



MAX PLANCK INSTITUTE

FOR COMPARATIVE PUBLIC LAW
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**THE RIGHT OF CULTURAL MINORITIES TO
BINDING CONSENT: CASE STUDY OF
JUDICIAL DIALOGUE IN THE FRAMEWORK
OF A *IUS CONSTITUTIONALE COMMUNE*
*EN AMÉRICA LATINA***

Juan C. Herrera



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THE RIGHT OF CULTURAL MINORITIES TO BINDING CONSENT: CASE STUDY OF JUDICIAL DIALOGUE IN THE FRAMEWORK OF A *IUS CON-* *STITUTIONALE COMMUNE* *EN AMÉRICA LATINA*

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ABSTRACT

This paper presents case law of the Inter-American Court of Human Rights and the Constitutional Court of Colombia during a 25-year period (1992 to 2017). By seriously contemplating the rights of indigenous peoples, afro-descendants and other cultural minorities, this study illustrates the standards of the afore-mentioned courts regarding prior and informed consultation and binding informed consent as an alternative to the problematic category of so-called “veto power”. In addition, it focuses on the principal outcomes of the landmark case *Saramaka v. Suriname* (2007) and decision T-129/11 *Emberá Katío v. Executive Power*, which currently encompass the highest standard of protection. However, the outcomes of judicial dialogue are at risk of being annulled. The problematic situations of these minorities and the inadequate application of a prior consultation requirement highlights the relevance of articulating standards in the transnational arena and within the framework of a broader *Ius Constitutionale Commune en América Latina*.

KEYWORDS:

Prior consultation, binding informed consent, indigenous peoples, afro-descendants, Constitutional Court of Colombia, Inter-American Court of Human Rights, judicial dialogue, *Ius Constitutionale Commune en América Latina* (ICCAL), internationalization of constitutional law, regional integration

Cover: Imbalanced World, 1996, Veronika Dell'Olio (photo: Miriam Aziz)

“Essential to our concept was the establishment of a connection to the work and objectives of the institute. In view of the diversity of the research tasks concerned, we have attempted to highlight an overarching idea that can be understood as the institute’s mission. We see this as the ideal of peaceful relations between peoples on the basis of an internationally validated notion of justice.... The depicted sculpture...[symbolizes] an imbalanced world in which some peoples are oppressed while others lay claim to dominance and power. The honeycomb form of the circular disks denotes the [international] state structure. Glass parts ... [represent] the individual states [The division] of the figure ... into two parts [can] be interpreted as the separation of the earth into two unequal worlds. The scissors-shaped base, on the one hand, makes the gap between them clear, on the other hand, a converging movement of the disks is conceivable.... The sculpture [aims] at what is imagined – the possibility of the rapprochement of the two worlds.”
[transl. by S. Less]

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