4

Indigenous Peoples and Territorial Rights in Colombia

Advances and Challenges in the "Implementation Gap"

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Introduction

Colombia has some of the most robust and secure land tenure regimes in Latin America, with full rights to land ownership, access, withdrawal, management, exclusion, due process, and compensation (RRI, 2014, 2015, 2018; Velázquez Ruiz, 2018).[1] However, the recognition of Indigenous Peoples' collective land rights has advanced in a context of intense land conflict, driven by a profound inequality to land access. Colombia has the highest concentration of land ownership in the world: one percent of landowners own more than 80 percent of the land, and the remaining 99 percent own less than 20 percent (Faguet et al., 2016; Guereña, 2017).

In 1991, the Colombian National Political Constitution (NPC) recognized and protected a comprehensive set of collective rights for Indigenous Peoples: to land, culture, identity, self-government, autonomy, and political participation. The NPC ratified the collective property rights of Indigenous Peoples under the *resguardo*, an administrative

[1] RRI's Tenure Tracking analysis defines three typologies of tenure categories: Category 1, administered by the government (lands or forests under this category are legally claimed as exclusively belonging to the state); Category 2, designated for communities (national law recognizes communities' rights to access and withdrawal, or to exclude others, and their participation in the management of lands and/or forests); and, Category 3, ownership (lands or forests are owned communities where their rights of access, withdrawal, management, exclusion, due process, and compensation are legally recognized for an unlimited duration). Alienation rights (whether through sale, lease, or use as collateral) are not required for communities to be classified as land or forest owners under this framework.

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regime for Indigenous Peoples' communal lands, born during colonial times. *Resguardo* is defined as a "legal and socio-political institution of special character, formed by one or more Indigenous communities, which with a collective property title (equivalent in guarantees to private property), own their territory, governed by an autonomous organization protected by the Indigenous jurisdiction and its own regulatory system" (Decree 2164 of 1995 compiled in Decree 1071 of 2015).

Article 7 of the NPC provides that "The State recognizes and protects the ethnic and cultural diversity of the Colombian Nation" (Corte Constitutional, 2021), a shift from the assimilationist 1886 Constitution and policies aiming to fragment and dispossess Indigenous Peoples of their collective ancestral lands (Semper, 2018). However, the promise of the NPC was hampered by a long-lasting internal armed conflict over land access and use, violence, and forced displacement of Indigenous and other rural communities. The 2016 Peace Accord sought to address land disputes. But the implementation of the Peace Accord and its promise of land justice was hampered by delays, political polarization, and several scandals over the management of public resources. In some rural areas, violence has again seen a resurgence.

This chapter details how land rights remain a contentious subject in Colombia: this issue is historically contested and rooted in enduring land disputes between state actors and Indigenous communities. The current land rights framework emerged from both the legislative actions and the socio-political mobilization of Indigenous Peoples, the latter playing a critical role in shaping land policy and achieving the restitution and recognition of their ancestral lands.

The chapter documents the legal and political strategies used by Indigenous Peoples to secure collective land rights in this contested setting. By taking a historical perspective, this chapter traces the structural factors affecting land rights implementation, and the repeating cycles of recognition, poor performance, and limitations on the enjoyment of tenure rights. Finally, the chapter explores the challenges and opportunities for land rights from the current Peace Accord.

Achieving Recognition of Indigenous Peoples' Collective Land Rights: A Historical Perspective

To understand the contradictions in Colombia's Indigenous land rights framework, one must look at the historical and political factors driving change and the structural factors that make Indigenous land rights

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contentious. Villa and Houghton (2004) discussed three territorial and population dynamics that have been affecting Indigenous land rights since the nineteenth century Republican era. The first dynamic began with Law 11 of 1821, which considered Indigenous Peoples as free and equal to the rest of country's population and ordered the dismantling and distribution of *resguardo* lands to other populations. This legislation displaced many Indigenous communities from their lands and turned people into day laborers and sharecroppers. The second dynamic was the expansion of the agricultural frontier and peasant colonization resulting from the civil violence in the 1950s. A third dynamic emerged during the 1970s agrarian crisis, expanding the planting of illegal crops, such as coca leaves and opium poppy, often around Indigenous territories, and catalyzing new forms of violence against Indigenous Peoples.

Muñoz Onofre (2016) argued that Colombia's land rights framework is embedded in a socio-economic model focused on the exploitation of natural resources, which ignores the existence and validity of Indigenous Peoples' territorial management perspectives, and thus leading to conflicts.

The following sections provide a chronology of major policies on Indigenous Peoples' rights to their ancestral lands from the Republican period until the late 1900s, showing the repeating cycles of recognition, poor performance, and limitations on the enjoyment of tenure rights.

The Republic Contexts

The Spanish colonial power imposed a new regime atop the social-economic, political, and communal land systems of Indigenous populations. Within this period, the *resguardo* emerged as a colonial model of social organization, administration, and control of territory, under which the colonial power assigned *resguardo* lands to Indigenous populations. The *resguardo* was a legislative initiative for the protection of subjugated Indigenous populations that encouraged their demographic recovery, but all the while liberated other lands for distribution to non-Indigenous settlers. In the *resguardo*, the community exercised full control and full domain for the use of the land and was protected against selling or leasing (Mayorga Garcia, 2004). Although Indigenous Peoples during the colonial period resisted the *resguardo* system, today the *resguardo* constitutes the strongest legal tenure regime for Indigenous Peoples in Colombia.

In the context of the New Republic after independence, liberal principles promoted the free market and the individual rights of citizens,

which affected Indigenous Peoples' collective tenure systems (Semper, 2018). The clash of ideological principles between individual and communal property rights flourished in a series of contradictory statutes that, while recognizing the Indigenous populations' rights to their communal lands, equally defined mechanisms for the erosion of the communal property – such is the case of Articles 3 and 11 of Law 1821, which ordered the extinction of Indigenous Peoples' obligation to pay tributes, while promoting the distribution of *resguardo* lands to non-Indigenous individuals respectively (Morales Gomez, 1979). Table 4.1 lists the key Indigenous policies created during the New Republic that either recognized or abolished the special status of Indigenous Peoples and their collective tenure rights.

Law 89 of 1890 was an important legal antecedent for Indigenous land rights: Articles 14 to 22 enshrined Indigenous Peoples' collective ownership over the *resguardo*, and the recognition of Indigenous councils (*Cabildos*)[2] as legitimate self-governance systems (Rodriguez, 2017; Ulloa, 2010). Despite the discriminatory content of the law against Indigenous Peoples and its integrationist intention, for a long time this law was the only legal tool for the vindication of Indigenous territorial rights, ethnic identity, and autonomy and governance. In the early twentieth century, Law 89 of 1890 became the major legal precedent for Indigenous Peoples to recover usurped lands in the next century (see the later section on Indigenous resistance and mobilization). In 1996, Constitutional Court Ruling No. C-139/96 declared the unconstitutionality of several articles of Law 89 of 1890 that treated Indigenous Peoples as "savages" and minors and as subjects of cultural assimilation, although it did not question the validity of the law (Semper, 2018).

[2] Decree 1071 of 2015 defines Indigenous Cabildos as a "special public entity, which are recognized and elected by procedures proper to an Indigenous community, who will have the legal representation to exercise authority, abiding by the law of use, customs and regulations proper to their community." Article 246 of the 1991 NPC provides that Indigenous Peoples' representative authorities may exercise jurisdictional functions within their territories, in accordance with their own standards and procedures, ensuring they do not conflict with the constitution and laws of the Republic (www.cidh.org/countryrep/colombia93eng/chap.11.htm). Some Indigenous groups maintain forms of organization different from the Cabildo system, which has forced the government to recognize the Associations of Traditional Authorities, which is a public legal entity created by Decree 1088 of 1993 responsible for promoting and coordinating with local, regional, and national authorities the execution of health, education, and housing projects.

Table 4.1 Policy development for Indigenous Peoples during the 1800s

Regulations impacting Indigenous collective tenure rights	Regulations favoring Indigenous collective tenure rights
Decree of September 24, 1810, issued by the Supreme Government Junta of Santa Fe on the termination of the *resguardo* system, which recognized Indigenous Peoples as citizens with equal rights and duties as other citizens. These measures sought to replace collective land property with individual private property.	Simon Bolivar issued a decree on May 20, 1820, that ordered the restitution of *resguardo* lands to Indigenous communities; however, it implied the internal division of communal lands to allow the participation of Indigenous communities in the free market.
The Law of October 4 of 1821 declared legal equality, subjecting Indigenous Peoples to the common law, and ordered the distribution of *resguardos* in five years.	The Law of June 30 of 1824 promoted the distribution of vacant lands to Indigenous communities, or lands lacking a property title, and the creation of *parroquias* to integrate "wild indigenous" into the national economy.
The Law 11 of 1821 declared Indigenous Peoples as citizens of the state, promoted the integration of Indigenous lands into the market, and ordered the gradual dissolution of the *resguardo* system. It suppressed the special status and the protections of Indigenous Peoples under the premise of equality.	The Law 11 of April 27 of 1874 recognized Indigenous Peoples' authority for regulating their internal affairs.
The Law 192 of 1824 incorporated Indigenous populations from zones not integrated into the economy into the missionary and evangelization processes, and Indigenous lands were given to the church.	The Law 89 of 1890 recognized and adopted the Cabildo as Indigenous Peoples' organizational structure and self-governance system, and their right to their collective territories guaranteed them a special status.
The laws of March 6, 1832, and June 2, 1834, are complementary, facilitating the division of *resguardo* into individual parcels.	
The Law of June 22, 1850, ordered the free distribution and alienation of the *resguardos* and allocation of individual property titles to Indigenous Peoples, just like any other citizens.	

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The Turn of the Twentieth Century

The early twentieth century was characterized by the government seeking to gain more control over Indigenous lands, while Indigenous land rights struggles emerged in the south of the Colombian Andean region. The government established a series of *concordats* with the Catholic Church in 1903, 1920, and 1973 to exercise administrative, judicial, and educational control over Indigenous Peoples, including through conversion to Catholicism and assimilation into the wider society. The Christian missions settling Indigenous lands were a driving force for the dismantling of Indigenous cultures and territories. According to Boza Villarreal (2013), until the late 1970s Catholic missions comprised 77 percent of the country's territory. However, by the 1980s, their power and control was reduced. As shown in Table 4.2, in the first half of the twentieth century, the government passed a series of laws promoting the dissolution of the *resguardo* system. For instance, Law 200 of 1936 regulated the dissolution of Indigenous lands lacking legal titles. In the second half of the century, a new structure for the legal collective tenure regime started forming, with new laws and decrees, including the enactment of the 1991 NPC, which established major changes in the state's relationship with Indigenous Peoples.

The social agrarian reform under Law 135 of 1961 was created against a backdrop of increasing political tensions and the re-emergence of internal armed conflict that displaced rural populations. The reform aimed to democratize rural property, including abolishing the division of Indigenous lands, and promoted the formalization of *resguardo* (Figueroa, 2016; Semper, 2018). The law created the Colombian Institute of Agrarian Reform[3] (INCORA in Spanish) to manage agrarian issues, and to acquire, redistribute, and provide lands to the landless, including the creation of *resguardo* lands (Balcazar et al., 2001).

Additionally, Decree 2117 of 1969, which partially regulated Law 135 of 1961, created the "Indigenous reservation"[4] tenure regime system, considered a regressive measure as it eliminated Indigenous Peoples' ownership rights over their territories, granting only usufruct rights. After advocacy by Indigenous Peoples, the government issued Decree

[3] The national agency in charge of land formalization has been dissolved on several occasions, passing functions from one institution to another and changing the scope of its role. The first agency was INCORA followed by The Colombian Institute of Rural Development (INCODER), and currently the National Land Agency (ANT).

[4] Decree 2117 of 1969 (www.suin-juriscol.gov.co/viewDocument.asp?id=1759090).

Table 4.2 Policy development on Indigenous Peoples' land tenure rights during the 1900s

Regulations impacting Indigenous collective tenure rights	Regulations favoring Indigenous collective tenure rights
Law 55 of 1095 recognized the private property rights of non-Indigenous individuals over areas of *resguardos*. Article 2 made legal the dispossession and dissolution of the *resguardo* system.	Law 135 of 1961 created the Colombian Institute of Agrarian Reform – INCORA, in charge of establishing new *resguardos*. It safeguarded vacant lands occupied by Indigenous communities from seizure by private individuals.
Law 51 of 1911 extinguished collective lands in the Valle of Sibundoy.	Law 31 of 1967 ratified the ILO Convention 1957.
Law 104 of 1919 extinguished *resguardos* with less than 200 people and judicialized Indigenous communities resisting land closure.	Regulatory Decree 2001 of 1988 of Law 31 of 1967 defined the legal procedure for the creation of *resguardos* on vacant lands and ordered the conversion of Indigenous reserves (created under Decree 2117 of 1969) into *resguardos*, returning the collective property rights of Indigenous Peoples to their ancestral lands.
Law 19 of 1927 created a special commission to divide and distribute Indigenous communal lands to new settlers.	Law 30 of 1988 (which reformed Law 200 of 1936) ordered the creation of new *resguardos*, restituted *resguardos* previously dissolved, and established that vacant lands occupied by Indigenous Peoples could only be used for the constitution of *resguardos*.
Law 111 of 1931 empowered the judicial and administrative authorities to order the division of *resguardos*.	National Political Constitution of 1991 ratified the collective property of Indigenous Peoples over the *resguardo*.
Law 200 of 1936, known as Statuto of Land, regulated the dissolution of Indigenous lands without titles, and granted these lands to new settlers.	Law 21 of 1991 ratified the ILO Convention 169 of 1989. This affirmed Indigenous Peoples' rights to self-determination, autonomy, territorial and socio-cultural integrity. There are also recognized rights to enjoy natural resources, health, education, political participation, and the right to be consulted about state's administrative actions that can affect these rights.

Table 4.2 (*cont.*)

Regulations impacting Indigenous collective tenure rights	Regulations favoring Indigenous collective tenure rights
Law 100 of 1944 (*Aparceria* or sharecropping Law) strengthened large-scale private landholdings and promoted unjust systems between landless peasants and landlords.	Law 60 of 1993 defined the allocation of financial resources to *resguardos*, outlining norms and competences according to Articles 151 and 288 of the NPC.
Law 81 of 1958 promoted agrarian development on Indigenous lands, required Indigenous communities to prove colonial titles to their lands, and declared lands without titles vacant lands of the nation.	Law 160 of 1994, chapter XIV, defined *resguardo* and its socio-environmental functions. Resguardos, as "indigenous reserves," were linked to Article 63 of the NPC that defined Indigenous territories as inalienable, imprescriptible, and not subject to seizure.
Decree 2117 of 1969 created a new tenure regime, "the Indigenous reserves," limiting Indigenous tenure rights to mere usufruct rights and restraining the collective property ownership of Indigenous Peoples over their lands.	Decree 2164 of 1995 regulated Law 160 of 1994, regarding the procedure for the creation, titling, extension of land area, and formalization of Indigenous lands.
	Decree 1397 of 1996 created a Permanent Table of Consensus of Indigenous Peoples (MPC) and the National Commission of Indigenous Territories (CNTI). Decree 1396 of 1996 created the Commission of Indigenous Peoples' Human Rights.
	Law 387 of 1997 enacted the protection of internally forced displaced peoples, with an ethnic perspective.

2001 of 1988 regulating Law 135 of 1961 in relation to the constitution of *resguardo* and compelled the conversion of Indigenous reservations back into *resguardos*.[5]

[5] Decree 2001 of 1988 (www.suin-juriscol.gov.co/viewDocument.asp?id=1755876).

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Throughout the evolving legal framework, Indigenous socio-political mobilization played a critical role in the restitution and recovery of their ancestral lands, while reshaping the country's Indigenous rights policies and resisting statutory actions to rollback their rights.

Indigenous Social and Political Mobilization

The first and second half of the twentieth century saw a series of Indigenous uprisings. First, in the southern provinces of Cauca, Huila, and Tolima, where the Indigenous movement resisted increasing dispossession pressures, the renowned Nasa Indigenous leader, Manuel Quintín Lame, organized an ethnic political movement to advance Indigenous communities' territorial rights by using the existing legal framework, in particular Law 89 of 1890 (Vasco Uribe, 2008). Through a process of reinterpreting the laws, Quintín Lame created a rights-based plan: the restitution and expansion of the *resguardo* lands; the strengthening of the *Cabildo* governance system; abolition of the *terraje*;[6] compliance with laws favorable to Indigenous Peoples' rights, such as Law 89 of 1890; and protection of Indigenous history, language, and traditions, among others (Sanchez Gutierrez & Molina Echeverri, 2014).

Quintin Lame's struggle influenced contemporary Indigenous movements in the 1970s and 1980s, with his political theory published in 1971, entitled *The Thought of the Indio Educated in the Jungle*, becoming a manifesto of the Indigenous movement after his death. In the same year, the Regional Indigenous Council of Cauca (CRIC) was founded on Lame's political ideology of land restitution and actions to recover thousands of hectares of lands (Benavides, 2009). The CRIC inspired the formation of a broader Indigenous movement: in 1982 the National Indigenous Organization of Colombia (ONIC) emerged, and a pan-ethnic Indigenous movement expanded, with organizations advocating for autonomy, control of territories, and the assertion of their distinctive ethnic identities, positioning Indigenous rights as a national public issue (Muñoz Onofre, 2016; Ulloa, 2010). These changes reshaped the political

[6] *Terraje* was a feudal and servile relationship, by which any Indigenous person paid with free labor had a right to live in and use a small plot of land within the hacienda of a landlord, normally located in the same lands taken from Indigenous *resguardos*. The *terraje* persisted until the 1970s when it was swept away by the Indigenous rights struggle that began in that decade (Vasco Uribe, 2008).

context and opened up opportunities for Indigenous political participation and representation.

In the 1980s, the Misak peoples led symbolic actions for ancestral land recovery[7] under the principles of "greater right" and "reclaiming the land to recover everything," and regained the *resguardo* Guambia in the State of Cauca. First, on July 19, 1980, the Misak recovered the Mercedes hacienda located at the core of their ancestral territory, under the control of political and economic elites, through a collective action involving the Misak community in solidarity with other Indigenous communities (CINEP, 2022; Tunubala Yalanda, 2016). This strategy of reclaiming land led to the legal recognition of *Cabildos* as public law entities with the administration function over their territories. The *Cabildo* of Guambía was the first to receive land restitution with autonomy according to their uses and customs (Velasco Alvarez, n.d.).[8]

Customary Laws and Governance

Despite assimilation pressures, Indigenous traditional forms of authority and governance continue. Each Indigenous group has its way of seeing the world and understanding the universe; this cosmo-vision is the foundation of traditional laws and self-governance. Some of the diverse concepts of traditional laws and self-government are the Law of Origin (from creation), Natural Law (laws of the natural world, earth, the spirits, and mythology since the beginning of time), Overarching Right (the law of the first inhabitants of America, passed down by elders and from the ancestors, who show the ways to act, and the rules that must be obeyed), and the Own Law (part of the cultures of Indigenous Peoples, their ways of living, thinking, and practicing justice).

The Law of Origin is the highest expression of the Arhuaco people's laws (from the Caribbean coast in the Sierra Nevada de Santa Marta), where all the obligations and rights of community members and all people are defined. Helmer Torres Solis, an anthropologist from the Arhuaco people (2004, p. 15), asserted that the Law of Origin integrates the rules of conduct and knowledge and guidelines of relationships with nature that the creator father *Serankua* left to the four brother peoples of

[7] Recovery is the term used by Indigenous Peoples to describe "the act of reclaiming territories by occupying usurped land" (Rappaport, 2005, p. 29).

[8] The recovery of the Guambia *resguardo* continued throughout the 1980s and 1990s. During this period, twenty-five Indigenous lands were recovered in the municipality of Silvia, in the Cauca State (Tunubala Yalanda, 2016).

the Sierra (Arhuaco, Kogui, Wiwa, and Kankuamo). These laws create balance, and from their spiritual obligations maintain the balance of both the Sierra Nevada (the mother) and the rest of the universe for the benefit not only of the Sierra peoples, the "older brothers," but also the other peoples of the earth or "younger brothers."

The laws of Indigenous Peoples are oral, including the cultural foundations and forms of exercising justice (Defensoria del Pueblo, 2018). These traditional laws are protected by Decree 4633 of 2011, and in accordance with section 11 of Article 8 and Article 150 of the NPC, which recognize the coexistence of Indigenous norms and laws with those of the state. Among Indigenous Peoples, traditional and spiritual authorities are Taitas, Iachas, Mamus, Payes, Jaibanas, Abuelos, Abuelas, Brujos shamans, wise men, wise women, and traditional healers. There are traditional Indigenous Guards, such as Chaskis, Wasikamas, Cuiracuas, Kiwe, Thegnas, and Samaneros. Also, Indigenous Peoples have political-administrative authorities such as governors, captains, mayors, chiefs, and *Thuthenas* (councillors) among other denominations and their structures of government, such as Cabildos, Association of Cabildos, Association of Traditional Indigenous Authorities, and Indigenous Councils (Defensoria del Pueblo, 2018).

The *Cabildo* governance structure emerged during the colonial era. Republican Law 89 of 1890, Articles 4–6, defined the functions of the *Cabildo*, which has the role of administering and governing Indigenous communities. Decree 4633 recognizes the *Cabildos* and traditional Indigenous authorities as unique public law entities. Decree 1088 of 1993 regulates the creation of Indigenous *Cabildos* and the association of traditional authorities as public entities with legal personality, and with their own assets and administrative autonomy.

Legal Frameworks for Recognizing Indigenous Peoples' Collective Tenure Rights

In the early 1990s, the Constitutional Assembly developed during a political crisis, with a weak state besieged by the consolidation of a drug trafficking economy into the state's political structures (Diaz Uribe, 2021). The participation of Indigenous Peoples in the Constitutional Assembly positioned them not only as members of Colombian society, but as national political actors who could shape the Indigenous rights framework established in the 1991 NPC. Muñoz Onofre (2016) wrote that Indigenous participation in the Constitutional Assembly was a

reconciliation process with the entire country, which reaffirmed the rights of Indigenous Peoples. The 1991 NPC safeguarded collective ownership, land use planning, and the autonomy and self-governing systems of Indigenous and Afro-descendant communities in relation to their collective territories (Bolaños Cardenas et al., 2021).

Muyuy (1998, cited in Herreño Hernandez, 2004, p. 259) identified six groups of rights recognized in the NPC.

1. *Cultural identity*: protections for ethnic and cultural diversity; Indigenous languages and bilingual education; cultural heritage; cultural equality and dignity as a fundamental basis for citizenship; and the right to exercise Indigenous justice systems (Articles 2, 7, 10e, 11, 12, 68n5, 70, 72, 246).
2. *Territorial autonomy*: recognizing *resguardo* and Indigenous territories as part of the nation's administrative-territorial entities, with autonomy for Indigenous Peoples to exercise their own governance system and self-development through their customary systems (*Cabildos*). *Resguardo* are inalienable, imprescriptible, and guaranteed against seizure (Articles 63, 286 and 287).
3. *Political and social autonomy and participation*: the right to political participation and representation in the Senate and House of Representatives. Article 171 establishes that there will be two seats in the Senate for Indigenous Peoples, via the Special Indigenous Constituency, but this does not preclude the possibility of participating in elections in the National Constituency or regional elections through political parties. There is recognition of double citizenship for Indigenous Peoples in frontier areas (Articles 176, 96c).
4. *Environmental and natural resources rights:* rights to prior consultation on projects within Indigenous territories (Articles 79 and 80).
5. *Economic rights*: the *resguardo* lands are interpreted as municipalities for managing national funds (Article 357). Article 329 recognizes the conformation of Indigenous territorial entities, although these are subject to creating the Comprehensive Law of Territorial Planning.
6. *Custom and tradition*: Article 330 recognizes the right of Indigenous Peoples to govern and regulate their territories according to their customs and traditions, and states that the exploitation of natural resources in Indigenous territories shall be done without harming the cultural, social and economic integrity of Indigenous communities. The government shall encourage the participation of Indigenous representatives in any natural resource decisions.

Additionally, Article 86 defines the legal mechanism of immediate action (known as *tutela* in Spanish), where any Colombian citizen can demand the protection of their fundamental constitutional rights. The Constitutional Court, the highest tribunal in judicial matters, ensures compliance with, and safeguards the integrity and supremacy of, the Constitution (Corte Constitutional, 2021). The courts are crucial for claiming rights and justice, and Indigenous organizations have embraced a litigation strategy and the *tutela* as a central legal tool to assert, defend, and pressure the government to fulfill its constitutional responsibilities for protecting ancestral territories. For example, the Indigenous Secretariat of the National Commission of Indigenous Territories (CNTI) won a *tutela* against the National Land Agency (ANT) for administrative due process, the protection of ethnic and cultural diversity, and the safeguarding of the Embera Katio people's collective property in northern Colombia. The Embera Katio people had to wait for more than four decades for the recognition of their collective lands (CNTI, 2021c), and the ruling paved the way for other Indigenous communities to resolve their long-unresolved land claims.

The Colombian government had also ratified the ILO Convention on Indigenous and Tribal Peoples 169 (1989) through Law 21 of 1991. With this ratification, prior consultation became a fundamental right of Indigenous Peoples to have their voices heard and considered in decisions that impact them in both formalized and non-formalized Indigenous territories.[9] The Constitutional Court ruling SU-039 of 1997 defined the objectives of prior consultation for natural resources activity on Indigenous territories: the community shall have comprehensive knowledge of the project planned in their territories and the mechanisms and procedures to implement them; the community shall be informed of the potential impacts on their subsistence, their social cohesion and their

[9] Rodriguez Garavito and Orduz Salinas discussed the legal dilemmas of prior consultation rights in Colombia, pointing out that "Prior consultation is defined in a dispersed manner by international and Colombian norms and jurisprudence, which in turn have different levels of obligatory nature. In addition to the normative dispersion, prior consultation is defined with very general parameters, but the procedural details have not been developed by legal norms." The Constitutional Court has established rules for cases in which the consent of the peoples is necessary (Court Ruling C-208 of 2007), and has specified the scope of consent as measures "whose magnitude [has] the potential to disfigure or disappear their ways of life" and "represent a high social, cultural and environmental impact on an ethnic community, cultural and environmental impact on an ethnic community, which could put its existence at risk" (Court Ruling T-19 of 2011, 2012, p. 7, 9).

cultural, political and economic practices; and the community shall debate among its members and representatives the advantages and disadvantages of the project, and freely express their interests and concerns around the viability of the project (Rodriguez, 2017).

The Implementation of the 1991 NPC

Following the 1991 NPC, new legislation and reforms were issued to recognize or amend existing laws on the collective rights of Indigenous Peoples. Moreover, Indigenous Peoples acquired rights to propose new or amend existing legislation in order to materialize their territorial rights. However, as the implementation of the collective rights achieved under the NPC were limited, the discontent among Indigenous organizations increased, motivating a sequence of mobilizations that combined direct actions and the strategic use of the courts to pressure the Colombian State to respect their unique and constitutional rights. In 1996, Indigenous leaders started forty-three days of peaceful takeover of the Episcopal Conference to protest the government's non-compliance with the constitutional provisions for Indigenous rights and the lack of state action to counteract the increasing violence against Indigenous leaders (El Tiempo, 1996). The protest was resolved with the creation of three high-level commissions for official direct dialogue between the national government and Indigenous Peoples to resolve issues related to human rights, territorial rights, and prior consultation rights. These tables were the National Commission of Indigenous Peoples Human Rights (CDDHHPI) (Decree 1396 of 1996), the National Commission of Indigenous Territories (CNTI), and the Permanent Table of Consultation with Indigenous Peoples (MPC) (Decree 1397 of 1996) (CNTI, 2019).

Tutela Legal Instrument Recognized by the 1991 NPC

With the spread of constitutional reforms in the Latin American region since the 1990s, the courts have become crucial for rights and justice. Colombian Indigenous organizations have extensively and strategically used the *tutela* legal instrument and the Constitutional Court to resolve or clarify legal gaps for the protection of their collective rights. Some of the current legislation originated from Constitutional Court rulings, such as Decree 2333 of 2014 on the special protection of Indigenous ancestral and customary collective lands as fundamental to the preservation of

Indigenous Peoples' culture, identity, and social and economic systems. The decree defines the principles for recognition and respect of Indigenous self-governance and legal systems, institutions, norms, and procedures (Ulloa, 2010).

These political cycles of recognition, dispossession, and Indigenous mobilization intersect with the Colombian fifty-year internal armed conflict that exacerbated violence against Indigenous communities. Indigenous Peoples were significantly impacted by this violence, and it altered their land ownership and autonomy, and disrupted their livelihood and use systems, their gardens, rivers, and forest resources (CNMH, 2013).

Advances on the Titling of Indigenous Collective Lands

Although Indigenous Peoples have secured ownership rights to over 35.6 million hectares of *resguardo* lands (see Figure 4.1), most of these collective lands were titled before the 1991 NPC (Muñoz Onofre, 2016, p. 65; Ortega-Roldan, 1993). CNTI reported that 1,450 Indigenous land formalization claims sat before the ANT, some of which have been waiting for more than two decades to be resolved (CNTI, 2019).

Scholars have analyzed the intrinsic contradictions of the 1991 NPC, which on one hand creates a protection framework, while on the other promotes an extractive economic model that affects Indigenous territories (Muñoz Onofre, 2016; Valencia Hernández et al., 2017). This contradiction is reflected in the case of four Indigenous groups of the Sierra Nevada de Santa Marta: Kogui, Arhuaco, Wiwa, and Kankuamo, whom in 1973 obtained recognition by the Colombian government of a ring of sacred sites extending around the base of the mountain range, known as the "Linea Negra" or "Black Line."

In 1995, resolution 837 was issued to guarantee their fundamental right to prior consultation and to participate in any legislative measure affecting their ancestral territory.[10] Despite these protections, a series of political negotiations and legal battles around the demarcation of the

[10] Resolution 002 of January 4, 1973. In 2018, Decree 1500 redefined the ancestral territory of the Arhuaco, Kogui, Wiwa, and Kankuamo peoples of the Sierra Nevada de Santa Marta, expressed in the system of sacred spaces of the "Black Line" as a traditional area of special protection and spiritual, cultural, and environmental value, according to the principles and foundations of the Law of Origin, Law 21 of 1991, and other provisions enacted. The decree considers 348 sacred sites.

Figure 4.1 Map of formalized Indigenous Territories (authors' own creation based on data from ANT and CNTI)

Linea Negra have taken place. An increasing interest in the minerals around the Linea Negra have resulted in the approval of 132 mining concessions (another 200 mining requests are pending approval) (Mongabay, 2020).

With the signing of the 2016 Peace Agreement between the Colombian government and the guerrillas FARC, the country hoped to leave behind

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a chronic situation of violence, injustice, and profound inequality regarding land access. The Peace Agreement recognized the inequality of land ownership as the root cause of this conflict. The Comprehensive Rural Reform (RRI in Spanish) of the Peace Agreement aimed to address land inequality by promoting the formalization of land ownership and land restitution, with particular emphasis on women's rights and vulnerable rural populations (Acuerdo Final de Paz, 2017). The Peace Agreement included an Ethnic Chapter, which established the principles of "no regression" and safeguards considerations to guarantee the respect of ethnic peoples' collective rights, such as prior consultation rights, and respect for the collective land rights accrued under national and international legislation, among others (Comisión Étnica, 2018).

However, the implementation of the Peace Agreement was delayed under the government of former President Duque (2018–2022), impacting land justice initiatives. During Duque's tenure, violence, exclusion, and the systematic killing of social leaders escalated, igniting a series of protests by Indigenous Peoples across Colombia, called the "National Ethnic, and Popular Minga" (MINGA) (BBC News Mundo, 2020; Romero Peñuela & Granados, 2021; Paz Cardona, 2020).[11]

Indigenous People's Land Rights in the Peace Agreement Context

Between 2012 and 2016, historic peace negotiations between the government and the guerrillas FARC concluded with the Peace Agreement, entitled the "Conclusion of the Conflict and the Construction of Stable and Lasting Peace." Although praised for promoting inclusion and citizenship participation and selected delegates (Mendes, 2020; Zambrano & Gomez, 2013), Indigenous and Afro-descendant Peoples, as distinct ethnic groups, only gained access to the negotiations in the final month because of international pressure to include them. By working together under an autonomous initiative called the Ethnic Commission, they achieved the addition of an Ethnic Chapter to the Peace Agreement, which defined the principles of non-regression of their collective land rights (Bolaños Cardenas et al., 2021; Comisión Étnica, 2018).

[11] The "Minga" is a civil and non-violence resistance strategy emerging from the Indigenous movement in the Cauca region and became a symbol for collective action in the defense of their rights. Minga manifestations have taken place in 2013, 2015, 2016, 2017, 2019, 2020, and 2021.

Both the peace negotiation process and the post-agreement outcomes evolved in a context of increasing discontent and protest by ethnic groups and the agrarian social movements against economic development programs directly affecting their land rights and local economies. Moreover, the failure to implement the Peace Agreement and the Ethnic Chapter exacerbated violence, generating a humanitarian crisis, and increased massive protests across the country. The 2019 *Minga* protest mobilized more than 20,000 people nationwide, and pressured the government to include an investment plan to solve the tenure rights problems in the National Development Plan 2018–22 – a plan that remains stubbornly unresolved (DNP, 2019).

The Law of Victims and Land Restitution (Law 1448 of 2011)[12] preceded the signing of the Peace Agreement and provided official recognition of the victims of Colombia's armed conflict[13] and the dramatic long-lasting land conflict that accounted for an estimated 6 million hectares of land being forcibly abandoned or usurped by different actors (Restrepo & Bernal, 2014). Decree 4633 of 2011 defined measures for the integral reparation of Indigenous Peoples' collective rights and the restitution of their territories, and recognized Indigenous territories as victims of the conflict based on the integral conception, the cosmovision, and the special relationship between Indigenous Peoples and their lands. However, there are limited advances on integral compensation and land restitution for victims of the conflict due to government opposition.

In 2019, the Ombudsman asserted that of the 121,462 total claims for land restitution (individual and collective), 64 percent were denied based on assessments that violated the law (Defensoria del Pueblo, 2019), while the Colombian Commission of Jurists (Comision Colombiana de Juristas, 2019) documented that only fourteen claims for collective land restitution were ordered by specialized judges, of which nine overlapped with mining concessions granted by the government, violating the prior

[12] Law 1448 of 2011 establishes the principles for the integral restoration of the victims' rights to access the truth, justice, and just compensation, while defining the mechanism to redress the victims' experiences of dispossession. The law adheres to an international framework on the protection of war victims and recognizes the disproportionate impacts and forced displacement suffered by Indigenous communities and other ethnic groups. Law 2078 of 2021 reformed Law 1448 of 2011 and Decree 4633 of 2011 and extended its term until June 10, 2031.

[13] During the presidential periods of Alvaro Uribe (2002–2008), the armed conflict and violation of human rights increased while a categorical denial persisted around the existence of the victims of the internal conflict (Martinez, 2013).

consultation rights of Indigenous communities. Analysis by the CNTI (2021b) showed that by February 2021, there were 573 requests for the restitution of Indigenous territories filed before the Land Restitution Unit, but only 2.9 percent of this total have received a court ruling.

The Comprehensive Rural Reform

The Comprehensive Rural Reform (RRI in Spanish) defined the pathways for land justice by promoting the formalization of land ownership and the implementation of restitution for victims and the land restitution law. The RRI targeted 10 million hectares for land redistribution, of which 3 million hectares constituted the so-called Land Fund for free distribution to rural populations, and 7 million for a massive formalization of rural property, including a multi-cadastre process aimed at updating and expanding current national cadastre data to better inform decisions on land rights formalization (Acuerdo Final de Paz, 2017).

Some authors argued that Decree 902 of 2017, for the implementation of the RRI, undermined the core problem of the conflict: the persistent private land concentration among cattle and agricultural interests, which impeded a fair distribution of land to poor rural populations (Chavarro cited in Chavez, 2018). Chavez (2018) explained that after a failed referendum to approve the 2016 Peace Agreement, the terms of the Peace Agreement were renegotiated, and substantial modifications were made to the RRI. These modifications limited the scope of the RRI and positioned it as a mechanism for rural development through agroindustry expansion. This created inequitable dynamics between poor peasants and large-scale producers, via Law 1776 of 2016 for areas of economic and social rural development interest (known as the ZIDRES law).

Thus, the changes to the Peace Agreement and the RRI, and the implementation decree, ignored historic power relations, inequality, and corruption, and made large-scale landowners the beneficiaries of the land formalization process (Chavez, 2018).

Another adjustment to the RRI was the modality for rural land allocation. The ANT implements the RRI under a "supply model" of land administration to accelerate the access and formalization procedures for rural land tenure. Espinosa et al. (2020) argued that the "supply model" is an innovative and effective approach, coherent with the territorial approach of the RRI, and "suggests a change in the dynamics of the state in relation to the citizens, as it privileges the guarantee of rights of

those who reside in the rural areas" (2020, p. 12). This new model of land administration contrasts with the "demand model" based on requests currently practiced under land Law 160 of 1996. Questions remain unresolved about the implications for the long-standing claims of Indigenous communities and the historical debt of the state.

Of the municipalities affected by the armed conflict, 79 percent lack basic cadastre information, and of these, around sixty municipalities in the provinces of Choco, Amazonas, Vaupes, Guainía, and Nariño are home to 81 percent of the Indigenous *resguardos* and collective lands of Afro-descendant communities (Comision Etnica, 2018). The CNTI argued that the implementation of the multi-cadastre process has ignored their constitutional rights and the terms of the Peace Agreement, generated segregation and exclusion, promoted and exacerbated conflicts in the territories, and violated their prior consultation rights (CNTI, 2021a). The current multi-cadastre implementation process is only implemented in areas where *resguardo* lands are legally recognized, thus impacting those Indigenous Peoples without *resguardo* rights (CINEP/CERAC, 2021). Using the *tutela,* the Indigenous MPC and CNTI pressured the government to define a road map for FPIC implementation and the integration of the territorial perspective in the multi-cadastre process (CNTI, 2021a). If the multi-cadastre process addresses the legal rights of all Indigenous Peoples of Colombia, it could be a mechanism to resolve pending land claims and persistent conflicts.

Development Plans with a Territorial Focus (PDET in Spanish) is the planning and management instrument created by Decree 893 of 2017 to implement the RRI in the most vulnerable regions of the country. There are 16 subregions of the country embracing 170 municipalities, representing 36 percent of the national territory prioritized, based on the following criteria: a high level of poverty, a high degree of impact from the internal armed conflict, institutional weaknesses, illicit crop cultivation, and illegal economies. Within the total areas prioritized, there are 452 *resguardos* (Comision Etnica, 2018).

However, these instruments have yet to resolve land inequality. The advances and results claimed by the national government on formalization of *resguardo* lands under the RRI do not coincide with Indigenous Peoples' evaluations. For instance, according to CINEP/CERAC report, "the progress reported by the National Land Agency in relation to formalization of *resguardos* under the RRI are in fact, backlogs for collective land titles of former land agencies, INCORA and INCODER" (CINEP/CERAC, 2021, p. 18). In this sense, the ANT has not complied

with the commitments of the RRI and Ethnic Chapter to secure collective land rights under the Land Fund.

The lack of compliance with the terms of the RRI and Ethnic Chapter have serious implications due to a lag in the formalization of Indigenous Peoples' territorial rights. Indigenous Peoples continue to pressure and influence the national government to comply with the constitutional framework protecting their rights. Indigenous political advocacy and litigation have compelled the government to issue Decree 1824 of 2020, which clarified the legal validity of the *resguardo* land titles of colonial or republic origin, and their protection during implementation of the RRI, as these will not be counted as available lands for distribution. The decree also established that requests for clarification of such titles, for their restructuring or extension, may be made by traditional authorities, *Cabildos* or Indigenous organizations through their prior consent (CINEP/CERAC, 2021).

Concluding Remarks and Recommendations

Although the 1991 NPC is the legal basis for advancing Indigenous Peoples' rights in Colombia, it has not resulted in the full restitution and protection of their collective lands. One of the major real positive impacts has been the use of the *tutela* legal mechanism for enforcing rights and the rulings of the Constitutional Court, which has strengthened the constitutional rights of Indigenous Peoples.

While there have been significant legal advances for land rights, there are still challenges as tension persists in the implementation of these laws. There are deep-seated barriers to advancing land rights in practice. However, the resilience of Indigenous Peoples to consistently organize and defend their rights through political mobilization and litigation, and to recover their ancestral lands, has been a driving force for policy and constitutional reforms, even as internal conflict has intensified.

In the current post-conflict context, Indigenous Peoples have contributed to the realization and implementation of the Peace Agreement. The integral implementation of the Ethnic Chapter and Decree 902 of 2017, which adopt measures to facilitate the implementation of the RRI in land matters, specifically in procedures for access and formalization, and the Land Fund, is crucial in this phase of peace reconstruction. Looking ahead, the government must guarantee the effective operation of the Land Fund and regulate the sub-account for Indigenous communities' access to collective lands, as established by Article 18 (12) of Decree

902 of 2017. It is imperative that the government clarifies the percentage of land allocated to Indigenous communities from the 3 million hectares of land the government plans to purchase under the RRI. Equally, it is crucial to define the percentage of lands for Indigenous communities among the 7 million hectares the government plans to formalize nationwide.

Moreover, the government needs to allocate the funds required for these land purchases, while improving coordination among institutions involved in land tenure rights and simplifying the administrative procedures for the formalization of Indigenous collective tenure rights. In this way, the government can ensure Indigenous Peoples are in fact recognized as rightsholders in the Comprehensive Rural Reform of the Peace Accord.

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