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A Dialogical Approach to Indigenous Lands Protections : Colombian Lessons in a Global Perspective

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A DIALOGICAL APPROACH TO INDIGENOUS LANDS PROTECTION: COLOMBIAN LESSONS IN A GLOBAL PERSPECTIVE

It seems that the indigenous struggles for the recovery of their ancestral territories have finally found eco in the international and national legal regulations. Nonetheless, in spite of those important legal developments, it seems to me that an untouched incomprehension lies beneath the international treaties, UN Agencies' documents, Constitutions and laws that attribute and protect indigenous land rights, and that constitute, from my point of view, the main source of the ongoing disputes. This article is based on a case study of the U'wa indigenous community in Colombia and its battle against both transnational corporations and the Colombian government for oil drilling in their territory. It aims at unveiling the subjacent logic that impedes a fair dialogue on the land issue. For this purpose, the first section describes the legal framework in which our case study is inscribed. Section two (2) introduces the main facts that constitute the case study as well as the strategies and institutions dealing with it. In the third section (3) I remark some weaknesses of the current legal approach; while in section four (4), I argue for the convenience of an intercultural dialogical dialogue for working out the indigenous land issue in Colombia. This proposed perspective aims, finally, to provide some basic tools for emancipating the traditional understating of indigenous land claims from merely Human Rights notions, and to reframe them, into a complex regulatory model with intercultural epistemological underpinnings.

I. APPROACHING THE LEGAL CONTEXT

The second half of the 20th century witnessed the adoption of different international instruments advocating for the recognition of ethnic differences and equality of civil and political rights within the nation-states. The very fist step was taken by the United Nations Covenant on Civil and Political Rights adopted in New York in 1966. In article 27 this convention imposes upon the parties' states in which there are ethnic minorities, the duty of respect their community's culture, religion and language. However, in spite of the formal recognition of ethnic minority rights to their own culture within the state by the UN Convention, it was only in the last 20 years that international instruments have properly recognized the land rights of indigenous peoples over their ancestral territories.

In response to these emerging international instruments dealing with indigenous rights, the national legal systems have correspondently enacted regulations for as-

suring the material effectiveness of indigenous people's right to self-determination in those territories. Most of Latin American states have not only promoted new laws creating reserves[1], but have also enlarged the scope of their constitutions[2]. The pioneer 1991 Colombian Constitution inspired several Latin American states to reform[3] or replaced[4] their constitutions aiming, among other things, at recognizing and integrating the indigenous peoples and other ethnic minorities into the national project. This enlargement in the representative democratic spheres, e.g. the plural composition of the Constitutional Assemblies, contrast with the former strategy of excluding the indigenous population from the political, economic and social functioning of the modern state as far as they were not "civilized"[5]. This "old" strategy, and also the new one as I will argue, meets Fitzpatrick affirmation that the mythic origins of modern law presuppose the "lawless nature of the savage"[6].

The political strategy implemented by the 1991 Colombian Constitution for promoting the inclusion of the indigenous people in the multicultural national project has part of its roots in the 169 Convention of the International Labor Organization – henceforth 169 ILO Convention – ratified by Colombia. The ILO 169 Convention was adopted on the 27th of June, 1989 by the General Conference of the International Labor Organization, but did not enter into force until September 1991. Until recently, it was the only international instrument properly dealing with indigenous rights, and especially, with their land and autonomy claims. Besides recognizing and promoting measures for the state recognition of the collective and individual ownership of land, the convention also regulates other territory related rights[7]. The Colombian 1991 Constitution emphasized article 14.1 of the 169 ILO Convention that claims the recognition of indigenous property rights "over the lands which they traditionally occupy". The 1991 Constitution strengthened therefore the dying colonial institution of the reserve and established in articles 286 and 321 the rights of indigenous people to territory under similar terms, but endowed with a larger legal (art. 246) and administrative (art. 357) autonomy.

The Colombian Constitutional Court has also contributed to delimitate the legal framework regulating that autonomy of indigenous reserves. Following the jurisprudential line developed by Edgar Solano González, we find that the first judg-

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[1] For the Colombian case Cf. C. A. Salazar, *La planeación participativa del Desarrollo y de la Política Territorial en La Organización Indígena de Antioquia* – OIA, No date. p. 14.

[2] C. Rodríguez & L. Arenas, "*Indigenous Right, Transnational Activism, and Legal Mobilization: The Struggle of the U'wa People in Colombia*", in: B. Santos & C. Rodríguez (eds.), Law and Globalization from Below. Towards a Cosmopolitan Legality, (2006), p. 243.

[3] The Latin American States have in their majority recognized the cultural and ethnic diversity constituting the nation. Among other Constitutional reforms: Nicaragua (1987 modified in 1995) in the preamble and in article 5; The Mexican (1917 amended in 1994, 1998) in article 4; the Guatemalan (1985 amended in 1993) in Chapter 2, Title 2, section 3.

[4] Among other new Constitutions: Colombia (1991) article 7; Paraguay (1992) Chapter 5, Part I title II; Peru (1993) article 2 # 19; Ecuador (1998) and Venezuela (1999) in the preamble.

[5] A. Frank, "*Sur le Problème Indien*", Partisans 26/27 (1966), p. 26–27; P. Dávalos, "*Movimientos Indígenas en América Latina: el derecho a la palabra*", in: P. Dávalos, (ed.), Pueblos indígenas, estado y democracia, (2005), p. 25.

[6] P. Fitzpatrick, *The Mythology of the Modern Law* (1992), p. 72.

[7] For a more comprehensive analysis of the 169 ILO Convention Cf. *ILO Convention on indigenous and tribal peoples, 1989 (No.169): A manual (2003).*

ment dealing with the limits of the indigenous autonomy was the case T 254 – 1994 in which the court analyzes the due process of an indigenous trial. This high tribunal established that "fundamental rights constitute a material limit to ethnic and cultural diversity" and, in that sense, established the respect of the due process as an imperative condition to be respected in indigenous trials. In the judgment T 349 – 1996 the Court retakes it previous position settling up the "acceptable minimums" of indigenous autonomy: *"life and the prohibitions of slavery and torture"*. The Court argues that besides these three restrictions, that are a real "intercultural consensus", it would be necessary to add the principle of legality of norms and punishments.

However, the Colombian Government has rejected the ratification of the recently approved UN Declaration on the Rights of Indigenous People. This international instrument approved by the UN General Assembly in the 61st session held on September 2007[8] goes further than 169 ILO Convention by attempting to firmly recognize and establish the rights of indigenous people in international law and international organizations. The Colombian Government has then fallen into a contradictory position. On the one hand it affirms that the declaration is incompatible with the Colombian legal system, but on the other hand it argues that the rights the UN declaration is aiming to protect are already protected by the Constitution and other international conventions ratified by Colombia – including the 169 ILO Convention. Hence, one must conclude that legal instruments protecting indigenous lands and autonomy claims in Colombia – as well as in many other Latin American Countries – are reduced to the Constitutional block, i.e. The 169 ILO Convention, the Constitution and the Constitutional Court judgments. It is within this legal framework and the jurisdiction of the Inter-American system of Human Rights[9], that the U'wa's land protection claim is inscribed.

II. THE OIL BUSINESS IN UWA'S TERRITORY[10]

The U'wa is an indigenous people of about 5000 members living in northeastern Colombia. In 1993 the Occidental petroleum (Oxy) and the Colombian government agreed on exploring, for eventual drilling, part of the territory legally assigned to the U'wa people and protected by the newly Constitution of 1991. After several demonstrations and pressure on the government to go through a consult procedure – as established in the Constitution and in the 169 ILO Convention – the U'wa, Oxy and the government reached an agreement that acknowledge the right of participation of the U'wa in the negotiation aiming at modifying the oil exploration process. Nonetheless, some days after this agreement, the government granted a license to Oxy for the exploration of oil in territories overlapping U'wa's lands. Since then a legal, social and political mobilization involving NGOs, Human Rights organizations,

[8] International Work group for Indigenous Affairs: http://www.iwgia.org/sw248.asp.

[9] The Inter American System of Human Rights (both Commission and Court) binds those countries belonging to the Organization of American States who have adopted the American Convention on Human Rights and its first protocol.

[10] This section relies mainly on the data and study of the U'wa case presented by Cesar Rodríguez and Luis Carlos Arenas in their article *Indigenous Rights, Transnational Activism, and Legal Mobilization: The Struggle of the U'wa People in Colombia*, supra n. 2. p. 241–266.

the Colombian courts, the Inter-American Commission/Court of Human Rights, the International Labor Organization – ILO – and the transnational indigenous network, among others, have been operating. Although each of the different actors develops a role according to his own discourse and agenda, what is nonetheless common to all of them is the settling of the debate in terms of "U'wa's collective right to property"[11]. Leaving aside the political and social mobilizations undertaken by the U'wa people in the defense of their territories I will briefly describe the legal mobilization at national and international instances in terms of Human Rights, to proceed afterwards to its critical analysis.

At the national level the mobilization of the Colombian Courts was initiated by the Ombudsman with formal complains before the Constitutional Court and the Council of State, representing respectively the '"progressive new constitutionalism" and the old conservative judiciary wing based on the French administrative model. The Ombudsman argued that the license granted to Oxy violated the right of effective participation established in the article 330 of the Constitution in benefit of the indigenous people. This article states the procedure of consult in case of exploration of natural resources located in their territories. The Constitutional Court (1997) ruled in favor of the U'wa people invoking the Constitution and the 169 ILO Convention. The Court supported its decision by arguing that "indigenous collective rights stand on a par with individual Human Rights". Just one month latter the Council of State (1997) handed down its decision in which, focusing on national laws rather than on constitutional or international law texts, argued the legality of the license granted by the government to Oxy on the basis of the inexistent duty of consult or agreement between the state and the indigenous people before the granting procedure. Given this clash of the highest courts of the country, the government supported by the decision of the Council of State authorized the drilling process to Oxy, while the U'wa people were left in a "juridical desert".

Reacting to the judicial impasse in Colombia the U'wa and the National Organization of Indigenous People of Colombia (ONIC) "submitted a formal complaint against the Colombian government before the Inter-American Commission of Human Rights *drafted by experts from transnational litigation-oriented NGOs*"[12]. Meanwhile Oxy and the Colombian government requested the recommendation of the Organization of American States (OAS) regarding the conflict. The OAS and a Harvard University's program on Nonviolent Sanctions and Cultural Survival Commission developed an *in situ* research from which they drew up a list of recommendations[13]. At the same time new laws were enacted by the Colombian government curtailing

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[11] The term "collective rights" is highly controversial within the legal literature. The core consensus is that it refers to a type of rights whose holder is a group as a whole. Thus collective rights are held by groups in an indivisible way, i.e. the subject entitled to claim is not a member of the group individually considered, but the collectivity as such. Although some authors have argued that "collective rights" belong to the third generation rights, I rather emphasize the right-holder and not the substance of the right as such (e.g. environment). Consequently any individual right (e.g. property, identity) whose holder is an indivisible collectivity can be said to be a collective right. Also Cf. Supra n. 2. p. 243.

[12] Supra n. 2. p. 254 (my emphasis).

[13] T. Macdonald; J. Anaya, James; Y. Soto. Obervaciones y recomendaciones sobre el caso del Bloque Samoré. OAS (1998) Accessible online: http://www.escr-net.org/usr_doc/Proyecto_en_Colombia_Universidad_de_Harvard.html.

the right of indigenous people to previous consult. The U'wa people refused to participate in the implementation of the recommendations given by the OAS because, according to them, it was an invitation to a dialogue, but "a dialogue in which a group convinces the other" for them "is not a dialogue but an imposition"[14]. Therefore the government decided to grant a new license to Oxy for drilling oil 1000 feet away of the new delimited borders of the U'wa's reserve. The legal objection to the new exploration process was rejected by the government on the basis of the new laws, opening consequently, the possibility for oil exploration in the U'wa's territory.

However, in 2001 Oxy abandoned the plans for drilling in U'wa's lands, returning the concession to the Colombian state. This temporary victory was cracked down in 2002 by the decision of the national oil company Ecopetrol of retaking the exploration in those territories. Later on a complaint formerly submitted by the Colombian Labor Unions supporting the U'wa's claim was being decided by the ILO. This organism found that the Colombian government had violated the ILO 169 Convention with the new regulation as far as it failed to implement an effective framework of previous consult. Nonetheless this decision did not impede the progress of the exploration that Ecopetrol was undertaking in U'wa's territories, considering that ILO decisions on the issue do not have a binding effect.

Lastly, the hope that the complaint submitted to the Inter American Commission of Human Rights would give way to a ruling of the Inter American Court of Human Rights remained alive. Even though the Inter American Court is bounded by the documents framing the suits to "the protection of civil liberties as opposed to collective rights"[15], the memorable decision of 2001 against Nicaragua[16] supporting the claim of the Awas to their ancestral territory, expanded the notion of private property established in the American Convention on Human Rights[17] –also Known as Pact of San Jose – to encompass the collective entitlement of indigenous people to territory Since the U'wa people have refused the implementation of a new consult procedure[18], the idea that the Inter American Court might rule their case according to Nicaraguan precedent has left some doors open for the protection of U'wa's territories.

III. THE LEGAL APPROACH: A MONISTIC MULTICULTURALISM

It could not be more evident to our eyes that the different institutions as well as the indigenous people themselves have taken for granted the Human Rights path as the natural instrument for dealing with the land protection claim. For using Pan-

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[14] Supra n. 2. p. 245.

[15] Cf. Supra n. 2. p. 246.

[16] Inter- American Court of Human Rights *The Mayana (Sumo) Indigenous Community of Awas Tingi vs. The Republic of Nicaragua, Judgment of 31 August 2001*. Cf. Paragraph 148.

[17] Most countries belonging to the Organization of American States have ratified this Convention. The most important absentees are the United States of America and Canada. Colombia has ratified the original Convention as well as the first Protocol.

[18] Uwa Bulletin, the 02.05.2005.

ikkar's expression, Human Rights have been a real Trojan horse[19] in the Indigenous people's defense strategies. Presenting themselves as the natural tool to solve the conflict they have conquered all possible strategies of defense, reducing all alternatives to legal terms – language. The U'wa predominant use of positive legal sources and international documents based on the modern project of rational law has certainly limited the claim of the U'wa people to a language incapable of embracing the richness and wideness of their claim.

Moreover they have grounded their claim in an argument issued from the available legal resources for the defense of their claims, especially in recent times in which the environment's health is a central topic in the international debate: indigenous people claim the indivisibility of identity, territory and environment. Gilberto Cobardia, the U'wa's spokesperson says that among their principles "is the awareness that we, the U'wa, are here to protect, take care and maintain the balance of the earth and of the existence in this planet"[20]. Although this common claim of indigenous people is seen as the core of their worldview, linking territory, identity and environmental care, I would rather argue that this environmental worry is a strategy that had to be adopted by the indigenous movement in order to defend their territories in the imposed terms of international and national law, i.e. in terms of human and fundamental rights. Some other authors have gone farther arguing that the construction of the new indigenous identity as belonging to a territory is an exercise of power from outsiders[21] a way of domination and segregation. Although I partially agree with this affirmation I prefer to limit myself in this section to argue that this strong link between indigenous peoples and environment care is a recent constructed concept of the indigenous people in accordance to the current legal available tools for defending their "mythology", rather than an element of their "mythology" itself. This plural legal system is what could be defined as a monistic multicultural model, i.e. a model in which other cultures are respected as far as they enter in the limits of the dominant culture worldview.

The current position of the U'wa's people legal autonomy seems well embraced in the model defined by John Griffiths as weak legal pluralism[22]. In this division of the general phenomena of legal pluralism, the scope of the indigenous "regulatory system" is not only required to be in conformity with the general state legal system as demanded by the previously reviewed Constitutional Court judgments, but also – as in the strong legal pluralism – the "regulatory" indigenous concept is limited to the notion of Law and legal system. This perception of legal pluralism that takes for granted the existence of "the law" based on its western unitary underpinnings[23] deserves to be re-thought. The alternative I will develop in the next section to emanci-

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[19] R. Pannikar, "La notion des Droits de L'Homme est-elle un concept occidentale? Inter-Culture 143 (2002). p. 42–43.

[20] Supra n. 2. p. 246.

[21] A. Appadaurai (1988), p. 37. quoted in L. Malkki, L, *"National Geographic: The rooting of peoples and the territorialization of national identity among scholars and refugees"*, in: A. Gupta & J. Ferguson (eds.), Culture, Power, Place. Exploration in Critical Anthropology (1999), p. 58–59.

[22] See J. Griffiths, "*What is Legal Pluralism?*" Journal of Legal Pluralism and Unofficial law 19 (1986), p. 1–47.

[23] R. Vachon, «*L'étude du pluralisme juridique – une approche diatopique et dialogale*», Journal of Legal Pluralism and Unofficial Law, (1990), p. 163–173.

pate the U'wa's territorial defense from legal rights' terms, and their autonomy claim from weak legal pluralism, is to depart from the concept of *alterity* in order to arrive to an understanding of the *complexity* of the legal phenomena in which we are inscribed. This model will allows us to think in terms of *multujuridisme* – within a dialogical perspective – rather in terms of legal pluralism, given that the former tries to avoid the reduction of the *juridical phenomena* to that one of the "Law" – complexity[24], while the latter neglects this difference.

The legal model embracing the U'wa's land defense fits with the concept of a structural legal system that operates through rhetoric, bureaucracy and violence[25]. This legal model that has conquered the indigenous regulatory system can be traced in the U'wa's case at all times. For didactic purposes I will just exemplify the first two elements: (1) The proposed solution by the OAS and Harvard University clearly fits in the category of rhetoric. For Santos "rhetoric as a structural component of law is present, for example, in such legal practices as the amicable settlement of a dispute"[26]. The similar model implemented in U'was case was nonetheless seen by the leader of the U'wa as an imposition rather than a negotiation. According to them "a dialogue in which a group convinces the other is not a dialogue but an imposition"[27]. (2) Bureaucracy "conceived as a communication form and a decision making strategy based on authoritative impositions through the mobilization of the demonstrative potential of regularized procedures and normative standard"[28], is present the whole time in U'was case as far as the National and International judiciary are seen as authoritative and legitimate authorities with competence over the case by both, the government and the U'wa.

This conquest of Colombian state Law and Human Rights system over the indigenous worldview has been well described by the concept of "encompassing the contrary" [29] developed by Louis Dumont. This process is a common underlying assumption of modern rational legal systems when approaching *non western legal cultures*. This encompassing process is rooted in the ethnocentric paradigm prevailing in almost any cultural comparison undertaken through the lens of one's culture, and which therefore, limits the understanding of the others to the analytical elements that ones culture provides. Furthermore, and specifically regarding a modern legal system viewpoint, it implies the superiority of the western legal system based on the myth of universal Reason in opposition to the particularity, spaced bounded and culturally based "legal" developments of the others[30].

I argue that the defense of the U'wa people at the Inter-American Court/Commission of Human Rights is capture by the process of "encompassing the other". On the one hand, as it was remarked before, the submitted complaint to the Commission was drafted by "experts from transnational litigation-oriented NGOs". This fact clear-

[24] C. Eberhard, Le Droit au miroir des cultures. Pour une autre mondialisation (2006).

[25] B. Santos, *Towards a New Common Sense. Law, Globalization and Emancipation* (1995), p. 86.

[26] Ibid.

[27] Supra n.2. p. 245.

[28] Supra n. 25.

[29] L. Doumond (1991), p. 140–141 quoted in: C. Eberhard, «*Prérequis épistémologiques pour une approche interculturelle du Droit. Le défi de l'alterité*», Droit et Cultures *(*2003), p. 11.

[30] C. Eberhard, «*Prérequis épistémologiques pour une approche interculturelle du Droit. Le défi de l'alterité*», Droit et Cultures *(*2003).

ly shows the priority of legal formalities and technicalities of the complaint over the aim of presenting the U'wa's point of view from their own perspective. The latter, would have allowed the U'wa people to express themselves in their own terms and ways regarding their land protection claim, and would have put the first brick for an attempt of intercultural dialogue. The procedure applied for drafting the complaint assumes the possibility of grasping a whole cultural worldview with the elements provided by a legal system founded on the modern rational project. This is nothing else but an exercise of encompassing the other: we reduced the other to the elements that our culture provides to understand their worldview, in this case, their claims.

On the other hand, the decision of the Inter-American Court of Human Rights –that remains a hope for the U'wa people – regarding the Nicaraguan case also constitutes from my point of view a process of encompassing the contrary. The proposed thesis of the Court to translate the indigenous claim for autonomy and territory into a claim for the right of collective property does not satisfy at all an exercise of Homeomorphic equivalence[31] in spite of the fact that guarantees to a certain extent the access of indigenous people to land. The proposed translation remains in the field of morphological and diachronic interpretation, and is incapable of entering into a diatopical dialogue in which the mutual understating process evades the assumption of preexisting common basis for comprehension[32]. The decision of the court implies the reversal of the Human Rights generational hierarchy anchored in the western perspective[33] – as 1. Political and Civil rights 2. Economic and social rights, and finally 3. collective rights – to a logic that gives priority to collective rights, namely collective property. Nonetheless this reversal does not escape from the encompassing paradigm. In fact this perspective limits the relationship between indigenous people and land to a mere situation of property able to be encompassed within the Human Rights system. This "rights recognition", as was also adopted by the Colombian Constitutional Court in the decision SU-039/97, downplays the reasons lying beyond the paradigm of the "right to property" and "collective rights" neglecting the existence of other arguments than those inscribed in the rational paradigm, governing the state law and the Inter American system of Human Rights.

Land is not merely material property but human dignity strictly connected with communitarian values certainly embracing an inestimable "symbolic meaning" – as expression of the myth – impossible to grasp from a rational *logos* approach[34]. Therefore I propose an intercultural dialogical dialogue able to capture the *myths* beneath the *logos* of both worldviews, aiming to construct a common horizon in which the task of inter-comprehension becomes feasible. In this common horizon lies the possibility of emancipation from the dominant myth of rationality anchored in the Colombian, Inter American and global legal system.

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31 Supra n.19.

32 R, Vachon, "Guswenta ou l'impératif intercultural", Inter culture 127 (1995), p. 51.

33 R. Vachon, «*Droits de l'Homme et Dharma*» Inter Culture 144, (2003).

34 Supra n. 32. p. 40.

IV. TOWARDS COMPLEXITY: RETHINKING DIALOGUE THROUGH ALTERITY

For the U'wa people the dialogue proposed by the OAS and Harvard University committee, as well as in general the options provided by the legal systems, do not represent a "fair dialogue", or in other terms, they reduce the dialogue to a rational argumentation towards the finding of the best argument. That best argument is that one that the counter part is unable to rationally reject, and which therefore has accepted if one does not want to fall into irrationality[35]. The objection of the U'wa is insurmountable in a dialogue that limits the arguments to the perspective of the dominant *topos* and its *logos*, namely the rational western *logos*. This approach excludes consequently the others' *topoi* (*logos)* and *mythos* as valid arguments. The rationality required in a dialogue aiming at convincing the other on the basis of valid rational arguments neglects from the very begging the validity of the other's *topoi* and assumes the superiority of the modern rational project, rendering the dialogue, a matter of domination and civilization. These symptoms can be read in the last recommendation given by the OAS and Harvard University commission in which they claim the necessity to provide "technical assistance to the U'wa to ensure that they are adequately prepared to evaluate and to decide on the issues under consideration"[36].

As it has been implicitly argued throughout this article I hold that the incomprehension between the parts lies in the limited epistemological underpinnings employed for the intercultural dialogue. The reduction of the U'wa's worldview to an object acknowledgeable through the rational *logos*, not only limits them to an object itself but also closes the doors for *alterity*. The goal of mutual understanding beyond the "encompassing of the contrary" paradigm requires jumping from a similarities/differences rational methodology to a *diatopical* one, in which the differences are not seen in terms of opposition but in terms of existent realities within a determined legitimate *topos*. This shift of perspective will allow the U'wa people to be taken as a serious legitimate subject in the dialogue with the other actors involved: the Courts, the Colombian government, Oxy, etc.

Once the other is acknowledged as a valid interlocutor we are ready to enter into a dialogical dialogue, that contrarily to the dialectical one, drives us to the recognition of a second point of intelligibility besides the *logos*: *the mythos37*. This "pluriverse" in which the worldviews of the participants in the dialogue are equally taken into account opens up the doors for mutual understanding beyond the encompassing of the other paradigm. Moreover, it may allows us to see an inside perspective of the other, that although limited by our own categories may permit us to have one foot in their culture and the other in ours[38]. It would be only then, that a dialogical enterprise would appear suitable to grasp the other beyond our own *logos*, and to discover, that the intercultural approach to law remains possible. This perspective based on mutual understating on the basis of dia-topos, will allow the U'wa people

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35 J. Habermas, Droit et Démocratie. Entre Faits et Norms, (1997), p. 123–145.

36 Macdonald et al (1998) quoted in Supra n. 2. p. 255.

37 Supra n. 30. p. 18.

38 Supra n. 19. p. 49.

to characterize their land claim protection in a more comprehensive way, while giving to the other actors a larger understanding of their claims of protection.

The complexity enterprise appears in the horizon of the dialogue. The trip – *dia* – through the *topos* of the other provides new elements for the composition of a negotiated model of law that could be implemented between the parts. For example we would be able to confirm to what degree the three foundations of the "tripod model of law" developed by le Roy[39] are present in the different regulatory systems and what solution are plausible to be taken with the least traumatism for all the actors involved.

V. CONCLUSION

It is then clear that the current strategy of including the indigenous people in the national project through Constitutions and international treaties doesn't escape from the paradigmatic origin of the modern law and its presupposition of the "lawless nature of the savage" –as the indigenous people were clearly considered[40]. The model of monistic multiculturalism, underlying the inclusion project, aims at embracing the indigenous people regulatory system in the state legal system in order to furnish it with the "basics legal minimums". This exercise is performed for example through the Human Rights channel, that acting as a Trojan horse, conquers the irrational spaces of indigenous worldviews while providing the legal elements that any legitimate actor shall employ.

The alternative proposed in this article is a permanent intercultural interaction under the conditions of a dialogical dialogue. It would allow the construction of an intercultural approach to law by developing and permanently enriching cultural "archetypes"[41] of the indigenous and the formal legal systems. These archetypes will help to improve and facilitated the mutual comprehension of the Indigenous people and the formal legal system, as far as they will provide some departing points from which a cultural translation can be undertaken aiming at better solving the disputes. For this reason the current multicultural national project of the Colombian state based on geographic segregation and primacy of the state legal system has to be reviewed. The U'wa's case has shown that the current multicultural monistic model amputees the possibility of a permanent dialogue and neglects the validity of the indigenous *logos*. The case has proved that the institutions anchored in the rational-modern legal tradition do not have any interest in opening spaces for negotiating the epistemological premises under which the legal systems are to be founded. There is just a reinterpretation of the legal rules of the system within its own rational paradigm, that may temporarily, provide a better protection to indigenous peoples' claims. It has to be restated nonetheless that this protection is far from an intercultural consensus.

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[39] E. Le Roy, *Le jeu des lois. Une anthropologie « dynamique » du Droit* (1999), p. 198–201.

[40] L. Ariza, "*We are indigenous too*": *anthropological knowledge, indigenous subjectivity and constitutional adjudication*",(2007), Paper Berlin Law and Society Conference.

[41] M. Alliot, «*Anthropologie et juristique. Sur les conditions de l'élaboration d'une science du droit*», in: K. Kuyu (ed.), *Le droit et le service publique au mirroir de l'anthrpopologie* (2002), p. 283–305.