

The land conflict over the resguardos between the indigenous people and the government in Colombia.

Sumario:

Introduction. The Creation of the Resguardos. The Beginning of the Conflict, a Historical Insight. The New Policies, Laws, and the Neoliberalism. The Contemporary Change and a New Legislation. Conclusions. Bibliographic References.

Resumen:

Este escrito constituye una de las primeras contribuciones al estudio del conflicto sobre las tierras de los resguardos entre los indígenas y el gobierno en Colombia haciendo un énfasis en el proceso histórico en el que esta disputa se ha desarrollado examinando también las perspectivas de estos actores por la tierra a través del tiempo. El análisis de este artículo es único porque se ha enfocado específicamente en el estudio de los resguardos indígenas, considerados como una de las razones continuas que siguen alimentando la lucha entre estos dos actores sobre la propiedad de la tierra que vista desde el punto de vista del gobierno es un mero medio de producción para el progreso económico mientras que para los indígenas es un lugar sagrado en el que sus deidades se manifiestan y en el que sus tradiciones históricas se mantienen vivas.

Palabras Clave: Conflicto de tierras, Resguardos, Indígenas, Gobierno, Construcción de Paz.

Abstract

This written constitutes one of the first contributions to the study of the conflict over the lands of the resguardos between the indigenous people and the government in Colombia by making an emphasis in the historic process in which the dispute has developed examining also the perspectives of these two parties over the land through time. The analysis of this article is unique because it is focused specifically in the analysis of the indigenous reservation lands, considered as one the continuous reasons which keep maintaining the scuffle between these two parties over the ownership of the land that seen from the point of view of the government is a mere mean of production for economic progress while on the contrary from the perspective of the indigenous people is a sacred area in which the deities manifest and their historic traditions are maintained alive.

Keywords: Land Conflict, Indigenous Reservations, Indigenous, Government, Peace Construction.

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El conflicto de tierras por los resguardos entre los indígenas y el Gobierno en Colombia.

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Introduction

In Colombia today there is a problem of an armed conflict that keeps generating several casualties, massive loss of lives, and of wealth for both the population as well as the government. Paying respect to the attempts of peacebuilding over the years this article will try to become one small contribution. Analyzing the origins of that continuous conflict that sometimes reached armed levels concerning the ownership of the lands, who owns them, and who has the rights to use them. On several occasions, the conflict arises from a disagreement over that right and in this article will examine the massive discrepancy that is present between the indigenous peoples and the government over the so called *resguardos* or indigenous reservation areas in English. On one side the indigenous peoples claim back today's land on the basis of the legality of position given by the *resguardos* and on the other side the government sustains that this case is already closed and solved in the law.

This article has as main purpose to deepen in the *resguardos* taking an analytical look back in history since its creation that appears in the colonial time considering its definition, whether it has served its purpose, or whether it has maintained a fixed position in time. For beginning this article let us begin with the moment in which the lands of the *resguardos* were created by the Spanish Crown in the 16th Century after the conquest expeditions almost extinguished the indigenous population with the massive violence done by the Spaniards who had arrived to these territories in the 15th Century.

The Creation of the *Resguardos*

For keeping the indigenous protected, to avoid their future mistreatments, and to control the possible manifestation of aggressive behaviors from the colonizers the Spanish Crown decided to grant the indigenous peoples some lands by introducing the system of *resguardos*. The idea was that after this system was implemented, these lands became the collective property¹ of the indigenous communities whose tribe leaders held the *cédulas reales* also referred as royal charters in English, understood as the devised mechanisms that made the entire communities the legitimate owners of the lands recognized by the Crown. This was enacted in the *Leyes de Indias* or Laws of the Indies² in English especially in (Ley xvi, Título XII, Libro IV) that states “for favoring the indigenous peoples and to avoid prejudice. We

1 The collective property means the lands belong to the whole community and to every one of its composing members.

2 Issued before 1520 the well-known Laws of Burgos were modified constantly during the colonial era to eventually become in 1542 the New Laws. These set of legal measures, created by the Catholic Kings of Spain, were also compiled later in history in 1680 in a set (of 10 books) of legal measures that were finally called the Laws of the Indies. These laws designed the organizations and procedures for administrating the colonized territories, its resources, and protecting the rights and the lives of the people living there. For more information, see also: 1.) Archivo digital de la legislación en el Perú. “Leyes de Las Indias”. [Online]. Available From: <https://archive.is/20120629195154/www.congreso.gob.pe/ntley/LeyIndiaP.htm>. Retrieved: 14/05/2014; and 2.) “III. Spanish Law in America and Colonial Administration”. *California's Legal Heritage. Digital Exhibition Presented by the Robbins Collection*. [Online] Available From: <http://callegalheritage.law.berkeley.edu/spanish-law-in-america.html>. Retrieved: 09/10/2014.

order the compositions of the lands of the indigenous and not of the Spaniards who acquired them against our ordinances and royal charters because in them is [expressed] our will..." (Recopilación de las Leyes de las Indias; Ley xvi, Título XII, Libro IV). The innovating characteristic of the *resguardos* originally recognized a group of indigenous peoples as collective holders of the property rights over some certain areas in which they were able to develop their own lifestyle and subsist without the intervention of the Spanish colonizers.

To recognize the indigenous as collective legitimate owners of the lands through the enactment of laws in order to avoid their extinction shows expressed commitment of the Spanish Crown towards the protection of the population of its conquered territories. For the indigenous people the actions of the Crown that created the *resguardos* allowed them to live peacefully in their communities until the independence of these territories from Spain and the beginning of the Republics.

The Beginning of the Conflict, a Historical Insight.

The struggle for the freedom from Spain begun approximately in the middle of the 18th century and it had as main purpose the construction of a free republic without the interference of Spain, with the rights of the man granted for all the population –as expressed by Antonio Nariño³– (Sánchez and Silva, 2002, pp. 50-52) (Nariño, 1982), and suppressing the colonial regime of the Spaniards imposed to the population which was composed mostly by indigenous people (Gutiérrez, 2010); and these points constituted perhaps the main idea of the construction of a new country.

The Great Colombia was the first attempt of the construction of a strong republic after the liberator Bolívar freed it from Spain and in comparison to the Viceroyalty of New Granada the Great Colombia was no longer under the influence of the Crown. The borders and

extensions in the territory remained unchanged the first years and after with the initiated freedom campaigns of Peru, Venezuela, and Ecuador, the *supreme regime's*⁴ laws and policies (the italic is mine) were modified as same as the geographic boundaries.

Elected as president of the Great Colombia, Bolívar immediately started to make several reforms that created a different order from the one established by Spain in the years of the colony. The first change was the enactment of the first constitution⁵ of 1821 (Constitución Política de Colombia de 1821) in which was enacted the creation of three branches of the government⁶ that still to this date are functioning (Sánchez and Silva, 2002, p. 65). Regarding the *resguardos* system Bolívar issued the decree of May 20th of 1820⁷ that requested the authorities of the future governments to return the lands of *resguardos* to the indigenous peoples, especially to the communities that had them registered them through the royal charters⁸. What made Bolívar's mandate especial was that in less than four years he reformed the political and the legal system for the wealth of the population, especially of the indigenous peoples because they represented the traditional roots of the country. His attempt of protecting these communities and their lands evidences that at the beginning of the republic there was a tendency that respected rights over the *resguardos'* lands and recognized the indigenous perspectives (Helg, 2012, p. 33). However, this tendency did not last long enough because in the upcoming years after the independence was achieved the total extension of the territory of the Great Colombia was gradually reduced. Just twelve years after achieving the independence from Spain and becoming a country, the Great Colombia was dissolved in 1832. The new country also known as the republic of New Granada (1831-1858) begun its administration with a different constitution (Constitución Política del Estado de Nueva Granada de 1832) than from the Great Colombia and also with radical ideals contrary to the ones implemented by Bolívar.

3 Known also as the precursor of the independence, Antonio Nariño, who was assassinated by the Spanish authorities during the Viceroyalty of New Granada, influenced the independence campaigns by divulging the declaration of the rights of the man in which he stated that all the men and women are equal against the law and for that reason the political system is above all the authority in charge of protecting them.

4 The term *Supreme Regimes* refers to the Crown in the colony and the governments in the republic.

5 Through the 19th and the 20th century, a total of eight constitutions were enacted. The most recent one is the, constantly amended, Political Constitution of 1991.

6 The executive composed by the president and the vice president; the legislative in charge of creating and enacting the laws formed by the Senate and the House of Representatives; and the judicial in which the judges and magistrates are in charge of judging the crimes committed against the violation of the rights of the population.

7 *Albicentenario. Celebración Colombiana. "El 20 de Mayo se cumplen 190 años del decreto de Simón Bolívar que ordenó devolverles los resguardos a los indígenas"*. [Online]. Available From: http://www.albicentenario.com/index_archivos/celebracion_colombiana141.html Retrieved: 2013/04/20., ans see also: ADHILAC Asociación de Historiadores Latinoamericanos y del Caribe -www.adhilac.com.ar-(20/03/2015). "Bicentenario. Simón Bolívar. Decreto a favor de los pueblos originarios. Cúcuta, 1820". Decreto que en su cuartel general de Cúcuta firma Simón Bolívar a favor de los pueblos originarios. [Online] Available From: <http://adhilac.com.ar/?p=1288>. Retrieved: 12/04/2015.

8 These types of lands are understood as colonial *resguardos*.



One of the most recognized presidents after this new country was founded was the four times elected president, Tomás Cipriano de Mosquera known also as the *mascachochas* or Gaga-chew in English, a dictator who liberalized the national economy and incentivized the parceling and the suppression of most of the *resguardos* in the central parts of the territory in order to generate development (Vásquez, s.f). The indigenous peoples became the center of attack under its radical policies and this president did not recognize their rights given in the previous governments. This proves that the lack of continuity between the policies and laws among the governments caused the presence of of hostile measures towards the *resguardos* and the indigenous. During the Republic of New Granada the suppression of the indigenous *resguardos* by the government caused the extinction of several communities mostly of these people living in the central part of Colombia that without lands to live were absorbed by the miscegenation process as pointed out by West (West, 2014, p. 45). This author also sustains that these measures marginalized the indigenous communities and other minorities whose rights were not taken into consideration by the government which had focused its attention in the boosting of the economy through the exploitation of natural resources and in the industrialization (West, 2014, p. 45). The divisions in ideals, identities, political and legal perspectives gradually caused a confrontation among provinces and the peoples in this republic divided in two ideologies; especially during the decade of the 1840s the when the Liberal and Conservative parties were founded.

According to West, Tomás Cipriano de Mosquera intended to impulse the industrialization of the society and grant its complete freedom from Spain (West, 2014, p. 45) but its policies that were under the ideologies of the Liberal party demonstrated instead a gap between the party's goals and what the president Cipriano did especially towards the *resguardos* by suppressing them. The government then saw the existence of the *resguardos* as a blockage for developing the economy and given the need of lands as well as of natural resources for the generation of revenues through the National Law of June 22nd in 1850 (Ley No. 8, 1850) the government of the former president José Hilario López put an end to the still existent *resguardos* in the whole national territory as stated by Moncada and Godoy (Moncada and Godoy, 2001, p. 65). Then, the indigenous population

along with other similar minorities such as peasants who were also not considered in the policies and laws of this government eventually started to manifest their disagreement in violent ways.

Two federal republics known as the *Confederación Granadina* or Granadine Confederation in English and the second one as the United States of Colombia were created after the Republic of the New Granada ceased to exist especially after the civil war that was generated in 1851 between the same members of the population who claimed for a change in the existent national order which was merely privileging the economic growth leaving aside the needs of the population. Paraphrasing Orrego Penago, the Liberal party was opposed to the Conservatives' idea of the continuity of the inherited colonial model in the republic. Unlike the Conservatives, the Liberals expressed their strong disagreement of the idea of a government permanently bonded with the Catholic Church that acted according to the principles of this organization; and finally, the Liberals in contraposition to the Conservatives favored the suppression of the slavery that existed in that time and the elimination of the entailed estate whilst they also sought to give support to the minorities of the population who lacked of the assistance of the government.

Meanwhile the Conservatives believed that through these actions the Liberals not only destroyed the inherited values from Spain, the system of beliefs of the Catholic Church, but also planted the seed of anarchy into the population (Orrego, 2003, p. 72)

The Liberal perspective that attempted to promote these benefits for the population generated paradoxically not only more confrontations between the Liberals and the Conservatives but also the destruction of more indigenous *resguardos* in the quest for development. Contrasting with Ocampo who sustains this Liberalism attempted to impulse the absolute freedom for the population (Ocampo, 1994, pp. 237-238), Laura Gutierrez sustains that the Liberalism in the United States of Colombia instead was focalized more on the improvement of the economy through the constant exploitation of lands and minerals, located mostly in the indigenous *resguardos*, rather than giving benefits to the population (Gutierrez, s.f. p. 3).

Evidently at that time, the liberal government desired to achieve the development of the country, without cogitating the populations'

needs and rights gradually more indigenous peoples disappeared and the lands of the *resguardos* became the property of private landlords, who had the support from the government which eased their settlement on these lands. Meanwhile, some groups of conservatives opposed to the idea of the radical liberalism before ending the 19th century started the well-known *movimiento de la regeneración* or regeneration movement that searched the unification of the country a Republic of Colombia with a centralized government that combining both, development and wealth, benefited equally to the whole society (Ocampo, 1994, p. 239).

At the beginning of 1886 the elected Conservative regime created a new Constitution (Constitución política de la república Colombia de 1886) and the new republic of Colombia that was no longer under the federal principles. Under the new Constitution, the federal provinces became eventually in the 20th century departments with their own administration united under a three branches government surveilled this time by the Supreme Court as one of the most important organs of the judicial branch. These advances according to the Conservatives served for the construction of the political and legal ground of country. Even though it was expected to experience a change in the administration towards the *resguardos* according to the arguments presented by the Conservatives against the Liberal party when it was still in the presidency, after the Conservative party assumed the power the situation of the *resguardos* was still in the center of the economic interests.

In the early 20th century, the indigenous peoples started to face the suppression of their rights over the *resguardos* by the government because the Conservative Party also saw these lands as potential zones for the generation of incomes through the exploitation of natural resources and the cropping of one of the most important products in Colombia, the coffee. During the first three decades of the 1900s, the conservatives focused their attention on the improvement of the economy of the country previously devastated due to the civil wars and the loss of Panama by using the incomes, profits, and revenues obtained from the exportation of the coffee. Coincidentally in this period the well-known *cafeteros* or coffee growers in English appeared all over the territory and used the lands of the *resguardos* for cropping and harvesting in big quantities this product for increasing their

capital. According to Ocampo, during the Conservative governments the coffee exportations of 60 kilograms' bulks augmented from around 90,000 (1870-1874) to 3,149,000 bulks in (1930-1934) (Ocampo, 2001, p.215) which simultaneously 1) increased the prices of the coffee by pound from approximately 6 cents of American dollars in 1900 to almost 27 cents in 1925 (Ocampo, 2001, p. 216) and 2) generated a land appropriation tendency that affected in most part to the indigenous peoples and their *resguardos*. The Conservatives believed the specialization of the economy of the country in the coffee was the route for generating economic development, growth, and improving the population life's conditions.

After the Conservative Party ended its presidential regime due to the incident at the United Fruit Company in 1928⁹ the Liberals returned to the presidency declaring to open the markets and boost the economic development according to their perspectives. This strategy arrived to the rural areas, which intensified the disputes between the indigenous and the government involving at the same time peasants and farmers who saw their interests and rights violated. In these Liberal periods the rights of the indigenous towards the *resguardos* were not considered in the policies and laws. The Law 200 of 1936 regarding the property of the land (Ley No 200, 1936) enacted under the mandates of President Alfonso López Pumarejo (1934-1938 and 1942-1945) attempted to reduce the intensity of the confrontations among the government, the indigenous, the peasants, the coffee growers, and similar landlords over the lands by designing tenancy patterns that served to clarify who were the real owners of the areas, determined by the government (Gómez, 2011, p. 65) but it neither mention the *resguardos per se* nor organize them under the legal framework created by the government in order to grant the indigenous peoples their rights.

The Law 200 of 1936 did not accomplish what enacted because the actions of the Liberals propitiated the usage and exploitation of the land without giving relevance to the means used to do it, which in words of Albán is translated as "it did not matter who and how" (Albán, 2011, p. 345).

Instead of reducing the confrontations between the groups, the violence incremented in the rural areas -near the indigenous *resguardos* because their members defended their lands from the intervention of other actors with their means-. In 1946 the when Conservatives

9 It is estimated that more than 1000 workers of the United Fruit Company were massacred under the orders of the President Abadía Méndez (1926-1930).



returned to the power of the government this violence had already worsened and due to the assassination of the presidential candidate of the Liberal party Jorge Eliecer Gaitán the country enters to an era of high violence. This era of high violence was calmed temporarily by the General Rojas Pinilla who militarily intervened and proposed government system called *Frente Nacional* or National Front in English in which both parties, the Liberal and the Conservative, shared and alternated the power of the presidency every four years and under this system a notable agrarian reform is made in 1958.

The Liberal President Lleras Camargo (1958-1961) issued the law 135 of 1961 (Ley No. 135, 1961), the agrarian reform that created the *Instituto Colombiano de Reforma Agraria*, Agrarian Reform Colombian Institute in English (INCORA) and still functions today known as *Instituto Colombiano de Desarrollo Rural*, Colombian Rural Development Institute (INCODER) which considered the *resguardos* as indeed designed special partitions of the territory in response of the demands of the indigenous people's over the years. This law was perhaps one of the most important advances in the recognition of the rights of the indigenous people over their *resguardos*. For Luisz and Martínez this agrarian reform that was constantly developed in the country before the creation of the constitution of 1991 (Constitución Política de la República de Colombia 1991) distributed the lands to others like the bigger landlords rather than give them to the indigenous people and those in need of areas to live. He also indicates that this intensified the conflict over the land especially in the rural areas of the country because the bigger landlords with their power blocked in some cases the repartition of lands prolonging more during the decades of the 1960s, 1970s, and 1980s the uprising of violent movements against the government (Martínez, 2010, pp. 123 and *passim*).

The New Policies, Laws, and the Neoliberalism.

However, in order to reduce the confrontations over the lands the governments kept constantly seeking alternative ways for the protection of those who were in need of land, especially the indigenous communities in search of their *resguardos*. The democratically elected president of the Liberal Party Virgilio Barco

(1986-1990) came into the presidency after the National Front ended and ratified in 1989 the International Labor Organization (ILO) Convention Number 169 regarding the protection of the indigenous peoples in tribal and independent countries (International Labor Organization C-169) and by doing so, the next Presidents implemented policies and enacted laws that were in harmony with the binding principles of the convention. The government of the president Barco demonstrated by ratifying the Convention the compromise of its government towards the respect of the population of indigenous peoples by following international standards designed specifically for these peoples. His actions created the bases for the change of the policies and laws of the government which was still working under the outdated constitution of 1886 (Constitución política de la república Colombia de 1886); that constrained not only the rights but also the freedoms of the population that claimed for immediate reforms.

The Liberal President Gaviria (1990-1994) continued with Barco's ideas to reform the country and in 1991 enacted the new Constitution (Constitución Política de la República de Colombia 1991) that changed into a Liberal the already established Conservative Political Constitution of 1886. This new Constitution recognized the indigenous collective rights over the *resguardos* in Articles 63 and 329 that defined these lands of *resguardos* as property of the indigenous people and above all are "inalienable, imprescriptible, and indefeasible" (Constitución Política de la República de Colombia 1991; Artículos 69, 329, y 330). According to these Articles the *resguardos* are legal entities, organized social forms that involve a piece of a territory and an indigenous community that is characterized by 1) being inalienable, that cannot be sold, 2) are imprescriptible meaning their possession is not lost in time, and 3) indefeasible denoting a situation in which a judge cannot dispose of it completely (Constitución Política de la República de Colombia 1991; Artículos 69, 329, y 330).

These political principles of the constitution were supported by the legal measures such as the Law 21 of 1991 (Ley No. 21, 1991) which after five years of being ratified the Convention 169 of the ILO this law formally applied the principles of this mentioned Convention and the decree 2164 of 1995 (Decreto No. 2164, 1995) that assisted the indigenous communities in the formation,

expansion, and entitlement of their lands. These conceptions of the *resguardos* also conceive these lands as “a space in which an authority¹⁰ is exercised over” (Sánchez, 2010, pp.115-116). The idea that the communities of indigenous were facilitated to have their own lands and the space to realize their lifestyle without the interference of the government was reinforced by the Liberal President Ernesto Samper (1994-1998) through the enactment of the Decree 2663 of 1994 (Decreto No. 2663, 1994) and the Law 60 of 1994 (Ley No 60, 1994) that represented an important advance in terms of an agrarian reform because delimited the lands of the *resguardos* in the nation considering the INCORA/INCODER, as the governmental organization in charge of constituting, expanding, compensating, and restructuring the lands in the country in order to determine the rights holders and owners.

Samper's government also enacted the decree 1475 of 1995 (Decreto No. 1475, 1995) which recognizes the collective property rights of the indigenous over the *resguardos* which means that the communities allotted in there can own and control the territory and its resources, rule their members, establish their customs and their traditions without the interventions of third actors even the government that without the previous consultation and the authorization of these communities has forbidden not only its entrance but also the possible development of expeditions, resources' exploitations, and similar actions in these territories, as issued in the Decree 1320 of 1998 (Decreto No. 1320, 1998) enacted during the government of the President from the Conservative Party, Andrés Pastrana Arango (1998-2002).

Nevertheless the policies, the laws, and the decrees that dealt with the *resguardos* were prepared; due to the Neoliberal waves that came into Latin America, Colombia was also involved in this Neoliberal tendency that aims to the free-trade, to the economic opening, and finally to the free competition and at the same time impacted the society through the elimination of the social function of the government and its redistributive policies causing with this the reduction of the government (Ahumada, 2002).

Ocampo, an author who agrees with the neoliberalism and also with presence of the multinationals in these lands, argues that thanks to the activities done by the multinational companies in the Latin American territories, especially in the rural areas, the revenues for

development increased from 360.142 million of dollars in 1990 to 639.867 million dollars in 1998-2000 (Ocampo and Martín, 2003, p.137). He also says that in the actual context the primary products like the cotton, sugar, wheat, bananas, rice, among others, are not expected to generate the same incomes in comparison with other nonrenewable resources like bauxite, tinfoil, copper, zinc, among other metals and minerals that have a high demand and rich value in the world and have become more important for the generation of economic growth and development. Nevertheless, Consuelo Ahumada sustains that “one logical result of the neoliberalist arguments in favor of the inequity is the defense of the concentration of the incomes in few hands” (Ahumada, 2002, p. 120) in which are not included the indigenous. She also states that the Neoliberalism neutralized the policies and the laws in Colombia, which affected the efficiency that was expected to obtain from the applicability of these legal tools (Ahumada, 2002, p. 145). In Neoliberalist context, the privilege is to exploit the land and gather as much resources and revenues as much as possible.

Uribe Vélez (2002-2010) a president who changed the INCORA to the INCODER (Decreto No. 1300, 2003) and in comparison to the past mandates which at least enacted laws for the protection of the rights of the indigenous and their lands, not only used its power but also the politics, and the laws as tools that lawfully: 1) authorized multinationals and private mining companies to explore the lands of *resguardos* in quest for resources and 2) permitted the construction of mega infrastructure projects in the *resguardos* without considering the rights of the indigenous population and violating their right of previous consultation, understood as one fundamental rights recognized after the creation of the political Constitution of 1991 (Constitución de la República de Colombia 1991).

Uribe Vélez was known for his policies in favor of the neoliberalism that privileged the economic growth over the existence of the *resguardos*, Two of the most controversial actions developed under his mandate were the enactment of the Law 1021 of 2006 (Ley No. 1021, 2006) and the Law 1152 of 2007 (Ley No. 1152, 2007). The first one called Forest Law; intended to eliminate the right of previous consultation of the indigenous in order to allow the arrival of multinationals for exploiting the territory in the quest of resources. This Law

10 Of the indigenous communities.



passed by the congress, prevailed over two years, and during its time the indigenous communities were affected by the destruction of their traditional lands at the hands of multinationals and private mining companies. The second, Law 1152 of 2007 denoted as the rural development statute eliminated the possibilities for the construction of new *resguardos* whilst at the same time intended to suppress them removing the people who lived there whether the government considered it necessary for the development process (Burgos, 2005, p. 278) which affected not only the indigenous peoples but also to the peasants and Afro descendant communities who literally were left without suitable areas to live.

Nonetheless, during the periods of Uribe there was one actor that assisted the indigenous and similar communities in the defense of their rights and of their lands. The Constitutional Court (CC), one derived organ of the Supreme Court of Justice (SCJ) declared both of these laws as unenforceable and after ratifying the sentence C-030 of 2008¹¹ (Corte Constitucional de Colombia; Sentencia C-030, 2008) concerning the law 1021 of 2006 and the sentence C-175 of 2009¹² (Corte Constitucional de Colombia; Sentencia C-175, 2009) regarding the law 1152 of 2007 removed them from the legal terrain as a way of protecting and guaranteeing the indigenous rights that were violated by the government. According to Gómez, the Constitutional Court stated the government of Uribe, and more specifically “that statute enacted as the law 1152 of July 25th of 2007... did not accomplish the subscribed obligation of Colombia in the Convention 169 of the ILO of consulting the indigenous communities...” (Gómez, 2011, p. 73.) before executing actions in their territories by enacting these sentences. Both laws are a clear expression of a legal manipulation of the government of Uribe who used the legal machinery of the nation in order to legitimize its actions towards growth and economic development that also did not consider the indigenous' rights over the ownership and use of the *resguardos*.

After the Court released its sentences in 2009 the government of Uribe became under pressure of the different minority sectors of the society that claimed its lack of compromise towards the protection of the rights of the population. Given this fact and for avoiding future conflicts with the minorities that could block

more the implementation of neoliberalist policies, in this same year, Uribe's government ratified the United Nations Declaration on the Rights of the Indigenous Peoples approved by the General Assembly through the resolution 61/295 (A/RES/61/295; 2007), which back in 2007 Colombia abstained due to the incompatibility of this resolution with the national laws designed for the indigenous. In spite of the efforts made by the Court to assure the protection of the rights of the indigenous people over the *resguardos*; the resources' exploitation, the mining activities, and the construction of mega infrastructure projects remained in the *resguardos* even after Uribe completed its second administration in 2010 and Juan Manuel Santos assumed its position as president (2010-).

The Contemporary Change and a New Legislation.

Juan Manuel Santos unlike its predecessor Uribe, has given priorities to the rights of the indigenous people over their *resguardos* and using the legal machinery has enacted two of the most important Decrees for the indigenous. The first one, the Decree 1953 of 2014 (Decreto No. 1953, 2014) allows the government to create and delimit, according to the national internal division order, the indigenous *resguardos* (Decreto No. 1953, 2014) considering as well the perspectives of these natives to administrate, own, and use these territories under their traditional system of beliefs. This Decree also attempts to maintain the indigenous peoples' territories and rights respected under the principles of self-governance, auto-determination, and the right of previous consultation complementing them with the principles of the Article 329 of the Political Constitution of 1991. And the second, the Decree 2333 of 2014 (Decreto No. 2333, 2014) in harmony with the principles of the Convention No. 169 of the ILO, aims to protect and guarantee the safety of the indigenous peoples and of their territories (Decreto No. 2333, 2014). Through this Decree, Santos attempts to organize and give every indigenous community their *resguardo* and in case these lands are already owned by citizens who have registered their titles the government shall provide the communities with other areas. What is remarkable of this Decree is that is perhaps the only legal measure that created a system of information and interconnection, inexistent until the end of 2014 between the

11 Colombia. Corte Constitucional (Enero, 2008) “Sentencia C-030”. M.P: Escobar, Gil. Rodrigo, Bogotá.

12 Colombia. Corte Constitucional (Marzo, 2009) “Sentencia C-175”. M.P: Vargas, Silva. Luis Ernesto. Bogotá.

institutions, official dependencies, and the ministries in order to 1) administrate more efficiently the lands of the territory and 2) reduce the disputes over the land between the indigenous peoples and the government.

Conclusions

The situation of the land in Colombia and especially of the *resguardos* indigenous has been under constant fluctuation and change through history as it was showed in this article. According to this fluctuation, the *resguardos* have been re-defined several times in its concept, in its purpose, and in its geographical extension. This ambiguity has caused conflicts separating the government as well as the indigenous in their perspectives over the land generating more mutual disagreements because the government says that the land of the *resguardos* is being protected under the law whilst the indigenous people say the lands are not being respected and protected.

This gap can be considered from now on as a point of reflection in order to construct peace agreements that last in time, that are not modified, that are not ambiguous, and most importantly that not fluctuate in time even though the governors as well as the economic doctrine change. For this its valid to suggest that these agreements are consolidated in the national order and that also follow the principles of the international mechanisms designed for the protection of the indigenous people and their lands of *resguardos*. It is possible to develop the country in a harmonic way that takes into account the perspectives of the indigenous and of the government over the lands and this may be conceivable respecting the law but for achieving this the mentioned gap has to be closed in order to benefit to the whole Colombian population, to the government, and to the indigenous people.

Bibliographic References

“III. Spanish Law in America and Colonial Administration”. *California's Legal Heritage. Digital Exhibition Presented by the Robbins Collection*. [Online] Available From: <http://calegalheritage.law.berkeley.edu/spanish-law-in-america.html>. Retrieved: 09/10/2014.

ADHILAC Asociación de Historiadores Latinoamericanos y del Caribe -www.adhilac.com.ar-(20/03/2015). “Bicentenario. Simón Bolívar. Decreto a favor de los pueblos originarios. Cúcuta, 1820”. Decreto que en su cuartel general de Cúcuta firma Simón Bolívar a favor de los pueblos originarios. [Online]

Available From: <http://adhilac.com.ar/?p=1288>. Retrieved: 12/04/2015.

Archivo digital de la legislación en el Perú. “Leyes de Las Indias”. [Online]. Available From: <https://archive.is/20120629195154/www.congreso.gob.pe/ntley/LeyIndiaP.htm>. Retrieved: 14/05/2014.

Colombia (1821) Constitución de 1821. 30 de Agosto de 1821. [Online]. Available From: <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=13690>. Retrieved: 21/12/2014.

Colombia (1832). Constitución Política del Estado de Nueva Granada 1832. 1 Marzo de 1832. [Online]. Available From: <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=13694#0>. Retrieved: 12/21/2014.

Colombia (1886). Constitución política de la república Colombia de 1886. 5 de Agosto de 1886. [Online]. Available From: <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=7153#0>. Retrieved: 21/12/2014.

Colombia (1991) Constitución Política de Colombia 1991. Panamericana Editorial. Bogotá, D.C.

Colombia (1998) Artículos 69, 329 and 330. Constitución Política de 1991, Panamericana editorial. Bogotá.

Colombia, Congreso Nacional de la República (1936/12/12). “Ley 0200 de 1936 sobre régimen de tierras”. *Diario Oficial* num, 23388 de 21 de Enero de 1937. Bogotá, Colombia [Online]. Available From: <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=16049>. Retrieved: 12/21/2014.

Colombia. Congreso Nacional de la República. (1913/13/12). “Ley 135 de 1961 Sobre la reforma social agraria”. *Diario Oficial*. Año XCVIII. num 30691. 20 de Diciembre de 1961. p. 801. [Online] Available From: http://www.incoder.gov.co/documentos/Normatividad/Leyes/Leyes%201961/ley_1961_135.pdf. Retrieved: 12/21/2014.

Colombia, Congreso Nacional de Colombia. (1991/03/04) “Ley 21 de 1991 Por medio de la cual se aprueba el Convenio número 169 sobre pueblos indígenas y tribales en países independientes, adoptado por la 76a. reunión de la Conferencia General de la O.I.T., Ginebra 1989”. *Diario Oficial*, num, 39.720 de marzo 6 de 1991. Bogotá. D.C.

Colombia, Ministerio de Agricultura. (1994/12/07). “Decreto 2164 de 1995 por el cual se reglamenta parcialmente el Capítulo XIV de la Ley 160 de 1994 en lo relacionado con la dotación y titulación de tierras a las comunidades indígenas para la constitución, reestructuración, ampliación y saneamiento de



los Resguardos Indígenas en el territorio nacional”. En: *Diario Oficial* num 42.140, del 7 de Diciembre de 1995. Bogotá.

Colombia, El Senado y la Cámara de representantes de la Nueva Granada. Reunidos en el congreso. (1850, 22 de Junio). “Ley 8 de 1850, que suprime algunos territorios”. Dada en Bogotá, 8 de Junio de 1850. Bogotá, 22 de Junio de 1850. [Online]. Available From: <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=12622>. Retrieved: 21/12/2014.

Colombia, Presidencia de la República Ministerio de Agricultura y Desarrollo Rural (1994/12/03) “Decreto 2663 de 1994. Por el cual se reglamentan los Capítulos X y XIV de la Ley 160 de 1994, en lo relativo a los procedimientos de Clarificación de la situación de las tierras desde el punto de vista de la propiedad, de delimitación o deslinde de las tierras del dominio de la Nación y los relacionados con los resguardos indígenas y las tierras de las comunidades negras”. En: *Diario Oficial*, num 4162 del 7 de Diciembre de 1995. Bogotá.

Colombia. Congreso Nacional de la República. (1994/08/03). “Ley 160 de 1994. Por la cual se crea el Sistema Nacional de Reforma Agraria y Desarrollo Rural Campesino, se establece un subsidio para la adquisición de tierras, se reforma el Instituto Colombiano de la Reforma Agraria y se dictan otras disposiciones”. En: *Diario Oficial* num. 41.479, de 5 de agosto de 1994. Bogotá.

Colombia. Presidencia de la República de Colombia. (1995/12/10) “Decreto 1475 de 1995. Por el cual se reglamenta el Capítulo III de la Ley 70 de 1993, se adopta el procedimiento para el reconocimiento del derecho a la propiedad colectiva de las “Tierras de las Comunidades Negras” y se dictan otras disposiciones”. En: *Diario Oficial* num, 42.049 de Octubre 13 de 1995. Bogotá.

Colombia. Ministerio del Interior. (1998/08/13) “Decreto 1320 de 1998. Por el cual se reglamenta la consulta previa con las comunidades indígenas y negras para la explotación de los recursos naturales dentro de su territorio”. *Diario Oficial*, num 43.340, del 15 de julio de 1998. Bogotá.

Colombia. Ministerio de Agricultura y Desarrollo Rural. (2003/05/21). “Decreto 1300 de 2003. Por el cual se crea el Instituto Colombiano de Desarrollo Rural, Incoder y se determina su estructura. En: *Diario Oficial*, num 45.196, de 23 de mayo de 2003. Bogotá. D.C.

Colombia. Congreso Nacional de la República de Colombia. (2006/04/20). “Ley 1021

de 2006 Por la cual se expide la Ley General Forestal”. En: *Diario Oficial*, num, 46249 de abril 24 de 2006. Bogotá. D.C.

Colombia. Congreso Nacional de la República de Colombia. (2007/07/25). “Ley 1152 de 2007 Por la cual se dicta el Estatuto de Desarrollo Rural, se reforma el Instituto Colombiano de Desarrollo Rural, Incoder, y se dictan otras disposiciones En: *Diario Oficial* num. 46.700 de 25 de Julio de 2007. Bogotá, D.C.

Colombia, Ministerio del Interior. (2014/10/07). “Decreto número 1953 de 2014. Por el cual se crea un régimen especial con el fin de poner en funcionamiento los Territorios Indígenas respecto de la administración de los sistemas propios de los pueblos indígenas hasta que el Congreso expida la ley de que trata el artículo 329 de la Constitución Política”. En: *Diario Oficial*, num. 49.297 del 7 de octubre de 2014. Bogotá. D.C.

Colombia, Ministerio de Agricultura y Desarrollo Rural. (2014/11/19) “Decreto 2333 de 2014 “Por el cual se establecen los mecanismos para la efectiva protección y seguridad jurídica de las tierras y territorios ocupados o poseídos ancestralmente y/o tradicionalmente por los pueblos indígenas acorde con lo dispuesto en los artículos 13 y 14 del Convenio 169 de la OIT, y se adicionan los artículos 13,16 Y 19 del Decreto 2664 de 1994”. en *Diario Oficial*, núm 49.340 de 19 de noviembre de 2014. Bogotá. D.C.

Colombia. Corte Constitucional (Enero, 2008) “Sentencia C-030”. M.P: Escobar, Gil. Rodrigo, Bogotá.

Colombia. Corte Constitucional (Marzo, 2009) “Sentencia C-175”. M.P: Vargas, Silva. Luís Ernesto. Bogotá.

General Assembly Resolution 61/295, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (13 September 2007), [Online] Available From: <http://www.un-documents.net/a61r295.htm>. Retrieved: 07/09/2013.

International Labor Organisation (ILO) C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) *Convention concerning Indigenous and Tribal Peoples in Independent Countries (Entry into force: 05 Sep 1991) Adoption: Geneva, 76th ILC session (27 Jun 1989) - Status: Up-to-date instrument (Technical Convention)*. [Online]: Available From: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169. Retrieved: 12/21/2014.

Recopilación de las Leyes de las Indias. Ley xvii. Que no se admita a composición de tierras

que hubieren sido de los Indios, o con título vicioso y los fiscales, y protectores sigan su justicia. Título XII. De la venta, composición y repartimiento de tierras, forales, y aguas. Libro IV. De los Descubrimientos. *Recopilacion de leyes de los reynos de las Indias: mandadas imprimir, y publicar por la Magestad catolica del rey don Carlos II, nuestro senor: va dividida en quatro tomos, con el indice general, y al principio de cada tomo el indice especial de los titulos, que contiene* (En Madrid: Por Iulian de Paredes, año 1681). The Robbins Collection, University of California, Berkeley, School of Law, Volume 2. p. 105. In: "III. Spanish Law in America and Colonial Administration". Recopilación de las leyes de los reynos de las indias, Madrid, 1681. *California's Legal Heritage. Digital Exhibition Presented by the Robbins Collection*. [Online]. Available From: <http://calegalheritage.law.berkeley.edu/spanish-law-in-america.html>. Retrieved: 09/10/2014.

Ahumada, Consuelo (2002). *El modelo neoliberal y su impacto en la sociedad Colombiana*. El áncora Editores. Bogotá, Colombia 2002.

Albán, Álvaro. (2011). "Reforma y Contrareforma agraria en Colombia". In: *Revista de economía institucional*, Vol. 13. No. 24., Primer trimestre, 2011. pp. 327-356.

Burgos, Gonzáles. Ana, Cecilia (2005) "La seguridad de los grupos étnicos Colombianos". In: Sánchez, Rubén. David (Ed.) (2005). *Seguridades en construcción en América Latina: Dimensiones y enfoques de seguridad en Colombia* (Vol. 2). Facultad de Ciencia Política y Gobierno, Centro de Estudios Políticos e Internacionales, Universidad del Rosario. Bogotá, Colombia 2005. pp. 250-284

Gómez, Hernández Bersarión. (2011) "La tenencia de la tierra y la reforma agraria en Colombia". In: *Revista Verba Iuris*. Edición 25. Universidad Libre de Bogotá, Colombia. pp. 63-83.

Helg, Aline (2012). "Simón Bolivar's Republic: A Bulkwark Against the "Tyranny" of Majority. *Revista de Sociología y política* Vol. 20, Nº 42: 21-3, Junio. 2012, pp.21-37.

Martínez, Zamora. Luisz Olmedo (2010). *Visiones con-partidas del territorio en un mundo dividido. El caso de la visión indígena y la del Estado*. Serie IDEAS 18. Instituto de Estudios Ambientales. Universidad Nacional de Colombia, Sede Bogotá. Editorial Kimpres Ltda. Bogotá, Colombia.

Moncada, Quintero. Gabriel., Godoy Suárez. Alvaro., and Dirección de la revista huellas del mundo (2001). "Cronología agraria" *Huellas del Mundo*. In: *Revista Universidad*

Cooperativa de Colombia No. 77, p. 60-68. [Online]. Available From: <http://www.obseruatoriodetierras.org/wp-content/uploads/2014/04/Cronologia-Agraria.pdf>. Retrieved: 23/07/2014

Nariño, Antonio (1982) *Escritos Políticos*. Selección y Recopilación por: Gabriel Fonnegra. El Áncora Editores. Bogotá, Colombia. 1982.

Ocampo, López, Javier (1994) *Historia básica de Colombia*. Plaza & Janes Editores. Bogotá, Colombia. 1994.

Ocampo, José Antonio. (2001). "Los orígenes de la industria cafetera, 1830-1929". In: Tirado, Mejía. Álvaro (2001). *Nueva Historia de Colombia. Nueva Historia de Colombia*. Vol. V. Economía, Café, Industria. Planeta, Colombiana Editorial. Bogotá, D.C. Colombia, pp. 213-232.

Ocampo, José Antonio., and Martín, Juan (Editors) (2003) *A Decade of Light and Shadow. Latin America and the Caribbean in the 1990s*. Economic Commission for Latin America and the Caribbean (ECLAC). United Nations, Santiago, Chile, July 2003.

Orrego, Penagos, Juan Luís (2003). "Liberales y conservadores en el siglo XIX: Un viejo debate". *Historia Caribe*, vol. III, núm. 8, 2003. Universidad del Atlántico Barranquilla, Colombia, pp 69-80.

Sánchez, Carlos., and, Silva, Vallejo. Fabio (2002). "Historia" *La Gran Colombia*. In: Sánchez, Carlos [Et. Al.] (2002) *Breviario de Colombia. Una guía para todos. Historia, Geografía, Cívica y Departamentos*. Panamericana Editorial. Ltda. Tercera Reimpresión. Bogotá, D.C. Colombia. 2002.

Sánchez, Carlos [Et. Al.] (2002) *Breviario de Colombia. Una guía para todos. Historia, Geografía, Cívica y Departamentos*. Panamericana Editorial. Ltda. Tercera Reimpresión. Bogotá, D.C. Colombia. 2002.

Sánchez, Botero. Esther (2010). *Justicia y pueblos indígenas en Colombia. La tutela como medio para la construcción del entendimiento intercultural*. 3ra Edición. Universidad Nacional de Colombia. Facultad de Derecho, Ciencias políticas y Sociales. Instituto de Unidad de Investigación Jurídico- Sociales Gerardo Molina (UNIJUS). Bogotá, Colombia, 2010.

Tirado, Mejía. Álvaro (2001). *Nueva Historia de Colombia. Nueva Historia de Colombia..* Planeta, Colombiana Editorial. Bogotá, D.C. Colombia. 2001

Van Cott, Donna Lee (2000) *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America*. Pittsburgh: University of Pittsburgh Press.



_____ (2005) *From Movements to Parties in Latin America The Evolution of Ethnic Politics*, New York, Cambridge University Press 2005.

_____ (2008) *Radical Democracy in the Andes*. Cambridge University Press, New York. 2008.

West, Hazel. Katharine (2014). *El derecho de auto-determinación de los pueblos indígenas en el ordenamiento político Colombiano*. "Incorporación política de la autodeterminación en los pueblos indígenas según el ordenamiento político Colombiano". [Tesis de Maestría]. Bogotá, Pontificia Universidad Javeriana, Maestría en Estudios Latinoamericanos.

Albicentenario. Celebración Colombiana. "El 20 de Mayo se cumplen 190 años del decreto de Simón Bolívar que ordenó devolverles los resguardos a los indígenas". [Online]. Available From: http://www.albicentenario.com/index_archivos/celebracion_colombiana141.html Retrieved: 04/20/2013.

Gutiérrez, Laura. "La hegemonía liberal en Colombia 1850-1880: Logros y desafíos". Universidad Nacional de Colombia, Bogotá, Colombia. pp. 1-12 [Online] Available From: <http://www.humanas.unal.edu.co/eristica/Liberalismo%20en%20el%20siglo%20XIX.pdf>. Retrieved: 27/12/2014.

Gutiérrez, Ramos. Jairo (2010) "Los indígenas en la independencia". *Revista Credencial Colombia*, Edición 247 Julio de 2010. Biblioteca Virtual, Biblioteca Luis Ángel Arango. Banco de la República de Colombia [Online]. Available From: <http://www.banrepcultural.org/node/86367>. Retrieved: 23/07/2014.

Vásquez, L. Claudia. "Ficha Biográfica, Tomás Cipriano de Mosquera". Biografías Biblioteca Virtual del Banco de la República, Biblioteca Luis Ángel Arango. [Online]. Available From: <http://www.banrepcultural.org/blaavirtual/biografias/mosqtoma.htm>. Retrieved: 18/04/2014.