOPEDIA (Sept. 25, 2018), https://www.thecanadianencyclopedia.ca/en/article/aboriginal-title [https://perma.cc/K3T6-V6YW].

81. CARLOS AUGUSTO SALAZAR, ASOCBARI, ET AL., ISHTANA, EL TERRITORIO TRADICIONAL BARÍ 11 (2005).

82. Kevin Barthel et al., *Land and Rural Development Policy Reforms in Colombia: The Path to Peace USAID/Colombia Land and Rural Development Program (LRDP)*, USAID/COLOMBIA LAND & RURAL DEV. PROGR. 15 (2016), https://www.land-links.org/wp-content/uploads/2016/09/USAID_Land_Tenure_World_Bank_2016_LRDP_Policy_Reforms.pdf [https://perma.cc/EUU8-LPQH].

83. *Id.*

84. L. 160/94, art. 81, agosto 3, 1994, DIARIO OFICIAL [D.O.] (Colom.).

85. José Manuel Alba Maldonado, et al., *Catatumbo's Campesino Guard, (Asociación Campesina del Catatumbo ASCAMCAT). Between Self-protection, Empowerment and Territorial Construction*, 22 REFLEXIÓN POLÍTICA 70, 75 (2020) (Colom).

the current conflict.[86] Indeed, this was the point of departure the Constitutional Court considered when studying this case in 2017, after the *Barí* group issued a *Tutela* action.[87]

III. THEORETICAL / LEGAL FRAMEWORK AND T-052/17 CASE

As previously stated, land disputes between indigenous communities and farmers are not something new in Colombia. Different cases have had diverse approaches from the state. In this chapter, I describe the existing theoretical and legal framework to approach the conflict between farmers and indigenous peoples. For this aim, I first expose the primary norms that protect indigenous land rights in Colombia, emphasizing the Duty to Consult and Accommodate. Secondly, by detailing the disproportionate legal safeguards that farmers have in Colombia in comparison to aboriginals, I bring to light the scarce norms regarding their protection. Finally, I will summarize the reasoning of the Colombian Constitutional Court in the *Barí* T-052/17 case.

86. Johana Herrera Arango, *Collective Land Ownership and Tenure in Colombia*, CTR. FOR INT'L FORESTRY RSCH. 1 (May 2018), https://www.cifor.org/publications/pdf_files/infobrief/6877-infobrief.pdf [https://perma.cc/K2MD-9E36].

87. Corte Constitucional [C.C.] [Constitutional Court], febrero 3, 2017, Sentencia T-052/17, Gaceta de la Corte Constitucional [G.C.C.] (3.4.3) (Colom.).

A. Indigenous Land Rights[88]

Indigenous land rights in Colombia are contemplated mainly in the national Constitution and three international instruments.[89] Out of the vast quantity of supranational rules designed to protect native communities in the country,[90] the Declaration on the Rights of Indigenous Peoples[91] and the Indigenous and Tribal Peoples Convention 169[92] are the most important. Similarly, the American Convention

88. I make the difference here just to give more emphasis to the land disputes in Colombia. Many authors state that it is not appropriate to talk about differences among human rights, because they are interdependent. That way, there should not be differences between human rights of first, second or third category. Similarly, there should not be differences between human rights and land rights regarding the indigenous communities. *See Definitions and Classifications*, ICELANDIC HUM. RTS. CTR. (Oct. 7, 2022, 12:30 PM), https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/definitions-and-classifications [https://perma.cc/HNZ2-LB5T].

89. Article 93 of the Colombian Constitution states: "International treaties and agreements ratified by Congress that recognize human rights and prohibit their limitation in states of emergency have domestic priority. The rights and duties mentioned in this Charter will be interpreted in accordance with international treaties on human rights ratified by Colombia . . ." *Colombia's Constitution of 1991 with Amendments through 2005*, CONSTITUTE PROJECT 20 (Oct. 13, 2022, 5:24 PM), https://www.constituteproject.org/constitution/Colombia_2005.pdf [https://perma.cc/V5A6-CV9G] [hereinafter *Colombia's Constitution of 1991*].

90. *See generally Ratification of International Human Rights Treaties - Colombia*, UNIV. OF MINN. HUM. RTS. LIB. (Oct. 7, 2022, 4:21 PM), http://hrlibrary.umn.edu/research/ratification-colombia1.html [https://perma.cc/9C24-EY9S].

91. *See generally* G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007); "In 2009, Colombia supported the United Nations Declaration on the Rights of Indigenous Peoples. With Order 004 of 2009, the Constitutional Court mandated that the State protect 34 indigenous peoples at risk of disappearance due to armed conflict, and qualified that situation as a state of unconstitutional things." *Indigenous World 2019: Colombia*, INT'L WORK GRP. FOR INDIGENOUS AFFS. (Apr. 24, 2019), https://www.iwgia.org/en/colombia/3395-iw2019-colombia.html [https://perma.cc/D67K-VJCY]. The counterpart of the UNDRIP in the Organization of American States is the American Declaration on the Rights of Indigenous Peoples (2016). *See generally* G.A. Res. 2888 (XLVI-O/16), American Declaration on the Rights of Indigenous Peoples, Org. of Am. States (June 15, 2016).

92. *See generally* Indigenous and Tribal Peoples Convention, June 27, 1989, 1650 U.N.T.S. 383.

on Human Rights,[93] which gave competence to the Inter-American System on Human Rights in Colombia (Commission and Court) in 1985,[94] has made possible the protection of aboriginal land rights.[95]

Correspondingly, the Colombian Constitution, which some authors argue is the only constitution worldwide that takes indigenous rights seriously, contemplates considerable provisions regarding the protection of land rights to native communities.[96] These three international instruments and the 1991 Colombian Constitution,[97] formulate the basis to the concerns of the indigenous people's land rights:

- The protection of the special relationship that the indigenous have with their lands or territories (collectively and holistically) (Art 13. ILO; Art. 25 UNDRIP; Art. 329 Constitution);[98]

93. *See generally* G.A. Res. 2888 (XLVI-O/16), American Declaration on the Rights of Indigenous Peoples, Org. of Am. States (June 15, 2016).

94. In relation to the American Convention on Human Rights, the Colombian state ratified it in 1973 and accepted the jurisdiction of the Inter-American Commission and the Inter-American Court on Human Rights in 1985. *See B-32: American Convention on Human Rights "Pact of San Jose, Costa Rica"*, INTER-AM. COMM'N ON HUM. RTS. (Oct. 7, 2022, 12:29 PM), https://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm [https://perma.cc/N23X-95M3].

95. *Id.* It must be emphasized: it is not the convention itself, but the competence and jurisdiction that this instrument gives to the Inter-American Commission and Court on Human Rights that is the important factor. *Id.* Together, the Commission (as well as its Office of the Special Rapporteur on the Rights of Indigenous Peoples) and Court have developed a strong body of doctrine and jurisprudence to protect indigenous rights in the Americas. *Id.*

96. CONSTITUTIONALISM OF THE GLOBAL SOUTH 244–45 (Daniel Bonilla Maldonado ed., 2013) (As Maldonado states, the constitution, "established a number of rights that allow Colombian cultural minorities to develop and defend their differences. These rights can be grouped in three categories: rights of self-government, rights to political participation, and cultural rights. The Constitution of 1991 may therefore be described as a multicultural Constitution.").

97. *See generally Los Constituyentes de Colombia en 1991*, SEMANA (June 4, 2011), https://www.semana.com/nacion/articulo/los-constituyentes-colombia-1991/238043-3/ [https://perma.cc/4QCF-HDB4] (Colom.) (Worldwide, the Colombian Constitution is considered one of the "most indigenous," not only for the express recognition of indigenous rights, but also because the Constitution itself was discussed and drafted by indigenous leaders).

98. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 329; Indigenous and Tribal Peoples Convention, 1989 No. 169, art. 13, June 27, 1989, 28383 U.N.T.S. 1650; G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples, art. 25 (Sept. 13, 2007).

- The rights of ownership and possession of the lands traditionally occupied (Art. 14 ILO; Art. 26 UNDRIP);[99]

- The rights of indigenous peoples to participate in the use, management and conservation of their natural resources (Art. 15 ILO);[100]

- The rights of indigenous peoples to be consulted when their lands or resources are going to be affected by private actors (Art. 15 ILO; Arts. 29 and 32 UNDRIP; Art. 329 Constitution);[101]

- The right of aboriginal communities to restitution, and to return to their traditional lands (Art. 16 ILO; Art. 28 UNDRIP);[102]

- The right to be benefited from affirmative actions when necessary (Art. 19 ILO);[103]

- The right to self-government and territorial jurisdiction (Arts. 246, 286, 329 and 330 Constitution).[104]

In the same way, concerning the protection of aboriginal land rights in Colombia, the most important institution has been the Constitutional Court. This tribunal, which technically functions as the highest court of justice in Colombia, has been known worldwide for its proactive activity in comparison with the rest of public institutions.[105] Thus, in many situations and cases, the high tribunal has gone

99. Indigenous and Tribal Peoples Convention, *supra* note 98, at art. 14; G.A. Res. 61/295, *supra* note 98, at art. 26.

100. Indigenous and Tribal Peoples Convention, *supra* note 98, at art. 15.

101. *Id.*; G.A. Res. 61/295, art. 29, 32; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 329. The process of consultation deemed the "indigenous territory," included both state-recognized safeguards and areas of indigenous habitation outside of the safeguards, including the spaces that were associated with particular communities. *See generally* Corte Constitucional [C.C.] [Constitutional Court], noviembre 10, 1998, Sentencia T-652/98, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

102. Indigenous and Tribal Peoples Convention, *supra* note 98, at art. 16; G.A. Res. 61/295, *supra* note 98, at art. 28.

103. Indigenous and Tribal Peoples Convention, *supra* note 98, at art. 19.

104. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 246, 286, 329, 330.

105. *See* CONSTITUTIONALISM OF THE GLOBAL SOUTH, *supra* note 96, at 6. Authors such as Daniel B. Maldonado agree that the Colombian Constitutional Court is one of the most "powerful courts" in the world. *Id.* Similarly, researchers such as Bocarejo conclude that the Colombian Constitutional Court: "not only . . . has a broad competence to revise the constitutionality of laws but . . . by way of [a legal action named tutela] it can also affect the decisions of other judges. Therefore, although formally the Constitutional Court is not a Supreme Court

beyond the strict existent norms to guarantee aboriginal groups their land rights, even to the detriment of other specific population groups.[106]

For instance, in 1993, the Court conceded a *Tutela* action seeking to protect the land demands of the indigenous community "Paso Ancho" above a disputed portion of territory known as *"Chicuambe."*[107] The decision would not have been

in all fields . . . in practice, thanks to its power to override, for constitutional reasons, the decisions of the other judges, the Court has imposed itself as a super-tribunal above the other Supreme Courts." Bocarejo, *supra* note 17, at 338 (quoting Uprimny, Rodrigo, and Mauricio García. 2004. Corte Constitucional y emancipación ocial en Colombia. In *Emancipación Social Y Violencia en Colombia*, ed. García, Mauricio and Boaventura Santos. Bogotá: Norma).

106. *E.g.*, Corte Constitucional [C.C.] [Constitutional Court], mayo 12, 1993, Sentencia T-188/93, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], junio 30, 1993, Sentencia T-257/93, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], septiembre 13, 1993, Sentencia T-380/93, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], marzo 15, 1995, Sentencia C-104/95, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], abril 9, 1996, Sentencia C-138/96, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], febrero 3, 1997, Sentencia SU-039/97, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], septiembre 25, 1998, Sentencia T-525/98, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], noviembre 10, 1998, Sentencia T-652/98, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], septiembre 18, 1998, Sentencia SU-510/98, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], agosto 30, 1999, Sentencia T-634/99, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], mayo 28, 2002, Sentencia C-418/02, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], octubre 22, 2002, Sentencia C-891/02, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], octubre 17, 2003, Sentencia T-955/03, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], mayo 13, 2003, Sentencia SU-383/03, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], marzo 1, 2005, Sentencia C-180/05, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], julio 10, 2008, Sentencia T-703/08, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], enero 19, 2009, Sentencia T-013/09, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], julio 30, 2009, Sentencia T-514/09, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], agosto 5, 2010, Sentencia T-617/10, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], marzo 31, 2011, Sentencia T-235/11, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], abril 12, 2011, Sentencia T-282/11, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

107. Corte Constitucional [C.C.] [Constitutional Court], mayo 12, 1993, Sentencia T-188/93, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

so controversial if the counterpart had not been part of the same indigenous group.[108] After discussing the importance that the collective property has to the indigenous communities, as well as the special relationship that aboriginals have with the territories they inhabit, the Court stated that "[t]he fundamental right to collective property of ethnic groups implies . . . a right to the constitution of safeguards [i.e. property titles] at the head of indigenous communities."[109]

Similarly, in 2005, while studying a complaint that abstractly alleged the unconstitutionality against the main statute that regulates the processes to acquire property titles of land, [110] the Colombian Court upheld the positive discrimination of aboriginal land claims above the land demands of the rest of the agricultural inhabitants with the following reasoning:

> [W]hile in the case of the indigenous communities it is about the acquisition of collectively owned land for the constitution, restructuring, expansion, or sanitation of the reservations, and therefore a fundamental right, in the case of agricultural workers, whatever their condition, it is about mechanisms to access the right to private property, which only exceptionally has the character of fundamental.[111]

Finally, another important achievement in regards to aboriginal land claims came in 2014, when the Constitutional Court upheld specific provisions within the Statute 160, which regulated the creation of peasant reserve areas.[112] While analyzing the legal provisions that allowed the constitution of PRZs, the Court established that "prior consultation processes" (in compliance with the ILO-169/89 Covenant) should be provided to the indigenous communities affected, who have the right to decide whether or not these areas promote their interests.[113]

108. *Id.*

109. *Id.*

110. There are two main models of judicial review regarding the timing for the revision of norms: "Abstract" where a specific case to claim the unconstitutionality of a statute is not needed, and "Concrete" (such as the American model) where it is not possible to claim the unconstitutionality of a statute if this is not applied to a specific scenario or circumstances. *See* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 502, 504 (Robert C. Clark, et al. eds., 3rd ed. 2014).

111. Corte Constitucional [C.C.] [Constitutional Court], marzo 1, 2005, Sentencia C-180/05, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

112. Corte Constitucional [C.C.] [Constitutional Court], junio 11, 2014, Sentencia C-371/14, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

113. *Id.*

B. Farmers' Access to Land[114]

Compared to the indigenous situation, the legal framework that specifically protects peasants in the country is scarce. The international legal corpus has not developed a strong number of mandatory norms to protect rural inhabitants; and the Colombian legal order has not provided the specific regulations to guarantee farmers any pragmatic treatment regarding land access.[115] This situation is contradictory in a country that has an enormous percentage of rural population, which historically has been vulnerable for many contextual factors.[116] However, some specific norms and constitutional cases appear in the panorama.

On December 17th, 2018, the General Assembly of the United Nations adopted the "Declaration on the Rights of Peasants and Other People Working in Rural Areas."[117] Ironically, Colombia was among the 57 states that abstained to vote on this Declaration; but some human rights organizations argue that this instrument might have important implications among decision-makers, judges, public officers, and farmers.[118] Considering the Declaration is a unique international instrument that aims specifically to support the rights of farmers and rural workers worldwide,[119] this is an enormous achievement.

Correspondingly, regarding the domestic protection of farmers and rural workers in Colombia, concise provisions found in the 1991 Constitution contemplate some of their rights focusing on land access:

> Article 64: It is the duty of the State to promote the gradual access of agricultural workers to landed property in individual or associational form and to services . . . with the purpose of improving the incomes and quality of life of the peasants.

114. *See generally* L. 160/94, agosto 3, 1994, DIARIO OFICIAL [D.O.] (Colom.); D. 1071/15, mayo 26, 2015, DIARIO OFICIAL [D.O.] (Colom.) (Contrary to "land rights" in the indigenous case, in Colombia the farmers do not have a collective right to property. Even though Peasant Reserve Zones exist, titles to property are adjudicated individually to each farmer and his or her family.).

115. *See generally Colombia's Constitution of 1991*, *supra* note 89.

116. *See generally* Nicolò Giangrande, *Colombian Peasants Fight for Land Rights*, EQUAL TIMES (Oct. 1, 2013), https://www.equaltimes.org/colombian-peasants-fight-for-land-rights?lang=es#.YIEhFuhKjIV [https://perma.cc/X2DV-UZHR].

117. G.A. Res. 73/165, *supra* note 51, at 1.

118. *La Declaración de Derechos Campesinos sí podría proteger al campesinado colombiano*, DEJUSTICIA (Dec. 19, 2018), https://www.dejusticia.org/la-declaracion-de-derechos-campesinos-si-podria-proteger-al-campesinado-colombiano/ [https://perma.cc/DN4N-3YCY/] [hereinafter *La Declaración*].

119. G.A. Res.73/165, *supra* note 51 (The UN Declaration applies also to indigenous communities "working on the land, transhumant, nomadic and semi-nomadic communities, and the landless engaged in the above-mentioned activities.").

> Article 65: The production of food crops will benefit from the special protection of the State. For that purpose, priority will be given to the integral development of agricultural, animal husbandry, fishing, forestry, and agroindustrial activities as well as to the building of physical infrastructural projects and to land improvement.[120]

Similarly, but with less normative force than the constitutional provisions,[121] specific statutes have contemplated the land access for farmers in Colombia. Statutes 200 of 1936,[122] and 135 of 1961,[123] regulated the procedures and requirements peasants had to fulfill to formalize the land which they already were occupying. Nowadays, statute 160 of 1994 regulates the administrative procedures farmers must follow in order to formalize the territory which they already inhabit.[124]

Lastly, similar to the indigenous situation but without the same fervor, the Colombian Constitutional Court has ruled specific cases guarantying farmers' access to land, mainly in abstract review of specific norms. In 1997, for example, while studying a legal restriction to farmers' adjudication and transfer of land, the Colombian Court specified:

> The social function of property, and especially the rural one, requires that its ownership and exploitation always be oriented towards the well-being of the community; therefore, in terms of access to property, agricultural workers have been privileged not only in order to facilitate the acquisition of land, but also with the aim of providing them with a better standard of living and stimulating agricultural development and, consequently, the economic and social welfare of the country.[125]

Similarly, in 2002, when studying another unconstitutionality claim against a specific norm within the Agrarian Statute, which regulated the size of the land to be adjudicated to farmers, the Colombian Court expressed its opinion in the following terms:

> The jurisprudence has recognized that the Political Constitution of 1991 grants the farm worker and the agricultural sector in general, a treatment that is particularly different from that of other sectors of society and production that finds justification in the need to establish equality not only legal[ly] but

120. *Colombia's Constitution of 1991*, *supra* note 89, at 20.

121. *Id.* (Article 4 of the Colombian Constitution states: "The Constitution provides the norm of regulations. In all cases of incompatibility between the Constitution and the law or other legal regulations, the constitutional provisions will apply.").

122. *See generally* L. 200/36, diciembre 30, 1936, DIARIO OFICIAL [D.O.] (Colom.).

123. *See generally* L. 135/61, diciembre 15, 1961, DIARIO OFICIAL [D.O.] (Colom.).

124. *See* L. 160/94, agosto 3, 1994, DIARIO OFICIAL [D.O.] (Colom.).

125. Corte Constitucional [C.C.] [Constitutional Court], octubre, 23, 1997, Sentencia C-536/97, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

> also economic[ally], social[ly] and cultural[ly] for the protagonists of agriculture, starting from the assumption that the promotion of this activity brings with it the prosperity of other economic sectors and that the intervention of the State in this field of the economy seeks to improve the conditions of life of a community traditionally condemned to misery and social marginalization.[126]

Finally, in 2012, the Colombian Constitutional Court struck down specific norms that reformed the Agrarian Statute.[127] Such specific norms restricted farmers' access to land ownership and took away the legal protections that rural workers already had. On this occasion, the Colombian Court gave its opinion in the following terms:

> The constitutional right established in Article 64 Superior implies an unequivocal constitutional imperative that requires the progressive adoption of structural measures aimed at creating conditions for agricultural workers to own rural land. This means that the right of access to property implies not only the activation of real and personal rights that must be protected, but also the imposition of mandates that link public authorities in the design and implementation of regulatory and factual strategies to stimulate, promote and promote such access to land, but also the permanence of the peasant in it, its exploitation, its participation in the production of wealth and in the benefits of development.[128]

C. T-052/17 Case

As previously said, the land dispute between *Catatumbo* farmers and the *Barí* communities got to the Constitutional Court with a *Tutela* action sued by the indigenous group.[129] The aboriginals claimed that the National Land Agency had not extended their *resguardo* titles over the vacant land, even when this concern had

126. Corte Constitucional [C.C.] [Constitutional Court], enero, 23, 2002, Sentencia C-006/02, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

127. Corte Constitucional [C.C.] [Constitutional Court], agosto, 23, 2012, Sentencia C-644/12, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

128. *Id.*

129. *Colombia's Constitution of 1991*, *supra* note 89, at 20 (The Colombian Constitution of 1991 brought the "Tutela" as a human right and action to claim the judicial protection of fundamental rights in the article 86: "Every individual may claim legal protection before the judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whoever acts in his/her name, the immediate protection of his/her fundamental constitutional rights when the individual fears the latter may be jeopardized or threatened by the action or omission of any public authority.").

been raised more than 15 years ago.[130] As previously described, the same territory solicited for the aboriginals was also demanded by *Catatumbo* farmers, who had also inhabited the territory a long time ago.[131] The farmers demanded the creation of the *Catatumbo* PRZ: a legal figure contemplated in the Statute 160 of 1994, which allows farmers to convene together to ask collectively for an enormous area of vacant land, to be individually adjudicated.[132]

Once the case arrived at the Colombian Tribunal, the issue focused on deciding which of these two population groups had the prevalent right above the vacant land: indigenous or farmers.[133] Explained differently, the legal problem the Court analyzed was the balancing of a *resguardo* extension (as a classic collective property title), versus the adjudication of private property titles for the rural inhabitants of the *Catatumbo* region, through the constitution of a PRZ.[134]

Legally speaking, it was relatively easy for the Constitutional Court to find the normative framework, in order to give prevalence to the indigenous pretentions. All the legal background described at the beginning of this second chapter, was enough to give prevalence to the *Barí* claims above the peasants' demands. The international instruments, specifically the ILO 89 Convention, were sufficient for the Court to reason the case in favor of the native group.[135] Furthermore, the evidence showed that the indigenous group had demanded the vacant land for the extension of their already existing *resguardo* titles, before the farmers' petition for the creation of a PRZ.[136] Thus, even the principle of "first in time, first in right"[137] was somehow interpreted in favor of the *Barí* claim.[138]

The Colombian Court reasoned its decision classifying the interdependent rights of ethnic groups in four categories: the right to subsistence, the right to ethnic and cultural identity, the right to prior consultation, and the right to collective land

130. Corte Constitucional [C.C.] [Constitutional Court], febrero 3, 2017, Sentencia T-052/17, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

131. *Id.*

132. *Id.*; L. 160/94, agosto 3, 1994, DIARIO OFICIAL [D.O.] (Colom.).

133. *See* Corte Constitucional [C.C.] [Constitutional Court], febrero 3, 2017, Sentencia T-052/17, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

134. *See id.*

135. *See* Indigenous and Tribal Peoples Convention, *supra* note 98, at art. 1.

136. *See* Corte Constitucional [C.C.] [Constitutional Court], febrero 3, 2017, Sentencia T-052/17, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

137. Palmer v. R.R. Comm'n of California, 167 Cal. 163, 170–71 (1914) (offering an excellent description of the application of the principle of the Common Law right of possession or "first in time, first in right").

138. *See generally* Corte Constitucional [C.C.] [Constitutional Court], febrero 3, 2017, Sentencia T-052/17, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

ownership.[139] Similarly, the Tribunal emphasized the obligation of previous consultation when administrative measures (or public projects) might affect traditionally inhabited territories.[140] This duty of the administration to previously consult the possibly affected indigenous communities was analyzed conjunctly with the Administrative Due Process principle.[141] Finally, even when the Court found that the *Campesino* population had also been a historically vulnerable group, the Tribunal ended the "proportionality case"[142] in favor of the *Barí* group. The Court "highlighted"[143] the legitimate constitutional interest of the Catatumbo farmers in the conflict, but prioritized the indigenous claims, as expected.

IV. THE INSTITUTIONAL PREDISPOSITION AND THE NEW APPROACH

Moving forward in the analysis of land disputes between farmers and indigenous in Colombia, I argue that the institutional framework which regulates these territorial conflicts is biased. In this section of the paper, I bring up some literature to argue that the norms and public bodies (national and international) which exist to approach the conflict are predisposed to favor aboriginals' claims over farmers' demands. I explain the negative consequences of this predisposition. Also, in comparative perspective, I bring to light the necessity of approaching these land conflicts in different ways.

A. The Norm of Regulations and the Court of Courts

As a modern, democratic state, Colombia has a classical tri-division of power among the Executive, Legislative, and Judicial branches of government, with other autonomous entities.[144] The Colombian Constitution of 1991 contemplates a concentrated and centralized model of judicial review and the Constitutional Court has evolved using a strong model for revision of norms and cases—via tutelary action.[145]

139. *Id.*

140. *Id.*

141. *Colombia's Constitution of 1991*, *supra* note 89, at 7 ("Due process will be applied in all cases of legal and administrative measures.").

142. Corte Constitucional [C.C.] [Constitutional Court], febrero 3, 2017, Sentencia T-052/17, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) (finding the existence of a "proportionality case" in order to weigh and balance the conflicting interests. In *Section III*, I will criticize this approach.).

143. *Id.*

144. *Colombia's Constitution of 1991*, *supra* note 89, at 26 (Although it is not relevant to the paper, the state flow chart in Colombia groups also independent state institutions such as the Comptroller General´s Office, the Public Ministry, and the Bank of the Republic.).

145. *See id.*; *see, e.g.*, JACKSON & TUSHNET, *supra* note 110, at 501–04 (different theorists

The Constitution follows the Kelsenian model and is the supreme norm, "the norm of regulations," in terms of article four.[146] Similarly, following Marshall's model of judicial review,[147] even when the country has four "supreme" courts and does not come from the common law tradition;[148] the highest above all of these courts, more for jurisprudential development than for express disposition, is the Constitutional Court.[149] As Diego Lopez stated: "the birth of the Constitutional Court in 1991 gave a new impetus to the value of precedent in Colombia even though once again it was qualified only as a nonbinding 'auxiliary source.'"[150] Indeed, the Colombian Constitutional Court "thanks to its power to override, for constitutional reasons, the decisions of the other judges, the Court has imposed itself as a super-tribunal above the other Supreme Courts."[151]

The political model imposed in Colombia with the Constitution guaranteed human (and particularly land) rights of indigenous communities within a classical model of liberal economy.[152] This was the chosen formula that the framers opted for in 1991, with the "Social State under the Rule of Law" clause:

> Colombia is a social state under the rule of law, organized in the form of a unitary republic, decentralized, with autonomy of its territorial units, democratic, participatory, and pluralistic, based on the respect of human dignity, the work and solidarity of the individuals who belong to it, and the prevalence of the general interest.[153]

classify between centralized v. decentralized models of judicial review and strong v. soft judicial review.).

146. Andrei Marmor, *The Pure Theory of Law*, STANFORD ENCYCLOPEDIA OF PHIL. (Oct. 7, 2022, 4:17 PM), https://plato.stanford.edu/entries/lawphil-theory/#BasNor [https://perma.cc/X3HY-UETG] (For this purpose, explains the Stanford Encyclopedia of Philosophy, "an act or an event gains its legal-normative meaning by another legal norm that confers this normative meaning on it. An act can create or modify the law if it is created in accordance with another, "higher" legal norm that authorizes its creation in that way. And the "higher" legal norm, in turn, is legally valid if and only if it has been created in accord with yet another, "higher" norm that authorizes its enactment in that way. . .").

147. *See Marbury v. Madison*, OYEZ (Oct. 7, 2022, 4:10 PM), https://www.oyez.org/cases/1789-1850/5us137 [https://perma.cc/LGE6-SZL6].

148. *See Colombia's Constitution of 1991*, *supra* note 89, at 27; JORGE VÉLEZ GARCÍA, LOS DOS SISTEMAS DE DERECHO ADMINISTRATIVO 39-68 (Institución Universitaria Sergio Arboleda, 2nd ed. 1996) (In Colombia, each one of the four supreme courts has different competence: ordinary, disciplinary, administrative, and constitutional. This is due to the Civil Law tradition and particularly the French influence regarding administrative matters).

149. *See Colombia's Constitution of 1991*, *supra* note 89.

150. Bocarejo, *supra* note 17, at 338 (quoting Diego López Medina).

151. *Id.*

152. *See generally Colombia's Constitution of 1991*, *supra* note 89, at 4.

153. *Id.*

The chosen formula incarnated the values of the liberal economy trumped in the late eighteenth and early-to-mid nineteenth century by theorists such as Adam Smith, Jean-Baptiste Say, and John Stuart Mill.[154] However, at the same time, it was a political model which (through state interventionism) guaranteed social values such as pluralism, the prevalence of the general interest, solidarity and—more importantly—human dignity.[155] The 1991 constitution did this under an archetype, very characteristic of the welfare state, which was highly influenced by the Bismarckian model[156] and the New Deal policies.[157]

In regards to indigenous rights, as previously explained in the second chapter of this document, the 1991 constitution guaranteed important privileges to native communities.[158] It recognized the aboriginals (individually and collectively) as subjects that deserved meritorious and preferential treatment for their community's uniqueness, minority character, and—more importantly—distinctiveness from the rest of the national population.[159] The Colombian constitution considered the cultural singularity of aboriginal groups as the decisive factor to concede preferential treatment when "the cultural question" was confronted.[160] Possibly with the idea of positive discrimination in mind, but also with the aim to protect the exotic and scarce cultural groups, the framers of the constitution were appealed by these indigenous claims in 1991.[161] During the NCA (the National Constitutional Assembly):

> [D]ebates about multicultural reforms in Colombia, for instance, the greater success of indigenous groups in framing their demands in ways that resonated with the public and the media was not due only to their greater visibility. It was also the result of perceptions on the part of the public and political elites of [I]ndians as particular kinds of citizens that merited collective rights.[162] Moreover, ethnic recognition . . . suited the purpose of creating a "new basis

154. *See* Hans E. Jensen, *John Stuart Mill's Theories of Wealth and Income Distribution*, 59 REV. OF SOC. ECON. 491, 491–94 (2001).

155. *Colombia's Constitution of 1991*, *supra* note 89, at 17.

156. T.R. Reid, Health Care Systems—The Four Basic Models, PBS FRONTLINE (Apr. 15, 2008), https://www.pbs.org/wgbh/pages/frontline/sickaroundtheworld/countries/models.html [https://perma.cc/CE2K-29JR].

157. *See What Was the New Deal?*, THE LIVING NEW DEAL (Oct. 7, 2022, 4:18 PM), https://livingnewdeal.org/what-was-the-new-deal/ [https://perma.cc/M7RL-5GYP].

158. *See generally Colombia's Constitution of 1991*, *supra* note 89.

159. *Id.* at 57.

160. *See id.* at 23.

161. *See generally id.*

162. Juliet Hooker, *Indigenous Inclusion/Black Exclusion: Race, Ethnicity and Multicultural Citizenship in Latin America*, 37 J. LATIN AM. STUD. 285, 302 (2005).

> of legitimation and a new social contract for the Colombian nation-state."[163]

With concerns about the cultural dimension of the chosen model, which is far from creating a peaceful model of society, the Colombian Constitution molded a necessarily conflicted model of the country. The Constitution shaped a legal prototype where social and cultural tensions became the core of the system. Colombia is a state that recognized important values such as private property and cultural unity, but at the same time established a constitutional order that contemplates provisions such as collective tenure of land, diversity, and territorial autonomy to self-identified, culturally different groups.[164] There is a tension between cultural unity and cultural diversity within the 1991 Colombian Constitution:

> The clash between the constitutional recognition of the indigenous groups' diverse moral and political principles (some of them illiberal) and the liberal Bill of Rights of the political charter comprises the first conflict. The tension between the constitutional declaration that Colombia is a unitary state and the self-government and judicial powers granted to aboriginal groups composes the second clash of political values.[165]

According to Bonilla, we (Colombians) appreciate our cultural diversity and the self-determination of our aboriginal groups (politically and territorially).[166] We want to remedy the past injustices and harm committed against them for centuries.[167] On the other hand, we want our country to develop economically to achieve progress and distributive justice.[168] This contradiction is at the core of the problem and, in part, was created by the institutions we have today (i.e., the Colombian Constitution itself). [169]

Concerning the recognition of indigenous rights specifically, this cultural tension between unity and pluralism, and between individual and collective interests, had to be forever guaranteed by a living institution.[170] A corporeal guardian that, falling short from modifying this cultural tension, had to preserve it for constitutional disposition. That institution had to be independent from the rest of the

163. Bocarejo, *supra* note 17, at 337 (citation omitted).

164. *See generally* Daniel Bonilla, *The Principle of Political Unity and Cultural Minorities' Self-Government*, 17 FLA. J. INT'L L. 525 (2005).

165. *Id.* at 525–26.

166. *Id.* at 534.

167. *See id.*

168. *See id.*

169. *See id.*

170. *See generally id.*

state´s entities and, more importantly, must have the last word when misunderstandings arose. This was the constitutional mandate to the Court in cultural matters: the maximum tribunal appeared not just as an organ of last resort within the national judicial branch, but also as a "guardian of the cultural equilibrium" created with the 1991 Constitution made by the National Constitutional Assembly.[171] "Since then, the court has consistently put forward representations of the Colombian nation, with the unit of a singular Colombian community continually mobilizing within larger claims of plurality."[172]

> In the last thirteen years [31 now] the Constitutional Court has been the public institution that has most actively tried to solve the theoretical and practical questions generated by the tension between the principle of political unity and cultural minorities' self-government rights. The conceptual framework developed by the Court has determined the character of the public debate about the content and limits of cultural minorities' political and legal autonomy.[173]

However, the Colombian Constitutional Court went beyond the formal vigilance of the cultural tension. In a risky and radical piece of judicial activism towards the materialization of the "Social State under the Rule of Law" clause, and the aboriginal land rights consigned in the constitution, the proactive Court began progressively to incline the balance in favor of indigenous communities.[174] In less than 10 years of its existence, the Court went from cases where indigenous claims were completely ignored to cases where aboriginal pretentions were favored with absolutist reasoning. First, in case T-428/92, "aboriginal groups' political autonomy, although a fundamental dimension of the conflict, is ignored by the Court."[175] Second, in case T-405/93, "indigenous communities' political autonomy is radically restricted and implausibly subordinated to other constitutional values."[176] Third, in cases T-257/93, T-380/93, SU-039/97 and T-652/98, "indigenous communities' political autonomy are supported, although in some cases using paternalistic arguments."[177]

171. *Colombia's Constitution of 1991*, *supra* note 89, at 56. Article 241 of the Colombian Constitution states: "The safeguarding of the integrity and supremacy of the Constitution is entrusted to the Constitutional Court . . . " CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 241.

172. Bocarejo, *supra* note 17, at 337 (internal citations omitted).

173. Bonilla, *supra* note 164, at 535.

174. *See id.* at 526.

175. *Id.*

176. *Id.*

177. *Id.*

In addition to the newly created constitution, other non-legal factors created the possibility of the quick progression of the jurisprudence regarding aboriginal land pretentions in Colombia. For anthropologists such as Diana Bocarejo, the judicial involvement of professionals different than lawyers (e.g. via *amicus curiae*/ expert witness)[178] and the imagined version of the "indigenous" people (compared to the rest of the nation) was crucial:

> [F]inal judgments . . . shape and articulate indigenous territories and identities. In this manner, the Constitutional Court, the justices, and lawyers involved are active participants in the consolidation of multiculturalism . . . Judgments constantly use the notion of national majority to denote ideas of hybridity and mestizaje, while they invoke the notion of radical otherness in the case of indigenous peoples. This all becomes legally translated into the equation of "more culture, more autonomy."[179]

Additionally, two specific assumptions made it possible for the Colombian Court to move forward in the protection of indigenous communities: the conjecture that native groups were exclusive protectors of the forest and the environment; and the presumption that the aboriginals had always (i.e. since pre-Hispanic times) inhabited the pretended land – as being part of it.[180] Because of the special relation that natives claimed to have with the territory (different from the western perspective of property), it supported the idea that, unlike the rest of the national population, their property rights were more "altruistic." Quickly, the opinion that aboriginals took better care of their inhabited places than the non-indigenous, generalized.[181] Hence, contrary to the urban citizen, but also to the rural but non-indigenous inhabitant, the aboriginal was conceived as a natural deserver of better rights:

> Colombian Constitutional Court judgments treat indigenous peoples as a cultural/ biological species that the state has to protect as it does nature . . . Culture, biology, and habitat are inextricably intertwined. Thus, a particular group of people is supposed to be bound to a territory for the continuation of its

178. This phenomenon can be appreciated also in other countries, where non-lawyer professionals have an important role guiding the courts with their specialized knowledge. Furthermore, in countries such as Canada, this relation with non-legal professionals is two-sided: from social professionals to courts and vice versa. MCHUGH, *supra* note 1, at 243.

179. *Id.* at 339–41 (internal citation omitted).

180. *Id.* at 343; Corte Constitucional [C.C.] [Constitutional Court], enero 16, 1995, Sentencia T-007/95, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

181. Anastasia Moloney, *Defending the Amazon: How Indigenous Culture Protects Colombia's Rainforest*, WORLD ECON. F. (Feb. 10, 2022), https://www.weforum.org/agenda/2022/02/amazon-indigenous-culture-colombia-rainforest-forest/ [https://perma.cc/T8CE-3BGA].

biological and cultural existence.[182]

Contrary to the rest of the property rights of the general population, the land rights of the native communities were considered fundamental.[183] Judicially speaking, it meant that just the indigenous could go to courts to claim the property they had (or pretended to have) through an expedite process (i.e. via tutelary action)[184]

To this end, the Convention ILO 169 gave to the Court a strong reason to super-guarantee to natives their land rights when they were treated by "external actors," even before the damage itself occurred[185]: "There are international agreements approved by Congress where the special relationship between indigenous communities and the territory they inhabit is highlighted."[186] Together, the Convention ILO 169 and the idea that indigenous land tenure was fundamental (i.e. essential), allowed the Court to immortalize natives' land claims

On the other hand, contrary to the native's case, peasant's property (or access to it) was not considered fundamental.[187] Nowadays, legally speaking, it means that farmers cannot demand their access to land via tutelary actions.[188] Furthermore, it means that even when indigenous people and farmers share similar characteristics, their rights are not protected in the same way.[189] Constitutionally and jurisprudentially there is an unequal treatment that tries to justify itself by the preference for indigenous groups – the circular reasoning of the Colombian Court has not been clear enough when reasoning this discrimination:

> There are few Constitutional Court judgments explicitly addressing the issue of equality seen from the point of view of those unmarked citizens [farmers] . . . Peasants do not have the same opportunities regarding the access to land that indigenous groups have, nor are they believed to have the same close connection with territory, as that connection is thought to be a quality

182. Bocarejo, *supra* note 17, at 341–42.

183. *Id.* at 356.

184. Within the Colombian constitutionalism, the consequence to consider that a specific right has the character of "Fundamental," means that this right can be protected / enforced by tutelary action: *"*Every individual may claim legal protection before the judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whoever acts in his/her name, the immediate protection of his/her fundamental constitutional rights when the individual fears the latter may be jeopardized or threatened by the action or omission of any public authority." CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 86.

185. Bocarejo, *supra* note 17, at 343.

186. *Id.* at 343–44.

187. *Id.* at 350.

188. *Id.*

189. *Id.*

> uniquely present in indigenous communities. As such, territory is only considered a Fundamental Right when indigenous peoples enter the scene.[190]

B. The International Proclivity

Concerning the international panorama already brought forth in the second chapter of this document, it is not difficult to appreciate the institutional tendency to favor indigenous communities over peasants. It is understandable because, contrary to the peasants' rights which were given the protection of a recently created international instrument,[191] the aboriginal groups have a broader safeguard of norms. Considering the international obligations binding Colombia in human rights matters, it is logical to understand why the national courts and the Constitutional Tribunal consider the analysis stated by the Inter-American Court on aboriginal rights recognition in their opinions.[192]

> Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival . . . [193]

Similarly, comparing the natives' situation with the farmers' case, it is reasonable to understand why many authors foresee important gaps in the protection of human rights, not just in Colombia but also in other states where rural populations exist:

> Reality has proved that the current international human rights norms offer peasants insufficient protection. One of the causes is the existence of an implementation gap, that is, human rights are not properly ensured by states (or sometimes not ensured at all). Another cause of insufficient protection is the existence of a normative gap in the right to property, which in the case of peasants expresses itself as follows: although peasants are entitled to the right to property, it does not protect peasants' informal or the customary

190. *Id.* (quoting Corte Constitucional [C.C.] [Constitutional Court], marzo 1, 2005, Sentencia C-180/05, Gaceta de la Corte Constitucional [G.C.C.] (Colom.)).

191. *See generally* G.A. Res. 73/165, supra note 51.

192. *See generally* Corte Constitucional [C.C.] [Constitutional Court], noviembre 15, 2018, Sentencia SU-123/18, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) (examining decisions of the Inter-American Court); Corte Constitucional [C.C.] [Constitutional Court], julio 9, 2014, Sentencia C-463/14, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) (examining decisions of the Inter-American Court); Corte Constitucional [C.C.] [Constitutional Court], junio 13, 2014, Sentencia T-379/14, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) (quoting Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001)).

193. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, No. 79 at ¶ 149.

> tenure of land (individually or collectively) as states' eminent domain powers have not been limited in relation to their access to land.[194]

C. The Misconceptions and the Consequences

Institutional misconceptions about indigenous groups and how their land rights should be protected has produced conflict in Colombia. Moreover, the legal framework constructed to grant territorial rights to aboriginals has had unexpected impacts on native groups.

The problem is not constitutional or judicial recognition of cultural differences of aboriginal groups. Such recognition is a *sine qua non* of peace and legitimacy in every multicultural state.[195] However, problems arise when cultural recognition is the standard used when deciding whether or not to grant land rights to indigenous people. After analyzing the inclusion of indigenous people and the exclusion of black people in Latin America, Hooker concluded: "[T]he main cause of the disparity [between aboriginals and blacks] is the fact that collective rights are adjudicated on the basis of possessing a distinct group identity defined in cultural or ethnic terms." [196]

Legal or judicial attribution of land rights based on the sole criteria of being, or identifying as, culturally unique compared to the rest of the national population, produces land and resource conflicts even in countries with numerous native groups.[197] For example, in Bolivia, where some estimates indicate almost 50% of the population are members of a recognized indigenous group,[198] Fontana thinks "the new type of land governance – which introduced identarian criteria for the allocation of property rights – is one of the main factors that can explain the rise of new ethnic-based intra-societal tensions."[199]

Moreover, "cultural uniqueness" as a standard to adjudicate territorial rights, which legally translates into "more cultural difference equals more land," implic-

194. This is crucially important in the Colombian case, considering most of the rural land tenure is informal. Similarly, the Colombian Civil Code states as follows: "All the lands that, being located within the territorial limits, have no other owner are property of the Union." CÓDIGO CIVIL (Civil Code) [C.C.] art. 675 (Colom.).

195. CONCILIATION RES., LEGITIMACY AND PEACE PROCESSES FROM COERCION TO CONSENT 16 (2014), https://rc-services-assets.s3.eu-west-1.amazonaws.com/s3fs-public/Legitimacy_and_peace_processes_From_coercion_to_consent_Accord_Issue_25.pdf [https://perma.cc/YX6E-ZAW4].

196. Hooker, *supra* note 162, at 285.

197. *See generally* Fontana, *supra* note 70.

198. *Indigenous Peoples in Bolivia*, IWGIA (Oct. 7, 2022, 3:59 PM), https://www.iwgia.org/en/bolivia.html [https://perma.cc/ZU6F-748B].

199. Fontana, *supra* note 70, at 313.

itly has some misconceptions that affect society as a whole. Some of these preconceived frameworks include: (1) the idea that national institutions and the rest of the national population are "non-ethnic"; (2) denial that "the nation" is a historical and non-uniform product of miscegenation (intrinsically related with the first preconception); (3) the self-adjudicative authority of institutions to grant rights based on these misconceptions; (4) the fixed idea that ethnic groups are pre-modern (implicit discrimination);[200] and (5) the idea that aboriginal culture (and their existence) can be protected only in isolation from the rest of the national population.[201]

The last misconception is commonly assumed by the Colombian Tribunal. It is based on the "strong association between indigeneity and territorial belonging . . . [and it] may rest in very static notions of culture that can have negative consequences for indigenous peoples."[202] In Colombia, the Constitutional Court consistently supports the false belief that aboriginals need a separate space to live in to avoid cultural extinction.[203] Instead of protecting the native groups, anthropologist Bocarejo believes this fallacy segregates them in unanticipated ways:

> The court can only portray change as acculturation, assuming that a group's conservation—as well as that of the environment—depends on the isolation and the protection of those people and places from external influence. The Western romantic idea of indigenous peoples derives from "the primitivist yearning for unbroken communities."[204]

According to Bocarejo, "[l]inking indigenous groups to a particular territory through legal measures encloses differences spatially" and can be a way of delimiting access to minority rights.[205] The court can utilize spatial exceptionalism requiring indigenous people live within a specified territory to exercise "differential" rights.[206]

Appreciated from the farmers' perspective, the logic of "more different equals more land," is seen as discriminative and segregationist.[207] For instance, as Rincón García wrote when analyzing land disputes between indigenous, farmers, and afro-descendants in Colombia, these institutional approaches aggravate the inequalities existing in the rurality.[208] It promotes the idea that the state prefers some

200. *See generally* Wsevolod W. Isajiw, *Approaches to Ethnic Conflict Resolution: Paradigms and Principles*, 24 INT. J. INTERCULT. RELS. 105 (2000).

201. *See* Bocarejo, *supra* note 17, at 340–41.

202. *Id.* at 357.

203. *See generally id.*

204. *Id.* at 342–43 (internal citation omitted).

205. *Id.* at 347.

206. *Id.*

207. *See generally* García, *supra* note 15.

208. *See generally id.*

groups of citizens above others because of their cultural traits. When the institutions satisfy the social needs (land adjudication) of just one group of the population, whatever the argument, it generates reactions in the rest of the society.[209] In the southwestern department of the country, for example, consequences resulted in farmers (and afro-descendants) beginning to identify themselves as indigenous (individually or collectively), to access land, commodities and public services (e.g., health, education).[210] Thus, the core of the problem was the formulation of public policies based in concepts of "positive" discrimination and affirmative actions.[211] When applied, these policies generate collateral and unforeseen damages to other vulnerable rural inhabitants (i.e., farmers).[212]

D. The Alternatives – 3 Steps

After having explained the general characterization of the conflict between farmers and the indigenous peoples in Colombia, as well as the legal and theoretical framework which regulates it, I will now present alternative approaches to these cases. It is not my aim to bring authoritarian reasoning or policies, but to enlighten the scenario with other options. For this purpose, comparative perspectives found in other cases can be useful. Of course, it has to be said that usually, the best approach is the one that emerges from the context itself, and every new approach must be tried carefully (not every context, institution, situation, or case is the same). However, the lines of attack and reasoning used by different theorists and different institutions could be useful, in particular to the Colombian Constitutional Court, which commonly is open to comparative and multidisciplinary approaches.[213]

Simply for expositive purposes, I divide the alternatives in three steps: first, regarding the way indigenous issues can be appreciated; second, relating to the reconsideration of farmers' claims; and third, analyzing how aboriginals' and farmers' demands can be studied collectively.

209. *See generally id.*

210. *See generally id.*

211. *Id.* at 84.

212. *Id.*

213. *See e.g.* Corte Constitucional [C.C.] [Constitutional Court], julio 26, 2011, Sentencia C-577/11, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], octubre 22, 1997, Sentencia C-239/97, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], junio 14, 1991, Sentencia C-355/06, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) (When reasoning "hard cases" it is a common practice of the Colombian Constitutional Court to reason its decisions using comparative approaches, consulting international law, and the regulations from other countries. Worldwide, the Colombian Court is one of the most rigorous tribunals which has taken advantage of comparative studies.).

1. First: Think Again

In order to approach the land conflicts between farmers and indigenous in Colombia we should redefine the meaning of indigenous. Certainly, as explained in the subtitle above, the institutionalized misconceptions about what the aboriginals are, what they really claim (compared to farmers' claims), and what they deserve (e.g., property, recognition, land rights), has caused social problems. One of the above-studied misconceptions when talking about natives in Colombia, is the automatic association between culture, identity and territory.[214] Thus, anthropologist Bocarejo argues that the term itself should be understood as non-static, and highly influenced by the participant scholars, judges, and other actors (e.g., mass media, politicians, religious leaders, etc.).[215]

> The definition of who is an indigenous subject, a question studied by many scholars in many areas of the world was addressed in Colombia to a large extent by using spatial belonging as a crucial identifier. Following authors such as Biolsi, my point is not that the definition of an indigenous subject in Colombia or in any other part of the world is "merely an empty sign produced by discourse, [but that] this category of identity is in historical flux, and that the category is in part defined by one's specific scholarly interests in native people."[216]

Furthermore, Bocarejo thinks that the "indigenous sovereignty" should be approached differently.[217] An alternative understanding of the term will allow the institutions to approach land conflicts in another way.[218] It can provide the necessary tools to allow the harmonic exercise of aboriginal rights within the society itself, and more importantly, without affecting farmers' rights:

> Hence, Colombia needs a better conceptualization of indigenous sovereignty, one that, as Bruyneel states, allows for a "third space of sovereignty that resides neither simply inside nor outside of state political systems, but rather exists on these very boundaries." The typology/topology binary built on notions of cultural preservation, habitats, and acculturation may not provide such a third space.[219]

214. *See generally* Bocarejo, *supra* note 17.
215. *See id.* at 347–49.
216. *Id.* at 348 (internal citations omitted).
217. *Id.* at 358.
218. *Id.* at 356.
219. *Id.* at 358 (internal citations omitted).

Other important points to consider when appreciating native land claims should be the difference that these demands carry concerning rights. The consequence of assuming that aboriginal claims must necessarily be translated into absolute rights has caused problems. The common logic in both Colombia and other South American countries has been to have a responsive model of institutionalism, where native groups demand and the state adapts to provide.[220] However, Fontana proposes alternative models of analyzing indigenous petitions, where factors such as political power, legitimacy, and business interest must be considered in a reciprocal relation (from institutions to aboriginals and vice versa)[221]:

> [R]ecognition [of] claims cannot be understood only through the lenses of rights. The dimensions of power and interests must be considered as well. Interpretative frameworks employed to understand Latin American ethno-cultural movements often assume an empirical coincidence between claims and rights: . . . Although there is often a complementarity between rights and claims, I consider it useful to keep them separated at the analytical level. I argue that social movements' claims can be in the name of expanding the access to certain rights, but not always and not only . . . The mechanism would thus be a two-way flow: from claims to norms, but also from norms to claims.[222]

Alternatively, the approaches that other countries have taken when deciding about indigenous land conflicts could be crucial. For instance, Canada, New Zealand, Norway, and the United States of America, provide important examples regarding institutional approaches to analyze native land claims.

Concerning the early case law from the United States, for example, "[T]he Proclamation as a starting point for discussing Aboriginal title"[223] embedded in the Marshall Decisions[224] is the most important heritage to the world regarding judicial

220. *Id.* at 313–14.

221. *Id.* at 311–12.

222. *Id.* at 314–15.

223. THOMAS ISAAC, ABORIGINAL LAW: COMMENTARY AND ANALYSIS 75–76 (Karen Bolstad ed., 2012). Regarding this concept in common law countries, the Canadian description is useful to the point. *Id.* Lamer C.J., delivering the majority judgment in *Delgamuukw*, affirmed earlier jurisprudence and held that Aboriginal title is a *sui generis* interest in the land and is therefore the "unifying principle underlying the various dimensions of that title." *Id.* Lamer C.J. identified three aspects of Aboriginal title: (a) its inalienability (lands held pursuant to Aboriginal title can only be sold, transferred, or surrendered to the Crown), (b) its source (The *Proclamation* simply recognizes that Aboriginal title arises from the prior occupation of Canada by Aboriginal peoples), and c) its communal nature (Aboriginal title is held communally)). *Id.*

224. *See generally* Johnson v. M'Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832).

approaches to native conflicts.[225] Contrary to the Colombian case, where the prehistorical occupation (pre-Hispanic) of land is considered when recognizing aboriginal land claims, in the United States the source comes from the discovery itself, which was given to the crown, and to the government after independence. Thus, aboriginal groups are seen as "domestic nations" dependent of the United States. [226] The discovery system creates an interesting phenomenon where the authority embedded in the discoverer/occupant is automatically transferred to the new government after the independence process.

> So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the king had a right to grant, or to reserve for the Indians.[227]

Furthermore,

> It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can with strict accuracy be denominated foreign nations. They may more correctly perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will . . . they are in a state of pupilage.[228]

Coakley, who analyzed the claims for "aboriginal title" in New Zealand, Canada and Norway, provides another example arguing that the terms indigenous, aboriginal, or native have evaluative connotations.[229] The author believes that the indigenous peoples' land claims share the same history as other self-identified cultural groups who seek restitution for their aboriginal titles.[230] Thus, explaining the cases of the Maori, the Inuit, and the Saami people, he argues that some way of

225. *See generally* ISAAC, *supra* note 223, at 74–77.

226. Johnson, 21 U.S. at 573. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it.

227. *Id.* at 596.

228. Cherokee Nation, 30 U.S. at 10.

229. John Coakley, *Approaches to the Resolution of Ethnic Conflict: The Strategy of Non-territorial Autonomy*, 15 INT'L POLIT. SCI. REV. 297, 308 (1994).

230. *See generally id.*

non-territorial autonomy could be the best solution to harmonize and balance aboriginal land claims within modern states.[231] "These three examples have in common the fact that in each case a marginal population that poses no threat to the dominance of the majority has been able to secure institutional recognition of certain privileges."[232] "The inevitable intermingling of this group with the dominant majority frequently entails consideration of non-territorial autonomy as a solution."[233]

2. Reconsider Farmers' Land Claims

It is critical to reconsider farmers' land claims. It is important to understand peasants' land demands to prevent (or resolve) social conflicts. As I previously explained in the first and second chapter of this document, it is paradoxical that the Colombian peasants have been historically unattended by the state, considering their magnitude and their importance within the national economy. Furthermore, it is important to carefully listen to farmers' claims, because their petitions could be the source of solutions to the armed conflict that has been going on in rural areas of the country. Turning a deaf ear to farmers' land demands has affected them, the state itself, and society in general.

When analyzing farmers' land claims, political scientists and anthropologists argue that it is important to consider PRZs as an alternative way to order the territory, suggested by rural communities themselves. Thus, the proposal of a PRZ for the rural communities should be understood as the result of their political and social organization. It should be appreciated as the product of a dialectic dialogue between the state and the farmers. Therefore, some authors argue, the PRZ proposal should be understood as a "Great Collective Person."[234]

3. Weigh and Balance Again

Balancing and proportionality is used by many courts of last resort around the world, it is also used by the Colombian Constitutional Court.[235] Specifically, countries such as Canada, Israel, India, Hong Kong, New Zealand, the United Kingdom or South Africa, contemplate within their constitutionalism specific provisions / cases where rights can be limited.[236] This approach is based on the

231. *Id.* at 306–10.
232. *Id.* at 309.
233. *Id.*
234. Falla & Castrillón, *supra* note 78, at 46.
235. JACKSON & TUSHNET, *supra* note 110, at 694–716.
236. *See id.*

general principle that rights are not absolute.[237]

In Colombia, the "test of proportionality" has also been applied in hard cases with some varieties. For instance, the decisions regulating euthanasia and abortion have been clear examples where the Constitutional Court has weighed and balanced confronted rights.[238] Similarly, as previously explained in the first section of this document, the Court announced the application of proportionality tools when deciding the T-052/17 case regarding the land dispute between farmers and the indigenous in the *Catatumbo*.[239] However, it is my critique in this specific case, that even when the court announced it was going to weigh and balance the confronted rights (or groups of people), it finished reasoning the case based on imperative arguments of pre-Hispanic indigenous occupancy as the source of property.[240] Similarly, even when the Court "highlighted the legitimate constitutional interest of the rural community of *Catatumbo* . . . and warned of the need to take into account the importance of this interest recognized by the Constitution, in an adequate and prudent weighting . . . " at the end, it concluded giving absolute prevalence to the legal and theoretical framework above-explained in the second section of this paper which was biased to favor aboriginal groups.[241]

As an alternative approach to the land disputes between farmers and the indigenous in Colombia, for example, the Canadian approach could be of more use. In that case, and referring to proportionality tools, the Supreme Court established that "[l]ike other Aboriginal rights, Aboriginal Title is not absolute and can be infringed by the Crown, federal and provincial, provided that the infringement is justified."[242] Specifically, when analyzing the *Delgamuukw* case, the Supreme Court clearly stated two conflicting premises: (a) Aboriginal peoples' historic occupation of Canada and the dispossession of their lands by the Crown at the time of sovereignty, while at the same time (b) the reality of Crown sovereignty as a starting point.[243]

> First, the infringement of Aboriginal title, like Aboriginal rights generally, must be in furtherance of a compelling and substantial legislative objective

237. *Id.* at 694, 695.

238. Corte Constitucional [C.C.] [Constitutional Court], octubre 22, 1997, Sentencia C-239/97, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], junio 14, 1991, Sentencia C-355/06, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

239. Corte Constitucional [C.C.] [Constitutional Court], febrero 3, 2017, Sentencia T-052/17, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

240. *Id.*

241. *Id.*

242. ISAAC, *supra* note 223, at 84.

243. *Id.*

> that is directed at either one of the purposes underlying the recognition and affirmation of Aboriginal rights in subsection 35(1), which are (a) the recognition of the prior occupation of North America by Aboriginal peoples, and (b) the reconciliation of Aboriginal prior occupation with the assertion of Crown sovereignty . . . The second part of the justification test requires an assessment of whether the infringement is consistent with what is framed as the special trust-like relationship between the Crown and Aboriginal peoples and the "honor of the Crown," which includes whether the Aboriginal peoples in question had been consulted in respect of such infringement and whether the right was infringed in a minimized manner . . . [244]

Correspondingly, when deliberating on the best approach to analyze and solve these kinds of social conflicts, it is important to remember that alternative dispute resolution mechanisms and other non-judicial approaches could be useful; thus, considering the impacts that political backgrounds as well as the cultural traits of the involved parties could have.[245] Balancing rights are best embodied in the Supreme Court of Canada's "consistent reminder that negotiations are the best means of achieving reconciliation, rather than relying on the courts to sort out the relationship between Aboriginal peoples, the Crown and Canadians generally."[246] In the end, finding common traits rather than differences between the confronted parties could be useful. Hence, the inhabitance of a shared territory, the similar socio-economic conditions, the same suffered victimizations due to the national armed conflict, and a combined vision of development can be the common roots for mutually beneficial projects. For instance, the sociologist Fernandez argues that environmental protection could be a common goal of the *Barí* people and *Catatumbo's* farmers.[247]

V. CONCLUSION

Land disputes between farmers and indigenous peoples are not something new in Colombia. Different cases and situations have been studied and approached differently by scholars and institutions. The phenomenon has many actors and factors involved that make it difficult to find perfect solutions. The *Catatumbo* case with the *Barí* peoples and rural peasants is just one example of how unsuccessful an institutional approach can be after having tried tools of last resort.[248]

The case in Norte de Santander is iconic for many reasons. First of all, it has the involved parties which motivates this investigative document: aboriginals and

244. *Id.* at 84–86.
245. *Id.* at 87–88.
246. *Id.*
247. Fenández Pinto, *supra* note 15, at 88.
248. *See generally id.*

peasants.[249] Second, both populations have been historically vulnerable in the country.[250] Third, the scenario itself; the region borders Venezuela and it has been somewhat unexplored by the state.[251] Fourth, the lack of institutional presence which implicitly creates legitimacy problems and complicates every possible governmental intervention.[252] Fifth, the aggravation of the situation with the drug business and the armed conflict still going on in the region.[253] Last but not least, the failed intervention of the Constitutional Court as the maximum tribunal.[254]

In the *Catatumbo* region and other parts of the country, the theoretical and legal framework used to approach land conflicts between farmers and natives shows a clear disproportionality. Contrary to the farmers' situation, the indigenous peoples enjoy a full body of norms and regulations that nationally and internationally protect them. Furthermore, the governmental rejection of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas shows that there is not even the political will to attend farmers' claims to access their already inhabited land.[255] Consequently, while peasants' demands are studied through the "common lens" of every citizen, indigenous claims are always appreciated in a responsive mood: a state that has to provide rights for legal disposition. There is an unequal treatment of farmers' and indigenous' petitions predisposed by the institutionalism itself.

The case studied by the Constitutional Court in 2017, trying to resolve the land dispute between farmers and indigenous peoples, clearly shows the predisposition of institutions to favor aboriginals exclusively.[256] Through a historical analysis of the 1991 Constitution and the jurisprudential construction of the Colombian Court, I explained why farmers' claims to access land are not as appreciated as natives' claims are. Furthermore, I argued that there are clear misconceptions about who the *indigenous peoples* are, what they are requesting and what the state should do. One of my criticisms here is related to the attribution of land rights exclusively based on the existence of different cultural traits. This has been one of the reasons why conflicts have erupted: because farmers see the unequal treatment as unfair.

It is necessary to approach indigenous claims differently. Similarly, it is important to reconsider farmers' demands with a new institutional attitude: open to find balanced solutions. Researching on multidisciplinary studies, it is urgent to

249. *See generally id.*
250. *See generally id.*
251. *See generally id.*
252. *See generally id.*
253. *See generally id.*
254. *See generally id.*
255. G.A. Res. 73/165, *supra* note 51; *La Declaración*, *supra* note 118.
256. *See* Corte Constitucional [C.C.] [Constitutional Court], febrero 3, 2017, Sentencia T-052/17, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

consider sociological and anthropological criteria to better understand the claims of both parties: farmers and aboriginals. Similarly, in a comparative perspective, it is important to appreciate critically the proportionality tests that the Constitutional Court has used to decide land disputes between aboriginals and peasants. Here, the examples of New Zealand, the United States of America, and, more specifically, the Canadian approaches regarding indigenous land claims could bring some light to the Colombian situation.