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Observations

Request for an Advisory Opinion on Democracy and its protection before The Inter-American Human Rights System

Title

Toward Democratic Ethnic-Racial Justice in the Inter-American System: Unpacking Structural Barriers to Indigenous and Afro-descendant Peoples' Political Participation

Directed to the

Inter-American Court of Human Rights

By

The Transnational Justice Clinic at the Centre for Human Rights and Legal Pluralism (McGill University's Faculty of Law)

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Introduction

This *amicus curiae* brief is submitted to the Inter-American Court of Human Rights ("IACtHR," "the Court," or "the Tribunal") in response to Guatemala's request for an advisory opinion on *"Democracy and Political Rights."* Particularly, the Centre for Human Rights & Legal Pluralism at McGill University's Faculty of Law seeks to contribute to addressing the following question raised by Guatemala: "*With respect to its exercise, is the human right to democracy, protected in the American Convention on Human Rights, susceptible of protection in the individual sphere, in the collective sphere, or both?*" Whether democracy is a human right or an expression or manifestation of the human right to self-determination is a complex matter that the Inter-American Court will have to grapple with.[2] At its core, democracy depends on meaningful voice and participation – namely, the ability of all peoples to influence the decisions that affect their lives through diverse forms of political engagement.

Building on this foundation, this *amicus brief* focuses on the individual and collective spheres of political participation of Indigenous Peoples and Peoples of African-Descent in the Americas, with a particular emphasis on two aspects: 1) the historical and current challenges Indigenous and Afro-descendant communities face to participate in their respective countries' democratic processes, and 2) the complex coexistence and interaction of Indigenous and Afro-descendant communities' traditional forms of organizations with the States' institutional arrangements and authorities. By reflecting on these two aspects, we call upon the Inter-American Court to require States to remove historical and today's ***de jure* and/or *de facto*** barriers that prevent Indigenous and Afro-descendant communities from effectively participating in their respective countries' democratic life. Additionally, the Court should acknowledge that meaningful or substantive democracy requires recognition and protection of the **right to self-determination** of Indigenous and Afro-descendant communities. This includes the right to maintain their own governance institutions based on their cultures and traditions, to safeguard their *cosmovisions,* and to freely choose their representative structures and community representatives. In short, we argue that the Court must recognize that democracy, as a human right or an expression of the right to self-determination, needs to be a catalyst for racial and ethnic justice[3] within the Inter-American System.

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[2] Please see, for example, García Escobar, Gabriela, "Towards a Human Right to Democracy? Some Initial Thoughts on Guatemala's Request for Advisory Opinion to the Inter-American Court of Human Rights," EJIL: Talk!, 25 June 2025, online: https://www.ejiltalk.org/towards-a-human-right-to-democracy-some-initial-thoughts-on-guatemalas-request-for-advisory-opinion-to-the-inter-american-court-of-human-rights/ ; and Amor Vázquez, Ecab, "In Defense of a Human Right to Democracy: Reflections on the Pending Advisory Opinion before the Inter-American Court of Human Rights," EJIL: Talk!, 11 July 2025, https://www.ejiltalk.org/in-defense-of-a-human-right-to-democracy-reflections-on-the-pending-advisory-opinion-before-the-inter-american-court-of-human-rights/

[3] For information on racial and ethnic justice, please consult: IACHR, The Situation of People of African Descent in the Americas, OEA/Ser.L/V/II. Doc. 62 (5 December 2011), online: https://www.oas.org/en/iachr/afro-descendants/docs/pdf/afros_2011_eng.pdf , IACHR, Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, Doc 47/15, OEA/Ser.L/V/II (2015), online: http://www.oas.org/en/iachr/reports/pdfs/extractiveindustries2016.pdf; Establishment of the Permanent Forum of People of African Descent, GA Res 75/314 (2 August 2021), UN Doc A/RES/75/314, online: https://docs.un.org/en/A/RES/75/314; UN Human Rights Council, Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers: Report of the United Nations High Commissioner for Human Rights, UNHRCOR, 47th

Based on the experience of some countries, with special focus on **Brazil**, **Canada**, **Colombia**, **Guatemala**, and **Peru**, we invite the Court to reflect on how *de jure* measures, mainly in the past, and *de facto* measures today have had cumulative effects that hinder the political participation of Indigenous and Afro-descendant communities in political and democratic processes at the national level.[4] Furthermore, *de jure* and/or *de facto* measures have been used to stymie the internal processes of political organization of Indigenous and Afro-descendant communities. These processes are nowadays protected under the right of self-determination.

We support a broader and more comprehensive understanding of political participation[5]—encompassing both engagement with State democratic institutions and processes, and the exercise of collective political authority through traditional[6] governance systems — which reveals a persistent gap with the way in which the Inter-American System has generally addressed the collective dimensions of rights. Democratic rights serve as an illustrative example of how the Inter-American System must strengthen its analytical approach to collective rights. Although case law and reports of the bodies of the Inter-American System have recognized the governance systems of Indigenous and Afro-descendant communities in specific contexts, the understanding of the democratic political framework outlined in the Inter-American Democratic Charter is limited to individual electoral participation and representative institutions, rather than collective political autonomy.[7]

These traditional forms of Indigenous and Afro-descendant[8] governance are based on the right to self-determination of peoples, understood as the right and capacity to freely determine their political status, and their economic, social and cultural development.[9] In examining Afro-descendant communities specifically, the Inter-American Court's jurisprudence on these communities has been criticized for "privileging cultural identity over racial identity, further promoting the phenomenon of making race invisible in Latin

Sess, UN Doc A/HRC/47/53 (2021).
Academic and legal sources include: Tanya Katerí Hernández, Racial Subordination in Latin America, Fordham University, New York, (2012); Edward Telles, Pigmentocracies: Ethnicity, Race, and Color in Latin America (Chapel Hill: University of North Carolina Press, 2014); David Theo Goldberg, The Racial State (Oxford: Wiley-Blackwell, 2001); Michael G Hanchard, The Spectre of Race: How Discrimination Haunts Western Democracy (Princeton: Princeton University Press, 2018).

[4] For example, formal guarantees of universal suffrage alone do not satisfy the obligations of states under Article 23 of the American Convention.

[5] Throughout this analysis, "political participation" encompasses both engagement with state democratic institutions (electoral processes, legislative representation, consultation) and the exercise of collective political authority through traditional governance systems (customary law, land management, community assemblies).

[6] In this *amicus curiae* brief, we use "traditional" to refer to governance systems with historical continuity within Indigenous and Afro-descendant communities. This term is used for lack of a more precise alternative while recognizing its inadequacy in capturing these institutions' dynamic nature. As Taiaiake Alfred states, in the context of Indigenous resurgence: "Working within a traditional framework, we must acknowledge the fact that traditions change, and that any particular notion that constitutes "tradition" will be contested", cited in: Glen Sean Coulthard, Red Skin, White Masks: Rejecting the Colonial Politics of Recognition (Minneapolis: University of Minnesota Press, 2014), 156.

[7] For example, the Inter-American Democratic Charter focuses on elections, party systems, and individual political rights. Inter-American Democratic Charter, Art. 3: "Essential elements of representative democracy include, inter alia, [...] the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government. "

[8] Although this paper analyses Indigenous and Afro-descendant communities together due to their shared experiences of democratic exclusion, we recognize the different historical trajectories and legal challenges faced by each group and seek to remain mindful of these differences throughout our analysis.

[9] Declaración Americana sobre los derechos de los pueblos indígenas, AC/RES. 2888 (XLVI-O/16) artículo III.

America."[10] Another criticism points towards the Court's approach of grouping or conflating Afro-descendant communities with Tribal peoples and vulnerable populations:

> *While the Inter-American human rights system's tribal peoples and vulnerable group approaches have helped some Afro communities gain collective land rights and contributed to enhanced legal protection of these communities, both approaches have several weaknesses. The tribal peoples approach overemphasizes folkloric cultural aspects and reinforces socio-economic inequalities and negative stereotypes. The vulnerable group approach fails to resolve ambiguities in the legal understanding of vulnerability. Both approaches neglect the land's economic dimension, raise challenges with third party rights, and risk paternalizing Afro communities.*[11]

Therefore, for conceptual clarity, we want to emphasize that in this *amicus* brief we are using the term "Afro-descendant" to refer to Black People of the African diaspora in the Americas, as recognized in the 2001 Durban Declaration, the 2011 Inter-American Commission Report on the Situation of People of African Descent in the Americas, and/or the United Nations General Assembly when establishing "Permanent Forum of People of African Descent" in 2021.[12] There will be instances in which we refer to the concept of "Tribal Peoples" as the IACtHR uses it, in line with the 1989 Convention 169 on Indigenous and Tribal Peoples. Still, we consider that Tribal Peoples are part of the larger concept of Afro-descendant peoples.[13]

The Inter-American Commission has established that self-determination is a right enshrined in various legal instruments in which Indigenous and Tribal peoples (a category used, as indicated above, to refer to Afro-descendant communities)[14] are recognized as collective subjects of law, and that this right includes their

[10] Ariel E. Dulitzky. When Afro-Descendants Became 'Tribal Peoples': The Inter-American Human Rights System and Rural Black Communities," (2010) 15 UCLA J. Int'l L. & Foreign Aff, at 18.
[11] Silja Aebersold, "Afro Communities' Struggle for Land Rights in Latin America: A New Approach to Protect their Lands in the Inter-American Human Rights System," Harvard International Law Journal (February 24, 2022), at 13, https://journals.law.harvard.edu/ilj/2022/02/afro-communities-struggle-for-land-rights-in-latin-america-a-new-approach-to-protect-their-lands-in-the-inter-american-human-rights-system/
[12] United Nations, Durban Declaration and Programme of Action (2001), at 48, online: https://www.ohchr.org/sites/default/files/Documents/Publications/Durban_text_en.pdf; IACHR, The Situation of People of African Descent in the Americas, OEA/Ser.L/V/II. Doc. 62 (5 December 2011), online: https://www.oas.org/en/iachr/afro-descendants/docs/pdf/afros_2011_eng.pdf; Establishment of the Permanent Forum of People of African Descent, GA Res 75/314 (2 August 2021), UN Doc A/RES/75/314, online: https://docs.un.org/en/A/RES/75/314.
[13] For a statistical description of Afro-descendant populations in Latin America and the Caribbean, see: FAO y CEPAL, Afrodescendientes en América Latina y el Caribe: Un acercamiento a las realidades sociales y territoriales en el mundo rural (Santiago: FAO y CEPAL, 2025) en 15 (estimating 153.3 million people of African descent representing 23.3% of the regional population in 2024), en línea: https://doi.org/10.4060/cd4853es; Edward E Telles et al, Racial and Ethnic Inequality in Latin America, IDB Working Paper Series No IDB-WP-01529 (Washington: Inter-American Development Bank, 2023) (analysing persistent racial and ethnic inequalities in the region).
[14] The Inter-American Commission itself is "aware of the shortcomings of using the term tribal communities as it relates to persons of African descent; but also understands it to be the technical term that, in the context of international human rights law, has enabled recognition of their rights to collective property, in keeping with the provisions of the Convention on Indigenous and Tribal Peoples." IACHR , Economic, Social, Cultural and Environmental Rights of Persons of African Descent: Inter-American Standards to Prevent, Combat and Eradicate Structural Racial Discrimination, OEA/Ser.L/V/II, Doc 109, 16 March 2021, at para 17, online: www.oas.org/en/iachr/reports/pdfs/desca-afro-en.pdf. Some legal scholars have criticised this approach for essentialising culture, rendering race invisible, and failing to address structural racism. See: Ariel E. Dulitzky, When Afro-Descendants Became 'Tribal Peoples': The Inter-American Human Rights System and Rural Black Communities, 15 UCLA J. Int'l L. & Foreign Aff. 29 (2010); Silja Aebersold, Afro Communities' Struggle for Land Rights in Latin America, Harv. Int'l L.J. (Feb. 24, 2022).

political self-determination, that is, respect for their own forms of government.[15] However, in reality, States do not fully protect the right to self-determination of Indigenous and Afro-descendant people.[16]

While Guatemala's request highlights the democratic crises currently threatening the region,[17] it also presents a vital opportunity to examine how these crises differentially affect Indigenous and Afro-descendant peoples, and to consider the implications of their own forms of political organization for a more comprehensive understanding of substantive democracy. Guatemala's own recent experience illustrates the urgency and relevance of this analysis: in April 2025, the IACHR condemned the criminalization of Indigenous authorities who had peacefully defended democratic institutions in 2023. The IACHR acknowledged "the instrumental role of the peaceful protests organized by ancestral and Indigenous leaders in preserving democratic order and enabling a peaceful transition of power."[18] The IACHR also stated that "the abusive use of criminal law to target Indigenous leaders not only silences individuals but creates a broader climate of fear, undermining the collective right to self-determination."[19]

This event exemplifies broader regional patterns where Indigenous and Afro-descendant communities are simultaneously essential to democratic preservation yet face systemic threats to their participation. Beyond direct challenges to political participation, these communities confront overlapping challenges that undermine their democratic agency: 1) environmental degradation exacerbated by extractive industries operating on ancestral territories, development projects implemented without adequate consultation that end up fragmenting communities and displacing traditional governance structures, and 2) disproportionate climate change impacts.[20] These interconnected challenges require specific attention from the Inter-American System to ensure that democracy safeguards serve all peoples of the Americas.

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[15] Self-determination is addressed in the Charter of the United Nations (1945) and the Universal Declaration of Human Rights (1948), and appears as an explicit right in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (1966), both of which establish in Article 1 that "All peoples have the right of self-determination.".
See also: Caso del Pueblo Indígena U'wa y sus miembros c Colombia (Fondo, Reparaciones y Costas) (2024), párr. 231, en línea: https://www.corteidh.or.cr/docs/casos/articulos/seriec_530_esp.pdf , which recognizes that "the right to self-determination of indigenous and tribal peoples is a right protected by the American Convention" and that "it has a dual projection: internal and external" (authors' own translation). ILO Convention 169 on Indigenous and Tribal Peoples (1989), although it does not explicitly mention self-determination, operationalises this right by recognizing the control of indigenous and tribal peoples over their own institutions, ways of life and economic development.
[16] CIDH, Derecho a la libre determinación de Pueblos Indígenas y Tribales, OEA/Ser.L/V/II. Doc. 413, 28 diciembre 2021, párr. 17. https://www.oas.org/es/cidh/informes/pdfs/LibreDeterminacionES.pdf
[17] Examples from the region: IACtHR, Presidential Reelection without Term Limits in Presidential Systems in the Context of the Inter-American Human Rights System, Advisory Opinion OC-28/21, (2021), online: https://www.corteidh.or.cr/docs/opiniones/seriea_28_eng.pdf; IACHR, "El Salvador: IACHR warns of possible impacts on the rule of law in light of indefinite presidential re-election", Press Release (8 August 2025), online: https://www.oas.org/es/cidh/jsForm/?File=/es/cidh/prensa/comunicados/2025/156.asp&utm_content=country-slv; IACtHR, Case of Gadea Mantilla v. Nicaragua, Judgement of October 16, 2024 (Merits, Reparations and Costs), Serie C No 543, https://www.corteidh.or.cr/docs/casos/articulos/seriec_543_ing.pdf; IACHR, "IACHR Expresses Concern over Impeachment of President of Brazil", Press Release (September 2, 2016), https://www.oas.org/es/cidh/prensa/comunicados/2016/126.asp ; IACHR, Nicaragua: Concentration of power and the undermining of the Rule of Law, online: https://www.oas.org/en/iachr/reports/pdfs/2021_Nicaragua-EN.pdf
[18] IACHR, "IACHR condemns criminalization of Indigenous leaders who defended democracy in Guatemala" (26 April 2025), Press Release No 080/25, online: https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2025/080.asp.
[19] IACHR, "IACHR condemns criminalization of Indigenous leaders who defended democracy in Guatemala".
[20] IACtHR. Advisory Opinion AO-32/25 of May 29, 2025. Climate Emergency and Human Rights. Series A No. 32, online: https://corteidh.or.cr/docs/opiniones/seriea_32_en.pdf

Framework and Thesis

As briefly mentioned above, this *amicus curiae* brief advances the argument that democracy operates at multiple levels — national, regional, and local — and that inclusive democratic participation must account for the decision-making mechanisms historically developed by Indigenous and Afro-descendant communities in accordance with their own values and worldviews. This approach moves beyond a purely "electoral" conception of democracy toward one focused on the basic conditions necessary for an effective and inclusive political system to function. Thus, this *amicus curiae* brief does not purport to take a position on whether democracy should or should not be recognized as a human right, but rather, accepting Guatemala's premise that such recognition warrants examination, analyzes what minimum content and concrete pathways for participation that right must contain to be meaningful for historically excluded communities.

This analysis affirms that democracy necessarily encompasses both individual and collective dimensions, and that its full realization requires protecting the pluralistic forms of deliberation and ancestral decision-making that have been developed by Indigenous and Afro-descendant peoples. Grounded in the principles or concepts of self-determination, legal pluralism, and racial justice, it must be recognized that Indigenous and Afro-descendant governance encompasses cultural practices and decision-making processes that extend beyond formal legal frameworks. This perspective, which respects the social, political, and legal forms of organization of Indigenous and Afro-descendant communities, is essential to understanding how democracy is practiced or experienced in communities whose political and cultural orders have long been undermined by state institutions and by majority rule, even where constitutions formally recognize legal pluralism. Racial justice, in this context, requires systematically dismantling the structural barriers that have historically excluded Indigenous and Afro-descendant communities from meaningful political participation. This framework acknowledges that democratic exclusion is facilitated by interconnected systems – from historical disenfranchisement to contemporary barriers to both electoral participation and the recognition of traditional governance systems.

The present analysis examines these issues through five main sections: (1) historical racialized exclusion from democratic processes and State governance structures; (2) the diversity and characteristics of Indigenous and Afro-descendant communities' traditional governance structures; (3) current challenges and tensions with majority rule; (4) the Inter-American system's jurisprudence on self-determination and legal pluralism for the protection of distinct political organizations of Indigenous and Afro-descendant communities; and (5) the conceptualization of the right to democracy as a catalyst for racial and ethnic justice in the Inter-American System. Through contributions by legal academics and legal practitioners, we primarily examine Brazil's constitutional recognition of Indigenous and Quilombola[21] rights, Colombia's legal framework to safeguard the rights of Indigenous and Afro-descendant communities, Peru's territorial autonomy movements, Canada's Indigenous governance structures, and Guatemala's recent electoral process and ongoing democratic challenges. Similarly, a brief comparative law analysis is carried out with the European system. Thus, this *amicus* brief's analysis demonstrates both the potential and the persistent barriers to realizing the notion of pluralistic democracy in practice.

[21] Quilombola communities are communities of descendants of African slaves who escaped forced labour to form rural villages called quilombos. See: Alicia Arquetoux, "Quilombolas: The Afro Brazilians serving as guardians of the forests", France 24 (30 November 2023), online: https://www.france24.com/en/americas/20231130-quilombolas-the-afro-brazilians-serving-as-guardians-of-the-forests

The Minimum Content of Democracy in the Inter-American System[22]

On previous occasions, the IACtHR has ruled both on the relevance of the effective exercise of democracy in the Inter-American System, and on the essential content of some of its elements. Regarding the former, Advisory Opinion OC-28/21 on indefinite presidential re-election developed, to a certain extent, the interdependence between the democratic principle, the rule of law, and the protection of human rights as the basis of the Inter-American System.[23] Regarding the latter, the Court has shed light on some minimum standards of transparency in the electoral process – *Gadea Mantilla v. Nicaragua*[24] and *Capriles Radoy v. Venezuela*[25] cases–, requirements for the registration of candidates – *Castañeda Gutman v. Mexico* case[26] –, electoral rules applicable to indigenous communities – *Yatama v. Nicaragua* case[27] –, among others. In *Petro v. Colombia*, the Inter-American Court established safeguards to prevent the removal of popularly elected public officials from office through administrative decisions. Instead, the Court established that such removal must be carried out through a judicial decision by a competent judge.[28]

Both the general approach to the role of the democratic principle within the Inter-American System, as well as the particular elements that it informs in the institutional design of the States, have been consistently associated by the Court with the right and "opportunity" to participate in government.[29] Thus, for the Court, the right to participate in politics is both an individual and collective right. This distinction is used to emphasize the State's obligation to provide the conditions and mechanisms for the effective exercise of political rights.[30]

Although the Inter-American Court has explored the individual and collective dimensions of political rights, it has not provided sufficient clarity on the minimum content of the democratic principle within the Inter-American System, and more importantly, on how the States Parties should incorporate it, given their diverse historical, political, racial, ethnic, and cultural conditions. This is certainly a complex task, since responding to Guatemala's request requires the Court to account for a complex concept of democracy in the Inter-American System. It must contain the necessary elements to guarantee the rights protected in the Convention and other relevant instruments, while being broad enough to capture the different legitimate forms of organization of both the predominant Western (and Western-influenced) democratic institutional frameworks that exist across the States Parties,[31] as well as the Indigenous and Afro-descendant communities that live there and have been relevant actors within the Inter-American System.

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[22] Analysis contributed by Mateo Merchán Duque.
[23] IACtHR, Presidential Reelection without Term Limits in Presidential Systems in the Context of the Inter-American Human Rights System, Advisory Opinion OC-28/21, Inter-Am Ct HR (Ser A) No 268 (2021).
[24] CoIDH. Caso Gadea Mantilla vs. Nicaragua. Fondo, Reparaciones y Costas. Sentencia de 16 de octubre de 2024. Serie C No. 543.
[25] CoIDH. Caso Capriles vs. Venezuela. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 10 de octubre de 2024. Serie C No. 541.
[26] CoIDH. Caso Castañeda Gutman vs. México. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 6 de agosto de 2008. Serie C No. 184.
[27] CoIDH. Caso Yatama vs. Nicaragua. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 23 de junio de 2005. Serie C No. 127.
[28] IACtHR, Case of Petro Urrego v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 8, 2020. Series C No. 406. https://www.corteidh.or.cr/docs/casos/articulos/seriec_406_ing.pdf
[29] CoIDH. Gadea Mantilla vs. Nicaragua, párr. 75.
[30] CoIDH. Gadea Mantilla vs. Nicaragua.
[31] As Michael Hanchard notes, "The most robust, long- standing democratic polities in the contemporary world— France, Britain, and the United States—have been housed in societies that have profited from slave labor, empire, and colonialism". Michael G. Hanchard, The Spectre of Race: How Discrimination Haunts Western Democracy (Princeton: Princeton University Press, 2018) at 4. These Western democratic models, characterised by liberal representative institutions combined with exclusionary

In this sense, this *amicus curiae* will provide some considerations on the normative and conceptual tools to which the Court could resort in order to advance this task. To answer the question about the content of the democratic principle, it is convenient to turn to the concept widely developed by academia in comparative constitutional law known as the "democratic minimum core." This conception of democracy presupposes, at the very least, the holding of periodic, free, and transparent elections, with a minimum degree of competition between political parties. In addition, it requires the existence of fundamental conditions that guarantee respect for the political rights and freedoms indispensable for the functioning of democratic processes, as well as a notion of the rule of law and the existence of independent institutions responsible for supervising and safeguarding the other components of a competitive political system.[32] Legal scholars such as Rosalind Dixon and David Landau, the latter cited by Judge Eduardo Ferrer Mac-Gregor in one of his concurring opinions,[33] argue that recognizing a "democratic minimum core" is helpful in preserving the capacity of constitutional systems to resolve reasonable disagreements among citizens on questions of constitutional morality and to avoid an undemocratic monopoly of power.[34] In this sense, the concept of the "democratic minimum core" underlies the essential conditions for democracy to function effectively.

The IACtHR's judgements on some aspects related to the holding of elections and the right to participate in politics have focused on the conditions for decision-making through majorities. Among the basic conditions of the democratic system is also an adequate consideration of the substantive participation of those affected by a decision. This is what some experts in comparative constitutional law have proposed under the concept of maintaining open channels of political participation for those who are typically excluded from decision-making processes.[35] This may imply, among other things, adopting anti-majoritarian decision rules that allow for informed decision-making through procedures in which minority groups or, in some cases, without being minorities, widely marginalized[36] groups can effectively intervene in a relevant way. A scenario that would hardly take place under an institutional scheme that adopts a reduced concept of electoral democracy. This recognition of the essential nature of the participation of minority and marginalized groups within the conception of the democratic principle that the IACtHR is called upon to construct in this case finds support in some of the norms of the States Parties to the Convention,[37] as well as other values, including individual freedom, dignity, and formal and substantive equality.

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citizenship regimes, became fundamental templates for postcolonial state formation in Latin America through constitutional modelling, legal transplantation, and influence on institutional design.

[32] Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal globalization and the subversion of liberal democracy*, (Oxford: Oxford University Press, 2021), 25, https://doi.org/10.1093/oso/9780192893765.001.0001.

[33] In footnote 37 of his concurring opinion in the Gadea Mantilla case, Judge MacGregor briefly refers to this concept of the minimum democratic core, citing the work of David Landau: "Although Landau focuses specifically on the use of constitutional reforms and replacements, the concept of abusive constitutionalism lends itself to a broader interpretation that includes the use of ordinary constitutional mechanisms, protected by their legitimacy of origin (majorities required to effect legislative changes), which undermine core elements of democracy and are ultimately aimed at consolidating and cementing power. This undermines the possibility that minorities, at any given moment, may have the opportunity to become majorities." (authors' own translation).

[34] Rosalind Dixon and David Landau. "Competitive Democracy and the Constitutional Minimum Core," en *Assessing Constitutional Performance*, ed. Tom Ginsburg and Aziz Huq (Cambridge: Cambridge University Press, 2016), 268–92. Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford: Oxford University Press, 2023), 140-80.

[35] See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) and Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford: Oxford University Press, 2023).

[36] Sergio Verdugo, "Limited democracy and great distrust: John Hart Ely in Bolivia and Chile," *International Journal of Constitutional Law* 19, n°. 2 (Abril 2021): 515–32, https://doi.org/10.1093/icon/moab037.

[37] For example, when interpreting the model of liberal democracy adopted by the 1991 Constitution of Colombia, its Constitutional Court stated: "(...) the notion of the people that accompanies the concept of constitutional liberal democracy

In addition, recognizing the relevance of participation by those affected by a decision within the political process as an essential element of the democratic principle also entails taking into adequate consideration the decision-making mechanisms of communities that have historically developed their own forms of organization, which in some way reflect their values and worldview. This is where the "electoral" conception of democracy comes into tension with one focused on the basic conditions for the functioning of the political system, which, as we have seen, are both procedural and substantive. A first approach of the Court in this regard is found in the case of *Yatama v. Nicaragua,* where it was determined that the legal mandate obliging Indigenous groups to operate as conventional political parties imposed an unreasonable and undue restriction on their political rights. This mandate disregarded the traditional forms of organization and "community democracy" of the Indigenous communities on the Nicaraguan Atlantic Coast, which are integral to their cultural identity. By imposing a model that contradicted their customs, the law affected their political participation by preventing them from utilizing structures that reflected their traditions. Furthermore, the Court emphasized that the political rights contemplated in Article 23 of the Convention are not limited to the formal right to vote and be elected, but also imply the active responsibility of the State to ensure the essential conditions for effectively exercising these rights.[38]

The jurisprudence of the IACtHR is far from taking a merely procedural view of democracy. On the contrary, it appears to be broadly substantive insofar as it is connected to a wide range of human rights enshrined in the Convention and other instruments that the Court has applied. However, the focus on the "democratic minimum core" proposed here and developed for the case of Indigenous and Afro-descendant communities' forms of organization and participation seeks to balance the need to protect those rights while safeguarding a plural and contextual approach to the democratic principle.

Recommendations

Based on the analysis presented in this *amicus curiae* brief, the following recommendations are made for the consideration of the honourable Inter-American Court:

1. **Recognize the historical and contemporary systemic exclusion of Indigenous and Afro-descendant peoples from democratic processes** as structural barriers or violations of safeguards for the enjoyment of rights contained in the American Convention on Human Rights, the American Declaration, the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, and other applicable inter-American standards.[39] These violations operate through interconnected *de jure* and *de facto* mechanisms, where past d*e jure* exclusions have created enduring *de facto* barriers, rooted in patterns of structural and intersectional racial discrimination. States must implement **positive mechanisms that make democratic participation a reality beyond formal recognition**, including: the elimination of administrative barriers to electoral access, the universal issuance and effective delivery of identity documentation to citizens, comprehensive access to polling stations, support for culturally relevant education that encourages active engagement, and addressing the physical violence perpetrated by State and non-State actors

cannot be divorced from the notion of pluralism and implies the coexistence of different ideas, races, genders, origins, religions, institutions or social groups. A people of such heterogeneous composition, when choosing a model of constitutional democracy, accepts that all power must have limits and, therefore, as a sovereign people, agrees to constitute itself and limit itself in accordance with that democratic model and institutes channels through which it can express itself in all its diversity." (authors' own translation) Sentencia C-141 de 2010 (M.P. Humberto Sierra Porto), sección 1.5.

[38] Yatama vs. Nicaragua, párr. 203-29.

[39] See American Convention on Human Rights (ACHR), arts. 1(1) (obligation to respect rights without discrimination), 23 (right to participate in government), 24 (equal protection), 26 (progressive development of economic, social and cultural rights); Yatama vs. Nicaragua, (2005) (holding that the exclusion of Indigenous political participation violates art. 23 of the ACHR); IACHR, The Situation of People of African Descent in the Americas (2011), (defining structural racial discrimination and its systemic nature); Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance (A-68).

that undermines the participation of Indigenous and Afro-descendant peoples in national democratic processes and self-governance endeavours. Without addressing the deep-rooted inequalities that persist within legal and political institutions, formal guarantees will continue to fall short of achieving substantive equality, inclusive citizenship, and racial justice.

2. **Recognize self-determination, legal pluralism, and racial justice as foundational components of the democratic minimum core in ethnically and racially plural societies, which requires the simultaneous protection of both individual and collective dimensions of political participation.** The Court has consistently recognized Indigenous and Afro-descendant territorial rights, consultation obligations, and their own systems of governance as essential to the survival of these communities. Some national constitutions have also begun recognizing aspects of Indigenous and Afro-descendant collective rights. Given this context of increasing consolidation of rights to protect Indigenous and Afro-descendant communities at international and domestic levels, self-determination, legal pluralism, and racial justice must now be understood as essential components of the democratic minimum core, rather than optional accommodations. Democratic legitimacy in plural societies requires recognizing collective political participation alongside individual electoral rights, and cannot be achieved through legal and political frameworks that privilege majority rule.

3. **Continue advancing the development of Inter-American jurisprudence that seeks to operationalize comprehensive self-determination** in a way that "enables Indigenous peoples to freely determine their political, economic, social, and cultural systems in accordance with their own institutions and values,"[40] by: (a) expanding the practical application of self-determination beyond its current predominant manifestations in territorial and consultation rights to fully encompass broader dimensions of autonomy; (b) requiring State recognition of Indigenous and Afro-descendant governance systems as legitimate political institutions deserving constitutional and legal protection, rather than subordination to majoritarian legal frameworks, in line with legal pluralism; (c) requiring States to provide community-specific institutional support for traditional authorities, customary decision-making processes and ancestral justice systems, including financial resources, technical capacity, and administrative support; and (d) requiring States to refrain from actions or policies that trigger, exploit, or exacerbate intra-community conflicts that undermine collective governance, consultation processes, and political participation.

4. **Continue to develop specific standards for free, prior and informed consultation,** in the context of legislative, administrative or development activities that may affect Indigenous or Afro-descendant lands or territories, resources, cultural heritage or governance and judicial systems. The protection of the aforementioned prerogatives of these communities constitutes the basis for the expression of democratic self-determination, which majority rule mechanisms cannot override. The Court must continue reinforcing States' obligations to: (a) respect traditional decision-making processes and timeframes without imposing artificial acceleration mechanisms; (b) ensure binding rather than consultative outcomes where community territorial integrity is affected; (c) prohibit procedural manipulation including corporate activities designed to divide communities prior to consultation; and (d) guarantee meaningful participation, rather than mere compliance with a formal process.

[40] Esta comprensión integral de la autodeterminación se alinea con la declaración reciente de la CIDH hecha en el contexto de dar la bienvenida al Decreto 488 de Colombia que establece Jurisdicciones Territoriales Indígenas. CIDH, "Colombia: CIDH saluda decreto que fortalece la libre determinación de los pueblos indígenas", Comunicado de Prensa No. 142/25 (16 de julio de 2025), https://www.oas.org/es/cidh/jsForm/?File=/es/cidh/prensa/comunicados/2025/142.asp&utm_content=country-col&utm_term=class-mon

5. **Institutionalize the systematic assessment of impacts on Indigenous and Afro-descendant peoples in Advisory Opinions and jurisprudential development.** We recommend that the Inter-American Court develop a consistent framework for analyzing differential impacts based on racial, ethnic, gender, and other grounds in its legal work. This could include a dedicated section in Advisory Opinions, where the Court explicitly assesses whether differential impacts are present and, when relevant, thoroughly examines them. This approach would ensure that legal standards across all subject matters — including political participation; environmental protection; economic, social, and cultural rights; territorial rights; individual rights; and/or other issues — contribute to substantive equity and avoid exacerbating longstanding historical disenfranchisement. Such a systematic assessment would align with the Court's jurisprudence, which requires States to adopt progressive measures to strengthen Indigenous, Tribal and Afro-descendant institutions and protect their territories,[41] while formalizing the Court's own commitment.[42]

[41] For example, see recent synthesis of state obligations and progressive measures in: IACtHR. Advisory Opinion AO-32/25 of May 29, 2025. Climate Emergency and Human Rights. Series A No. 32, at para 606.
[42] Similar analytical frameworks include Racial Impact Assessments, or Canada's Gender-Based Analysis Plus (GBA+) which requires intersectional impact assessment in federal decision-making to examine how policies affect diverse groups differently.

Section 1. Historical Racialized Exclusion from Democratic Processes and Power Structures

Across the Americas, Indigenous and Afro-descendant communities have confronted centuries of systemic political exclusion that transcends formal government or regime changes and operates through mechanisms of racialized domination which have evolved from colonial conquest and enslavement to contemporary democratic institutions.[43]

Through the concept of "coloniality of power", Aníbal Quijano has explained that ethnic-racial discrimination has historically been the basis for state domination of Indigenous peoples, evolving from the European conquest to the *criollo* states of the 19th century.[44] As Eduardo Gudynas argues, the advance of extractivism constitutes a contemporary form of war, in which the imposition of a unique development model justifies the dispossession, criminalization, and symbolic extermination of Indigenous ways of life.[45] This historical foundation has established enduring belief systems that rationalize violence and domination by elites over Indigenous and Afro-descendant peoples, creating institutional structures of exclusion that continue to fundamentally shape the possibilities and limits of democratic participation across the region.

In contrast to countries such as the United States and Canada, where segregation and exclusion norms were explicitly codified in law, Latin American societies primarily developed what legal scholar Tanya K. Hernández terms the "customary law of race regulation"[46] – a system in which "state resources and coercion were utilized to enforce the marginalization of persons of African descent."[47] This framework denotes how "the rules of racial exclusion were more than social conventions"[48] but rather constituted informal legal regimes used by state actors to reinforce racial hierarchy. These regimes operated in practice through unwritten rules and collective social knowledge about racial and ethnic boundaries that could not be transgressed without severe consequences.

Historically, there have been material and symbolic barriers to the exercise of Indigenous and Afro-descendant peoples' collective rights, due to phenomena such as: territorial dispossession, systemic violence, resource grabbing, denial of their forms of deliberation and institutional exclusion. In the context of democracy and political access, exclusion operates through two interconnected yet distinct mechanisms: the more visible, but less pervasive ***de jure*** exclusions — formal legal barriers to participating in the democratic process, such as literacy requirements, property qualifications, and discriminatory electoral laws — and ***de facto*** exclusions, which are practical obstacles, such as the lack of ballot boxes in Indigenous and Afro-descendant communities, the non-issuance of identity documents for members of these communities to vote, or physical violence against these communities, which renders effective political participation structurally impossible, even where formal rights appear to exist.

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[43] Michael G Hanchard, The Spectre of Race: How Discrimination Haunts Western Democracy (Princeton: Princeton University Press, 2018); chapter 4.
[44] Quijano, Aníbal (2014). "Colonialidad del poder, eurocentrismo y América Latina", en Edgardo Lander (comp.), Cuestiones y horizontes: de la dependencia histórico-estructural a la colonialidad/descolonialidad del poder, Buenos Aires: CLACSO.
[45] Gudynas, Eduardo (2015). Extractivismos: ecología, economía y política de un modo de entender el desarrollo y la naturaleza. Cochabamba: Centro de Documentación e Información Bolivia (CEDIB) / Centro Latinoamericano de Ecología Social (CLAES).
[46] Tanya Katerí Hernández, Racial Subordination in Latin America, Fordham University, New York, (2012), 14. https://www.cambridge.org/core/books/racial-subordination-in-latin-america/6901AF93E1B154AEB9AC5B74CEEC2D96#fndtn-contents
[47] Tanya Katerí Hernández, Racial Subordination in Latin America, Fordham University, New York, (2012), 15
[48] Tanya Katerí Hernández, Racial Subordination in Latin America, Fordham University, New York, (2012), 15

1.1 De *Jure* Exclusions: Constitutional and Legal Barriers

1.1.1 Colonial Foundations and Constitutional Exclusions

The exclusion of Indigenous and Afro-descendant communities from democratic processes has deep constitutional and legal roots that established racialized citizenship since the formation of American republics. These foundational exclusions created discriminatory legal frameworks that would persist for centuries. Beyond the formal exclusion of certain populations, literacy and property requirements were widespread mechanisms for maintaining legal exclusion from electoral systems across the Americas. While facially neutral, these requirements perpetuated the racialized exclusions established at independence – as sustained forms of disenfranchisement.

For instance, **Brazil's** 1824 Constitution, the first following Brazil's independence, established a limited form of constitutional monarchy and restricted suffrage to literate male citizens with a minimum income. This effectively excluded enslaved persons, most Indigenous peoples, and free Afro-descendant citizens. Even following the abolition of slavery in 1888, no process of political incorporation was established for formerly enslaved populations. Instead, the new Republican regime consolidated a racialized structure of citizenship that continued to marginalize Afro-Brazilian and Indigenous peoples. The absence of land redistribution, access to education, or recognition of collective identities meant that democratic inclusion remained illusory for much of the population.[49]

Similarly, Indigenous peoples in **Peru** have historically been limited in their right to vote, since this right depended on census requirements such as property ownership and income. Since 1896, it was established as a necessary requirement to be able to read and write in order to vote, which in practice excluded a large part of the illiterate Indigenous population.[50] It was not until the 1979 Constitution that universal suffrage was recognized, as the literacy requirement was eliminated and it was established that everyone over the age of 18 is a Peruvian citizen with the right to vote (Article 65). According to the last national census, 25.8% of Peruvians self-identify as belonging to an Indigenous or native group, including the Quechua, Aymara and other Amazonian ethnic groups, reaching a figure of approximately 6 million people.[51] This figure illustrates that, throughout most of Peru's republican history, a significant proportion of the national population has been denied the right to vote.[52]

Likewise, the right to vote of Indigenous peoples continues to face threats today. In the 2021 presidential elections, 42 lawyers from the country's leading law firms deployed a legal strategy to challenge the victory of then-candidate Pedro Castillo Terrones. They filed around 900 annulment requests against polling stations located mainly in the southern Andes, a region with a majority Quechua and Aymara population, where Castillo had obtained a considerable lead.[53] This manoeuvre delayed the announcement of the election results, fuelling institutional mistrust and political polarization, although all the appeals were eventually declared unfounded due to a lack of evidence.[54] In June 2022, the Plenary Session of the

[49] Analysis contributed by Ana Luiza Gregorio Vidotti
[50] del Águila, Alicia (2012). Historia del sufragio en el Perú, s. XIX–XX: una lectura desde la ciudadanía y la participación indígena. En Participación electoral indígena y cuota nativa en el Perú: aportes para el debate (pp. 17–35). IDEA Internacional.
[51] Instituto Nacional de Estadística e Informática. (2018). Censo Nacional de Población y Vivienda 2017 https://www.inei.gob.pe/estadisticas/censos/
[52] Analysis contributed by José Saldaña Cuba
[53] Ojo Público. "Más de 40 abogados de grandes estudios aportaron a la estrategia del fraude de Fuerza Popular". En línea: https://ojo-publico.com/politica/abogados-grandes-estudios-aportaron-la-estrategia-del-fraude Visitada el 30 de septiembre de 2025.
[54] Hurtado, Veronica (2024). La retórica del fraude: consecuencias para la democracia en las elecciones peruanas de 2016 y 2021. Elecciones. En línea: https://revistas.onpe.gob.pe/index.php/elecciones/article/view/362/991

Congress of the Republic confirmed this outcome by shelving a commission's report on alleged electoral fraud.[55]

This systemic disenfranchisement reveals that recognition and enforcement of social and political rights cannot rely solely on judicial efforts by constitutional and international courts. Instead, it requires political inclusion and agency to empower marginalized groups within the political system.

1.1.2 Legal Architecture of Political Control of Indigenous and Afro-descendant Peoples

Other forms of *de jure* barriers involved state-implemented legal frameworks that systematically controlled Indigenous and Afro-descendant political structures, and targeted foundational elements of political autonomy: language, governance, knowledge, family structures, and territorial connections.

This is observed in **Canada's** Indian Act system through the creation of parallel governance structures. The 1876 Indian Act imposed the 'band system' on Indigenous peoples to control the governance of local Indigenous populations. This system created legal recognition only for elected band councils, while excluding traditional hereditary governance systems that had operated for centuries.[56] (This is an example of a case with lasting consequences, the continuing tension of which will be revisited in Section 3.)

More broadly, the Truth and Reconciliation Commission of Canada reported that "[f]or over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada."[57] The Act further entrenched exclusion, barring Indigenous people from organizing in political groups, hiring lawyers to defend their rights, and prohibiting *Balhats* (traditional governance ceremonies).[58] Residential schools, existing from the 1870s to 1997, were also a central element of this policy.[59] These provisions reveal a systemic legal strategy to eliminate Indigenous political autonomy while maintaining the appearance of democratic inclusion through imposed electoral structures.

1.2 *De Facto* Barriers

Post-independence constitutions across the region enshrined principles of formal equality and universal citizenship. However, these formal guarantees masked the persistence of systemic exclusion, creating democracies that, while formally egalitarian, proved insufficient to ensure real participation and protection

[55] Infobae. "Pleno del Congreso archivó el informe final de comisión que investigó las Elecciones 2021". En línea: https://www.infobae.com/america/peru/2022/06/16/pleno-del-congreso-archivo-el-informe-final-de-comision-que-investigo-las-elecciones-2021/ ; Analysis contributed by José Saldaña Cuba.

[56] Nancy R. Tapias Torrado, Wet'suwet'en women leading the defence of rivers and water from abuses committed in connection with megaprojects. The persistent legacies of the past in Canada. In T. Acevedo-Guerrero, M. Zwarteveen, L. Bossenbroek, I. Leonardelli, & S. Kulkarni (Eds.), Routledge Handbook of Gender and Water Governance. Routledge. [2024, https://doi.org/https://doi.org/10.4324/9781003100379].

[57] TRCC, 2015, p.1; cited in Nancy R. Tapias Torrado, Wet'suwet'en women leading the defence of rivers and water from abuses committed in connection with megaprojects.

[58] Nancy R. Tapias Torrado, Wet'suwet'en women leading the defence of rivers and water from abuses committed in connection with megaprojects.

[59] Nancy R. Tapias Torrado, Wet'suwet'en women leading the defence of rivers and water from abuses committed in connection with megaprojects, at 331.

of collective rights for ethnic and racial minorities.[60] Rachel Sieder describes this trend: "[s]ociety remained characterized by sharp racial, ethnic and class discrimination, yet the hegemonic discourse was of universal and undifferentiated citizenship, shared national identity and equality before the law."[61] This constitutional emphasis on formal equality masked the persistence of structural exclusion, notably the *de facto* barriers that operate through multiple interconnected mechanisms, reinforcing racialized exclusion.

Historical Violence as a Mechanism of Exclusion

Systemic violence has served as a primary mechanism for enforcing democratic exclusion, particularly during periods of political crisis or when communities assert their rights. This violence builds upon deeper historical foundations where Indigenous and Afro-descendant peoples were rendered legally and politically invisible, and often denied fundamental rights and human rights. Such dehumanization enabled extreme forms of violence, including genocidal campaigns such as the attempted extermination of the Maya Ixil people in Guatemala during the 1980s,[62] and practices such as the "hunting" of Indigenous peoples in Colombia's Orinoco region during the 1960s.[63]

In **Peru**, according to the Truth and Reconciliation Commission, during the internal armed conflict (1980-2000), the insurgent groups *Shining Path* ("*Sendero Luminoso* (SL)" in Spanish) and the *Revolutionary Movement Túpac Amaru* (*Movimiento Revolucionario Túpac Amaru* (MRTA) in Spanish) were responsible for killings and other abuses against the Indigenous population, reproducing conceptions of inferiority and instrumentalization. For their part, the Peruvian State Armed Forces committed abuses based on the contempt and objectification of the "Indian."[64] Certainly, systemic or structural racism produced a differentiated valuation of the victims, arousing indifference among the national public opinion, despite the thousands of Indigenous men and women murdered and whose rights were violated.[65] One of the most widely used legal instruments that enabled the sustained violation of human rights was the declaration of a state of emergency for extended periods, covering several southern Andean regions. State of emergency declarations further weakened Peruvian democracy by granting broad powers to military commanders, to the detriment of legitimately elected civilian authorities.[66]

This pattern of state-sanctioned violence was also observed in other countries. During **Brazil's** military dictatorship (1964–1985), Indigenous peoples were subjected to systemic violence, forced displacement, and assimilationist policies under the guise of national development.[67] State-led infrastructure projects — such as highways, dams, and mining ventures in the Amazon — were implemented without consultation and often resulted in the invasion and destruction of Indigenous territories. The National Indian Foundation

[60] For instance, while the Constitution of Colombia recognizes ethnic and cultural diversity (Article 7) and guarantees the autonomy of indigenous territories to maintain their own authorities and norms (Article 330), these guarantees coexist with a normative and political model that privileges traditional liberal democracy; Analysis contributed by Heiner Mosquera.
[61] Rachel Sieder, "Introduction," in *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (2002).
[62] CEH, 1999, referenced in in Tapias Torrado, N. (2020). Indigenous women leading the defence of human rights from the abuses by mega-projects in Latin America, in the face of extreme violence. ORA. https://ora.ox.ac.uk/objects/uuid:3a1393b3-1a8b-4341-bb6e-7a33897db5c7
[63] Samper, 2012, referenced in Tapias Torrado (2020).
[64] Comisión de la Verdad y Reconciliación (CVR) (2003), Informe Final, Tomo I, Segunda parte, Capítulo 1: "Los actores armados", Lima: CVR, disponible en: https://www.cverdad.org.pe/ifinal/tomo1.php
[65] Comisión de la Verdad y Reconciliación (CVR), Informe Final, Tomo 8, Lima: CVR, 2003, disponible en: https://www.dhnet.org.br/verdade/mundo/peru/cv_peru_informe_final_tomo_08.pdf
[66] Comisión de la Verdad y Reconciliación (CVR) (2003), Informe Final, Tomo I, Capítulo 4: "La dimensión jurídica de los hechos", Lima: CVR, disponible en: https://www.cverdad.org.pe/ifinal/pdf/TOMO%201/1.4%20La%20dimension%20juridica%20de%20los%20hechos.pdf
[67] Juliana Neuenschwander Magalhães, "The Inclusion of the Exclusion of Indigenous Peoples in Brazil: From the 'Raposa Serra do Sol' Case to the Maracanã Village" in XXIII National Congress of CONPEDI/UFPB (João Pessoa: CONPEDI, 2014) 124.

(FUNAI), though formally tasked with protecting Indigenous rights, functioned primarily to assimilate Indigenous populations into dominant society, undermining their autonomy. For most of the twentieth century, Brazil's Indigenous peoples were considered legal wards of the state,[68] with their affairs managed by the federal government.[69]

Reports from the era, in Brazil, including those compiled by the National Truth Commission (*Comissão Nacional da Verdade,* CNV), document cases of torture, massacres, and exposure to diseases as part of a broader strategy to neutralize Indigenous resistance to state expansion.[70] The CNV estimates that at least 8,350 Indigenous people died during the military dictatorship.[71] These actions exemplify how the authoritarian regime instrumentalized development and national security discourse to suppress Indigenous political and territorial claims.[72]

Nicaragua is another country where there are "patterns of violence, territorial dispossession and cultural assimilation" [73] as "part of a process of historical discrimination and exclusion against Indigenous and Afro-descendant peoples."[74] The IACHR has documented how historical violence against these peoples has intensified since 2015. In a 2025 report, the IACHR highlighted patterns of violence against these peoples on the Caribbean coast of Nicaragua, with the acquiescence or tolerance of the State. The IACHR specified that "the lethal violence directed against Indigenous and Afro-descendant peoples on the Caribbean coast has been perpetrated with extreme cruelty, in a sustained manner over time and with the purpose of dispossessing communities of their ancestral territories."[75] Additionally, the IACHR underscored the systematic nature of this armed violence against these peoples in the following terms:

> *some of these murders have occurred in the context of systematic armed attacks perpetrated by settler groups and organized crime with the tolerance and acquiescence of the State, with the aim of dispossessing the peoples of their territories, destroying their livelihoods, such as crops, and instilling a climate of fear in the region. In many cases, these attacks have been reported as "ambushes" in which Indigenous people were attacked while carrying out subsistence activities in their own territories. The IACHR has also identified a pattern of kidnappings that culminated in the murder of the victims.*[76]

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[68] Jonathan W. Warren, Racial Revolutions: Antiracism and Indian Resurgence in Brazil (Durham: Duke University Press, 2001) at 148.
[69] Brazil, "Statute of the Indian (Law No 6.001/1973)" (1 December 1973) art 4, online: https://pib.socioambiental.org/pt/Estatuto_do_%C3%8Dndio; José Maurício Arruti, "Identidades quilombolas: políticas, dispositivos e etnogêneses" (2003) 18:51 Rev Bras Ci Soc 143; Analysis contributed by Ana Luiza Gregorio Vidotti.
[70] Brazil, National Truth Commission, Final Report: Volume I, Part II – Violations of the Rights of Indigenous Peoples (Brasília: CNV, 2014) at ch 2, online: https://comissaodaverdade.al.sp.gov.br/relatorio/tomo-i/downloads/I_Tomo_Parte_2_Violacoes-aos-direitos-dos-povos-indigenas.pdf
[71] Brazil, National Truth Commission, Final Report: Volume I, Part II – Violations of the Rights of Indigenous Peoples (Brasília: CNV, 2014) at 215.
[72] Mariana M. Dias Werneck, "Transitional (In)Justice for Indigenous Peoples in Brazil" (2017) 22:2 Revista Direito Público 431 at 433–434, online: https://www.scielo.br/j/rdp/a/JrfYbbjx5CXf8s9VyX8rJtC/?lang=en.
[73] Authors' own translation. CIDH, Violencia contra pueblos indígenas y afrodescendientes de la Costa Caribe en Nicaragua, OEA/Ser.L/V/II Doc. 149/25, 25 de agosto de 2025, párr. 203, en línea: https://www.oas.org/es/cidh/informes/pdfs/2025/informe_afro_%20ind%C3%ADgenas_nicaragua.pdf
[74] Authors' own translation. CIDH, Violencia contra pueblos indígenas y afrodescendientes de la Costa Caribe en Nicaragua, OEA/Ser.L/V/II Doc. 149/25, 25 de agosto de 2025, párr. 203.
[75] Authors' own translation. CIDH, Violencia contra pueblos indígenas y afrodescendientes de la Costa Caribe en Nicaragua, OEA/Ser.L/V/II Doc. 149/25, 25 de agosto de 2025, párr. 148.
[76] Authors' own translation. CIDH, Violencia contra pueblos indígenas y afrodescendientes de la Costa Caribe en Nicaragua, OEA/Ser.L/V/II Doc. 149/25, 25 de agosto de 2025, párr. 149.

The IACHR also recognized that this violence violates the rights to self-determination and territorial rights of Indigenous and Afro-descendant communities on Nicaragua's Caribbean coast, requiring the State to act promptly and effectively to safeguard those rights.[77] This context of vulnerability for Indigenous and Afro-descendant peoples is exacerbated by the State's unwillingness to ensure that the authorities elected by these peoples exercise their role legitimately. In this regard, in its 2025 report, the IACHR recommended that the State "adopt a national plan aimed at re-establishing indigenous and Afro-descendant authorities, guaranteeing traditional election systems, and eradicating 'parallel' authorities or governments that supplant the authorities elected by indigenous and afro-descendant communities."[78]

In Latin America, this historical violence has been reinforced by intersecting systems of oppression. Indigenous women, in particular, have endured violence, discrimination, and exclusion from negotiations, decision-making, and leadership roles concerning projects that affect their territories.[79] These exclusions operate through patriarchal structures, where ancestral community organizations and land titling systems traditionally exclude women. Meanwhile, corporate and state actors favour negotiating only with men, even when Indigenous women occupy leadership roles within their communities, intensifying violence and discrimination against these women.[80]

Institutional Discrimination and Statistical Invisibilization

Beyond direct violence, institutional discrimination has operated through systemic economic and social exclusion that reinforced political marginalization. For instance, in **Brazil**, the legacy of authoritarianism also permeates the judicial system, where Indigenous and Quilombola claims to land and cultural autonomy are often met with legal obstacles, bureaucratic delays, and political interference. Even after the 1988 Constitution formally recognized these communities' collective rights, implementation has been inconsistent and vulnerable to ideological shifts. The agrarian, industrial, and political elite have routinely sought to limit territorial protections through legislative maneuvers and judicial reinterpretations. Attempts to enforce restrictive frameworks, such as the "Temporal Framework" (*marco temporal*) thesis, exemplify efforts to systemically weaken Indigenous and Quilombola land rights despite constitutional safeguards.[81]

Furthermore, the erosion of social policies meant to promote inclusion — particularly in education, health, and political representation — has hindered the full realization of Indigenous and Quilombola citizenship. Political participation, though formally guaranteed, remains structurally constrained. In this context, Brazil's legal advancements in Indigenous and Quilombola rights must be viewed not as completed

[77] CIDH, Violencia contra pueblos indígenas y afrodescendientes de la Costa Caribe en Nicaragua, OEA/Ser.L/V/II Doc. 149/25, 25 de agosto de 2025, párrs. 204-207.
[78] Authors' own translation. CIDH, Violencia contra pueblos indígenas y afrodescendientes de la Costa Caribe en Nicaragua, OEA/Ser.L/V/II Doc. 149/25, 25 de agosto de 2025, párr. 218(2).
[79] Tapias Torrado, N. (2020). *Indigenous women leading the defence of human rights from the abuses by mega-projects in Latin America, in the face of extreme violence*. ORA, at 129-131. https://ora.ox.ac.uk/objects/uuid:3a1393b3-1a8b-4341-bb6e-7a33897db5c7
[80] Nancy Tapias Torrado (2020). Indigenous women leading the defence of human rights from the abuses by mega-projects in Latin America, in the face of extreme violence, at 129.
[81] The "marco temporal" thesis limits Indigenous and Quilombola land rights to territories occupied by them at the time of the promulgation of the Federal Constitution (October 1988). Despite the Supreme Federal Court deeming it unconstitutional, Law 14.701/2023 seeks to enforce this framework, threatening Indigenous land demarcation and benefiting economic interests. Indigenous leaders warn this "desconstitutionalization" undermines their territorial rights and autonomy. Agência Brasil, "Luta indígena enfrenta marco temporal e tenta "aldeamento do Estado" (2025), online: https://agenciabrasil.ebc.com.br/direitos-humanos/noticia/2025-02/luta-indigena-enfrenta-marco-temporal-e-tenta-aldeamento-do-estado; Analysis contributed by Ana Luiza Gregorio Vidotti.

victories, but as ongoing struggles within a system still deeply shaped by colonial, authoritarian, and racialized structures.[82]

Statistical exclusion is one factor that has reinforced political marginalization, particularly regarding ethno-racial self-identification and statistical visibility. Data collection trends mirror political priorities and ideologies. As Edward Telles explained, many countries sought to assess their progress in whitening their populations in the late 19th and early 20th centuries by conducting ethno-racial censuses, which peaked in the 1920s and were subsequently dropped. A shift towards multiculturalism in the 1990s led to a resurgence in demand for ethnic-racial identification, and although progress has been made, indicators still show a lack of improvement.[83] The consequence of this, as described by the IACHR, is that "[t]he lack of statistical data on Persons of African Descent stands in the way of the progressive realization of their rights and inclusion in public policies."[84]

Colombia's history exemplifies another form of invisibility: the lack of practical realization of rights. The abolition of slavery in Colombia took place in 1851, with the law coming into effect in 1852.[85] By the time slavery was abolished, "a good portion of the Black population already had the status of free citizens, a status obtained through various mechanisms ranging from running away and collective organization in 'palenques' (Runaway slaves' settlements), to self-purchased freedom (sic) or freedom granted individually by some enslavers."[86] However, their effective political participation was limited because Colombian society "in practice maintained inferiorizing racial prejudices" which, "coupled with the conditions of social marginalization to which the poorest strata (to which the majority of the Black population belonged) are subjected in a stratified society, effectively turned them into 'second-class citizens.'"[87] Therefore, the legal recognition of citizenship did not automatically translate into material or effective political participation.

During the 19th century, as part of its strategy for integration and social mobility, a large portion of the Black movement joined anti-colonial struggles, and during the Republican period, they played an "active part in the so-called 'democratic societies.'"[88] However, despite their contributions, their participation was marked by subordination,[89] which proves that the structures of racialization have not allowed for the full realization of this population's right to citizenship. During the second half of the 19th century, there was a trend towards excluding Black communities from political and administrative leadership roles. Specifically, "in regions with a demographic predominance of black populations (mainly the Pacific coast and the north of the department of Cauca) [...] [t]he vast majority of administrative staff in local or national and regional institutions with a local presence (mayor's office, customs, revenue, justice, health, education, etc.) were

[82] Security in Context, "Indigenous Peoples in Brazil: A Reflection on Political Resistance and a Luminous Struggle" (2022), online: https://www.securityincontext.com/posts/indigenous-peoples-in-brazil-a-reflection-on-political-resistance-and-a-luminous-struggle. Brazilian Indigenous lawyer talks about fight for Native rights, Harvard Gazette (20 October 2022), online: https://news.harvard.edu/gazette/story/2022/10/brazilian-indigenous-lawyer-talks-about-fight-for-native-rights/; Analysis contributed by Ana Luiza Gregorio Vidotti.
[83] Edward Telles, "The Project on Ethnicity and Race in Latin America (PERLA): Hard Data and What Is at Stake" in Pigmentocracies: Ethnicity, Race, and Color in Latin America (Chapel Hill: University of North Carolina Press, 2014) at 24.
[84] IACHR, Economic, Social, Cultural and Environmental Rights of Persons of African Descent: Inter-American Standards to Prevent, Combat and Eradicate Structural Racial Discrimination, OEA/Ser.L/V/II, Doc 109, 16 March 2021, at para 62, online: www.oas.org/en/iachr/reports/pdfs/desca-afro-en.pdf
[85] Corte Constitucional de Colombia, Sentencia C-931/09, 2009, en línea: https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_489.pdf
[86] Authors' own translation. Carlos Efrén Agudelo, "Etnicidad negra y elecciones en Colombia" (2002) 7:2 Journal of Latin American Anthropology 168, p. 4, en línea: https://hal.science/hal-00943300v1/document
[87] Authors' own translation. Carlos Efrén Agudelo, "Etnicidad negra y elecciones en Colombia" (2002), p. 4.
[88] Authors' own translation. Carlos Efrén Agudelo, "Etnicidad negra y elecciones en Colombia" (2002), p. 4.
[89] Carlos Efrén Agudelo, "Etnicidad negra y elecciones en Colombia" (2002), p. 4.

mestizo[90] and white people from the center of the country or belonging to the non-black minority population of the locality,"[91] which shows that the possibilities for people belonging to the Afro-descendant population to "directly assume the role of local administrators [...] [were] minimal or practically nil."[92]

At the beginning of the 20th century, the Black Colombian population, especially those located in the Pacific region, were among the poorest and most marginalized population groups in the country, and probably had a high illiteracy rate for the time.[93] These conditions of vulnerability were exploited to restrict Black people's right to vote and access to public office, since, until 1932, "knowing how to read, write, and own property" were required to enjoy these rights.[94]

Over the course of the 20th century, and as a result of the exceptional access to higher education that some Black people began to have, in regions or communities with a significant Black population, such as the provinces of Chocó, Valle del Cauca, and Cauca, a Black and *Mulato*[95] leadership elite began to emerge, gradually taking on leadership roles and political and administrative positions in their communities of origin.[96] However, the centralist political and administrative model that has historically characterized Colombia[97] has meant that predominantly Black regions and their leaders, as a general rule, remain structurally marginalized and invisible. The 1991 constitutional process constituted an opportunity for Black communities to fight for the vindication of their rights as a people. Based on Colombia's recognition as an ethnically and culturally diverse country,[98] within the framework of the aforementioned constitutional process, the foundations were laid, through Transitory Article 55 of the Constitution, for the adoption of Law 70 of 1993, also known as the "Black Communities Law." This law constitutes a specific normative framework that aims to recognize and guarantee the territorial rights of Black communities in Colombia.[99] Similarly, the Constitution recognizes the importance of ensuring a minimum degree of political participation and representation for Black communities, which is why the Constitution establishes that Black communities have the right to elect two representatives to the House of Representatives of Congress through special congressional seats established for this purpose (Article 176).[100] The ongoing challenges to access to electoral rights and political representation in contemporary contexts, as well as modern forms of systemic violence, will be addressed in greater detail in Section 3.

Conclusion

This historical foundation, and particularly the convergence of *de facto* barriers, created what amounts to a legacy of systematic disenfranchisement. As documented across the region, Indigenous and Afro-descendant communities faced a complex web of obstacles, making political participation difficult even where it is formally guaranteed. Legal recognition alone is insufficient to dismantle deeply entrenched structural inequalities.

In this regard, we respectfully invite the honourable Court to recognize that the historical exclusion of Indigenous and Afro-descendant communities from democratic processes represents a foundational

[90] Historically, the term 'Mestizo' is used to refer to people of mixed White European (usually Spanish or Portuguese) and indigenous ancestry.
[91] Authors' own translation. Carlos Efrén Agudelo, "Etnicidad negra y elecciones en Colombia" (2002), p. 4.
[92] Authors' own translation. Carlos Efrén Agudelo, "Etnicidad negra y elecciones en Colombia" (2002), p. 4.
[93] Carlos Efrén Agudelo, "Etnicidad negra y elecciones en Colombia" (2002), p. 4.
[94] Authors' own translation. Carlos Efrén Agudelo, "Etnicidad negra y elecciones en Colombia" (2002), p. 4.
[95] In Colombia, the term "Mulato" (Mulatto) refers to a person of mixed African and European ancestry.
[96] Carlos Efrén Agudelo, "Etnicidad negra y elecciones en Colombia" (2002), p. 4.
[97] David Soto, "La descentralización en Colombia: centralismo o autonomía" (2003) Opera 133, en línea: https://revistas.uexternado.edu.co/index.php/opera/article/view/1243
[98] Constitución Política De Colombia, Articulo 7. En línea: https://www.constitucioncolombia.com/titulo-1/capitulo-0/articulo-7
[99] Analysis contributed by Heiner Mosquera.
[100] Constitución Política de Colombia, 1991, art. 176

challenge that continues to undermine genuine political participation across the Americas. Understanding this legacy of exclusion requires examining the interlocking principles of **self-determination, legal and constitutional pluralism, and racial justice** as fundamental underpinnings for transforming democratic practice and ensuring meaningful participation for historically marginalized communities – to which we will turn in Section 2.

Section 2. Indigenous and Afro-descendant Governance Traditions

The exclusion of Indigenous and Afro-descendant communities from formal democratic institutions did not imply political passivity or an absence of governance structures. On the contrary, both groups have historically preserved, adapted, and asserted their own forms of political and social organization, many of which predate or exist alongside contemporary democratic regimes. These systems reflect autonomous decision-making processes, collective governance, and resistance to colonial frameworks and those imposed by the contemporary state.[101]

This section examines the theoretical concepts of **self-determination**, **legal pluralism,** and **racial justice** that underpin diverse forms of political organization. This section also provides examples of how the diverse forms of political organization operate in practice.

2.1 Defining Key Concepts

Self-Determination

The principle of **self-determination** of peoples recognizes the inherent right of peoples to decide their own political, economic, social, and cultural destiny, free from external interference and respecting the principle of equality. It implies both the right to internal self-determination (democratic participation in government) and external self-determination (the ability to decide on their own political future).[102]

The principle is established in Article 1(2) of the UN Charter, which seeks "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[103] Among the international norms that recognize this right, the identical Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes that "[a]ll peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."[104]

Specialized human rights instruments further operationalize these rights for Indigenous and Afro-descendant peoples. While the International Labour Organization's Convention 169 (ILO Convention 169)

[101] José Maurício Arruti, "Identidades quilombolas: políticas, dispositivos e etnogêneses" (2003) 18:51 Rev Bras Ci Soc 143; Glenn H Shepard Jr, "Indigenous Autonomy and the State in Brazil" (2019) 44:3 Latin Am Perspect 14; United Nations, Permanent Forum on Indigenous Issues, Indigenous Peoples' Collective Rights to Lands, Territories and Resources (New York: United Nations, 2010) at 12-15.
[102] Analysis contributed by Heiner Mosquera.
[103] The Charter of the United Nations (1945) also protects the right to self-determination based on Article 55 and Chapter XI. Charter of the United Nations, online: https://www.un.org/en/about-us/un-charter/chapter-1
[104] International Covenant on Civil and Political Rights. General Assembly resolution 2200 A (XXI). 16 December 1966. Online: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights International Covenant on Economic, Social and Cultural Rights. (16 December 1966). General Assembly resolution 2200 A (XXI). https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights

on Indigenous and Tribal Peoples (1989) does not explicitly refer to self-determination, it recognizes the authority of Indigenous and Tribal peoples to control their own institutions, ways of life, and economic development.[105] This ILO Convention also establishes participation, consultation, and self-management, as well as the right of Indigenous and Tribal peoples to decide their own priorities, which is an important mechanism for the realization of the right to self-determination.[106]

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) made this right explicit, establishing that "Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development" (Article 3).[107] Article 4 operationalizes this right, recognizing that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[108] The ILO has affirmed that Convention 169 and UNDRIP are compatible and mutually reinforcing.[109]

Regional recognition reinforces these international standards. The IACHR's Thematic Report on Self-Determination recognizes that self-determination includes:

> *the development of systems of autonomy, self-government, and indigenous and tribal administration of justice; respect for the appointment and election of their own authorities; rights to lands, territories, and natural resources; their own initiatives and protocols to enforce the rights of consultation and free, prior, and informed consent; the right to promote and control their own systems or programs of education, health, security, or food sovereignty; and other economic, social, and environmental rights.*[110]

This recognition demonstrates that self-determination encompasses multiple dimensions of collective political authority, extending beyond individual electoral participation to include autonomous governance systems operating according to community-determined values and priorities, as well as issues such as land and territorial rights.[111]

In practice, self-determination empowers communities to organize politically as they see fit. Rather than prescribing particular governance forms, self-determination operates as a principle that enables communities to determine their own political organization in accordance with their values and worldviews.[112] This principle safeguards the fundamental recognition that Indigenous and Afro-descendant communities possess inherent authority to determine their own political organization, whether through consensus assemblies, hereditary leadership, territorial councils, or hybrid arrangements that combine

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[105] Indigenous and Tribal Peoples Convention, 27 June 1989, 1650 UNTS 383, ILO No 169, Preamble [ILO Convention 169].
[106] ILO Convention 169, Articles 6 and 7(1).
[107] United Nations Declaration on the Rights of Indigenous Peoples, Article 3, at 8. Online: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf
[108] United Nations Declaration on the Rights of Indigenous Peoples, Article 4.
[109] CIDH, Derecho a la libre determinación de Pueblos Indígenas y Tribales, OEA/Ser.L/V/II. Doc. 413, 28 diciembre 2021, párr. 75-77. https://www.oas.org/es/cidh/informes/pdfs/LibreDeterminacionES.pdf
[110] Authors' own translation. CIDH, Derecho a la libre determinación de Pueblos Indígenas y Tribales, párr. 49.
[111] For example, see UN General Assembly, Interim report of the Special Rapporteur on the rights of Indigenous Peoples, Albert Kwokwo Barume, UNGAOR, 80th Sess, UN Doc A/80/181 (2025) at para 25, online: https://docs.un.org/en/A/80/181
[112] Authors' own translation. "The IACHR emphasises that the standards, based on international instruments, referred to below should not be understood as predefined or, much less, uniform elements, which could even have a counterproductive effect on the exercise of self-determination. On the contrary, the Commission considers it essential to understand that 'the very content of this right is given in its exercise and is readjusted in relation to changes in historical relations, political conditions, and cultural transformations." CIDH, Derecho a la libre determinación de Pueblos Indígenas y Tribales, párr. 90.

traditional and contemporary elements.[113] Beyond internal governance, self-determination also manifests in processes that affect national scenarios, such as prior consultation and participation in external decisions affecting community territory, resources or culture. These mechanisms enable communities to articulate their positions, conditions, and proposals regarding projects or policies that directly affect their collective well-being.[114]

Thus, for Indigenous and Afro-descendant communities, self-determination encompasses collective decision-making authority exercised through traditional governance structures that operate according to ancestral knowledge, cultural protocols, and community-determined priorities. This collective dimension derives legitimacy through community deliberation processes rather than state authorization, establishing autonomous political authority that operates according to community-determined values and worldviews. Crucially, this understanding recognizes that self-determination is not a right given by the state, but rather acknowledges the fundamental reality that peoples who have maintained their own ways of life and political organization systems, which in some cases coexist with or predate modern states, possess inherent rights to self-determination. These rights must be recognized to maintain peace and security, and to limit states' colonialist approaches.

Legal Pluralism

Closely linked to the concept of self-determination, is that of **legal pluralism**, which challenges the assumption that legitimate normative authority flows exclusively from state institutions; or as Brian Tamanaha states, "[l]egal pluralism stands in opposition to the widely held image of monistic state law."[115] Tamanaha notes that in the past, "ideas about sovereignty and monist law provided key justifications for Western colonization, seizing land, and disregarding indigenous law in settler countries." Along these lines, today, "the monist law state is an implicit standard widely held by jurists for what a properly constructed system of law consists of, deeming anything that departs from this image inherently flawed and in need of rectification."[116] Reflecting this, Latin American states have historically developed centralized national legal systems. However, plural legal orders have persisted across the region, in the form of Indigenous and Afro-descendant governance and judicial systems. Throughout the 19th and 20th centuries, Indigenous and Afro-descendant communities continued to resolve their disputes through their own authorities and norms, both as expressions of autonomous legal systems and in response to state marginalization and inadequate legal infrastructure that did not reach their territories.[117]

Contemporary legal theory offers sophisticated frameworks for understanding how these multiple normative orders function conceptually. For Indigenous and Afro-descendant communities, legal pluralism extends beyond coexisting legal systems to encompass what Boaventura de Sousa Santos describes as "legal porosity" or "interlegality".[118] Interlegality refers to how our legal life is constituted by an "intersection of

[113] Analysis contributed by Heiner Mosquera.
[114] The IACHR emphasises that consultation processes should not give rise to a "homogenising mechanism", but rather respect the diversity of governance, recognizing that "there is no single way to exercise this right" and that consultation and consent "have been redefined by indigenous and tribal peoples themselves, based on their self-determination" (authors' own translation). CIDH, Derecho a la libre determinación de Pueblos Indígenas y Tribales, párrs. 178-180.
[115] Brian Z Tamanaha, Legal Pluralism Explained: History, Theory, Consequences (New York: Oxford University Press, 2021) at 4.
[116] Brian Z Tamanaha, Legal Pluralism Explained: History, Theory, Consequences, at 8.
[117] Rachel Sieder, "Introduction," in *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (2002), at 9.
[118] Boaventura de Sousa Santos, "Law: A Map of Misreading – Toward a Postmodern Conception of Law" (1987) 14 J.L. & Soc'y 281, at 298.

different legal orders," while legal porosity denotes the fluid boundaries between these orders, which can give rise to overlaps and contradictions.[119] Further, Boaventura de Sousa Santos affirmed that:

> *Legal pluralism is the key concept in a postmodern view of law. Not the legal pluralism of traditional legal anthropology in which the different legal orders are conceived as separate entities coexisting in the same political space, but rather the conception of different legal spaces superimposed, interpenetrated, and mixed in our minds as much as in our actions.*[120]

This framework explains why Indigenous and Afro-descendant governance systems cannot be considered subordinate to state democratic institutions without losing their essential character. Instead, they represent legitimate political authority that operates according to different but equally valid normative frameworks. Indigenous Community Councils, Quilombola assemblies, and territorial governments demonstrate this interpenetration of these systems in practice (see Section 2.2 below).

For the purposes of democratic analysis, legal pluralism is distinct from political pluralism, defined in the Democratic Charter as the need for a "pluralistic system of political parties and organizations."[121] Legal pluralism goes beyond expanding the electoral roll or adding Indigenous or Afro-descendant candidates to subordinate party lists, but involves recognizing the plurality of normative systems.[122]

International law has established frameworks protecting the reality of legal pluralism through instruments such as ILO Convention 169, which establishes that Indigenous and Tribal peoples "shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights" (Article 8).[123] Constitutional frameworks across the Americas have made some progress recognizing this;[124] however, challenges remain, including state overreach in defining which customs are acceptable.[125]

Many States' constitutional frameworks across the Americas have increasingly recognized legal pluralism, though with varying degrees of explicitness and scope. **Colombia's** Constitution explicitly recognizes legal pluralism in Article 246, which grants Indigenous authorities jurisdictional functions within their territories "in accordance with their own laws and procedures as long as they are not contrary to the Constitution and the laws of the Republic".[126] The same was expanded to Afro-descendant communities through Constitutional Court jurisprudence, which deemed the 169 ILO Convention, incorporated into Colombian legislation through Law 21 of 1991, applicable to Black communities.[127] Law 70 of 1993 (also known as

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[119] Boaventura de Sousa Santos, "Law: A Map of Misreading – Toward a Postmodern Conception of Law" (1987) 14 J.L. & Soc'y 281, at 298.
[120] Boaventura de Sousa Santos, "Law: A Map of Misreading – Toward a Postmodern Conception of Law", at 298.
[121] Inter-American Democratic Charter, Article 3; I/A Court H.R., Request for an Advisory Opinion on Democracy and its protection before the Inter-American Human Rights System submitted by Guatemala, at 30-31.
[122] Analysis contributed by José Saldaña Cuba.
[123] ILO Convention 169, Article 8.
[124] For instance, Article 149 of the Peruvian Constitution states "The authorities of the rural communities, with the support of the rural patrols, may exercise jurisdictional functions within their territorial jurisdiction in accordance with customary law, provided that they do not violate fundamental human rights; and that the law shall establish the forms of coordination of such special jurisdiction with the magistrates' courts and other bodies of the judiciary" (Authors' own translation). online: https://www2.congreso.gob.pe/sicr/cendocbib/con4_uibd.nsf/1B2F184F18C0076E05257BF2005E521E/$FILE/08648.pdf. Colombia's 1991 Constitution similarly recognizes Indigenous territorial autonomy, while Brazil's 1988 Constitution affirms Indigenous social organization, customs, languages, beliefs, and traditions.
[125] Rachel Sieder, "Introduction," in *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (2002)
[126] Authors' own translation. Constitución Política De Colombia, Articulo 246. En línea: https://colombia.justia.com/nacionales/constitucion-politica-de-colombia/titulo-viii/capitulo-5/
[127] ILO Convention 169, Article 8.2: "These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human

the *Law regarding Black communities*) and Presidential Decree 1745 of 1995 recognize that traditional authorities within Black communities can exercise jurisdiction to resolve disputes within the communities in an amicable manner.[128] However, this is a more limited scope than Indigenous jurisdictional autonomy.[129] **Peru's** Constitution (Article 149) grants the authorities of Indigenous communities ("*Comunidades Campesinas y Nativas*") jurisdictional functions "within their territorial scope in accordance with customary law, provided they do not violate fundamental human rights," though without using the term "legal pluralism".[130]

Bolivia's Constitution establishes legal pluralism as a foundational state principle, stating in Article 1 that the country "is founded on political, economic, juridical, cultural and linguistic pluralism," and declares that "ordinary jurisdiction [exercised by the Supreme Court of Justice] and rural native indigenous jurisdiction enjoy equal status" (Article 179, II). However, the subsequent Jurisdictional Demarcation Law (*Ley de Deslinde Jurisdiccional*) has imposed limitations, for instance, by excluding matters such as homicides, corruption, and labour law from Indigenous jurisdiction.[131] The Bolivian judicial branch has also developed an intercultural protocol for judges, which regulates how cases involving Indigenous peoples subject to ordinary jurisdiction should be interpreted.[132]

Ecuador's Constitution demonstrates plurinational recognition, declaring the state as "intercultural, plurinational" (Article 1) while Article 171 grants Indigenous communities, peoples, and nationalities jurisdictional functions based on their ancestral traditions and their own law, within their territorial scope, provided they are not contrary to the Constitution and human rights recognized by international instruments.[133] This provision establishes the State's binding commitment to recognizing and supporting these jurisdictions.

Brazil presents a more complex case of recognition. Although Brazil does not explicitly recognize legal pluralism as a formal principle, constitutional provisions create opportunities for partial recognition, particularly regarding Indigenous peoples and Quilombola communities. Article 231 of the Constitution recognizes the social organization, customs, languages, beliefs, and traditions of Indigenous peoples,

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rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle."; Law 21 of 1991, https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=37032; Colombian Constitutional Court. Sentencia C-169 de 2001, https://www.corteconstitucional.gov.co/relatoria/2001/c-169-01.htm.

[128] Law 70 of 1993, Article 5, https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=7388; Decree 1745 of 1995, Article 11, numeral 12, https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=7389.

[129] National Constituent Assembly, Colombian Constitution of 1991: "ARTICLE 246. The authorities of indigenous peoples may exercise jurisdictional functions within their territorial jurisdiction, in accordance with their own rules and procedures, provided that they are not contrary to the Constitution and the laws of the Republic. The law shall establish the forms of coordination of this special jurisdiction with the national judicial system" (authors' own translation); Yuri Alexander Romaña-Rivas, "Legal Adaptation: How Colombia's Specialized Tribunal Has Adapted to the Reality of Legal Pluralism" (2023) 2 GLSA Research Series (Legal).

[130] Authors' own translation. Political Constitution of Peru, 1993, Article 149. https://www.oas.org/juridico/spanish/per_res17.pdf. Likewise, Indigenous peoples enjoy constitutional recognition of their communal property and political governing bodies, as set out in the General Law on Rural Communities (Law No. 24656, 1987); Ley General de Comunidades Campesinas, Ley N.º 24656, publicada en El Peruano el 29 de abril de 1987; Analysis contributed by José Saldaña Cuba.

[131] Political Constitution of the Plurinational State of Bolivia, 2009, Articles 1, 178, 179, https://www.constituteproject.org/constitution/Bolivia_2009; Guillermo Pérez Ciudad, "Plurinational States and Legal Pluralism: An Impossible Mission?" The Political Science Reviewer 48, no. 2 (2024): 265, discussing Article 10 of the Jurisdictional Demarcation Law.

[132] Tribunal Supremo de Justicia de Bolivia, "Protocolo de Actuación Intercultural de las Juezas y Jueces, en el marco del pluralismo juridico igualitario" 2017, https://tsj.bo/wp-content/uploads/2019/11/protocolo-de-actuaci%C3%B3n-intercultural-de-las-juezas-y-jueces-min.pdf.

[133] Constitution of the Republic of Ecuador, 2008, arts. 1, 171, https://www.oas.org/juridico/pdfs/mesicic4_ecu_const.pdf.

guaranteeing their original rights to the lands they traditionally occupy.[134] Article 68 of the Transitional Constitutional Provisions guarantees collective land rights to Quilombola communities.[135] Supreme Federal Court (*Supremo Tribunal Federal*) jurisprudence has reinforced this interpretation, notably in the demarcation of the Raposa Serra do Sol Indigenous land case, in which the Court acknowledged the importance of Indigenous customs and organizational structures in shaping constitutional rights. Brazil thus recognizes a certain plurality of normative systems, though not legal pluralism in the strict sense, since no law establishes such a framework and the state's legal order ultimately prevails.[136]

The different constitutional approaches reveal ongoing tensions in the recognition of legal pluralism, relating to both its explicit articulation and its practical implementation. Even when recognized in their own right, Indigenous and Afro-descendant legal orders are often limited in terms of their area of application, or the state retains ultimate interpretive authority, thereby limiting their effective judicial and political autonomy.

Racial Justice

The historical exclusion documented in Section 1 reveals that barriers to democratic access are deeply intertwined with **structural or systemic racism**, hindering both effective participation in formal democratic institutions and recognition of Indigenous and Afro-descendant governance systems. Indigenous and Afro-descendant communities face distinct yet interconnected experiences of racialized exclusion stemming from different historical trajectories: colonial conquest, the trading of human beings and labour exploitation during enslavement, and post-abolition marginalization. Accordingly, international instruments reflect different approaches: some address Indigenous peoples and people of African descent separately, while others address Indigenous and Tribal peoples jointly, with the latter category often including Afro-descendant communities.[137]

The foundational international framework for addressing racial discrimination is established by the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, which defines racial discrimination as:

> *any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*[138]

Article 5(c) explicitly protects political rights, including "the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in

[134] Constituição da República Federativa do Brasil de 1988, Título VIII, Capítulo VIII, art. 231, https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=469704
[135] Constituição da República Federativa do Brasil de 1988, Título X, Ato das Disposições Constitucionais Transitórias, art. 68, https://www.mds.gov.br/webarquivos/legislacao/seguranca_alimentar/_doc/leis/1988/Constituicao%20Federal%20de%201988%20-%20Titulo%20X%20-%20Art%2068.pdf.
[136] Analysis contributed by Ana Luiza Gregorio Vidotti.
[137] See, e.g., UN Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, 13 September 2007 (Indigenous peoples); World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban Declaration and Programme of Action, 8 September 2001, A/CONF.189/12 (focused on people of African descent); cf. International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989 (addressing both Indigenous and tribal peoples, the latter category often including Afro-descendant communities).
[138] International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, entered into force 4 January 1969, art. 1(1).

the conduct of public affairs at any level."[139] The Committee on the Elimination of Racial Discrimination (CERD) monitors the implementation of the Convention and, through its General Recommendations, has developed extensive guidance and recommendations to combat structural racism.[140]

Within the Inter-American context, the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance defines racism as "any theory, doctrine, ideology, or sets of ideas that assert a causal link between the phenotypic or genotypic characteristics of individuals or groups and their intellectual, cultural, and personality traits, including the false concept of racial superiority" that "leads to racial inequalities, and to the idea that discriminatory relations between groups are morally and scientifically justified."[141] This Convention also recognizes "certain persons and groups experience multiple or extreme forms of racism, discrimination and intolerance, driven by a combination of factors such as race, color, lineage, national or ethnic origin, or others recognized in international instruments."[142]

The 2001 Durban Declaration and Programme of Action, with its particular focus on people of African descent, established definitions and called for concrete actions by States and other actors to address systemic discrimination.[143] Structural discrimination operates systemically to limit opportunities for self-development, restrict access to resources, and exclude communities from decision-making processes based on racial positioning within social structures.[144] The structural perspective reveals how seemingly neutral democratic institutions can perpetuate exclusion through their design and operation.

Contemporary analysis by the UN High Commissioner for Human Rights emphasizes that states must take "concrete steps to implement the recommendations made by United Nations and regional human rights mechanisms," underscoring the role of regional human rights systems like the Inter-American system in advancing racial justice.[145]

The need to address structural problems rather than focusing solely on individual acts of discrimination is reflected in judicial approaches that acknowledge the ongoing relevance of race in legal analysis. U.S. Supreme Court Justice Sonia Sotomayor offers a compelling reflection on racial justice by articulating why race matters to the interpretation and application of law to address historical injustices. In Schuette v. Coalition to Defend Affirmative Action (2014), Justice Sotomayor stated the following:

> *Race matters. Race matters in part because of the long history of racial minorities being denied access to the political process. ... Race also matters because of persistent racial inequality in*

[139] International Convention on the Elimination of All Forms of Racial Discrimination, art 5(c).
[140] International Convention on the Elimination of All Forms of Racial Discrimination, art. 8; Committee on the Elimination of Racial Discrimination, General Recommendation No. 37 (2024) on equality and freedom from racial discrimination in the enjoyment of the right to health; General Recommendation No. 36 (2020) on preventing and combating racial profiling by law enforcement officials.
[141] Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance (A-68), Chapter I, Article 1(4), online: https://www.oas.org/en/sla/dil/inter_american_treaties_a-68_racism.asp ; Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, adopted on June 5, 2013, entered into force on November 11, 2017. OAS, Department of International Law, online: https://www.oas.org/en/sla/dil/inter_american_treaties_A-68_racism_signatories.asp
[142] Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, Preamble, at 2.
[143] Durban Declaration and Programme of Action, World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 8 September 2001, UN Doc A/CONF.189/12, online: https://www.ohchr.org/sites/default/files/Documents/Publications/DurbanDecProgAction_sp.pdf
[144] Iris Marion Young Structural Injustice and the Politics of Difference, at 83-84.
[145] UN Human Rights Council. "Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers", A/HRC/47/53.1, 1 July 2021, at para 67, online: https://digitallibrary.un.org/record/3930167?v=pdf

> *society — inequality that cannot be ignored and that has produced stark socioeconomic disparities. […]*
>
> *In my colleagues' view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.*
>
> *As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race does matter*.[146]

Therefore, understanding and acknowledging the history of racialized contexts is essential for analyzing political participation among Indigenous and Afro-descendant groups. For Indigenous peoples, claims to freedom of cultural expression and political self-determination occur within what Young terms "racialized structural inequality"[147], while for people of African descent, these claims reflect legacies of systemic dehumanization that continue to operate through state institutions. This gives context to both the structural barriers Indigenous and Afro-descendant face in accessing state governance, as well as the conditions in which autonomous governance systems are developed and maintained. Combined with self-determination and legal pluralism, racial justice provides the theoretical foundation for recognizing Indigenous and Afro-descendant governance systems as legitimate forms of collective political participation, offering a framework for examining current practices, tensions, and potential solutions.

2.2 Indigenous and Afro-descendant Peoples' Traditional Governance Systems

The principles outlined above find concrete expression in diverse governance systems across the Americas. Rather than attempting a comprehensive typology of governance systems, this section examines some forms and cases of traditional governance systems, informed by analysis provided by contributors from Peru, Colombia, and Brazil.

Diversity of Systems and Levels of Governance

Indigenous and Afro-descendant communities maintain governance systems that often operate outside state recognition, and these systems play a central role in regulating social, political, economic, and spiritual life.[148] These structures often act as legitimate spokespersons for group interests, guiding not only internal community life but also channelling active participation in national scenarios through differentiated representation mechanisms.[149] These systems can operate through various mechanisms and leadership formats at the local, regional, and national levels, ranging from communal councils (*cabildos*) elected by consensus in collective assemblies, to healers who exert influence through ancestral and spiritual

[146] Gene Demby, 'Two Justices Debate The Doctrine Of Colorblindness' NPR (23 April 2014), online: https://www.npr.org/sections/codeswitch/2014/04/23/306173835/two-justices-debate-the-doctrine-of-colorblindness; Schuette v Coalition to Defend Affirmative Action, 572 US 291 (2014) (US Supreme Court): https://supreme.justia.com/cases/federal/us/572/291/#:~:text=A%20state%20does%20not%20violate,departments%20of%20state%20educational%20institutions

[147] Iris Marion, Young Structural Injustice and the Politics of Difference, at 104.

[148] Analysis contributed by Ana Luiza Gregorio Vidotti.

[149] Analysis contributed by Heiner Mosquera.

knowledge, to regional and national Indigenous organizations that serve as interlocutors with state institutions.[150]

Importantly, these governance spheres can operate in tandem and in tension with one another. As Virginie Laurent documented in Colombia, interaction between Indigenous representatives at different levels can generate conflicts, particularly generational tensions between those who engage with state institutions and those who resist doing so.[151] Despite these tensions, however, the different spheres of Indigenous political expression function as complementary rather than competing systems. Laurent describes how the Indigenous movement has achieved this over the last 30 years: "its institutionalization has been only partial, and it has been able to sustain a strong capability of contest".[152] This demonstrates that strategic engagement with state systems can be achieved without full integration or loss of autonomous political power.

As a note, although often addressed together in this *amicus* brief, it is essential to acknowledge, as mentioned above, the distinct histories of Afro-descendant and Indigenous communities. Unlike Indigenous systems rooted in pre-colonial structures, Afro-descendant governance developed through liberation struggles and community formation under hostile conditions. Afro-descendant governance emerges from resistance to slavery and post-abolition marginalization, emphasizing collective solidarity and territorial reconstruction. These systems have developed institutional forms – such as community councils and territorial assemblies – that address both the practical needs of governance and the preservation of collective identity.

Cases of Indigenous and Afro-descendant Governance Systems

In **Peru**, although recognition and protection of Indigenous peoples' autonomy have been limited, there are several examples of autonomous territorial governments. One of these is the Wampis Autonomous Territorial Government (GTAW). This initiative was launched in 2005 with the aim of exercising full autonomy and resolving conflicts that directly affected them, such as illegal mining practices in their rivers, which are seriously damaging the ecosystems of the Amazon. In the absence of the Peruvian state, the GTAW is the only actor resisting to these extractive practices.[153] Likewise, its governing statute, approved in 2015, is based on its Indigenous *cosmovision* and has an intercultural perspective, with emphasis on the protection and valorization of its collective identity.[154]

This autonomy does not imply a form of separatism from the State, nor does it involve the creation of areas outside the law.[155] On the contrary, it is based on the principle of adequacy, understood as the need to maximize the exercise of this collective right, given its vital importance for the subsistence of Indigenous populations. Therefore, the full and effective recognition of the right to self-determination of peoples must be a priority on the State's agenda. However, the Peruvian state has not deployed mechanisms for the full

[150] Virginie Laurent, "Indigenous Political-Electoral Representation in Colombia (1990s–2020s): Stakes and Outcomes in Three Decades of Practice" in Adrian Albala & Alejandro Natal, eds, Indigenous Political Representation in Latin America (Cham: Springer, 2023) 93.
[151] Virginie Laurent, "Indigenous Political-Electoral Representation in Colombia (1990s–2020s): Stakes and Outcomes in Three Decades of Practice"
[152] Virginie Laurent, "Indigenous Political-Electoral Representation in Colombia (1990s–2020s): Stakes and Outcomes in Three Decades of Practice", at 120.
[153] Nayra Torres. "Liderazgo wampis: la resistencia ante la minería ilegal" (30 September 2024). En línea: https://www.pucp.edu.pe/climadecambios/noticias/liderazgo-wampis-la-resistencia-ante-la-mineria-ilegal/
[154] CIDH. (2021). Derecho a la libre determinación de pueblos indígenas y tribales. En línea: https://iwgia.org/es/recursos/publicaciones/4590-derecho-a-la-libre-determinaci%C3%B3n-de-los-pueblos-ind%C3%ADgenas-y-tribales.html
[155] TC (2009). Sentencia recaída en el expediente Nº 03343-2007-PA/TC. Caso cordillera escalera. https://www.tc.gob.pe/jurisprudencia/2009/03343-2007-AA.pdf

recognition of the GTAW's legal status or communal property, which shows a colonial attitude of distrust and protection of interests that are alien to Indigenous peoples.[156]

More generally, in Peru, under Article 149 of the Peruvian Constitution, Indigenous peoples have the authority to administer justice "within their territorial scope in accordance with customary law, provided that they do not violate the fundamental rights of the individual."[157] Although communal justice is an institution recognized by the State, based on its ancestral origin, the lack of coordination between communal justice and ordinary justice generates serious problems.[158] Similarly, Indigenous peoples have constitutional recognition of their communal property and their political governing bodies, set out in the General Law of Peasant Communities (Law No. 24656, 1987). Under this regulation, it is established that communal leaders are elected periodically through personal, free, and secret voting.[159] Candidates are usually proposed by community members themselves, in view of their aptitudes and commitment to the community and its common interests. These legal practices, still in force today, demonstrate that the communal authorities enjoy a high level of legitimacy, even higher than that of the formally elected authorities in the Peruvian state structure.[160]

In **Colombia**, Community Councils represent a distinct form of governance among Afro-descendants, born out of sustained mobilization and constitutional reform. Following the 1991 Constitution, Law 70 of 1993 legally established the Community Councils as the ethnic authority responsible for administering the Collective Territories of the Black communities. These institutions have evolved far beyond their original mandate. Since then, despite challenges, these spaces have constituted not only a mechanism for the defence of territory and culture, but also a key tool of political resistance, through which these communities have questioned the limits of the liberal model of citizenship and have proposed other forms of democratic participation, based on community, ancestry and territory.[161]

Furthermore, as mentioned above, these systems interact with state institutions through various mechanisms that preserve autonomy while enabling political engagement. Colombia provides examples of institutional mechanisms designed to preserve self-determination and facilitate interaction with the state administration. National-level Indigenous organizations and Afro-Colombian organizations serve as intermediaries between the State and traditional governance, building bridges between these systems and national political processes.[162]

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[156] Roger Merino and Gobierno Territorial Autónomo Wampis (GTAW). Informe legal de sustento de la personería jurídica de los Gobiernos Indígenas Autónomos bajo el principio de autodeterminación. Lima: June. En línea: https://nacionwampis.com/wp-content/uploads/2023/06/Informe_Legal_GTANW_Autodeterminacion.pdf .

[157] Authors' own translation. Constitución Política del Perú de 1993, 29 de diciembre de 1993, Diario Oficial El Peruano, 30 de diciembre de 1993, en línea: https://www.oas.org/juridico/spanish/per_res17.pdf

[158] Coordinadora nacional de derechos humanos. (2023). Informe alternativo sobre el cumplimiento del convenio 169 de la OIT en el Perú. En línea: https://derechoshumanos.pe/informe_alternativo_sobre_cumplimiento_del_convenio_169_de_oit_2023/

[159] Ley General de Comunidades Campesinas, Ley N.º 24656, publicada en El Peruano el 29 de abril de 1987.

[160] Infobae (22 de diciembre de 2024), "Perú lidera ranking de percepción de la corrupción y desconfianza en autoridades, según estudio internacional". En línea: https://www.infobae.com/peru/2024/12/22/peru-lidera-ranking-de-percepcion-de-la-corrupcion-y-desconfianza-en-autoridades-segun-estudio-internacional

[161] Restrepo, E. (2013). Etnización de la negridad: La invención de las 'comunidades negras' como grupo étnico en Colombia. Editorial Universidad del Cauca. https://www.ram-wan.net/restrepo/documentos/etnizacion-libro-fin.pdf. Analysis contributed by Heiner Mosquera.

[162] For instance, in Colombia, organizations like Organización Nacional Indígena de Colombia (ONIC) act as intermediaries with the state. Further details on the ONIC's work can be found in the following link: https://www.onic.org.co/. In the case of Afro-descendant communities, there is a High-Level Advisory Commission of Black, Afro-Colombian, Raizal, and Palenquera Communities. Persuant to the Presidential Decree 1640 of 2020, this commission serves as a space for dialogue and coordination between Afro-descendant communities and the national government. For further details, see Presidential Decree 1640 of 2020 available in the following link: https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=151246

In **Brazil**, Quilombola assemblies have endured for generations as spaces of collective resistance and resilience.[163] These forms of organization — rooted in collective sovereignty and ancestral ties to land — are increasingly expressed through contemporary political movements that maintain traditional leadership structures while engaging with national and international institutions. Quilombola communities embody a unique form of resistance and survival, shaping political and social structures that stand in opposition to dominant narratives of state formation and economic development.[164] Their existence as autonomous territories is characterized by distinct land tenure systems rooted in collective ownership and mutual aid. For centuries, Quilombola settlements functioned as enclaves of sovereignty for the Africans and their descendants who escaped enslavement.[165]

In recent years, only a small fraction of the more than 3,000 recognized Quilombola communities have received definitive land titles, leaving the majority vulnerable to land grabbing, violence, and displacement, creating a gap between legal promise and fulfillment.[166] Contemporary Indigenous and Quilombola organizations embody both continuity and transformation, reinforcing traditional forms of political resistance while adapting strategies to confront modern challenges. These movements maintain the collectivist governance models that have historically sustained Indigenous and Quilombola autonomy, mobilizing their communities to defend territorial rights, cultural preservation, and political recognition.

The Articulation of Indigenous Peoples of Brazil (APIB) and the National Coordination of Articulation of Rural Black Quilombola Communities (CONAQ) are among the most influential organizations advocating to defend territorial rights, cultural preservation, and political recognition through engagement with legal and democratic institutions and international human rights organizations, participating in global forums to hold Brazil accountable for its obligations under international law.[167] For more relevant details on the Brazilian context, please refer to the Annex attached to this *amicus curiae* brief. Information on other relevant cases, contributed by collaborators, is included throughout this document.

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[163] Agência Pública, "Conheça os direitos dos povos quilombolas" (February 2025), online (video): https://apublica.org/video/2025/02/conheca-os-direitos-dos-povos-quilombolas/.

[164] Federal Senate News Agency, "Resistentes, quilombolas querem reconhecimento de seus territórios" (February 2025), online: https://www12.senado.leg.br/noticias/infomaterias/2025/02/resistentes-quilombolas-querem-reconhecimento-de-seus-territorios

[165] Agência Pública, "Conheça os direitos dos povos quilombolas" (February 2025), online (video): https://apublica.org/video/2025/02/conheca-os-direitos-dos-povos-quilombolas/.; This continuity of self-determination is evident in the legal recognition afforded by Article 68 of the 1988 Transitional Constitutional Provisions Act, Decree 4.887/2003, and the Racial Equality Statute (Law 12.288/2010), all of which affirm Quilombola territorial rights and the inherent connection between land, identity, and political inclusion; André Ricardo Fonsêca da Silva, "Public Policies for Maroon Communities: A Building in Fight" (2018) 1:48 Política & Trabalho: Journal of Social Sciences 115, online: https://doi.org/10.22478/ufpb.1517-5901.2018v1n48.27650.

[166] Comissão Pró-Índio de São Paulo, "Quilombola Communities in Brazil: Land Rights and Challenges" (2024), online: https://cpisp.org.br/en/quilombola-communities-in-brazil-land-rights-and-challenges/; Cultural Survival, "Quilombos and Land Rights in Contemporary Brazil" (2023), online: https://www.culturalsurvival.org/publications/cultural-survival-quarterly/quilombos-and-land-rights-contemporary-brazil; University of Texas at Austin, "Afro-Brazilian Quilombo Communities' Struggle for Land Rights" (2022), online: https://law.utexas.edu/wp-content/uploads/sites/31/2016/02/brazil-eng.pdf; Terra de Direitos, "Quilombolas' Community Land Rights under Attack by Brazilian Ruralists" (2023), online: https://cpisp.org.br/quilombolas-community-land-rights-attack-brazilian-ruralists/ ; Terra de Direitos, "Quilombolas – Actions What We Do" (2024), online: https://terradedireitos.org.br/en/actions-what-we-do/quilombolas/16.

[167] Conselho Indigenista Missionário (CIMI), "Indígenas e Quilombolas fortalecem resistência contra fascismo e racismo" (23 October 2018), online: https://cimi.org.br/2018/10/assembleia-dos-povos-indigenas-e-quilombolas-fortalecem-resistencia-contra-fascismo-e-racismo/; Conselho Indigenista Missionário (CIMI), "Desafios para a realidade indígena no atual contexto brasileiro" (15 May 2023), online: https://cimi.org.br/2023/05/desafios-para-a-realidade-indigena-no-atual-contexto-brasileiro/

Conclusion

Contemporary Indigenous and Afro-descendant governance systems demonstrate comprehensive frameworks for political decision-making, economic management, and cultural preservation that operate as integrated alternatives to state democratic institutions. However, in some cases, they have also developed mechanisms that demonstrate their ability to operate and collaborate effectively with state democratic institutions.

The evidence establishes three foundational principles for the Court's analysis**: self-determination** as the normative basis for protecting collective governance systems; **legal pluralism** as the framework enabling coexistence of multiple legitimate normative orders; and **racial justice** as the requirement for dismantling structural exclusions that perpetuate political marginalization. These interconnected principles reveal that Indigenous and Afro-descendant governance represents legitimate political autonomy, and become particularly relevant when examining the systemic tensions these communities encounter with majority rule institutions, as explored in the following section, Section 3.

Section 3. Current Tensions with Majority Rule

3.1 Theoretical Framework: State-Centric Legal Order vs. Legal Pluralism

Having established the diversity of Indigenous and Afro-descendant governance systems in Section 2, we now examine why these systems create fundamental tensions with prevailing state-centric conceptions of the rule of law. Liberal democratic models across the Americas emphasize formal equality, electoral competition, and majoritarian decision-making as core mechanisms for participation. While important for political consolidation, these frameworks often fail to account for historical inequalities affecting ethnic and racialized peoples, with effective participation remaining conditioned by structural racism and persistent social inequalities.[168] Consequently, while democratic principles such as the rule of law are formally egalitarian, they prove insufficient when implemented through majoritarian frameworks that marginalize collective governance traditions.

The resulting tensions stem from state-centric models of institutional design that concentrate authority in unified state systems, in contrast to Indigenous and Afro-descendant governance systems that embody plural normative orders. The Western and Western-influenced majoritarian democratic model privileges individual rights and electoral majority rule, often marginalizing collective and non-Western political traditions such as those of Indigenous and Afro-descendant communities. Boaventura de Sousa Santos characterizes this as "abyssal thinking," a cognitive divide that renders invisible alternative epistemologies and political ontologies rooted in collective sovereignty and cultural continuity.[169] Claude Lefort further elaborates that liberal democracy's reliance on majority rule institutionalizes exclusion by silencing minority political expressions, underscoring the fundamental tension between inclusion and exclusion inherent in democratic systems.[170] Consequently, if the IACtHR were to adopt a predominantly state-centric, majoritarian, and individualistic approach to conceptualizing democracy, there would be a

[168] Walsh, C. (2009). Interculturalidad, Estado, sociedad: luchas coloniales de nuestra época. Universidad Andina Simón Bolívar / Abya-Yala; Analysis contributed by José Saldaña Cuba.
[169] Boaventura de Sousa Santos, Epistemologies of the South: Justice Against Epistemicide (London: Routledge, 2014) at 4–6, 42–45, online: https://doi.org/10.4324/9781315634876 [Santos, Epistemologies of the South].
[170] Claude Lefort, The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism (Cambridge, MA: MIT Press, 1986) at 85–90; Analysis contributed by Ana Luiza Gregorio Vidotti.

significant risk of neglecting essential communitarian, Indigenous, and Afro-descendant perspectives.[171]

As established in Section 2, these theoretical tensions manifest when States attempt to impose centralized legal and political systems that contradict the plural normative orders through which Indigenous and Afro-descendant communities exercise political authority. Legal pluralism emerges as a necessary response, broadening the forms of collective expression and political participation beyond conventional electoral mechanisms to recognize diverse forms of organization and representation of ethnic peoples.[172]

In practice, these tensions present themselves in various forms, including territorial authority and jurisdictional disputes, consultation failures, racialized violence, and inadequate political representation and leadership recognition of traditional authorities.

3.2 Natural Resource Governance and Territorial Authority

Territorial Governance Challenges

The survival of Indigenous and Afro-descendant communities depends on the recognition of their lands and territories, which serve as the material basis for their social, political, economic, and cultural existence. However, the contemporary exercise of territorial governance by Indigenous and Afro-descendant communities directly challenges state claims to exclusive authority over natural resource governance, creating fundamental tensions over who holds legitimate decision-making authority within ancestral territories. In Latin America, there is strong competition over natural resources between Indigenous and Afro-descendant communities on one side, and extractive industries, infrastructure developers, and agro-industrial interests on the other — factors that have contributed to the increase in attacks against environmental and territorial defenders.[173]

The Inter-American Commission has identified the serious danger faced by human rights defenders, especially Indigenous, Afro-descendant, and environmental defenders, in relation to extractive projects. Among the problems identified are the criminalization of defenders, threats against their lives, arbitrary detentions, and other forms of violence by state agents and private actors.[174] As evidence, globally, 31% of human rights defenders killed in 2023 were Indigenous or worked on Indigenous peoples' rights, which is disproportionate given that Indigenous peoples represent only 5% of the world's population.[175]

Contemporary legislative developments demonstrate how states circumvent their obligations to respect and guarantee territorial governance through formal democratic processes. In this regard, the **Peruvian** State has made little progress in regulating and promoting the titling and georeferencing of Indigenous territories, and there have even been setbacks. The most recent case is Law No. 32293, which declares the demarcation and titling of communal territory to be a matter of national necessity and social interest. This regulation poses a threat to collective rights, as it allows for the formalization of illegal occupations within Indigenous

[171] Sergio Verdugo, "Ius constitutionale commune latinoamericano y promesas fallidas" (2025) 51 Actualidad Jurídica 81, p. 89.
[172] Will Kymlicka, Multicultural Odysseys: Navigating the New International Politics of Diversity (Oxford: Oxford University Press, 2007); Brian Z Tamanaha, Legal Pluralism Explained: History, Theory, Consequences (New York: Oxford University Press, 2021).
[173] Anne Larson et al, "Land rights of indigenous peoples and local communities" in *The Land Gap Report* (2022) at 63.
[174] IACHR, Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, Doc 47/15, OEA/Ser.L/V/II (2015), chapter 4, online: http://www.oas.org/en/iachr/reports/pdfs/extractiveindustries2016.pdf
[175] UN General Assembly, Interim report of the Special Rapporteur on the rights of Indigenous Peoples, Albert Kwokwo Barume, UNGAOR, 80th Sess, UN Doc A/80/181 (2025) at paras 45-46, 83, online: https://docs.un.org/en/A/80/181

communal property.[176] Furthermore, although an Intersectoral Mechanism for the protection of defenders has been approved in Peru, [177]it has yet to be effectively implemented, as it lacks precise guidelines, a budget, and other measures to complement the legal security of Indigenous peoples. [178]

Consultation Failures

Prior consultation is a fundamental expression of territorial governance, as it is the primary mechanism through which Indigenous and Afro-descendant communities can exercise decision-making authority over matters that affect their ancestral territories. Prior consultation is a fundamental right of ethnic communities, regardless of whether the impact is positive or negative, as it is the ethnic communities that must decide whether plans, projects, administrative, legal, and/or judicial measures affect or benefit them. Nevertheless, in many cases, the normative recognition of consultation is insufficient because the decision on the implementation of extractive projects continues to rest with the State, despite affecting Indigenous and Afro-descendant lands and territories.

Within these flawed consultation processes, Indigenous women face additional marginalization as mega-projects operate within patriarchal systems where corporate and State actors favour negotiating only with men, even when women hold leadership positions.[179]

Extractive conflicts are a sign that democracies in the region have not developed satisfactory institutional channels for relations with Indigenous peoples and Afro-descendant communities. For instance, mining operations proceed despite inadequate consultation that violates international standards, with domestic legislation increasingly designed to circumvent consultation requirements entirely. Recent legislative developments across the region demonstrate this systematic pattern. In **Brazil**, Draft Bill 2159/2021 (dubbed as the "Devastation Bill") aimed to weaken environmental safeguards and restrict consultation to cases of direct impact on Indigenous and Quilombola communities. Although President Lula vetoed several of its most regressive provisions when sanctioning it as Law No. 15.190/2025, concerns remain: the law still facilitates accelerated licensing and leaves communities vulnerable to projects approved without meaningful consultation.[180] **Ecuador's** recent law of protected areas similarly proceeded without required

[176] Pressenza. (2025). Perú: Ley N° 32293 facilita despojo de tierras comunales y avance de la minería ilegal. https://www.pressenza.com/es/2025/05/peru-ley-n-32293-facilita-despojo-de-tierras-comunales-y-avance-de-la-mineria-ilegal/

[177] Presidencia del Consejo de Ministros – Perú, Decreto Supremo N° 004-2021-JUS, que crea el Mecanismo Intersectorial para la protección de personas defensoras de derechos humanos, Diario Oficial El Peruano, dispositivo NL/1946184-4, publicado el 22 de abril 2021 (publicado en El Peruano bajo NL/1946184-4)

[178] Rivasplata Cabrera, Francisco y Chávez Villafane, Geraldine (2023). "Defensores de derechos humanos en el Perú: a dos años de la creación del Mecanismo Intersectorial para la protección de las personas defensoras de derechos humanos", Boletín y Eventos, IDEHPUCP, en línea: https://idehpucp.pucp.edu.pe/boletin-eventos/defensores-de-derechos-humanos-en-el-peru-a-dos-anos-de-la-creacion-del-mecanismo-intersectorial-para-la-proteccion-de-las-personas-defensoras-de-derechos-humanos-28110/

[179] Nancy Tapias Torrado. (2020). Indigenous women leading the defence of human rights from the abuses by mega-projects in Latin America, in the face of extreme violence. ORA. https://ora.ox.ac.uk/objects/uuid:3a1393b3-1a8b-4341-bb6e-7a33897db5c7, p.129; and see mobilization in response to Brazil's "Devastation Bill": Amazon Watch, "Indigenous Women March Against Ferrogrão Railway and 'Devastation Bill' in Brazil" (7 August 2025), online: Amazon Watch https://amazonwatch.org/news/2025/0807-indigenous-women-march-against-ferrograo-railway-and-devastation-bill-in-brazil.

[180] Ione Wells, "New Brazil development law risks Amazon deforestation, UN expert warns" BBC News (29 July 2025), online: https://www-bbc-com.cdn.ampproject.org/c/s/www.bbc.com/news/articles/cy98jqr4p0xo.amp; Andre Giles & Bernardo M Flores, "Brazil's 'devastation bill' empowers criminals" (2025) 389:6760 Science 583, online: https://www.science.org/doi/10.1126/science.adz7734; https://www12.senado.leg.br/noticias/materias/2025/08/08/publicada-lei-do-licenciamento-ambiental-com-63-vetos; "Publicada Lei do Licenciamento Ambiental, com 63 vetos" Agência Senado (8 agosto 2025), online: Senado Federal: https://www12.senado.leg.br/noticias/materias/2025/08/08/publicada-lei-do-licenciamento-ambiental-com-63-vetos ; United Nations Human Rights Council, "UN experts welcome Brazil's veto of environmental licensing bill provisions" (4 September

consultation, despite directly affecting Indigenous territories.[181] These examples reveal how States use legislative mechanisms to avoid or weaken consultation obligations rather than improve consultation processes.

Similar conflicts have arisen in **Canada**, with Bill C-5, which includes the *Building Canada Act*, allowing the federal Cabinet to designate infrastructure projects as being in the "national interest" and streamline their regulatory approval process.[182] Indigenous associations have warned that the legislation permits the federal Cabinet to unilaterally fast-track infrastructure projects deemed in the "national interest" without ensuring meaningful consultation or requiring free, prior, and informed consent of Indigenous Peoples, despite Canada's obligations under UNDRIP.[183] The British Columbia Assembly of First Nations also condemned the bill itself as being "forced through the House of Commons without adequate discussion or consultation with First Nations."[184] In fact, Indigenous Peoples have challenged the constitutionality of Bill C-5 before the Courts.[185]

In the context of the extractive industry, the Peruvian State has been reluctant to grant recognition as Indigenous peoples to communities that self-identify as such, in order to avoid the requirement of prior consultation as a prerequisite for implementing investment projects.[186] The *Regulatory Decree of the Prior Consultation Law* has further limited human rights norms, since the right to consent is not legally recognized. As a result, the State retains the ultimate authority to approve or reject investment projects, regardless of the opinion of Indigenous communities.[187] In the mining sector, the Ombudsman's Office (*Defensoría del Pueblo*) has pointed out that only the beginning of a project is consulted, omitting the evaluation of the conditions under which it will be developed and its possible impacts on the consulted

2025), online: OHCHR https://www.ohchr.org/en/press-releases/2025/09/un-experts-welcome-brazils-veto-environmental-licensing-bill-provisions.

[181] See Ecuador's "Ley Orgánica para el Fortalecimiento de Áreas Protegidas" (July 10, 2025), approved despite indigenous opposition, further discussed in Section 4. Efeverde, "Ecuador aprueba Ley de Áreas Protegidas con el correísmo en contra y rechazo de indígenas" EFE Verde (11 julio 2025), en línea: https://efeverde.com/ecuador-aprueba-ley-de-areas-protegidas-correismo-en-contra-y-rechazo-indigenas/; Comunidades y Pueblos Originarios Amazónicos, «Denuncia Pública: Comunidades y Pueblos Originarios Amazónicos EXIGIMOS al Gobierno de Daniel Noboa y a la Asamblea Nacional NO PRIVATIZAR NI DESPOJAR nuestros territorios que fueron INCONSULTAMENTE declarados como áreas protegidas», julio de 2025; Amazon Frontlines, "Ante la ausencia de Consulta, pueblos indígenas y nacionalidades lanzan segunda alerta por violación de derechos humanos y colectivos" Amazon Frontlines (julio 2025), en línea: https://amazonfrontlines.org/es/chronicles/proyecto-de-ley-para-privatizar-areas-protegidas-ecuador-comunicado/

[182] Bill C-5, An Act to enact the Free Trade and Labour Mobility in Canada Act and the Building Canada Act, 1st Sess., 45th Parl., 2025, sections 4, 6(1), 22(a) (first reading June 6, 2025).

[183] UN Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, 13 September 2007.

[184] Indigenous Bar Association, "Indigenous Bar Association Raises Serious Concerns About Bill C-5 and Calls for Meaningful Consultation with Indigenous Peoples," June 26, 2025, online: https://www.indigenousbar.ca/press-releases/indigenous-bar-association-raises-serious-concerns-about-bill-c-5-and-calls-for-meaningful-consultation-with-indigenous-peoples#:~:text=While%20the%20preamble%20of%20Bill,instead%20of%20substantive%20constitutionalized%20rights.%E2%80%9D; BC Assembly of First Nations "Federal Government Rushes Bill C-5 through Parliament, Violating First Nations Rights, its own Laws and the UN Declaration," Press Release, June 18, 2025, online: https://www.bcafn.ca/news/federal-government-rushes-bill-c-5-through-parliament-violating-first-nations-rights-its-own.

[185] Allison Jones, "9 Ontario First Nations ask for injunction against Bill 5, say law represents 'clear and present danger'", CBC News (15 July 2025), online: https://www.cbc.ca/news/canada/toronto/first-nations-legal-challenge-against-ontario-bill-five-1.7585361.

[186] CooperAcción y Oxfam (2018), Consúltame de verdad: Aproximación a un balance de la consulta previa en el Perú en los sectores minero e hidrocarburífero. Lima: CooperAcción y Oxfam, pp. 15 – 16. En línea: https://cooperaccion.org.pe/wp-content/uploads/2018/07/Consultame-de-verdad.pdf.

[187] Artículo 23 del Decreto Reglamentario del Derecho a la Consulta Previa, Ley N.º 29785. Decreto Supremo N.º 001-2012-MC, aprobado en abril de 2012.

population.[188] Therefore, the agreements adopted become irrelevant, as they do not influence the project's content,[189] and citizen participation is limited to a mere formality through closed-door workshops, where the capacity to influence decision-making is practically null.[190] This fact alone represents a violation of the human right to a healthy environment, as recognized and developed in Advisory Opinion 23/2017 of the Inter-American Court of Human Rights.[191]

Extractive Conflicts and Violence

In the case of the Las Bambas mining operation (Apurímac, **Peru**), there have been various acts of violence that have resulted in the violation of fundamental rights against the Indigenous population, such as murders during protests, aggressions, criminalization, etc. All of this has occurred due to an application of prior consultation that has not followed the standards established in international law, especially concerning the principle of good faith. In addition, another exacerbating factor has been the lack of state recognition of community leaders elected through autonomous processes.[192]

3.3 Contemporary Forms of Democratic Exclusion

Contemporary Racialized Violence

Historical patterns of racialized violence as mechanisms of political exclusion (documented in Section 1.2.2) persist in contemporary democratic contexts, demonstrating that formal democratic transitions have not eliminated systemic state violence against Indigenous and Afro-descendant communities. This pattern of racialized state violence can be observed across the region, as exemplified in some key cases, in response to communities exercising their collective democratic rights, whether through traditional governance, territorial defence, or political mobilization.

Persecution and discrimination against Indigenous populations have a long tradition in **Peru**'s political crises. Following former president Pedro Castillo's attempted *coup d'état*, which triggered the most recent major democratic crisis, social protests with widespread Indigenous presence took place between December 2022 and February 2023, with devastating consequences as a result of excessive use of force by State agents. According to the Inter-American Commission on Human Rights, 56 people were killed and at least 912

[188] Defensoría del Pueblo, Informe de Adjuntía N.º 001-2019-DP-AMASPPI-PPI: El derecho a la consulta previa y la modificatoria del estudio de impacto ambiental del proyecto minero Antapaccay – expansión Tintaya – integración Coroccohuayco (Lima, 15 de agosto de 2019).

[189] In addition to the lack of adequate consultation, there is a lack of transparency regarding the procedures for approving environmental impact studies, which is a central element in the operation of extractive projects. The environmental impact assessment procedures conducted by the National Environmental Certification Service for Sustainable Investments (SENACE) do not include significant opportunities for democratic participation, exacerbating environmental conflicts and sowing mistrust among the actors involved, which will lead to greater conflicts in the future. Furthermore, there is no capacity to correct errors made by SENACE regarding the lack of inclusion of communities in the area of direct environmental influence, as in the case of rural communities in the province of Espinar (Cusco, Peru) affected by the Antapaccay mining operation. Source: CooperAcción, IDL, & DHSF. (2024). Contaminación con metales pesados en Espinar: Evidencias de afectación a la salud humana y el ambiente. En línea: https://cooperaccion.org.pe/wp-content/uploads/2024/10/ContaminacionEspinar_CooperAccion_IDL_DHSF_2024-final.pdf ; Analysis contributed by José Saldaña Cuba.

[190] Analysis contributed by José Saldaña Cuba.

[191] CoIDH, Medio ambiente y derechos humanos (interpretación y alcance de los artículos 4.1 y 5.1, en relación con el artículo 1.1 de la Convención Americana sobre Derechos Humanos), Opinión Consultiva OC-23/17, de 15 de noviembre de 2017, solicitada por la República de Colombia, párr. 168.

[192] M. Pérez y C. Bazán. (2015). Las Bambas: violaciones de derechos humanos y protesta social. CIDHh, IDL. https://www.researchgate.net/publication/341354646_Las_Bambas_violaciones_de_derechos_humanos_y_protesta_social; Analysis contributed by Heiner Mosquera.

were injured in road blockades and other protest actions.[193] Amnesty International documented that the State response followed a "planned and consistent" strategy with a "racist bias," directing lethal force specifically against historically discriminated populations engaged in legitimate political expression.[194]

Similarly, **Colombia**'s response to national protests in 2021 revealed systemic targeting of Indigenous and Afro-descendant communities during democratic mobilization.[195] The Inter-American Commission documented disproportionate lethal force against racialized protesters, particularly in Cali, the city with the highest population of Afro-descendant individuals in Colombia, and areas with significant Indigenous populations.[196] At least 82 Afro-descendant persons aged 13-60 were victims of State repression, while Indigenous peoples reported 2 deaths, 159 cases of harassment, and 21 attempted attacks in the context of the protests.[197] Violence included eye targeting, armed civilians acting with apparent police acquiescence, and mass detentions.[198] This selective violence sought to undermine Indigenous and Afro-descendant political participation by demonstrating that democratic engagement – even peaceful protest – can result in death, particularly when exercised by racialized communities.

Referenced in the introduction of this *amicus brief,* **Guatemala's** April 2025 criminalization of Indigenous authorities exemplifies how states weaponize criminal law against Indigenous political participation. The State detained Luis Haroldo Pacheco and Héctor Manuel Chaclán, leaders of the 48 Cantons of Totonicapán, for allegedly leading blockades in 2023 to defend democratic institutions. The IACHR condemned this criminalization, recognizing "the instrumental role of the peaceful protests organized by ancestral and Indigenous leaders in preserving democratic order and enabling a peaceful transition of power."[199] These leaders now face terrorism and sedition charges.[200] Guatemala's own Advisory Opinion request states that prohibiting associations is only acceptable "when the severity of its activities infringe upon democratic principles."[201] In this recent case, however, the State criminalized those who protected democratic institutions, inverting this principle to exclude Indigenous voices from democratic processes.[202]

Finally, this violence has been shown to persist despite formal transition to democracy.[203] For instance, in **Brazil**, the past authoritarian legal culture continued to shape governance and law enforcement practices, disproportionately affecting Indigenous and Afro-descendant communities. The persistence of racialized

[193] CIDH, Situación de derechos humanos en el Perú, OEA/Ser.L/V/II. Doc. 28, 3 mayo 2023, en línea: https://www.oas.org/es/cidh/informes/pdfs/2023/Informe-SituacionDDHH-Peru.pdf
[194] Amnistía Internacional (2023). Racismo letal: Ejecución extrajudicial y uso ilegitimo de la fuerza por los cuerpos de seguridad de Perú. En línea: https://www.amnesty.org/es/documents/amr46/6761/2023/es/ ; Analysis contributed by José Saldaña Cuba.
[195] Observaciones y recomendaciones de la visita de trabajo de la CIDH a Colombia realizada del 8 al 10 de junio de 2021. En línea: https://www.oas.org/es/cidh/informes/pdfs/observacionesvisita_cidh_colombia_spa.pdf; Observaciones Preliminares: Visita in loco a Colombia realizada del 15 al 19 de abril de 2024. En línea: https://www.oas.org/es/cidh/informes/pdfs/2024/observaciones_preliminares_colombia_2024.pdf
[196] Observaciones y recomendaciones de la visita de trabajo de la CIDH a Colombia realizada del 8 al 10 de junio de 2021, párrs. 78-80.
[197] Observaciones y recomendaciones de la visita de trabajo de la CIDH a Colombia realizada del 8 al 10 de junio de 2021, párrs. 79 y 81.
[198] Observaciones y recomendaciones de la visita de trabajo de la CIDH a Colombia realizada del 8 al 10 de junio de 2021, párrs. 31, 48 y 37; Observaciones Preliminares: Visita in loco a Colombia realizada del 15 al 19 de abril de 2024.
[199] IACHR, "IACHR condemns criminalization of Indigenous leaders who defended democracy in Guatemala" (26 April 2025), Press Release No 080/25, online: https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2025/080.asp
[200] IACHR, "IACHR condemns criminalization of Indigenous leaders who defended democracy in Guatemala".
[201] Guatemala, Request for an Advisory Opinion on Democracy and Political Rights, Inter-American Court of Human Rights (December 6, 2024), at 77. Online: https://corteidh.or.cr/docs/opiniones/soc_1_2025_eng.pdf
[202] Carlos Arturo Villagrán Sandoval, "The Unforeseen Guardians of Constitutional Democracy: Lessons from the Guatemalan 2023 Electoral Process" (2025) German Law Journal 1 at 19-20, DOI: 10.1017/glj.2025.22.
[203] Pinheiro, Paulo Sérgio. 1991. “Autoritarismo e Transição.” *Revista USP* (São Paulo), no. 9: 45–56.

policing, rooted in Brazil's colonial and slaveholding past, ensured that security forces remained a tool of repression rather than protection for marginalized groups. The Military Police, originally established to maintain order over enslaved populations and control urban poverty, has retained structural elements of its repressive origins, frequently engaging in violent and discriminatory practices against Indigenous peoples, Quilombolas, and Afro-Brazilian communities. Patterns of extrajudicial killings, forced evictions, and extreme surveillance disproportionately target these groups, reinforcing structural racism within State institutions.[204]

Continued Electoral Disenfranchisement and Administrative Barriers

Even when constitutional rights exist, such as the equal right to vote, bureaucratic and administrative obstacles, as well as physical violence, can render these rights practically inaccessible.

The Superior Electoral Court (TSE) in **Brazil** has implemented various measures to facilitate electoral participation for Indigenous and Quilombola communities. These include the establishment of voting sections in Indigenous villages, the incorporation of ethnicity and native language in voter registration, and the production of educational material in Indigenous languages. Additionally, the TSE allows temporary transfers of voting location within municipalities to enhance access. Although Portuguese remains the official language, such efforts seek to overcome linguistic and geographic barriers. However, digital exclusion and limited political education continue to hinder full participation.[205]

Colombia faces multiple overlapping electoral barriers. Colombia's 2022 OAS Electoral Observation Mission confirmed that the lack of ID cards still limits the potential for political participation in remote Indigenous and NARP (Black, Afro-Colombian, Raizal, or Palenquera) communities, despite ID issuance campaigns and the existence of specialized registration centers. The report also confirmed limited distribution of voting facilities in remote areas, and a lack of information materials in most of the recognized Indigenous languages.[206] Additionally, electoral violence has intensified, with violence against political, social, and community leaders increasing 98.5% during the 2022 electoral calendar compared to the run-up to the 2018 elections, forcing some candidates to renounce their candidacies due to threats from armed groups.[207] Experts and UN officials have noted the disproportionate targeting of social leaders and human rights defenders, especially from Afro-descendant and Indigenous communities.[208]

Other administrative barriers include census participation and demographic recognition, which directly affect political representation. In some cases, administrative failures in census data collection and

[204] Dutra, Luiza Correa de Magalhães, Osmar Antônio Belusso Júnior, and Rodrigo Ghiringhelli de Azevedo. 2018. "Quem fiscaliza a polícia? Um estudo sobre os mecanismos de controle acerca da violência policial." In Proceedings of the 8th International Congress of Criminal Sciences, Porto Alegre, 2017. Porto Alegre: PUCRS. Online: https://www.academia.edu/36851500/Quem_fiscaliza_a_pol%C3%ADcia_Um_estudo_sobre_os_mecanismos_de_controle_acerca_da_viol%C3%AAncia_policial.
Holloway, Thomas H. 1997. Polícia no Rio de Janeiro: repressão e resistência numa cidade do século XIX. 1st ed. Rio de Janeiro: Editora Fundação Getulio Vargas. Bueno, Samira. 2014a. "Letalidade na ação policial." In Crime, polícia e justiça no Brasil, edited by R. S. Lima, L. L. Ratton, and R. G. Azevedo, 511–518. São Paulo: Contexto. Bueno, Samira. 2014b. Bandido bom é bandido morto: a opção ideológico-institucional da política de segurança pública na manutenção de padrões de atuação violentos da polícia militar paulista. Master's thesis, São Paulo School of Business Administration, Fundação Getúlio Vargas, São Paulo; Analysis contributed by Ana Luiza Gregorio Vidotti.
[205] Tribunal Superior Eleitoral (TSE). 2024. "Dia Internacional dos Povos Indígenas: Justiça Eleitoral fortalece ações de cidadania e inclusão." August 9, 2024; Analysis contributed by Ana Luiza Gregorio Vidotti.
[206] Preliminary Report of the OAS Electoral Observation Mission in Colombia, March 15, 2022.
[207] Preliminary Report of the OAS Electoral Observation Mission in Colombia, at 17-19.
[208] United Nations Security Council, Meeting Coverage SC/16123, 18 July 2025. https://press.un.org/en/2025/sc16123.doc.htm

restrictions on ethnic self-identification questions can lead to the actual population numbers being underestimated or underreported, which has an impact on electoral planning, among other issues.[209]

3.4 Political Representation Challenges

Internal Governance Recognition

Conflicts over the determination of legitimate representatives, state regulations governing how Indigenous and Afro-descendant communities select their representatives, and the lack of alignment between community-selected leaders and those appointed or recognized by the state represent fundamental challenges to self-determination. These tensions become particularly acute when states attempt to regulate how Indigenous and Afro-descendant communities choose their representatives, exercise collective political authority, and participate in national political processes.

The imposition of the *Indian Act* electoral system in **Canada** serves as an illustration of how supposedly democratic reforms can fundamentally restructure and control Indigenous political authority, rather than accommodating existing governance traditions. Prior to colonization, "various structures of Indigenous government existed across Canada," but the 1876 Indian Act "imposed the band system on Indigenous peoples" to "control the governance of local Indigenous populations".[210] The Act defines a band as "a body of Indians" whose affairs are managed by the federal government, creating a contradiction where band governments function as local governments while remaining "under the administration of the Indian Act".[211] This system creates dual authority conflicts that persist to this day. First Nations, such as the Haida and Kwakwaka'wakw, recognize hereditary chiefs who have inherited their titles and governing responsibilities from traditional ruling families. Still, the Indian Act only recognizes elected band leaders. Consequently, some bands have two forms of leadership – elected and hereditary chiefs.[212] Nevertheless, only one form of authority receives state recognition, undermining traditional governance while creating the appearance of accommodation. Contemporary conflicts, such as the Wet'suwet'en resistance to pipeline construction, illustrate these ongoing tensions. The State has "circumvented the hereditary system...

[209] These patterns appear across the region. A good practice still pending implementation in Peru has been the creation of an Official Database of Indigenous or Original Peoples, under the responsibility of the Ministry of Culture. After carrying out identification studies, it publishes the officially recognized peoples with some of their most important territorial and cultural characteristics. However, recent pressure has been reported from the National Congress for the National Institute of Statistics to exclude questions on indigenous self-identification in the new National Census. See: Base de Datos del Ministerio de Cultura (2025): https://bdpi.cultura.gob.pe/; Quilca Catacora, M. (2025, 9 de abril). Acusan a Alejandro Cavero de excluir a los pueblos originarios en el proceso del Censo Nacional 2025: pidió a INEI cambiar preguntas. Infobae. En línea: https://www.infobae.com/peru/2025/04/09/acusan-a-alejandro-cavero-de-excluir-a-los-pueblos-originarios-en-el-proceso-censo-nacional-2025/; Analysis contributed by José Saldaña Cuba.
In Colombia, the 2018 census acknowledged significant difficulties in applying the ethnic self-recognition question in areas with higher NARP populations due to security issues and operational failures. Some departments showed implausible population decreases suggesting systematic undercounting. Departamento Administrativo Nacional de Estadística, "Debate de control político - Resultados población Negra, Afrocolombiana, Raizal y Palenquera (NARP): Censo Nacional de Población y Vivienda CNPV-2018" (25 noviembre 2019), en línea: https://www.dane.gov.co/files/investigaciones/boletines/grupos-etnicos/comunicado-grupos-etnicos-poblacion-NARP-2019-debate-ctrl-politico-camara-rep.pdf
[210] Nancy R Tapias Torrado, "Wet'suwet'en Women Leading the Defense of Rivers and Water From Abuses Committed in Connection with Megaprojects. The Persistent Legacies of the Past in Canada" in Routledge Handbook of Gender and Water Governance, 1st ed (London: Routledge, 2024).
[211] First Nation Bands in Canada. Canadian Encyclopedia https://www.thecanadianencyclopedia.ca/en/article/band
[212] Nancy R Tapias Torrado, "Wet'suwet'en Women Leading the Defense of Rivers and Water From Abuses Committed in Connection with Megaprojects. The Persistent Legacies of the Past in Canada"

[dealing] exclusively with bands," thereby exacerbating divisions between traditional governance systems and imposed administrative structures, and bypassing traditional decision-making processes.[213]

In another case, **Colombia's** Constitutional Court held in Ruling T-576/14 that "no administrative or judicial authority can impose a specific model of representative institution on Black communities".[214] In other words, it is up to the communities themselves, exercising their autonomy and based on ILO Convention 169, to define who represents them and the procedure to designate delegates in prior consultation processes.[215] However, challenges remain in applying this legal precedent. For instance, the Ministry of the Interior is the sole body with authority to recognize Indigenous or Afro-descendant groups and grant them rights; yet, there is a significant backlog in evaluations, meaning many communities that have declared themselves Afro-Colombian or Afro-descendant have yet to be officially recognized by the State.[216]

The fundamental challenge remains that community-selected governance must still receive state recognition to be considered legitimate for consultation and other practical purposes, creating dependency that undermines community autonomy.

State-Level Representation

Cross-regional evidence establishes systemic patterns of exclusion despite formal recognition, a pattern that reflects global challenges documented by UN mechanisms. At the 2023 UN Permanent Forum on Indigenous Peoples, Special Rapporteur Francisco Calí emphasized that "the rights of Indigenous Peoples cannot be realized without their full, meaningful representation and participation in decision-making processes."[217]

In addition to processes like prior consultation, communities can also express their positions, conditions, and proposals at the national level through affirmative action measures in political participation, when available. The 1991 **Colombian** Constitution attempted to ensure a minimum level of political representation for Indigenous and Afro-descendant communities by allocating two Senate seats to Indigenous peoples and two House of Representatives seats to Black communities. While this minimum level of political participation does not always translate into effective representation in practice, these mechanisms are intended to ensure that these communities have a voice and vote in Congress's democratic deliberative process. In theory, these mechanisms enable communities to bring their worldviews and perspectives directly into the national legislative sphere. Nonetheless, given their meagre political representation of just four seats in a Congress composed of more than 250 lawmakers, there is no guarantee that their priorities will be taken seriously or not overridden by what the majority claims to be the "national interests". This demonstrates that even measures considered positive participation mechanisms, which can

[213] Nancy R Tapias Torrado, "Wet'suwet'en Women Leading the Defense of Rivers and Water From Abuses Committed in Connection with Megaprojects. The Persistent Legacies of the Past in Canada"
[214] Authors' own translation. Corte Constitucional de Colombia, Sentencia T-576/14, 2014, 5.33, en línea: https://www.corteconstitucional.gov.co/relatoria/2014/t-576-14.htm. Sentencia T-576/14 primarily addresses the right to free, prior, and informed consultation and the recognition of representative forms within Afro-descendant communities.
[215] Corte Constitucional de Colombia, Sentencia T-576/14, 2014, 5.34.
[216] Vattenfall. A Human Rights Risk Assessment in Colombia, "Vattenfall's efforts on coal supply chain responsibility," November 2017, at 32. Online: https://group.vattenfall.com/siteassets/corporate/who-we-are/sustainability/doc/vattenfall_colombia_coal_report_english.pdf
[217] United Nations, Permanent Forum on Indigenous Issues, "Indigenous Peoples Must Have Full Representation, Participation in Decisions Affecting Their Territory, Governance, Speakers Stress at Permanent Forum", UN Doc HR/5477 (19 April 2023), online: https://press.un.org/en/2023/hr5477.doc.htm

work in parallel with traditional consultation processes, may fall short of ensuring comprehensive and meaningful participation.[218]

In **Peru**, only seven self-identified Indigenous people have served as members of Congress over the past 30 years, and only one of them belonged to an Amazonian Indigenous people.[219] This is despite measures adopted by the Peruvian state to integrate the Indigenous population into the representative political sphere, for example, through Indigenous quotas for regional and municipal elections, which require that at least 15% of candidates in constituencies with a significant Indigenous presence be Indigenous or native representatives.[220] However, the impact of Indigenous quotas is extremely limited, as political parties tend to place Indigenous candidates at the bottom of their lists and, even when they are elected, they are unable to promote the agendas of their peoples.[221]

Brazil demonstrates a gradual but limited trajectory of progress in this area. Although the 1988 Constitution formally recognized the rights of Indigenous peoples and opened space for their political participation, this participation remains deeply embedded in ongoing disputes[222] and structural resistance within the political and legal systems, which continue to hinder the whole exercise of self-determination.[223] The election of Mário Juruna, the first Indigenous federal deputy in 1983, marked a turning point,[224] and, decades later, Joênia Wapichana made history by becoming the first Indigenous woman elected to Brazil's National Congress in 2018, representing the state of Roraima.[225] As both a member of the Wapichana people and a trained lawyer, she also became the first Indigenous woman to practice law in the country, and in 2023, the first Indigenous woman to head the National Foundation of Indigenous Peoples (FUNAI), symbolizing the growing, though still insufficient, political inclusion of Indigenous voices in Brazil's democratic institutions.[226]

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[218] Instituto Interamericano de Derechos Humanos, Coordinación entre sistemas jurídicos y administración de justicia indígena en Colombia por Rosembert Ariza Santamaría (San José: IIDH, 2010). En línea: https://cejamericas.org/wp-content/uploads/2020/09/20coordinacinentre2sistemas.pdf ; International Foundation for Electoral Systems, "Colombian Presidency 2022 Round 2" (19 June 2022), online: ElectionGuide https://www.electionguide.org/elections/id/3063/

[219] Diego Saavedra. (2025, 27 de mayo). Desconfianza en la política y limitaciones para la participación de los pueblos indígenas. DAR Opina. https://dar.org.pe/desconfianza-en-la-politica-y-limitaciones-para-la-participacion-de-los-pueblos-indigenas/

[220] Ley de Elecciones Municipales, Ley N.º 26864. Artículo 10. Diario Oficial El Peruano, 30 de septiembre de 1997. Ley de Elecciones Regionales, Ley N.º 27683. Artículo 12. Diario Oficial El Peruano, 15 de marzo de 2002.

[221] Paredes, Maritza (2015). Representación política indígena: un análisis comparativo subnacional. Fondo editorial JNE. En línea: https://www.researchgate.net/publication/323442106_Representacion_Politica_IndigenaUn_Analisis_Comparativo_Subnacional IDEHPUCP. (2021, 22 de junio). Bicentenario: El reto pendiente de la inclusión política de los pueblos indígenas en el Perú. Boletín y eventos. IDEHPUCP. https://idehpucp.pucp.edu.pe/boletin-eventos/bicentenario-el-reto-pendiente-de-la-inclusion-politica-de-los-pueblos-indigenas-en-el-peru-24560; Analysis contributed by José Saldaña Cuba.

[222] Antonio Carlos de Souza Lima, "Sobre tutela e participação: povos indígenas e formas de governo no Brasil, séculos XX/XXI" (2015) 21:2 Mana 425, online: https://www.scielo.br/j/mana/a/Hq63jTNN9yHhPTQ4PjXjBdw/.

[223] Ricardo Verdum, "Povos Indígenas no Brasil: o desafio da autonomia" (24 julho 2009), Instituto Socioambiental, online: https://acervo.socioambiental.org/acervo/noticias/povos-indigenas-no-brasil-o-desafio-da-autonomia

[224] Juruna – The indigenous politician", Rio Then (7 December 2016), online: https://riothen.wordpress.com/2016/12/07/juruna-the-indigenous-politician/.

[225] "Joenia Wapichana becomes first Indigenous woman to lead Brazil's Indigenous agency", Mongabay (3 January 2023), online: https://news.mongabay.com/2023/01/joenia-wapichana-becomes-first-indigenous-woman-to-lead-brazils-indigenous-agency/.

[226] Joenia Wapichana becomes first Indigenous woman to lead Brazil's Indigenous agency", Mongabay (3 January 2023), online: https://news.mongabay.com/2023/01/joenia-wapichana-becomes-first-indigenous-woman-to-lead-brazils-indigenous-agency/ ; Vânia Maria Losada Moreira, "Indios no Brasil: marginalização social e exclusão historiográfica" (2011) 17:1 Revista História & Ensino 11, online: https://nephs.com.br/wp-content/uploads/2022/06/Indios-no-Brasil-marginalizacao-social-e-exclusao-historiografica.pdf ; Analysis contributed by Ana Luiza Gregorio Vidotti.

Beyond inadequate representation, contemporary electoral processes reveal how States can manipulate accountability mechanisms to exclude Indigenous or Afro-descendant leaders from formal political participation. In **Guatemala's** 2023 elections, Indigenous leader Thelma Cabrera and her vice-presidential candidate Jordán Rodas were initially accepted as candidates by the Supreme Electoral Tribunal (TSE). Rodas held a Provisional Certificate of Non-Existence of Charges from the Comptroller, which certifies that state bureaucrats managing public funds have no pending corruption cases. However, after Cabrera and Rodas gained traction in polls, the Comptroller revoked Rodas's certificate, prompting the TSE to exclude both candidates.[227] This selective enforcement of facially neutral administrative processes effectively eliminated Indigenous political representation.

Conclusion

Indigenous and Afro-descendant participation in representative democratic mechanisms remains systemically limited and exclusionary. Despite formal advances, such as the recognition of universal suffrage and the implementation of electoral quotas, these measures prove insufficient when confronting political structures that fail to recognize Indigenous and Afro-descendant ways of life, representation, and decision-making. As evidenced by cases in Peru, Colombia, Brazil, and Canada, formal inclusion mechanisms cannot overcome structural discrimination that treats or views these communities as obstacles to state-defined development priorities. This exclusion intensifies in extractive industry and investment contexts, where states deliberately limit Indigenous recognition, participation and rights to circumvent consultation obligations.

The systemic tensions documented across territorial authority, consultation processes, racialized violence, and political representation reveal that these are not isolated democratic failures, but interconnected manifestations of deeper structural contradictions between majoritarian democratic frameworks and Indigenous and Afro-descendant governance systems. Addressing these tensions requires examining how the Inter-American Human Rights system has developed legal standards that recognize collective political participation as foundational to the effective exercise of all other collective rights.

Section 4. Jurisprudence of the Inter-American System on Democratic Pluralism: Towards the Protection of Differentiated Indigenous and Afro-descendant Communities' Political Organizations

This section examines how the Inter-American Court's existing jurisprudence provides a foundation for protecting a set of differentiated rights for Indigenous and Afro-descendant communities that are essential for their political organizations as well as for safeguarding their recognized collective rights. In this section, we do not intend to undertake an exhaustive review or analysis of the Inter-American Court's entire jurisprudence on the rights of Indigenous and Afro-descendant communities. Instead, we want to highlight some of the most significant legal principles established by the Court that underscore the importance of safeguarding the collective rights of these historically marginalized communities.

The Inter-American system has recognized numerous collective rights for Indigenous and Afro-descendant communities — including territorial rights, cultural preservation, and prior consultation. However, without

[227] Amy Goodman, "Hablamos con Thelma Cabrera, la líder indígena a quien se impide postularse en las elecciones presidenciales de Guatemala" Democracy Now! (3 marzo 2023), en línea: https://www.democracynow.org/es/2023/3/3/hablamos_con_thelma_cabrera_la_lider

guaranteeing these communities' political and organizational autonomy to advance their collective life plans, these collective rights are rendered meaningless. **This analysis establishes that self-determination is not just another collective right among many, but the essential prerequisite that gives meaning and enforceability to all other collective rights**. In other words, political autonomy and the right to establish governance systems are not additional rights, but rather the foundational conditions that enable the effective exercise of all other recognized collective rights of Indigenous and Afro-descendant peoples.

Professor Rachel Sieder notes that for Indigenous activists, the notion of 'autonomy' generally implies a combination of land, resources, and normative and administrative space — what has been referred to as "ethnic territory".[228] This conception of autonomy encompasses not merely cultural preservation or local administration, but genuine political self-governance over territorial and normative matters. Citing Willem Assies, who observes, "[c]laims to autonomy … tend to go beyond the circumscribed community level that states now seem to be prepared to concede but to which 'autonomy' has historically tended to be reduced".[229] States usually restrict their recognition to local administrative functions, while resisting the acknowledgement of Indigenous and Afro-descendant governance systems as legitimate forms of political autonomy. The discrepancy between Indigenous autonomy claims and the state's reluctance to recognize meaningful self-governance underscores the necessity of international and national legal frameworks that conceptualize self-determination as a fundamental aspect of collective democratic participation.

4.1 International Legal Framework for Self-Determination

Building on the foundational definitions and sources outlined in Section 2.1, this subsection examines the international legal system's evolving interpretation of self-determination as a possible *jus cogens* norm. While historically recognized as a general principle of international law, recent developments point to its potential elevation to a peremptory norm.

Some of those developments under international law have been advanced by the International Law Commission (ILC), the International Court of Justice (ICJ), and the U.N. General Assembly, among other international institutions. The ILC, in its 2022 Draft Conclusions on Peremptory Norms of General International Law, included the right to self-determination in its non-exhaustive list of *jus cogens* norms.[230] More recently, in its 2024 Advisory Opinion on the Legal Consequences of Israel's Policies in the Occupied Palestinian Territory, the ICJ explicitly affirmed the *jus cogens* character of self-determination "in cases of foreign occupation."[231] While this identification marks a significant development, it remains unclear whether the Court's reasoning meets the criteria set out by the ILC for the recognition of *jus cogens,* particularly the requirement that the norm be "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted"[232] Accordingly, it is increasingly accepted – though not uncontested – that the right to self-determination may possess peremptory status in

[228] Rachel Sieder, ed, Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy (Basingstoke: Palgrave Press, 2002), p.7.
[229] Rachel Sieder, ed, Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy (Basingstoke: Palgrave Press, 2002) at 7, citing Willem Assies, Gemma van der Haar & André Hoekema, eds, The Challenge of Diversity: Indigenous Peoples and Reform of the State in Latin America (Amsterdam: Thela Thesis, 2000) at 12.
[230] Hua Deng, "Reflections on the Identification of Jus Cogens by the ICJ in the Advisory Opinion on the Legality of Israel's Occupation of Palestinian Territories," *EJIL:Talk!*, 27 August 2024, citing: ILC Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens), Conclusion 23 and Annex, adopted on second reading (2022).
[231] International Court of Justice (ICJ), Advisory Opinion on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, 2024, at para 233.
[232] Hua Deng, "Reflections on the Identification of Jus Cogens by the ICJ in the Advisory Opinion on the Legality of Israel's Occupation of Palestinian Territories," *EJIL:Talk!*, 27 August 2024, discussing the ILC's two-step criteria set out in Draft Conclusion 4 of Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries, 2022: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf

international law, at least in some cases or circumstances.

Additional support for this interpretation can be found in a 2014 UN General Assembly report, which states that self-determination has emerged as a *jus cogens* norm, rooted in Article 1 of the UN Charter. Self-determination is considered too important to be renounced, on a par with rights such as life, liberty, and identity.[233] Furthermore, specialized international instruments such as ILO Convention 169 and UNDRIP operationalize the right to self-determination for Indigenous and Afro-descendant communities (see Section 2.1).

4.2 Inter-American Development: From Self-Determination to Collective Democratic Participation

The IACtHR has progressively drawn a connection between self-determination and the effective enjoyment of other collective rights by Indigenous and Tribal peoples. In its 2024 judgement in *U'wa v. Colombia,* the Court stated that Indigenous participation in decisions affecting their rights has "a close relationship with the right to self-determination," particularly in relation to territory, collective property, and cultural identity.[234] The Court reiterated that the right to self-determination of Indigenous and Tribal peoples is protected under the American Convention on Human Rights, grounding it in the right to cultural identity as a component of the right to participate in cultural life, recognized under Article 26 of the American Convention on Human Rights.

The IACtHR further recognized that self-determination includes both an “internal” and an "external" dimension, where the latter encompasses "the right of peoples to choose their own authorities or representatives, as well as to participate in decision-making processes that may affect them."[235] The Court emphasized the State's obligation to guarantee these rights "particularly in a pluralistic, multicultural, and democratic society",[236] thus underscoring the obligation of states to operationalize the right to self-determination.

More recently, in *Quilombola Communities of Alcântara v. Brazil (2024),* the IACtHR explicitly extended these principles to Afro-descendant Quilombola communities, noting that these communities are to be characterized as Tribal peoples under international human rights law "given their particular relationship with the territory in which they live, their worldview, cultural identity, and organizational forms."[237] The Court found Brazil in violation of the right to self-determination, along with rights to collective property, free, prior and informed consultation, freedom of movement and residence, and for the impact on the collective life project.[238] This is a crucial case that articulates many of the same principles as above and extends them to Quilombola communities, recognized “as Afro-descendant communities initially

[233] United Nations, General Assembly, Promotion of a democratic and equitable international order: Note by the Secretary-General transmitting the interim report of the Independent Expert Alfred-Maurice de Zayas, UN Doc A/69/272 (7 August 2014), at 66: “Self-determination has emerged as a jus cogens norm and is enshrined in Article 1 of the Charter as one of the purposes of the Organization. The right is not extinguished with lapse of time because, just as the rights to life, freedom and identity, it is too important to be waived. All manifestations of self-determination are on the table: from a full guarantee of cultural, linguistic and religious rights, to various models of autonomy, to special status in a federal State, to secession and full independence, to unification of two State entities, to cross-border and regional cooperation.”

[234] Authors’ own translation. CoIDH, Caso del Pueblo Indígena U'wa y sus miembros c Colombia (Fondo, Reparaciones y Costas) (2024), (Ser C) No 530, párr. 168, en línea: https://www.corteidh.or.cr/docs/casos/articulos/seriec_530_esp.pdf.

[235] Authors’ own translation. CoIDH, Caso del Pueblo Indígena U'wa y sus miembros c Colombia, párr. 232.

[236] Authors’ own translation. CoIDH, Caso del Pueblo Indígena U'wa y sus miembros c Colombia, párr. 33.

[237] CoIDH, Comunidades Quilombolas de Alcântara y sus miembros c Brasil (2024), (Ser C) No 548, párr. 66.

[238] All protected under Articles 4, 5, 7, 8, 11, 13, 21, 22, 23, 24, 25, and 26 of the American Convention, in connection with Article 1.1. CoIDH, Comunidades Quilombolas de Alcântara y sus miembros c Brasil, párr. 197.

composed of people who escaped slavery or who were already free", thus affirming a distinct historical trajectory but parallel rights.[239]

The IACtHR's ruling in *Quilombola Communities of Alcântara v. Brazil* serves as a stark reminder of the consequences of disregarding collective forms of political organization. The forced displacement of Quilombola families by the Brazilian State, without meaningful prior consultation, led to the State being found responsible for violating the fundamental rights to ancestral land and self-determination. This decision reinforces a broader legal argument: democracy cannot be solely understood as access to electoral processes — it must also encompass the recognition of diverse political expressions and historical struggles for autonomy. The survival of Quilombola communities hinges not only on legal protections but on societal and institutional shifts that affirm their governance traditions, land rights, and political agency. Without such active commitment to pluralism, democracy risks remaining exclusionary rather than empowering historically marginalized groups.[240]

Complementing the IACtHR jurisprudence, IACHR has explicitly connected the right to self-determination to political and legal autonomy. In its 2021 Thematic Report on the Right to Self-Determination of Indigenous and Tribal Peoples, the IACHR affirmed that self-determination includes "among other aspects, the development of systems of autonomy, self-government, and indigenous and tribal justice administration."[241] This formulation directly connects self-determination to political autonomy, with the Commission emphasizing that the right to self-determination "must be understood as the basis for dialogue to build a new relationship between these peoples and States."[242]

National Implementation: The Case of Colombia

The progression from international recognition to national implementation demonstrates how self-determination can be operationalized within domestic constitutional frameworks, with **Colombia** offering a leading example of this implementation process. The 1991 Political Constitution, adopted after the adoption of ILO Convention 169 in 1989, explicitly includes the right to self-determination in its domestic legal framework. Article 9 on international relations establishes that the State's foreign relations are based on "respect for the self-determination of peoples", and Article 7 recognizes and protects "the ethnic and cultural diversity of the Colombian Nation". Article 13 guarantees equality and requires the State to protect marginalized groups.[243] This constitutional recognition provides the legal basis for the exercise of self-determination of Indigenous peoples and Afro-descendant communities within the national territory, in accordance with international standards.

With respect to Black communities in Colombia, the 1991 Constitution contained Transitory Article 55, which mandated that:

> *[w]ithin two years of the approval of the new Constitution, the Congress will elaborate and approve, based on a study to be conducted by a special commission to be created by the Government for such purpose, a law that recognizes the collective property rights of black communities that have inhabited the empty lands (tierras baldías) in the rural riparian zones of the Pacific coast, in accordance with their traditional production practices. The areas will be*

[239] CoIDH, Comunidades Quilombolas de Alcântara y sus miembros c Brasil, nota de pie 2.
[240] Analysis contributed by Ana Luiza Gregorio Vidotti.
[241] Authors' own translation. CIDH, Derecho a la libre determinación de los Pueblos Indígenas y Tribales, OEA/Ser.L/V/II, Doc. 413/21 (2021), párr. 49.
[242] Authors' own translation. CIDH, Derecho a la libre determinación de los Pueblos Indígenas y Tribales, párr. 5.
[243] Constitución Política de Colombia. (1991). *Constitución Política de Colombia.* Artículos 7, 9 y 13, en línea: https://www.constitucioncolombia.com

demarcated by the same law. [...][244]

The constitutional mandate of Transitory Article 55 was operationalized through Law 70 of 1993 (or *Law regarding Black Communities*), which recognizes Afro-descendant communities' legal ownership over their traditional lands. This law also establishes Community Councils as "the ethnic authority responsible for administering the Collective Territories of black, Afro-Colombian, Raizal, and Palenquero communities". Through Decree 1384 of 2023,[245] which was issued 30 years after the enactment of the *Law regarding Black Communities*, the Colombian government enacted measures to regulate and implement aspects of Law 70 of 1993 with respect to the use of land, protection, and use of renewable natural resources and the environment, in the collective territories of Afro-descendant communities. Similarly, through Decree 1396 of 2023, the Colombian government issued measures to regulate and implement aspects of Law 70 of 1993 for the promotion and development of mining activities by Afro-descendant communities in their territories.[246]

Recent developments demonstrate continued progress. In July 2025, the IACHR welcomed Colombia's Decree 488 of 2025, establishing Indigenous Territorial Entities ("ETI" in Spanish) as autonomous political and administrative structures with authority over health, education, Indigenous justice, land management, and environmental protection. The Commission emphasized that this "marks an important step toward the effective recognition of Indigenous peoples' right to self-determination and self-governance."[247]

However, Colombia's experience reveals persistent tensions that illustrate broader regional dynamics. Despite constitutional guarantees and recent advances following long and persistent demands from Indigenous and Afro-descendant communities, which have led to some rights recognition, a dissonance persists between constitutional principles and practice, as institutions continue to reproduce patterns that subordinate Indigenous and Afro-descendant governance systems. As has been mentioned above, formal recognition of rights does not always translate into effective transformations of realities. Some of the most significant promises made to Black communities in the context of Law 70 of 1993 were that they would administer their own natural and mining resources. However, Black communities had to wait 30 years for the State to begin honouring that commitment through the enactment of decrees that regulate how Afro-descendant communities can administer their resources.

The issuance of these decrees is a positive step forward, but their enactment 30 years later illustrates how challenging it can be for historically marginalized peoples to gain rights and then use them to transform their realities in concrete ways. In fact, it may take some time to assess whether these new measures by the Colombian Government have meaningful and positive impacts on the ground.

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[244] Authors' own translation. Constitución Política de Colombia de 1991 (rev. 2015), artículo transitorio 55, en línea: https://direitosp.fgv.br/sites/default/files/2022-01/arquivos/anexo17ppal.pdf

[245] Colombia, Decreto 1384 de 2023, "Por el cual se reglamenta el capítulo IV y las demás disposiciones ambientales contenidas en la Ley 70 de 1993, en lo relacionado con los recursos naturales renovables y del ambiente, en los territorios colectivos adjudicados, en trámite u ocupados ancestral y/o tradicionalmente por las comunidades negras, afrocolombianas, raizales y palenqueras" (25 agosto 2023), en línea: https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=217070

[246] Colombia, Decreto 1384 de 2023.

[247] IACHR, "IACHR welcomes decree strengthening Indigenous peoples' right to self-determination in Colombia" (16 July 2025), Press Release No 142/25, online: https://www.oas.org/en/iachr/media_center/PReleases/2025/142.asp ; Colombia, Decreto 488 de 2025, "Por el cual se dictan las normas fiscales necesarias y las demás relativas al funcionamiento de los territorios indígenas y su coordinación con las demás entidades territoriales" (5 mayo 2025), en línea: https://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=178902

4.3 Key Principles: Concrete Manifestations of Collective Political Participation

The Inter-American System's jurisprudence establishes foundational principles that demonstrate how self-determination manifests across different spheres of collective political life. The following analysis examines three interconnected expressions of collective political participation: **territorial and resource governance** (establishing collective authority over ancestral lands and natural resources), **consultation processes** (operationalizing community decision-making about external interventions), **and autonomous legal institutions** (maintaining internal governance systems). Together, these examples demonstrate the Inter-American Court's recognition that Indigenous and Afro-descendant communities must exercise meaningful political authority rather than merely participate in externally imposed democratic structures.

4.3.1 Territorial Rights as Collective Property

The *Awas Tingni v. Nicaragua* case is an important precedent regarding Indigenous participation in territorial processes, though it did not formulate a fundamental principle directly linking territorial rights with autonomous governance systems. In this decision, the Court determined that delimitation and titling processes must be carried out "with full participation by the Community and taking into account its customary law, values, customs and mores."[248] While this ruling recognized the importance of customary law and community participation in territorial decisions, it focused primarily on violations of property rights and judicial protection, without explicitly establishing that territorial rights require autonomous governance authority for their effective implementation.

Subsequent jurisprudence has reinforced the connection between territorial rights and collective democratic participation. In *Saramaka People v. Suriname*, the Court considered that "regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and tradition."[249]

Recent Inter-American jurisprudence has continued to refine the concepts of the right to self-determination and prior and informed consent. The 2024 ruling in *Indigenous Peoples Tagaeri and Taromenane v. Ecuador* set a precedent, explicitly recognizing the principle of "No Contact" as fundamental to the self-determination and survival of uncontacted Indigenous groups.[250] Thus, the Court recognizes even the choice to remain outside formal political systems as legitimate political self-determination.

National Implementation: Territorial and Governance Recognition

Constitutional developments across the region demonstrate parallel recognition of territorial governance as political participation. Recent rulings of the **Brazilian Supreme Federal Court (STF)** have significantly reinforced Indigenous and Quilombola land rights, rejecting restrictive interpretations that sought to limit their constitutional protections. The STF's 2023 decision in RE 1017365 firmly dismissed the "temporal

[248] IACtHR, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua (Merits, Reparations and Costs) (2001), (Ser C) No 79, para 164, online: https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.
[249] IACtHR, Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations, and Costs) (2007), (Ser C) No 172, para 134, online: https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf.
[250] Letícia Machado Haertel, "From the Right to be Consulted to the Right to No Contact: The Inter-American Court Faces Its First Case on Indigenous Peoples in Voluntary Isolation", EJIL:Talk! (20 March 2025), online: https://www.ejiltalk.org/from-the-right-to-be-consulted-to-the-right-to-no-contact-the-inter-american-court-faces-its-first-case-on-indigenous-peoples-in-voluntary-isolation/

framework" (*"marco temporal"*) thesis.[251] The Court affirmed that Indigenous territorial rights are original, deriving from traditional occupation rather than formal State recognition.[252]

Similarly, a 2018 decision[253] upheld Quilombola land titling processes, emphasizing that self-identification constitutes a legitimate criterion for community recognition and reinforcing principles of collective territorial autonomy. The Court rejected efforts to impose a time frame on Quilombola land claims, emphasizing that self-identification is a valid element for recognizing Quilombola communities.[254]

In another context, the jurisprudence of the **Constitutional Court of Colombia** has been fundamental to the interpretation and protection of the principle of self-determination of ethnic peoples, especially in the context of Indigenous and Afro-descendant communities. Through various rulings, this high court has consolidated a rights-based approach that recognizes the differential nature of these collective subjects within the constitutional order. In Ruling T-652 of 1998, the Court reaffirmed the right of Indigenous peoples to territorial autonomy and to decide on their internal affairs in accordance with their own traditional norms and authorities.[255] Similarly, in Ruling T-576/14, the Court recognized that Afro-descendant communities have the autonomy to determine their own representative institutions and consultation procedures without external imposition.[256] These ruling recognized the legal validity of their own community structures as a legitimate expression of self-government, within the framework of respect for ethnic and cultural diversity enshrined in the 1991 Constitution.

These cases demonstrate that territorial rights and consultation processes are interconnected, as territorial governance requires decision-making authority over external interventions.

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[251] Assessoria de Comunicação/Funai, "Marco temporal volta à pauta no STF; Entenda porquê a tese é inconstitucional e viola os direitos dos povos indígenas" (5 August 2024), Fundação Nacional dos Povos Indígenas, em linha: https://www.gov.br/funai/pt-br/assuntos/noticias/2024/marco-temporal-volta-a-pauta-no-stf-entenda-porque-a-tese-e-inconstitucional-e-viola-os-direitos-dos-povos-indigenas

[252] The ruling clarified that Indigenous peoples' absence from their lands due to forced removals does not invalidate their claims, and demarcation processes must consider anthropological evidence and historical contexts. However, the Court did not preclude the Brazilian National Congress from legislating on Indigenous land matters. While the STF held that the "marco temporal" thesis is unconstitutional, it acknowledged that Congress retains legislative competence in this domain—as long as any law enacted respects the constitutional principles already affirmed by the Court. In this context, the passage of **Law No. 14.701/2023,** after the cited judgement, which reinstates aspects of the rejected "marco temporal" thesis, raises significant constitutional concerns and is likely to be subject to further judicial review within some pending constitutional actions against it; based on analysis contributed by Ana Luiza Gregorio Vidotti. Sources: "Lei estabelece marco temporal para terras indígenas, mas o tema ainda vai ser julgado no STF" (28 de junio de 2024), Câmara dos Deputados, en línea: https://www.camara.leg.br/noticias/1078111-lei-estabelece-marco-temporal-para-terras-indigenas-mas-o-tema-ainda-vai-ser-julgado-no-stf/; Terra de Direitos, Editorial: Direito territorial indígena não pode ser negociado" (30 August 2024), en línea: https://terradedireitos.org.br/noticias/noticias/editorial-direito-territorial-indigena-nao-pode-ser-negociado/24057; Conselho Indigenista Missionário (CIMI), "Indígenas se retiram de 'conciliação forçada' sobre Lei 14.701 no STF e afirmam que direitos são inegociáveis" (28 August 2024), en línea: https://cimi.org.br/2024/08/indigenas-saida-conciliacao/

[253] ADI 3239, upholding the constitutionality of Decree 4.887/2003

[254] By affirming the executive branch's authority to regulate land titling through INCRA, the ruling prevented political interference and the cancellation of numerous existing land titles. Despite this legal protection, Quilombola communities continue to face significant challenges in land titling due to persistent underfunding and political threats. Based on analysis contributed by Ana Luiza Gregorio Vidotti.

[255] Corte Constitucional de Colombia. (1998). *Sentencia T-652 de 1998* [MP:Carlos Gaviria Díaz]. Bogotá, Colombia. Recuperado de https://jurisprudenciaconstitucional.com/resolucion/106469-corte-constitucional-de-colombia-t-652-98

[256] Colombian Constitutional Court, Sentencia T-576/14, 2014. https://www.corteconstitucional.gov.co/relatoria/2014/t-576-14.htm.

4.3.2 Consultation as a Democratic Process of Self-Determination

Consultation processes are inextricably tied to self-determination, and the connection to democratic participation becomes clear when one recognizes that consultation enables communities to collectively exercise political authority over territorial and cultural matters in accordance with their own governance systems and decision-making timeframes. The IACHR has reiterated that:

> *the right to free, prior, and informed consultation and consent is based on the right to self-determination. To this end, the effective participation of the members of an indigenous people or community in development or investment plans within their territory must be guaranteed, in accordance with their customs and traditions, within the framework of constant communication between the parties.*[257]

The Inter-American Court has characterized the right to consultation as democratic self-determination rather than administrative accommodation, and has clarified this in its judgements. In *U'wa v. Colombia*, the Court re-emphasized that the right to participate in decisions that affect the rights of communities is exercised through "free, prior, and informed consultation."[258] In *Agua Caliente v. Guatemala*, the Court requires an "adequate and participatory process," "in particular, among other instances, in cases of large-scale development or investment plans".[259] In this case, the Court declared for the first time that the State had violated the right of access to information enshrined in Article 13 of the American Convention in the context of consultation processes.[260] The Court found the State responsible for this violation due to the informational deficiencies and linguistic inaccessibility of the studies that supported the mining concession in traditional territory.[261]

It is important to note that the IACHR has elected not to standardize the consultation process, as a way of respecting and protecting Indigenous, Tribal, and Afro-descendant peoples governance diversity and avoid becoming a "homogenizing mechanism"[262]. Instead, "it is the duty of States to respect and guarantee, without discrimination, the consultation and consent exercised by indigenous and tribal peoples, based on their self-determination", thus requiring "constant intercultural dialogue".[263]

More recently, acknowledging the disproportionate climate impacts of extractive activities on the ancestral territories of Indigenous and Tribal communities, the 2025 Climate Emergency Advisory Opinion requires states to strengthen recognition of Indigenous, Tribal, and Afro-descendant representative institutions in matters of self-government, autonomy, and territorial management, while also requiring the collaborative development of climate studies and strategies with the affected communities. Furthermore, to ensure the right to prior consultation is met, the Court established that States need to meet a standard of "maximum disclosure, up-to-date, clear and accessible, sufficient and timely information on the potential

[257] Authors' own translation. CIDH, Cohesión social: el desafío para la consolidación de la Democracia en Bolivia, CIDH OEA/Ser.L/V/II.Doc.1/24, 20 de enero de 2024, párr. 139.
[258] Authors' own translation. CoIDH, Caso del Pueblo Indígena U'wa y sus miembros c Colombia, párr. 168.
[259] Authors' own translation. CoIDH, Comunidad Indígena Maya Q'eqchi' Agua Caliente c Guatemala (2023), párr. 247, en línea: https://www.corteidh.or.cr/docs/casos/articulos/seriec_488_esp.pdf
[260] CoIDH, Comunidad Indígena Maya Q'eqchi' Agua Caliente c Guatemala, párr. 269, y voto concurrente párr. 11.
[261] CoIDH, Comunidad Indígena Maya Q'eqchi' Agua Caliente c Guatemala, párr. 285.
[262] Authors' own translation. CIDH, Derecho a la libre determinación de Pueblos Indígenas y Tribales, párrs. 178-180; and reiterated in CIDH, Cohesión social: el desafío para la consolidación de la Democracia en Bolivia, párr. 140.
[263] Authors' own translation. CIDH, Derecho a la libre determinación de Pueblos Indígenas y Tribales, párr. 180.

environmental, climatic, social and cultural impacts of any law, policy, regulation, project, public initiative and measure that may affect their territorial rights or other rights essential to their survival as a people".[264]

National Implementation of Consultation: Unstandardized

Despite established international standards, practice reveals fundamental tensions between consultation as democratic self-determination and administrative procedure, as illustrated by some key examples.

Colombia illustrates an advanced constitutional recognition of consultation as democratic self-determination. In Ruling SU-383 of 2003, the Constitutional Court established that the State has a constitutional obligation to guarantee prior consultation in decisions that directly affect Indigenous and Tribal peoples. This consultation is not only a mechanism for participation, but also a concrete manifestation of the right to self-determination, as it allows the affected peoples to substantially influence decisions that affect their territory, culture and way of life.[265] Subsequently, in Ruling SU-128 of 2019, the Constitutional Court unified its precedent to the effect that there is a direct impact on ethnic minorities, which makes prior consultation appropriate, according to the standards set by this court, when: (a) social, spiritual, cultural, health and occupational structures are disturbed, (b) there is an impact on the sources of subsistence located within the territory of the ethnic minority; (c) it makes it impossible to carry out the trades from which subsistence is derived; (d) it imposes burdens or attributions, to the point where it modifies their legal situation or position; (e) it interferes with the elements that define their identity or culture; (f) it intends to develop ILO Convention 169; (g) it alludes to an intervention on any of the rights of the ethnic community; or (h) it generates a differentiated and specific impact on the community.[266]

Recent **Colombian** case law continues to develop these principles, as demonstrated in ruling T-248/24, which addressed a complex conflict related to REDD+ (Reducing Emissions from Deforestation and Forest Degradation) projects in Indigenous collective territories. The Court determined that the companies involved failed to fulfill their duty of due diligence by not identifying, preventing, and mitigating the negative impacts resulting from the project's implementation. After noting the lack of effective internal and institutional protections for these communities, the Court reiterated the need for differential and intercultural approaches in the design, implementation, and monitoring of such projects.

In contrast, **Peruvian** jurisprudence has been inconsistent, presenting serious setbacks in some cases, such as the Constitutional Court's ruling in Case No. 03066-2019-PA/TC, regarding the *amparo* filed by the Chila Pucara and Chila Chambila communities. In this judgement, the Court held that prior consultation does not constitute a fundamental right, since it is not expressly or tacitly recognized in the Political Constitution.[267]

These varied national experiences demonstrate that consultation implementation requires protecting Indigenous and Afro-descendant governance diversities, while preventing State and corporate circumvention of international obligations. The rejection of standardized consultation processes protects Indigenous and Afro-descendant governance diversities, yet this same flexibility may be partially responsible for creating regulatory gaps that undermine meaningful participation and countries with no

[264] IACtHR. Advisory Opinion AO-32/25 of May 29, 2025. Climate Emergency and Human Rights, at para 610.
[265] Analysis contributed by Heiner Mosquera.
[266] Corte Constitucional de Colombia, Sentencia SU-128 de 2019; see also Sentencia T-248 de 2024, párr. 226.
[267] Tribunal Constitucional del Perú (2022). *Sentencia recaída en el expediente 03066-2019-PC/TC*. Comunidades campesinas chila chambilla y chila pucará contra la resolución 58. 20 de enero. Recuperada de https://tc.gob.pe/jurisprudencia/2022/03066-2019-AA.pdf; Analysis contributed by José Saldaña Cuba .

procedures. The Court should continue developing minimum standards that frame consultation as collective participation, enabling communities to exercise territorial governance.

4.3.3 Judicial Administration as Self-Determination

Although judicial functions are typically distinguished from democratic processes by the principle of separation of powers, Indigenous justice systems are inextricably tied to self-determination.[268] The connection to democracy becomes clear when one recognizes that Indigenous justice systems represent collective decision-making institutions that resolve disputes, maintain social order, and enforce community values according to culturally appropriate processes.

International law recognizes this connection through the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which establishes Indigenous peoples' right to "maintain and strengthen their distinct political, legal, economic, social and cultural institutions" (Article 5) and to "promote, develop and maintain their juridical systems or customs, in accordance with international human rights standards" (Article 34).[269]

The Inter-American Court's development of a right to collective juridical personality provides essential support for Indigenous and Tribal judicial autonomy. In *Saramaka People v. Suriname*, the Court established that recognizing collective juridical personality constitutes "one of the special measures owed to indigenous and tribal groups in order to ensure that they are able to use and enjoy their territory in accordance with their own traditions".[270] The Court ordered the State to:

> *establish, in consultation with the Saramaka people and fully respecting their traditions and customs, the judicial and administrative conditions necessary to ensure the recognition of their juridical personality, with the aim of guaranteeing them the use and enjoyment of their territory in accordance with their communal property system, as well as the rights to access to justice and equality before the law.*[271]

This requirement directly supports Indigenous judicial systems by mandating State recognition of Indigenous and Tribal or Afro-descendant collective authority to make binding decisions and represent community interests.

While traditionally focused on internal community matters, the principles underlying Indigenous and Afro-descendant judicial systems have broader implications. The 2025 Climate Emergency Advisory Opinion marked a significant development by requiring states to "facilitate access to justice tailored to ancestral, indigenous, and local knowledge and ways of life" for climate-related harms.[272] This goes beyond accommodating Indigenous and Afro-descendant peoples within existing judicial frameworks, mandating that justice systems themselves adapt to Indigenous and Afro-descendant epistemologies and governance approaches. This requirement can be linked to the "disproportionate impact" of climate change on Indigenous, Tribal, and/or Afro-descendant communities.[273]

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[268] UN Human Rights Council, The right of Indigenous Peoples to maintain and develop justice systems: Report of the Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite, 59th Sess, UN Doc A/HRC/59/52 (2025).
[269] United Nations Declaration on the Rights of Indigenous Peoples, Articles 5 and 34. Online: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf, at 8.
[270] IACtHR. Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007. Series C No. 172, at para 172. Online: https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf
[271] IACtHR. Case of the Saramaka People v. Suriname, para 174.
[272] IACtHR. Advisory Opinion AO-32/25 of May 29, 2025. Climate Emergency and Human Rights, para 613(ii).
[273] IACtHR. Advisory Opinion AO-32/25 of May 29, 2025. Climate Emergency and Human Rights, para 605.

National Implementation of Indigenous Justice Systems

The absence of formal recognition for Indigenous and Afro-descendant across the Americas often extends to their legal systems, which may be disregarded, constrained, or even criminalized, depending on the context.[274]

In some jurisdictions, Indigenous justice operates informally without State endorsement or interference, while in others, formal recognition exists but is accompanied by limitations such as subordination to State courts or insufficient institutional support. **Canada**, for instance, represents restrictive recognition: while affirming Indigenous peoples' inherent right to self-government, authority over justice systems has been largely excluded from this recognition, with the establishment of Indigenous courts and tribunals subject to protracted negotiations.[275]

Colombia illustrates similarly complex dynamics, where higher courts have historically overturned Indigenous and Afro-descendant legal authorities' decisions despite formal recognition of legal pluralism.[276] Specialized transitional justice institutions have developed dialogue mechanisms and consultation protocols with Indigenous and Afro-descendant authorities.[277] However, even these specialized processes operate within predetermined institutional boundaries, and unresolved disputes, for example between transitional justice authorities and Indigenous authorities, ultimately require resolution by the Constitutional Court.[278]

In **Guatemala**, although legal pluralism is formally recognized, Indigenous authorities have at times been prosecuted for offenses such as illegal detention or kidnapping when applying their customary justice systems, including the detention of suspects.[279]

Some States have adopted broader constitutional measures to recognize Indigenous justice. **Bolivia's** Plurinational Constitution affirms the right of Indigenous peoples to "self-determination and territoriality" and the right to practice "their political, juridical and economic systems in accord with their worldview",[280] with its Constitutional Court affirming that self-determination predates colonization. **Ecuador's** Constitution also recognizes the right of Indigenous communities to "perform jurisdictional duties, on the basis of their ancestral traditions and their own system of law"[281]. Yet even with such recognition,

[274] UN Human Rights Council, The right of Indigenous Peoples to maintain and develop justice systems: Report of the Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite, 59th Sess, UN Doc A/HRC/59/52 (2025).
[275] UN Human Rights Council, The right of Indigenous Peoples to maintain and develop justice systems: Report of the Special Rapporteur on the independence of judges and lawyers, at paras 29-33.
[276] Yuri Alexander Romaña-Rivas, "Legal Adaptation: How Colombia's Specialized Tribunal Has Adapted to the Reality of Legal Pluralism" (2023) 2 GLSA Research Series (Legal) 55 at 1.
[277] Yuri Alexander Romaña-Rivas, "Legal Adaptation: How Colombia's Specialized Tribunal Has Adapted to the Reality of Legal Pluralism" (2023), at 13.
[278] The Special Jurisdiction for Peace (SJP) is a transitional justice tribunal established following Colombia's 2016 Peace Agreement. The SJP has developed dialogue protocols with ethnic authorities based on "equal footing." While unresolved jurisdictional disputes must go to the Constitutional Court, "in most cases, the Special Jurisdiction and the Indigenous authorities have resolved jurisdictional disputes." Source: Yuri Alexander Romaña-Rivas, "Legal Adaptation: How Colombia's Specialized Tribunal Has Adapted to the Reality of Legal Pluralism" (2023) at 21.
[279] Rachel Seider, "The judiciary and Indigenous rights in Guatemala" (2007) 5 International Journal of Constitutional Law 211, cited in UN Human Rights Council, The right of Indigenous Peoples to maintain and develop justice systems: Report of the Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite, 59th Sess, UN Doc A/HRC/59/52 (2025) at para 85.
[280] Constitution of the Plurinational State of Bolivia, art. 30 (II) (4) and (14), online: https://www.constituteproject.org/constitution/Bolivia_2009
[281] Constitution of Ecuador, art. 171, online: https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html

implementation remains uneven, with States continuing to bypass required consultation processes. In Ecuador, for example, the National Assembly approved the "Organic Law for the Strengthening of Protected Areas" ("*Ley Orgánica para el Fortalecimiento de Áreas Protegidas*") in July 2025 despite Indigenous opposition, and without consultation, despite affecting Indigenous territorial rights.[282] In **Bolivia**, as stated above, the scope of Indigenous jurisdiction has been severely limited by measures that seek to regulate said jurisdiction.

These varied experiences across the region highlight the need for sustained institutional transformation that recognizes traditional Indigenous and Afro-descendant justice systems as legitimate expressions of political and legal autonomy rather than subordinate legal orders.

Conclusion

Taking into account recent legal developments, the 2025 Climate Emergency Advisory Opinion synthesizes these principles by establishing comprehensive State obligations that extend beyond consultation to include the need for institutional support for Indigenous and Afro-descendant governance systems. Although articulated in the specific context of climate emergencies, these obligations establish State duties that cannot be fulfilled through formal recognition alone, but require action in key areas, such as: 1) strengthening recognition and providing financial capacity for Indigenous and Tribal self-government institutions, 2) developing statistics and disaggregated data systems, 3) implementing targeted public policies, and 4) legislative and administrative reforms, all aimed at supporting territorial management and protection to ensure resilience and adaptability to climate challenges.[283] When applied to the democratic context, this serves as a useful and transferable synthesis of State obligations to actively support Indigenous and Afro-descendant political autonomy on the matters described above, such as territorial management, natural resource governance and judicial administration.

4.4 Comparative Regional Analysis: Democracy in the European Context and Safeguards for Minorities[284]

While minority rights and the right to democracy have received increasing attention in international law, regional systems have developed different approaches to addressing these challenges. Understanding how other regional systems have addressed similar issues can inform the Inter-American system's development of democratic standards. As Juan E. Mendez observes, a crucial structural distinction exists between regional systems: while European Convention ratification is mandatory for the European Union [EU] membership, Inter-American states retain discretionary participation in the human rights system.[285] This difference in adhesion requirements, Mendez notes, enabled European organs to "act to preserve

[282] In Ecuador, the Asamblea Nacional approved the "Ley Orgánica para el Fortalecimiento de Áreas Protegidas" on July 10, 2025, with 80 votes in favor despite indigenous opposition. Communities denounced that the proposal "systematically violates the human and collective rights of Ecuador's indigenous communities and nationalities, because it promotes the privatisation of the management and administration of protected areas" (authors' own translation). They warn that "This process violates the right to pre-legislative consultation provided for in Article 57(17) of the Constitution and the Escazú Agreement; therefore, the result will be unconstitutional and, consequently, null and void" (authors' own translation). Indigenous organizations plan to file a constitutional challenge. See: https://efeverde.com/ecuador-aprueba-ley-de-areas-protegidas-correismo-en-contra-y-rechazo-indigenas/; and Comunidades y Pueblos Originarios Amazónicos, "Denuncia Pública: Comunidades y Pueblos Originarios Amazónicos EXIGIMOS al Gobierno de Daniel Noboa y a la Asamblea Nacional NO PRIVATIZAR NI DESPOJAR nuestros territorios que fueron INCONSULTAMENTE declarados como áreas protegidas," julio 2025.

[283] IACtHR. Advisory Opinion AO-32/25 of May 29, 2025. Climate Emergency and Human Rights, at para 606.

[284] Section analysis contributed by Carla Kallas.

[285] Juan E Mendez "The Inter-American System of Protection: Its Contributions to the International Law of Human Rights," 111-142.

democracy" through suspension threats, while "countless military dictatorships and authoritarian regimes in Latin America have remained for years as members in good standing of the OAS."[286] These stronger enforcement mechanisms have correspondingly resulted in different European approaches to minority political participation and self-determination.

By adopting the European Convention on Human Rights,[287] the Council of Europe[288] affirmed its commitment to safeguarding and promoting human rights and fundamental freedoms across Europe, acknowledging that they are "best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend."[289] Democracy undoubtedly represents a fundamental element of the "European public order,"[290] with the European Union explicitly founded on principles of democracy and respect for human rights, as stated in Article 2 of the Treaty on European Union, which commits Member States to building societies based on "pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men."[291]

The Copenhagen European Council[292] further reinforced these commitments by setting out the minimum political criteria for accession to the European Union. These criteria include the existence of "free and regular elections, separation of powers and competences, control and monitoring mechanisms, political pluralism and competition[…]."[293] On a broader international scale, the Universal Declaration on Democracy[294] affirms a shared understanding of democracy as a system fundamentally aiming to "preserve and promote the dignity and fundamental rights of the individual, to achieve social justice, foster the economic and social development of the community, strengthen the cohesion of society and enhance national tranquillity, as well as to create a climate that is favourable for international peace".[295] Democracy must guarantee that both the processes of accession to power and the exercise of power are based on free political competition, which fundamentally arises from open, free, and non-discriminatory popular

[286] Juan E Mendez "The Inter-American System of Protection: Its Contributions to the International Law of Human Rights," 114.
[287] The Convention for the Protection of Human Rights and Fundamental Freedoms is a key international treaty that was adopted by the Council of Europe in 1950 and entered into force in 1953. It was created to protect civil and political rights of individuals in the member states of the Council of Europe. The European Court of Human Rights (ECtHR), based in Strasbourg, enforces the Convention and allows individuals to file cases against member states for human rights violations.
[288] The Council of Europe is an international organization that promotes human rights, democracy, and the rule of law in Europe. It was established in 1949, making it the oldest European intergovernmental organization focused on protecting human dignity and democratic governance.
[289] European Convention on Human Rights, 4 November 1950, ETS 5, as amended by Protocols 11 and 14 (entered into force 1 June 2010), online: Council of Europe, https://www.coe.int/en/web/compass/the-european-convention-on-human-rights-and-its-protocols
[290] Loizidou v Turkey, No 15318/89, [1996] VI ECHR 2216 at para 75, online: https://hudoc.echr.coe.int/eng?i=001-58007 ; United Communist Party of Turkey and Others v Turkey, No 19392/92, [1998] I ECHR 1 at para 45, online: https://hudoc.echr.coe.int/eng?i=001-58128>
[291] Article 2 of the Treaty on European Union.
[292] The Copenhagen European Council refers to the meeting of European Union heads of state and government held in June 1993 in Copenhagen, Denmark. This summit was significant because it defined the political criteria for countries aiming to join the European Union. The Council emphasized the importance of democracy and human rights as fundamental values for the EU.
[293] Blandine Chelini-Pont, "The European Union and national sovereignty: a new democratic challenge?" (5 May 2025), Robert Schuman Foundation, online: European Issues https://www.robert-schuman.eu/en/european-issues/790-the-european-union-and-national-sovereignty-a-new-democratic-challenge
[294] The Universal Declaration on Democracy is an international document adopted in 1997 by the Inter-Parliamentary Council, which brings together members of parliaments from around the world.
[295] Inter-Parliamentary Union, "Universal Declaration on Democracy" (16 September 1997), preamble, online: https://www.ipu.org/impact/democracy-and-strong-parliaments/ipu-standards/universal-declaration-democracy.

participation, carried out in accordance with the rule of law.[296] Consequently, democracy is defined as a fundamental right of the citizen, which must be exercised under conditions of freedom, equality, transparency, and accountability, with respect for the plurality of opinions and in the common interest.[297]

Moreover, the interdependence and mutual reinforcement of democracy and the respect for all human rights and fundamental freedoms were formally reaffirmed at the 2005 World Summit in New York.[298] This recognition, which underscores the crucial role of democracy in the preservation of human rights, has been consistently affirmed in the jurisprudence of the European Court of Human Rights.[299] Accordingly, the Court views democracy and human rights as inseparable, affirming that democracy inherently includes pluralism and that freedom of association is indispensable for the effective functioning of a democratic system.[300]

Historical Exclusion and the Right to Political Participation

Since its establishment, the Council of Europe has placed particular emphasis on the protection of minorities,[301] and several European legal instruments protect minority rights, such as the European Charter for Regional or Minority Languages[302] and the Framework Convention for the Protection of National Minorities.[303] The implementation of the latter represents a significant institutional advancement.[304] In fact, it is monitored by the only international committee dedicated exclusively to minority rights,[305] marking a major step forward within the Council of Europe.

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[296] Blandine Chelini-Pont, "The European Union and national sovereignty: a new democratic challenge?" (5 May 2025), Robert Schuman Foundation, online: https://www.robert-schuman.eu/en/european-issues/790-the-european-union-and-national-sovereignty-a-new-democratic-challenge

[297] Blandine Chelini-Pont, "The European Union and national sovereignty: a new democratic challenge?" (5 May 2025), Robert Schuman Foundation.

[298] 2005 World Summit Outcome, GA Res 60/1, UNGAOR, 60th Sess, UN Doc A/RES/60/1 (2005) at para 135, online: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf ; Blandine Chelini-Pont, "L'Union européenne face au national-souverainisme : un nouveau défi démocratique ?" (5 mai 2025) at 3, Fondation Robert Schuman, online : Questions d'Europe https://www.robert-schuman.eu/questions-d-europe/790-l-union-europeenne-face-au-national-souverainisme-un-nouveau-defi-democratique

[299] United Communist Party of Turkey and Others v Turkey, No. 19392/92, [1998] I ECHR 1 at para 45, online: https://hudoc.echr.coe.int/eng?i=001-58128; The Court emphasizes the significance of freedom of association within a state governed by the rule of law, particularly in relation to political pluralism.

[300] As established in several judgements, notably in the case of United Communist Party of Turkey and Others v. Turkey (1998).

[301] E.g., The European Union is founded on core values, including respect for the rights of persons belonging to minorities, as affirmed in Article 2 of the Treaty on European Union, which affirms the Union's commitment to democracy and human rights, including «the rights of persons belonging to minorities».

[302] The European Charter for Regional or Minority Languages (ECRML) is a Council of Europe treaty adopted in 1992. Its main purpose is to protect and promote regional and minority languages: European Charter for Regional or Minority Languages, 5 November 1992, ETS 148, online: Council of Europe https://www.coe.int/en/web/european-charter-regional-or-minority-languages/text-of-the-charter .

[303] "The Framework Convention for the Protection of National Minorities is the most comprehensive European treaty aimed at protecting the rights of persons belonging to national minorities. It is the first multilateral, legally binding instrument devoted to the protection of national minorities in the world. It was adopted on 10 November 1994 by the Committee of Ministers and entered into force on 1 February 1998. It should also be noted that the Framework Convention does not explicitly define 'national minority'. Therefore, there is a certain flexibility granted to States to decide which minorities may fall under the protection of the Convention. However, this decision or margin of appreciation must be made in good faith and in accordance with the general principles of international law": Framework Convention for the Protection of National Minorities, 1 February 1995, ETS 157, online: Council of Europe https://www.coe.int/en/web/minorities; Council of Europe, "Minorities: At a Glance", online: Council of Europe https://www.coe.int/en/web/minorities/at-a-glance.

[304] It is now in force in 38 States.

[305] Council of Europe, "At a Glance: Framework Convention for the Protection of National Minorities", online: https://www.coe.int/en/web/minorities/at-a-glance .

Despite these legal and institutional advancements, the issue of minority democratic rights continues to generate concern and tension across Europe. Indeed, nearly every European state is home to national minorities whose political participation and recognition remain contested, underscoring the gap that can still exist between formal commitments and actual implementation.[306] The European Court of Human Rights has addressed these tensions through key decisions. In *United Communist Party of Turkey and Others v. Turkey*, the Court established that "there can be no democracy without pluralism,"[307] ruling that Turkey's dissolution of the party violated Article 11 of the European Convention on Human Rights. [308] In *Sejdić and Finci v. Bosnia and Herzegovina*, the Court ruled that constitutional provisions barring Roma and Jewish citizens from the presidency and House of Peoples violated the European Convention on Human Rights.[309]

Efforts to Preserve Traditional or Historical Forms of Political or Social Organizations

In Europe, minorities have developed their own political institutions throughout history: community councils,[310] local authority systems, and other governance structures.[311] One of the concrete examples illustrating the efforts of Indigenous peoples to preserve their traditional forms of social or even political organization is the situation of the Sámi in **Sweden**. On January 23, 2020, the Supreme Court of Sweden delivered a historic verdict in favor of the Girjas sameby[312] in a lawsuit against the Swedish State, ending a long-standing dispute over who holds the rights to manage fishing and hunting within the designated land management areas.[313]

The Girjas sameby claimed the exclusive right to manage hunting and fishing in their herding areas above the so-called *odlingsgränsen* (agricultural boundary) in Norrbotten län (county) in northwestern Sweden, [314] while the Swedish State claimed that it alone held these rights.[315] The Supreme Court ruled in favor of the Girjas sameby, granting them the exclusive right to manage fishing and hunting in their area. The judgement was based on Sámi traditional customary law[316] and immemorial usage. The Court also justified

[306] Including the ongoing demands of the Basques in Spain, Corsican nationalists in France, as well as the persistent marginalization of minorities such as the Roma , Ossetians and Chechens, demonstrate that the democratic rights of minorities remain fragile Conseil de l'Europe, « À propos de la Convention-cadre pour la protection des minorités nationales », en ligne : https://www.coe.int/fr/web/minorities/at-a-glance
[307] United Communist Party of Turkey and Others v Turkey, No 19392/92, [1998] VI ECHR 1 at para 43, 30 January 1998, online: https://hudoc.echr.coe.int/eng?i=001-58128
[308] United Communist Party of Turkey and Others v Turkey, No 19392/92, [1998] VI ECHR 1 at para 48, 30 January 1998, online: https://hudoc.echr.coe.int/eng?i=001-58128 .
[309] Sejdić and Finci v Bosnia and Herzegovina, Nos 27996/06 and 34836/06, [2009] ECHR 273 at para 67, online: https://hudoc.echr.coe.int/eng?i=001-96491 .
[310] The Sami Parliament in Norway, Sweden, and Finland. It functions as a representative body for the Sami people.
[311] For example, the Basque Autonomous Community in Spain.
[312] The *sameby* (Sámi herding community) has roots in traditional Sámi forms of collective land use and herding. It predates the modern Swedish state and has continued to function alongside the state. (The Girjas Sámi reindeer herding community)
[313] Supreme Court of Sweden (Högsta domstolen), Case T 853-18, 23 June 2020, online: https://www.domstol.se/globalassets/filer/domstol/hogstadomstolen/avgoranden/2020/t-853-18.pdf ; In other words the dispute concerned the authority to administer hunting and fishing rights within the Girjas land area; The Sami reindeer herding community or the Swedish state; High North News, "Girjas Sami Village Won Swedish Supreme Court Case – May Have Consequences for Other Countries" (23 January 2020), online: https://www.highnorthnews.com/en/girjas-sami-village-won-swedish-supreme-court-case-may-have-consequences-other-countries
[314] Øyvind Ravna, "A Sámi Community Wins Case against the Swedish State in the Supreme Court" (2020) 11 Arctic Review on Law and Politics 19 at 19, online: https://www.jstor.org/stable/10.2307/48710621
[315] Since the reindeer husbandry act (1971), Swedish law has not allowed Sámi communities to decide who may hunt or fish in their traditional lands. That authority was held by the state. The Sámi were users of the land, but not decision-makers.
[316] "Sámi customary laws should be treated as a part of the Sámi culture and tradition. Sámi rights to fish or hunt are based on Sámi customary laws concerning natural": Dawid Bunikowski, "Indigenous Peoples, Their Rights and Customary Laws in the

its decision by relying on land rights under Article 26 of UNDRIP,[317] concluding that "an indigenous people have the right to the lands, territories and resources which it has traditionally owned, occupied or otherwise used or acquired."[318] Additionally, the Court based its ruling on Article 8 of the ILO Convention 169.[319]

The Swedish Supreme Court's verdict recognizes both social and political rights. It reflects recognition of Indigenous political authority over their traditional territories and limits the state's exclusive control over land and resource management, marking a significant shift towards Indigenous self-governance, self-determination and legal pluralism. The Girjas case is of great importance as it concerns not just land use, but land governance and decision-making over traditional territory, which is fundamentally a political right. The decision has empowered other Sámi communities to assert their rights over traditional lands.[320]

These precedents demonstrate that European systems have grappled with similar tensions between majority rule and minority rights, though focused primarily on ethnic and cultural minorities rather than Indigenous, Tribal, and Afro-descendant peoples, given the different regional context. European courts have recognized elements of pluralism and minority political participation as important to democratic functioning, with some decisions acknowledging that control over traditional practices and resources can constitute meaningful empowerment for minority communities.

Section 5. Rethinking the Right to Democracy as a Catalyst for Racial and Ethnic Justice in the Inter-American System

This *amicus* brief has documented the systemic exclusion of Indigenous and Afro-descendant communities from democratic processes across the Americas. For these communities, the notion of political participation encompasses both engagement with state democratic institutions and the exercise of collective political authority through traditional governance systems. The evidence presented shows a continuum of exclusion ranging from historical *de jure* to contemporary *de facto* barriers.[321] Most significantly, these exclusions — through violence, administrative electoral barriers, and other obstacles — create a situation where formal democratic inclusion mechanisms alone cannot fulfill States' obligations to ensure effective political participation. Structural barriers prevent these Indigenous and Afro-descendant communities from enjoying their ways of life, electing their representatives autonomously, being guaranteed the right to prior

North: The Case of the Sámi People" (posted 1 February 2016) at 77, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2725380

[317] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UNGAOR, 61st Session, Supp No 49, UN Doc A/61/49 (2007), art 26, online: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

[318] Øyvind Ravna, "A Sámi Community Wins Case against the Swedish State in the Supreme Court" (2020) 11 Arctic Review on Law and Politics 19, online: https://www.jstor.org/stable/10.2307/48710621

[319] ILO Convention 169, Article 8(1) and 8(2). Although Sweden has not ratified the ILO 169, the Supreme Court has considered it as a customary law binding nations states without even ratifying it : Øyvind Ravna, "A Sámi Community Wins Case against the Swedish State in the Supreme Court" (2020) 11 Arctic Review on Law and Politics 19, online: https://www.jstor.org/stable/10.2307/48710621

[320] Indeed, "Inherited rights are acknowledged in this verdict. It has been argued that these have formed the basis of the Sámi rights, and the Court has agreed with that. Cases like this one matter" Stated by Miss Åsa Larsson Blind who is the vice president of the Saami Council, a non- governmental organization promoting protection of Sámi rights and culture and raising awareness of Arctic and environmental issues; Hilde-Gunn Bye, "Girjas Sami Village Won Swedish Supreme Court Case. May Have Consequences for Other Countries" (28 January 2020), online: https://www.highnorthnews.com/en/girjas-sami-village-won-swedish-supreme-court-case-may-have-consequences-other-countries

[321] See sections 1 and 3.

consultation and making decisions based on self-determination.

In practice, in democratic contexts, many countries perpetuate monocultural and State-centered patterns, which make invisible, subordinate or delegitimize the systems of organization and justice that Indigenous and Afro-descendant communities have historically developed. In many cases, contemporary tensions demonstrate how Indigenous and Afro-descendant peoples continue to be treated as obstacles in the face of a development model that, in many contexts, prioritizes extractive investment over collective rights and ecological balance.[322] Thinking about intercultural democracy in this context cannot be limited to expanding the electoral roll or adding Indigenous and Afro-descendant candidates to subordinate party lists, but requires recognizing the plurality of normative systems, forms of government, and connections to the territory that sustain Indigenous and Afro-descendant political and cultural life.

The systemic exclusion documented throughout this *amicus* brief reveals the essential role of collective rights as the foundation for meaningful political autonomy. Without collective territorial rights, these communities cannot exercise self-determination over their ancestral lands or demand adequate consultation on matters affecting them. Without protection of their collective governance systems, communities lose their decision-making authority. Without meaningful participation mechanisms that go beyond formal electoral access, democratic systems fail to overcome historical and racial marginalization. Without strong consultation rights, development decisions could continue to be imposed through majoritarian frameworks and extractive interests.

Indigenous and Afro-descendant communities have maintained their own political organizations, not as alternatives permitted by the State, but as ongoing realities of self-governance that have operated independently of state recognition, coexisting with or predating modern democratic states.[323] This reality reveals that meaningful political participation for these communities requires addressing three interconnected foundational principles:

- **Self-determination** encompasses collective decision-making authority exercised through traditional governance structures according to ancestral knowledge and community-determined priorities, with legitimacy derived through community deliberation rather than state authorization.
- **Legal pluralism** provides the framework for recognizing these multiple legitimate normative orders, acknowledging Indigenous and Afro-descendant governance systems as autonomous authorities operating according to different but equally valid frameworks.
- **Racial justice** emerges as the transformative requirement to dismantle structural systems perpetuating racial hierarchies while creating conditions for genuine equality and collective self-determination.[324]

Given the Court's consistent jurisprudence recognizing Indigenous and Afro-descendant territorial rights, consultation obligations, and governance systems as essential to these communities' survival, as well as national constitutional developments recognizing aspects of Indigenous and Afro-descendant peoples' collective rights,[325] these concepts — **self-determination, legal pluralism, and racial** justice **— must now be understood as integral components of the democratic minimum core in the Inter-American context**, rather than optional accommodations.

[322] See Section 3.
[323] See Section 2.2.
[324] See Section 2.1 for detailed definitions of these concepts.
[325] See discussion in sections 2.1, and Inter-American jurisprudential development in section 4.

Addressing racial discrimination requires systemic institutional responses rather than treating racism as isolated individual acts. The Inter-American System's focus on racial justice as an antiracist framework could contribute to progressively overcoming these historical legacies and current challenges to build substantive democracies in the Americas. This systemic approach finds support in the work of the IACHR, which has established positive State obligations by requiring "affirmative actions and strategies" with "development plans at all levels to specifically address the needs of this ethnic and racial group."[326] Similarly, the UN High Commissioner for Human Rights emphasized that states must take concrete steps to implement the recommendations made by the UN and regional human rights mechanisms, underscoring the role of regional human rights systems like the Inter-American system in advancing racial justice.[327]

Operationalizing this framework, democratic racial justice means that states must take serious measures to remove *de jure* and *de facto* barriers that undermine Indigenous and Afro-descendant participation in democratic processes. These communities must be guaranteed full citizenship through deliberate transformative measures that facilitate meaningful access to decision-making scenarios, rather than being an afterthought within institutional arrangements. States must respect Indigenous and Afro-descendant communities' own forms of political, economic, social, and cultural organization as legitimate expressions of democratic participation. Communities and their leaders must be able to participate in democratic processes without fearing for their personal integrity. Additionally, territorial collective rights recognized for Indigenous and Afro-descendant communities must be protected as foundational to political autonomy.

Thus, in the context of the present Advisory Opinion proceeding, this analysis argues that regardless of whether the Court recognizes a distinct right to democracy under the American Convention, the minimum content of democratic participation for Indigenous and Afro-descendant communities must incorporate self-determination, legal pluralism, and racial justice as foundational principles. This brief urges the Court to consider in its Advisory Opinion the historical exclusion, jurisprudential foundations, and contemporary realities documented herein. The Court has a unique opportunity to advance standards with transformative approaches that ensure that democracy serves as a catalyst for racial and ethnic justice rather than perpetuating exclusion for Indigenous and Afro-descendant communities.

In conclusion, the Inter-American system has a historic opportunity to exercise leadership by recognizing that real or substantive democracy requires removing *de jure* and *de facto* barriers that undermine the political organization and participation of Indigenous and Afro-descendant peoples. In this regard, the Court must establish that the States of the region have the obligation to simultaneously protect both the individual and collective political participation of these peoples at different levels of the public sphere, as well as safeguard the rights of Indigenous and Afro-descendant peoples to collective governance.

[326] IACHR, Economic, Social, Cultural and Environmental Rights of Persons of African Descent: Inter-American Standards to Prevent, Combat and Eradicate Structural Racial Discrimination, OEA/Ser.L/V/II.Doc.109, March 16, 2021, par. 44.
[327] UN Human Rights Council. "Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers." A/HRC/47/CRP.1, 28 June 2021, at paras. 312-315, online: https://www.ohchr.org/sites/default/files/Documents/Issues/Racism/A_HRC_47_CRP_1.pdf

Annex – Case Study

Quilombola Communities of Brazil[328]

In Brazil, Indigenous councils and Quilombola assemblies have endured for centuries as expressions of collective resistance. Rooted in collective sovereignty and ancestral ties to land, these forms of organization are increasingly expressed through contemporary political movements that preserve traditional leadership structures while also engaging with national and international institutions. Quilombola communities in particular embody a distinctive form of resistance and survival, shaping political and social structures that challenge dominant narratives of state formation and economic development.[329]

Their existence as autonomous territories, with distinct land tenure systems rooted in collective ownership and mutual aid, challenges the liberal-democratic framework that prioritizes individual property rights over communal arrangements. Quilombola settlements have long sustained governance models that diverged from the formal institutions of colonial and republican Brazil[330]. This continuity of self-determination is evident in the legal recognition afforded by Article 68 of the 1988 Transitional Constitutional Provisions Act, Decree 4.887/2003, and the Racial Equality Statute (Law 12.288/2010), all of which affirm Quilombola territorial rights and the inherent connection between land, identity, and political inclusion.[331]

Despite these legal advancements, structural obstacles persist. Brazil's governance model remains predominantly shaped by majoritarian principles that marginalize non-Western political traditions. The Quilombola experience underscores the tensions between state-centric legal frameworks and community-based governance, as seen in efforts to reinterpret territorial rights through restrictive measures like the "Temporal Framework" ("*Marco Temporal")* thesis, which challenges the self-identification criteria and titling procedures established under Decree 4.887/2003.[332]

According to the 2022 Census, only 62,859 people resided in the 147 Quilombola territories that had been formally titled. Of this total, 57,442 (91.38%) were Quilombolas and 5,417 (8.61%) were non-Quilombolas. This means that just 4.3% of Brazil's Quilombola population lives in titled territories, while 95.7% — around 1.27 million people — remain without definitive land rights through the formal titling process. The highest proportions of Quilombolas living in titled territories were recorded in Pará (28.1%), Amapá (14.1%), and Goiás (11.6%). These figures underscore the persistent gap between constitutional promises and the reality of land regularization, leaving the vast majority of Quilombola communities exposed to land grabbing, violence, and displacement. This gap between legal promise and practical enforcement is exacerbated by the influence of powerful agribusiness and mining interests, which have consistently challenged Quilombola rights in courts and through legislative maneuvers.

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[328] Analysis contributed by Ana Luiza Gregorio Vidotti.
[329] Federal Senate News Agency, "Resilient Quilombolas Seek Recognition of Their Territories" (February 2025), online: https://www12.senado.leg.br/noticias/infomaterias/2025/02/resistentes-quilombolas-querem-reconhecimento-de-seus-territorios.
[330] Agência Pública, "Know the Rights of Quilombola Peoples" (February 2025), online (video): https://apublica.org/video/2025/02/conheca-os-direitos-dos-povos-quilombolas/.
[331] André Ricardo Fonsêca da Silva, "Public Policies for Maroon Communities: A Building in Fight" (2018) 1:48 Política & Trabalho: Journal of Social Sciences 115, online: https://doi.org/10.22478/ufpb.1517-5901.2018v1n48.27650.
[332] Agência Brasil, "Indigenous Struggle Faces 'Marco Temporal' and Attempts at State-Led Village Formation" (February 2025), online: https://agenciabrasil.ebc.com.br/direitos-humanos/noticia/2025-02/luta-indigena-enfrenta-marco-temporal-e-tenta-aldeamento-do-estado.

The Inter-American Court's ruling in *Comunidades Quilombolas de Alcântara v. Brazil* (2024) serves as a stark reminder of the consequences of disregarding these collective forms of political organization. Brazil's forced displacement of Quilombola families, carried out without meaningful consultation, was condemned for violating fundamental rights to ancestral land and self-determination. The survival of Quilombola communities hinges not just on legal protections but on societal and institutional shifts that affirm their governance traditions, land rights, and political agency.

Contemporary Indigenous and Quilombola organizations embody both continuity and transformation, reinforcing traditional forms of political resistance while adapting strategies to confront modern challenges.[333] These movements maintain the collectivist governance models that historically sustained Indigenous and Quilombola autonomy, mobilizing their communities to defend territorial rights, cultural preservation, and political recognition. The Articulation of Indigenous Peoples of Brazil (APIB) and the National Coordination of Articulation of Rural Black Quilombola Communities (CONAQ) are among the most influential organizations advocating for these rights. APIB, through national mobilization efforts, protests, and policy interventions, has been instrumental in shaping constitutional debates and resisting regressive policies that threaten Indigenous sovereignty. CONAQ, founded in 1996, has played a critical role in securing formal recognition of Quilombola School Education as a distinct modality within Brazil's education system, ensuring that collective histories and cultural traditions remain central to the educational framework.

These organizations do more than articulate demands; they challenge the fundamental structures that have historically excluded Indigenous and Quilombola communities from full citizenship. APIB and CONAQ's engagement with legal and democratic institutions highlights the ongoing tension between state policies and traditional governance systems, demonstrating that political resistance is not merely reactive — it is foundational to these communities' survival and self-determination. Their advocacy extends beyond national borders, forging alliances with international human rights organizations and participating in global forums to hold Brazil accountable for its obligations under international law.[334]

Beyond formal advocacy, cultural expressions — such as religious festivals, dances, and agricultural rituals — remain vital elements of resistance, serving as mechanisms for identity affirmation and collective cohesion. These traditions are inherently political, countering the forces of cultural erasure and land expropriation while asserting ancestral ties to territory. The connection between culture and political struggle is exemplified in Quilombola movements that integrate traditional ceremonies into protests, framing land defense as both a legal and spiritual battle.[335]

Despite these efforts, Indigenous and Quilombola organizations face entrenched barriers, including violence, land invasions, and systemic impunity for crimes against community leaders.[336] The

[333] Conselho Indigenista Missionário (CIMI), "Challenges for Indigenous Realities in the Current Brazilian Context" (15 May 2023), online: https://cimi.org.br/2023/05/desafios-para-a-realidade-indigena-no-atual-contexto-brasileiro/; Conselho Indigenista Missionário (CIMI), "Challenges for Indigenous Realities in the Current Brazilian Context" (15 May 2023), online: https://cimi.org.br/2023/05/desafios-para-a-realidade-indigena-no-atual-contexto-brasileiro/

[334] Conselho Indigenista Missionário (CIMI), "Indigenous and Quilombola Peoples Strengthen Resistance Against Fascism and Racism" (23 October 2018), online: https://cimi.org.br/2018/10/assembleia-dos-povos-indigenas-e-quilombolas-fortalecem-resistencia-contra-fascismo-e-racismo/; Conselho Indigenista Missionário (CIMI), "Challenges for Indigenous Realities in the Current Brazilian Context" (15 May 2023), online: https://cimi.org.br/2023/05/desafios-para-a-realidade-indigena-no-atual-contexto-brasileiro/

[335] Rodrigues, Santos & Macedo, "Body Practices, Cultural Identity and Public Policies in Quilombola Communities" (2024) 12 Nova Revista Amazônica 15, online: https://periodicos.ufpa.br/index.php/nra/article/viewFile/17617/11756.

[336] Centro de Estudos Sindicais e Economia do Trabalho (CESE), "Territorial Rights: A History of Struggle and Resistance of Indigenous and Quilombola Peoples" (16 August 2024), online: https://www.cese.org.br/blog/direitos-territoriais-uma-historia-de-luta-e-resistencia-de-indigenas-e-quilombolas/.

criminalization of activists, alongside legislative maneuvers to weaken land protections, demonstrates the enduring hostility of Brazil's political system toward autonomous governance models. However, the resilience of these organizations – evidenced by initiatives like CONAQ's Quilombola Women's Committee and APIB's nationwide mobilization efforts – underscores their continued determination to secure justice and recognition. Their struggle is not simply about inclusion within existing State structures; it is about reshaping democracy itself, ensuring that plural political traditions are acknowledged and safeguarded.

Sincerely,

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