

**PARTICIPATORY RIGHTS OF INDIGENOUS PEOPLES REGARDING
EDUCATION AND LANGUAGE POLICIES.
COMPARATIVE PRACTICES OF COLOMBIA AND NICARAGUA**
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Abstract:

This research is motivated by the level of language at risk regarding indigenous communities. I analyze the interconnection of participatory and cultural rights. Focused specifically in language and educational policies, my position is that it is required a strong indigenous involvement in their decision-making, being the Free Prior Informed Consent a suitable framework. The used methodology is a comparative approach of the jurisdictions of Colombia and Nicaragua, based on their regulations and documentation available.

International and regional protection of indigenous peoples supports the participatory approach in decision-making related to cultural matters, where FPIC ensures a qualified indigenous participation. Moreover, analyzing the practice of consultations in Colombia and Nicaragua to assess Indigenous peoples' representativeness, two models are observed: the 'Board' model of consultations relies on indigenous organizations, whereas the 'Regional' model is based on authorities of the regional level of governance. I conclude that the first model serves better as a representative scheme, because it is more respectful with indigenous self-determination and inclusive with the diverse IPs potentially involved.

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Abbreviations:

AR	Autonomous Regions of Nicaragua
C169	Convention-169 International Labor Organization
CERD	Committee on the Elimination of all Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CIT	Confederación Indígena Tayrona
CRC	Committee on the Rights of the Children
ECOSOC	Economic and Social Council
FPIC	Free, Prior, Informed Consent
HRC	Human Rights Committee
IAComHR	Inter American Commission of Human Rights
IACtHR	Inter American Court of Human Rights
ILO	International Labor Organization
IPs	Indigenous Peoples
OAS	Organization of American States
ONIC	Organización Nacional Indígena de Colombia
OPIAC	Organización de los Pueblos Indígenas de la Amazonía Colombiana
PCN	Pacific, Centre and North regions
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly

1. Introduction

Most of the 6,700 languages in the world are spoken by only 3% of the population, out of which 4,000 are Indigenous Peoples (IPs).¹ Despite their variety, native languages suffered ‘linguistic attenuation’.² Languages themselves are valuable to construct our identities,³ but also part of the human cultural heritage.⁴ For IPs, languages play an important role, strongly relevant for the preservation of their values, knowledge-systems and their environment.⁵ Moreover, besides means of communication, they are a repository of orally transmitted culture.⁶ However, prior experiences of colonization, policies of ‘assimilation’⁷ and other internal practices, such as education,⁸ had put IPs culture at stake. Recently Latin American states have pursued intercultural bilingual policies to include indigenous perspectives.⁹ The concern on preserving cultural distinctiveness motivates this research.

The Universal Declaration on the Rights of Indigenous Peoples (UNDRIP) states specific protection against forced assimilation, meaning, a recognition of the distinctive culture as part of the principle of self-determination¹⁰ and a plea to avoid external impositions. In the

¹ UN Permanent Forum on Indigenous Issues. *Backgrounder Indigenous languages* (2018)

² M. Haboud et al. ‘Linguistic Human Rights and Language Revitalization in Latin America and the Caribbean’ in: *Indigenous Language Revitalization in the Americas*, ed. S. Coronel-Molina, T. McCarthy, (Routledge, 2016)

³ A. de Fina. ‘Discourse and Identity’ In: *The Encyclopedia of applied linguistics*, ed. C. Chapelle (2019)

⁴ UNESCO ad hoc Expert Group on Endangered Languages. *Language Vitality and Endangerment*, Paris CLT/CEI/DCE/ELP/PI/2003/1 (2003)

⁵ M. Degawan. “Indigenous languages: Knowledge and hope” *The UNESCO Courier* (2019)

⁶ ECOSOC Permanent Forum on Indigenous Issues. “*Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples. Report of the international expert group meeting*” E/C.19/2010/14, (2010) para.44

⁷ Process where only a set of values are considered legitimate and divergent modes are forced to be integrated. G.J. Ashworth, B. Graham, and J. E. Tunbridge. “Nature and types of plural society.” In *Pluralising Pasts: Heritage, Identity and Place in Multicultural Societies* (London; Ann Arbor, MI: Pluto Press, 2007)

⁸ S. Sabol. “Assimilation and Identity.” In “*The Touch of Civilization*”: *Comparing American and Russian Internal Colonization*, (Boulder, Colorado: University Press, 2017) Accessed April 16, 2020

⁹ R. Cortina. (ed.) *The Education of Indigenous Citizens in Latin America* 95. (New York: Multilingual matters, 2013)

¹⁰ UNGA UNDRIP, adopted by the UN General Assembly in 2007, Sixty-first Session, Supplement No. 53 (A/61/53). Arts. 3, 4

context of ‘internal self-determination’,¹¹ participation and autonomy are fairly related.¹² So their indigenous self-organization and independence are complemented with participation in the political life of state, to exercise direct control on affairs of their concern.^{13 14} It is framed in relation to participatory democracy and bottom-up actions.¹⁵

This research focusses on the participation of IPs in cultural policies. Human rights are considered universal, indivisible, independent and interrelated.¹⁶ Hence, this investigation will explore the interconnection of political and cultural rights regarding indigenous groups. I aim to enhance the protection of IPs’ rights by promoting a strong participatory approach with effective representation.

My research question is: *How can the indigenous peoples’ participation rights be strengthened in language and educational policies by the use of the FPIC?* I argue that legislation that regulate essential matters for indigenous peoples, policies that affect their culture integrity, should not be relegated to ordinary process. Instead, they must implement a reinforce procedure with FPIC to ensure meaningful consultations. I will use a comparative approach analyzing primary and secondary sources of documentation and legal instrument from the international, regional, and domestic level, using Colombia and Nicaragua as case-studies. These two Latin America with indigenous population (4,4%¹⁷ and 8%¹⁸ correspondingly) have

¹¹ HRC Expert Mechanism on the Rights of Indigenous Peoples, *Progress Report on the study on indigenous peoples and the right to participate in decision making*, A/HRC/15/35, (2010) p.3

¹² M. Barelli. “Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions” *International Community Law Review* 13 (2011)

¹³ Y. Ghai, *Public Participation, Autonomy and Minorities* (Minority Rights Groups International 2011), 23.

¹⁴ Many IPs will coexist in current states, except the indigenous population in voluntary isolation, such as in Colombia recognized and protected by Law-Decree 4633 of 2011. These will not be analyzed in this research.

¹⁵ L. Fontana, J. Grugel. ‘The Politics of Indigenous Participation Through “Free Prior Informed Consent”’: Reflections from the Bolivian Case’, *World Development* 77 (2016)

¹⁶ World Conference on Human Rights. ‘*Vienna Declaration and Programme of Action*’, 25 June 1993, A/CONF.157/23 (1993) para.5

¹⁷ Departamento Administrativo Nacional de Estadística. <https://www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/grupos-etnicos/informacion-tecnica> [accessed 4 April 2020]

¹⁸ According to VII Censo de Población y VI Vivienda (Census of Population and Housing), INIDE 2005. Although, different estimations offer a higher number. On this matter: V. del Cid, ‘Diagnóstico sobre la situación de los derechos humanos de los pueblos indígenas de América Central. Tomo II, Nicaragua’ (Report on the human rights situation of the indigenous peoples in Central-America. Volume 2, Nicaragua) *OACNUDH*, (2018), 372

however different territorial and institutional structure in relation to their IPs. As it will be described in the following chapters, these differences determine their consultations.

This study is not an analysis on the effectiveness of the measures taken on education or on language diversity. Nor a discussion on the state attitude toward IPs. I however focus on the possibility of IPs to have a saying in the decision-making as a first step, so then they can raise their concerns and help shape the relations with the state in accordance with their culture.

The scope of this research is centered in education and language rights, as part of cultural rights. Cultural life includes tangible and intangible elements that have significance for identity of a group, as defined by the UN Committee on Economic, Social and Cultural rights.¹⁹ However, this thesis will be narrowed to these two topics. As explained earlier, they were principal vehicles for assimilation. They are complementary: monolingual or plurilingual approaches are educational decisions. Moreover, although the duty of consultation raises with ‘legislative or administrative measures that may affect’ IPs,²⁰ this research will observe only legal provisions as general frameworks for the use of languages and educational systems.

Regarding the FPIC, it is not my concern to discuss theoretical²¹ or practical²² discussions. Instead I assume it as a relevant safeguard for self-determination, as a ‘duty that entails more than a mere right to be informed and heard but not an absolute right to veto’.²³ Although the FPIC has many components, this research is limited. I would focus only on the representative aspect, as a precondition to include the affected groups, assessing the involved actors and the articulation of consultations.

¹⁹ CESCR. *General Comment 21 on Right of everyone to take part in cultural life*, para.13

²⁰ UNGA, UNDRIP, Article 19

²¹ See: S.J. Rombouts, *Having a Say. Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Wolf Legal Publisher, Oisterwijk, 2014); J. Anaya, S. Puig. ‘Mitigating state sovereignty: The duty to consult with indigenous peoples’ *University of Toronto Law Journal*, 67 no.4 (2017)

²² M. Barelli, ‘Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: developments and challenges ahead’, *The International Journal of Human Rights*, 16, no.1 (2012), doi: 10.1080/13642987.2011.597746

²³ Anaya, Puig. *Supra* n.21, p.453

Much of the literature on FPIC was focused on land rights,²⁴ but concentrate in other less studied applications. I argue that the FPIC approach can shift to be used in broader contexts, in matters that are considered culturally significant and hence, to prevent violation on indigenous cultural rights. Additionally, this research can help states build intercultural dialogue and better fulfil their international duties, considering different ways of consultations. Regardless, I am aware of the difficulties on generalization, given the diversity indigenous population and the need of flexibility of FPIC.

This study will start by an analysis of the FPIC standards: what can the FPIC offer for the protection of language and education rights? The international and regional standards in human rights law supports the strengthening of indigenous participations, due to the recognition of their distinctive culture. Consequently, their cultural self-determination is argued to be more successfully preserved by FPIC. Furthermore, Chapter 3 will compare the jurisdictions of Colombia and Nicaragua to assess their consultation practices on language and educational policies. How were the consultations carried out? Who were involved in the negotiation? Is there a specific institution created? I will examine the different constitutional recognition and arrangements regarding IPs and the involved actors in consultation. I will describe that different approaches are taken: the ‘Board’ model engages with indigenous organizations, whereas the ‘Regional’ model relies in regional institutions. My conclusion is that the first serves more effectively to represent IPs in respect with their self-determination and is highly inclusive.

²⁴ On development projects: T. Ward, ‘The Right to Free, Prior, and Informed Consent: Indigenous Peoples’ Participation Rights within International Law’, *Northwestern Journal of International Human Rights* 10, no.2 (2011). On extractive industries: P. Hanna & F. Vanclay, ‘Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent’ *Impact Assessment and Project Appraisal*, 31, no.2 (2013); D. Szablowski, ‘Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice’, *Canadian Journal of Development Studies* 30, no.1-2 (2010); HRC Expert Mechanism on the Rights of Indigenous Peoples. *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries* (2012) A/HRC/21/55

2. Legal framework: foundations for a consultative process according to FPIC in relation to cultural rights.

This section will go over the international and regional human rights standards applicable to participatory rights, from a cultural perspective, with emphasis on education and languages. As it will be explained hereafter, from the recognition of a distinctive indigenous culture and their right to self-determination derived the obligation to consult, in the effort to preserve the indigenous cultural integrity.

Foremost, I would like to clarify the multitude of references to usages of and meanings associated to ‘consultations’ and ‘participation’, which is relevant for reading and interpreting texts. There are often various ways of speaking about participation in international instruments, jurisprudence and academia. International instruments sometimes allude to free, prior, informed consent; others to consultations, decisions ‘in cooperation’, etc. But how are they different?

There is no common and comprehensive framework for participatory rights regarding IPs.²⁵ As argued by Rombouts, different participatory standards emerged in this context, where the right to effective participation has served as an general framework, as an umbrella term.²⁶ Still this concept in itself is not clear nor sufficient to meet indigenous peoples’ demands.²⁷ Instead, FPIC serves to clarify the ambiguities and vagueness of the latter norm and is used to qualify the requirement of such participation.²⁸ Even the UNDRIP used diverse vocabulary, which can be seen as a ‘layered’ systems on participatory provisions.²⁹ They are all concepts form the same semantic family, but they differ on the degrees of contribution of IPs in shared

²⁵ A. Tomaselli. ‘The Right to Political Participation of Indigenous Peoples: A Holistic Approach.’ *International Journal on Minority and Group rights* 24 (2017), 392

²⁶ Rombouts, supra n.21, 76

²⁷ Different understanding on ‘effective participation’ account for either minimal or maximalist approaches. See: Kymlicka W, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, USA, 2007)

²⁸ Rombouts, supra n.21, 83

²⁹ In various degrees from lower to greater involvement: ‘in conjunction with’, ‘in consultation and cooperation’, ‘prior effective consultations’ and finally ‘free prior informed consent’. Ibid, 85

decision-making processes, being the right to *consent* the strongest and more capable of ensuring peoples' physical and cultural survival.³⁰ However, an absolute right of veto in FPIC processes is difficult to defend in present framework.³¹ Instead, FPIC constructs a dialogue where IPs have an effective voice and influence in the outcome of the decision.

Observing international law, IPs shall be consulted regarding 'legislative or administrative measures that may affect them'; a principle recognized by the UNDRIP,³² the International Labor Organization Convention 169 (henceforth ILO C169)³³ and by the Inter-American Court of Human Rights (IACtHR).³⁴ Both countries in will focus on in this paper have endorsed the UNDRIP³⁵ and ratified the ILO Conv.169.³⁶ But not only specific instruments discuss consultations, others also address participatory rights regarding communities of a distinctive culture.

The UNDRIP proclaims the right to self-determination of IPs,³⁷ where the rest of the rights derive. According to Article 3, the scope of the self-determination includes its cultural facet, namely to '*freely determine their political statutes and freely pursue their... cultural development*'. IPs have the primary role in determining their future. But this recognition also looks at the present, when it acknowledges also the '*right to maintain and strengthen their*

³⁰ When indigenous peoples can retain their consent, this could equal veto power, especially in extractive projects affecting their lands. See: M. Yriart. 'Jurisprudence in a political vortex. The Right of Indigenous Peoples to Give or Withhold Consent to Investment and Development Projects – The Implementation of *Saramaka v Surinam*.' In: *The Inter-American Court of Human Rights: Theory and Practice, Present and Future*, ed. Y. Haeck, O. Ruiz-Chiriboga & Burbano-Herrera (2015), 479

³¹ As discussed about different interpretations of FPIC, by J. Anaya or Rombouts, supra n.21

³² UNGA. UNDRIP, Art. 19

³³ ILO Convention 169, Art. 6(1)

³⁴ Case *Sarayaku v Ecuador*, (2012) IACtHR, para.166

³⁵ Nicaragua was one of the countries voting in the UNGA in favor. Instead, Colombia showed reluctance at first, abstaining in 2007. In 2009 finally endorsed it. See: UN Department of Economic and Social Affairs. Indigenous Peoples. "United Nations Declaration on the Rights of Indigenous Peoples", Accessed 25th March 2020, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

³⁶ Adopted in Colombia by the Law 21 of 1991. Nicaragua, Decree 5934, 6 May 2010. See the ratification status of this Convention in ILO database. Accessed: 5th April 2020 : https://www.ilo.org/dyn/normlex/es/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314

³⁷ UNGA, UNDRIP Arts. 3, 4. Although the concept of 'self-determination itself offers different interpretations, its theorization, conceptualizing and multiple potential application continue and is evolving. Tomaselli Supra n.25, 396

distinct... cultural institutions'.³⁸ Although development could derive some economic connotations, new paradigms emerge under a cultural understanding.³⁹

Beyond this Declaration, other UN decisions supports this line. The General Assembly has acknowledged the role of culture for sustainable development, both as enabler and driver of development,⁴⁰ as well as the UNESCO Declaration on Cultural Diversity, that embraces cultural rights and promotes expression on own languages and education according to their cultural identity.⁴¹

Article 5 in conjunction to 18 of the UNDRIP provides the general participatory elements, recognizing its double realm.⁴² The internal specific indigenous institutions, with own procedures, are complemented with the right to fully participate in external dialogue if they decide so. These are non-indigenous processes in relation to state and other actors.⁴³

Therefore, a variety of measures that states take must be developed in cooperation with indigenous peoples. The UNDRIP is prolific, prescribing it in general and stressing it in specific areas. Article 19 describe the general clause of consultation in adopting and implementing legislative or administrative measures, done by FPIC, as well as the implementation of the Declaration itself 'in cooperation'.⁴⁴ Moreover, the FPIC is mentioned in specific matters.⁴⁵

³⁸ UNDRIP Art. 5

³⁹ Such as the Andes region. S.Radcliffe, N.Laurie. 'Culture and development: taking culture seriously in development for Andean indigenous people' *Environment and Planning D: Society and Space* 24, (2006)

⁴⁰ UNGA. *Culture and sustainable development*, 70th session (2015) A/RES/70/214

⁴¹ UNESCO. *Universal Declaration on Cultural Diversity* (2001). Art. 5

⁴² Also recognized in academia, see: H. Quane, 'The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?', in *Reflections on the un Declaration on the Rights of Indigenous Peoples*, ed. S. Allen and A. Xanthaki, (Oxford, Hart Publishing, 2011) However other interpretations are present too, see: Chapter II in Rombouts, supra n.21

⁴³ In this external dialogue, different problems might arise: indigenous communities might not be dominant, not equal footing, not influence, poor implementation, biased towards certain indigenous over others... HRC Expert Mechanism on Rights of Indigenous Peoples. *Final study on indigenous peoples and the right to participate in decision-making* (2011) A/HRC/EMRIP/2011/2 para.10

⁴⁴ UNDRIP, Article 38

⁴⁵ Regarding cultural, intellectual, religious property, Article 11 (2); territory, Article 28(1); storage or disposal of hazardous materials, Article 29(2); land and resources Article 32(2)

However, despite the several explicit references, the FPIC should be considered in a larger framework of self-determination and effective participation,⁴⁶ in matters of relevance for their rights, survival, dignity and wellbeing.⁴⁷ The duty to consult originates from its relationship with self-determination,⁴⁸ as related principles of democracy and popular sovereignty.⁴⁹ The duty to consult emerges when states decision ‘affects’ IPs; Anaya suggests that this scope refers to ‘*decision (that) may affect indigenous peoples in ways not felt by others in society ... when the interests or conditions of indigenous peoples that are particular to them are implicated in the decision*’.⁵⁰ Thus, FPIC has the potential to ensure respect of indigenous self-determination, even in its cultural facet.

Building on the distinctive culture of IPs, Article 8 of UNDRIP proclaims the right not to be subjected to forced assimilation or destruction, which also result in the obligation to both prevent and redress actions that aim or cause the loss of such distinctive indigenous identity.⁵¹ This means that, in order to prevent cultural assimilation, states have to provide mechanism to ensure that their actions are culturally appropriate to IPs. As part of the preservation of their culture, a broad range of manifestations related to culture are recognized.⁵² The allusion to language is extensive, recognizing the right to use the own indigenous language in private, public spheres and media.⁵³

On matters of education, Article 14 of UNDRIP states the self-determination in education. It allows their own educational system as well as right to access to linguistic and cultural pertinent education without any threshold. The implementation of this right is

⁴⁶ Rombouts, supra n.21, 20

⁴⁷ HRC. *Annex Expert Mechanism advice No. 2: Indigenous peoples and the right to participate in decision making* (2011) A/HRC//18/42 para.22

⁴⁸ HRC Expert Mechanism Supra n.43 para.22

⁴⁹ J. Anaya. *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people* (2009) A/HRC/12/34/Add.5, 14

⁵⁰ Ibid, 19

⁵¹ UNDRIP, Article 8(2 a)

⁵² This includes traditions or customs and their manifestations, religious and ceremonial acts, in addition to cultural heritage, knowledge, expressions...

⁵³ Ibid, Arts. 13 and 16

conceived under the obligation of state to take measures. The duty to consult is formulated with various constructions: ‘in conjunction with indigenous peoples’, ‘in consultation and cooperation’.⁵⁴

The other relevant international instrument that addressed specifically IPs is the ILO Conv. 169. Its early adoption in 1989 was focused on economic and social rights, which left aside the controversial concept of ‘self-determination’ in international law.⁵⁵ However, it covers a wide range of areas, including culture and education, and also frames obligation of states ensure their distinctive institutions and carry on consultations. The distinctive culture of IPs is recognized though; these own institutions understood as their current practices of IPs economic, cultural and social development.⁵⁶ This lead to positive measures to respect, promote their cultures⁵⁷ as well as to take culture into account in applying the Convention.⁵⁸

The ILO C169 refers to consultations specifically on topics of lands, other cultural and political matters.⁵⁹ In general terms, Articles 6 and 7 provides the overall framework for consultation and participation, together with Article 2 and 33, that calls on government to take action ‘with participation’ and ‘cooperation’ of peoples concerned. By these, C169 refers to three interrelated processes: consultation, participation and coordination of government action,⁶⁰ respectively. Once again, there is a variety in terminology, although all of them remain under the paradigm of effective participation

This convention addresses the right to education, from the perspective to access of all levels of education, specialized programs and the autonomy of their own educational system.⁶¹

⁵⁴ Ibid, Arts. 14(3) and 15(2)

⁵⁵ ILO, *Indigenous & tribal peoples’ rights in practice. A guide to ILO Convention No. 169* (2009), 25

⁵⁶ Ibid, 50

⁵⁷ C169, Art, 2(1), 4

⁵⁸ C169, Art. 5

⁵⁹ C169. Arts. 15(2), 16(2), 17(2), 5(c), 22, 27(2), 28(1), 33. On resources, land relocation, land alienation, policies on life and work conditions, training programs, educational institutions, language when its teaching is unpracticable, administrations of government programs

⁶⁰ ILO, Committee of Experts on the Application of Conventions and Recommendations, *General Observation, Indigenous and Tribal Peoples*, 98th Sess. (2009) para.2

⁶¹ C169, Arts. 26 and 27

It reflects a similar consultation approach, since their education must be ‘developed and implement in co-operation’, even in the creation of indigenous curriculum,⁶² therefore IPs effective participation becomes relevant. As part of these programs, the language perspective also relies on bilingual education, including indigenous language alongside national language.⁶³ It entails positive measures to preserve and promote languages and to provide translations or media communication.⁶⁴

In addition to these instruments, the right to political participation can be found in other international human rights instruments, even without specifically addressing IPs. Yet, some of these provisions allow for an interpretation in conjunction to culture, language and education, that upholds the relevance of the right to consultation.

Beyond the right to self-determination,⁶⁵ from the perspective of civil and political rights, the provisions on political participation and minority rights⁶⁶ is to be interpreted as to include the right to enjoy particular culture, according to the Human Rights Committee.⁶⁷ Complementary, the Committee on Economic, Social and Cultural Rights (CESCR) has put progressively more emphasis on culture. Specifically, concerning the right to take part in cultural life entitles individuals to participate, access and contribute to cultural life.⁶⁸ The state actions implementing this must be culturally ‘acceptable’, meaning that ‘consultations should be held ... in order to ensure that the measures to protect cultural diversity are acceptable to them’.⁶⁹ This cultural value is stressed in education too.⁷⁰ International soft law also reinforce

⁶² C169, Art. 31

⁶³ C169, Art. 28 and 29

⁶⁴ C169, Art. 30(2)

⁶⁵ Mirroring article in Articles 1 from the International Convenat in Civil, Political rights and Economic, Social and Cultural Rights.

⁶⁶ UNGA *International Covenant on Civil and Political Rights* (ICCPR) (1966) Art. 25

⁶⁷ HRC. *General Comment No. 23 on Article 27*, CCPR/C/21/Rev.1/Add.5 (1994) para.3.2

⁶⁸ CESCR, *supra* n.19 para.15

⁶⁹ *Ibid* para.16(c)

⁷⁰ *Ibid* para.54 and CESCR. *General Comment no. 13: Right to Education (art.13)* life E/C.12/1999/10 (1999), para.50

such claims, as the Vienna Declaration⁷¹ and the recent ‘Los Pinos Declaration’⁷² that pushed the political agenda towards developing indigenous languages

The UN Committee on Racial Discrimination touches on IPs.⁷³ While recognizing their distinct culture, language and way of life as enriching State identity, it calls for their preservation, promotion and effective participation in public life, requiring their informed consent.⁷⁴ Moreover, regarding children’s rights,⁷⁵ it is acknowledged the dual collective and individual aspect of indigenous child’s education,⁷⁶ and that its access and content lead to develop indigenous identity.⁷⁷

At a regional level, the Inter American System has provided a strong development on indigenous rights. Not only the Court and Commission decisions worked, but the Organization of American States (OAS) in its regional soft law that indicates a general political will. Although the American Convention does not address IPs, it is remarkable the right to participation stated in Article 23; yet the IACtHR jurisprudence progressively interpreted the convention to introduce IPs claims.⁷⁸

The IAComHR has pushed forward to recognize the coexistence of cultural diversity, in an intercultural approach,⁷⁹ that implies the distribution of power and a level of recognition without exclusion. Furthermore, the IACtHR dealt with indigenous rights, developing the duty

⁷¹ It relates democracy with participation, at the time that protects and promote cultural differences. It points on democracy being the full participation of peoples (I.8); protection of minorities with own culture: calling on strengthening the IPs rights (I.20, II.20-32) and strengthening institutions of effective participation decision-making (II.67). *Vienna Declaration* supra n.16

⁷² UNESCO, ‘Los Pinos Declaration’ and the Decade of indigenous Languages 2022-32 Accessed: 22th April 2020 <https://en.unesco.org/news/upcoming-decade-indigenous-languages-2022-2032-focus-indigenous-language-users-human-rights>

⁷³ CERD. *General Recommendation no. 23 on Indigenous Peoples* (1997)

⁷⁴ Ibid, para.4

⁷⁵ UNGA. *Convention on the Rights of the Child* (1989) Art. 30

⁷⁶ CRC. *General Comment 11, CRC/C/GC/11* (2009)

⁷⁷ CRC. *Recommendations, Day of general discussion on the rights of Indigenous Children*, 34th session (2003), 258

⁷⁸ A. Fuentes. ‘Judicial Interpretation and Indigenous Peoples’ Rights to Lands, Participation and Consultation. The Inter-American Court of Human Rights’ Approach’ *International Journal on Minority and Group Rights* 23, no.1 (2016)

⁷⁹ IAComHR. (2019) *Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon Region* OAS/Ser.L/V/II para.43

to consult. Worth to mention are the most remarkable cases. In *Saramaka v Suriname* (2007)⁸⁰ the Court set the obligation to consult given the cultural distinctiveness of IPs, though flowing from right to property, and demand consent in certain circumstances affecting their land and survival.⁸¹ Moreover, in *Sarayaku v Ecuador*, the Court grounded FPIC as general principle of international law and cultural identity as fundamental right of independent nature, informing the obligation on state to consult. However, it is argued that the Court was ‘using civil and political rights to indirectly protect economic, social and cultural rights’;⁸² the found violations originated on the duty to consult in relation to right to property, instead of a violation of cultural rights too. Similarly, in *YATAMA v. Nicaragua*,⁸³ the Court argued that IPs have the right to participate in equal grounds on political decisions that would affect them, using their own institutions.⁸⁴

Politically, the OAS has also achieved a regional understanding on IPs rights, in the American Declaration on the Rights of Indigenous Peoples. It resembles the UNDRIP, although some of its elements are criticized (i.e. not having self-determination as strong guiding principle) and scant participation of IPs.⁸⁵ It recognizes self-determination within the state, provides a participatory scheme with consultations,⁸⁶ protects against assimilation and genocide, and embraces indigenous own institutions, as multicultural and multilingual societies.⁸⁷ However, Colombia, Canada and USA⁸⁸ presented objections.

⁸⁰ Note that cases *Saramaka v. Suriname* (2007) and *Sarayaku v. Ecuador* (2012) were cases of logging, mining and oil exploitation in indigenous lands.

⁸¹ Yriart, *supra* n.30, 477

⁸² *Ibid.* 584

⁸³ Case *Yatama v. Nicaragua* (2005). It was an electoral dispute, IACtHR found a violation on only right of political participation.

⁸⁴ *Ibid.* para.225

⁸⁵ IWGIA. *Analysis on the new OAS American Declaration on the Rights of Indigenous Peoples* (2016) Accessed: 22th April 2020 <https://intercontinentalcry.org/analysis-oass-recent-american-declaration-rights-indigenous-peoples/>

⁸⁶ OAS GA. *American Declaration on the rights of indigenous people*. GT/DADIN/doc.334/08 rev.12 (2016)

⁸⁷ *Ibid.* Arts. 10, 11, Section 3

⁸⁸ Although approved by consensus, these countries included statements with their own considerations. Colombia interpreted is as no veto power on natural resources, sacred lands being regulated by law and language in media subjected to legal requisites. P. Joffe. ‘*Advancing Indigenous Peoples’ Human Rights: New Developments in the Americas*’ Colombia Caravana Org (2017)

All these instruments stipulate in various provisions the state commitment to respect and promote indigenous languages and education. This leads to a combination of state negative and positive obligations. In the production of such measures, the state cannot unilaterally define its parameters. Instead, it is the indigenous voice which should be reinforced. In accordance to self-determination, IPs would be determinant to delineate the content of their culture, such as having own educational systems and languages. Then, that would define the grounds where the state needs to take IPs into consideration and hence ensure their effective participation in the formulation of decisions that would affect them.

Finally, considering that there is international recognition of IPs right to ‘effective participation’ in cultural matters, among this panoply of concepts related to participation, what are the benefits of FPIC? Various arguments can be found, besides the FPIC inherent relationship with self-determination, as suggested earlier, hence serving to qualify indigenous position in consultation. Firstly, it works as a balancing mechanism, playing a remedial function on affected rights.⁸⁹ It helps articulate indigenous interests along with states interests and duties. Secondly, the FPIC relational approach facilitates achieving mutual benefits in a context of co-existence.⁹⁰ Thirdly, because FPIC presents a standards for intercultural dialogue that ensures recognition, consent and continuity.⁹¹ Also, engaging IPs in decisions as full partners searching a mutually agreeable outcome would overcome the consent-as-veto dispute.⁹²

In conclusion, there is great recognition internationally to indigenous consultations, consequently states must cooperate ‘in good face’ with indigenous communities ‘in order to obtain free, prior informed consent’. Since this FPIC is essentially embedded in the indigenous

⁸⁹ Anaya & Puig. *supra* n.21, 457

⁹⁰ T. Mitchell, C. Arseneau, D. Thomas & P.Smith. ‘Towards an Indigenous-informed relational approach to free, prior, and informed consent (FPIC).’ *The International Indigenous Policy Journal* 10,no.4 (2019).

⁹¹ According to Tully’s theory of intercultural dialogue, in: Rombouts, *supra* n.21, 108

⁹² M. Papillon, & T.Rodon. ‘Proponent-Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada’, *Environmental Impact Assessment Review*, 62 (2016) doi: <https://doi.org/10.1016/j.eiar.2016.06.009>

right to self-determination, it can be used extensively in all the matters that are considered culturally significant for them, as in education and language policies. Firstly, because it derives from the recognition of indigenous distinctive culture and autonomous education system and language. Secondly, because FPIC offers a established framework to materialize indigenous' right on participation at an equal footing than states. And finally, in a practical manner, FPIC is a platform for intercultural dialogue. Thus, it helps states to fulfil its international obligations towards its citizens, to procure cultural pertinence of state decisions related to education and language.

3. Implementation of the FPIC and how to ensure representativeness: Colombia and Nicaragua.

In this section I will discuss the consultations practices in Colombia and Nicaragua. To answer my research question, preventing violation on IPs' rights requires ensuring their effective participation, and the agency for their consent and participation in FPIC processes presupposes forms of representations.⁹³ Hence, this section focusses on the representativeness of consultations, namely, the involvement of IPs in legal or administrative decisions related to education and language regulations. How is the participation of IPs articulated? Are there specific institutions? Which actors are implicated? My analysis will offer two models of consultations according to the involved subjects: 1) the 'Board' style negotiations with indigenous organizations and 2) the Regional institutions. By assessing the representativeness of the participating IPs, I conclude that the 'Board' model is more effective scheme, more respectful with the indigenous self-organization and inclusive.

3.1 Recognition

Recognition is an essential element for dialogue.⁹⁴ The initial step of the exam of the legal framework is the Constitutions of the two countries, in which indigenous movements took part.⁹⁵ Both jurisdictions, Colombia⁹⁶ and Nicaragua,⁹⁷ stipulate diversity and multi-ethnicity of their population, equality and anti-discrimination clauses. Cultural affairs are also addressed, as a state obligation to protect culture or as rights to education and access to culture.⁹⁸ Both

⁹³ Rambouts, *supra* n.21, 406

⁹⁴ Taylor, C. 'The Politics of Recognition' In *Multiculturalism. The Examining the Politics of Recognition*, ed. A. Gutmann, Princeton, Princeton University Press. (1994)

⁹⁵ D.L. Van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America*. (Pittsburgh: University of Pittsburgh, 2000)

⁹⁶ Political Constitution Colombia (1991). Arts. 1, 7, 13

⁹⁷ Political Constitution Nicaragua (1987). Arts. 5, 8, 27, 48, 91

⁹⁸ Colombian Constitution, Arts. 8, 44-45, 67-68, 70-72. Nicaraguan Constitution Arts. 58, 116-125, 126-128

states give official status to their native languages and protect the right to education,⁹⁹ stressing the relevance of cultural-appropriate education by bilingual systems; Nicaraguan explicitly acknowledges intercultural education in mother tongue. Hence, with several provisions, both constitutions praise cultural diversity and its interconnection with the education and native languages.

However, no mention to the FPIC as such is indicated in either of the constitutions. Instead, they prescribe basic principles between the state and the IPs according to the different authorities involved. In Colombia, the constitutional jurisprudence firstly shaped the right to consultation;¹⁰⁰ later this obligation was institutionalized under the Ministry of Interior.¹⁰¹ This framework for consultations were adopted already with the participation of indigenous representatives through the Permanent Board of Concertation with Indigenous Peoples and Organizations.¹⁰² Nicaragua lacks a regulatory framework for consultations.¹⁰³

Consequently, IPs in these countries have a recognition status¹⁰⁴ based on the principle of self-determination.¹⁰⁵ But the effective exercise of authority can be hampered by the framework that the constitutions define for IPs, hence to leave it empty of meaning, as just a formal acknowledgment. It then affects the following consultation processes. The essential differences are that Colombia outlines autonomous ‘indigenous territories’, with self-ruling

⁹⁹ Colombian Constitution, Art 10; Nicaraguan Constitution Art. 11

¹⁰⁰ Cifuentes Sandoval, G. et al. ‘La consulta previa en la jurisprudencia constitucional de Colombia: Análisis de línea entre 1997-2015’ (The prior consultation in the constitutional jurisprudence of Colombia: Line analysis between 1997-2015) *Revista Justicia*, 23 no.33 (2018)

¹⁰¹ Ministry of Interior. Decree 2893 of 2011. The presence of this ministry is common in consultative organs. The Directorate of Indigenous affairs keeps census and registry and the National Authority on Prior Consultation carries certain FPIC

¹⁰² Created by Decree 1397 (1996) alongside the National Commission on Indigenous territories. It is formed by representatives of the ministries, IPs organizations, other indigenous agents and advisors (Fig.1)

¹⁰³ M.V. Cacerera Ormaza. *The Requirement of Consultation with Indigenous Peoples in the ILO: between normative flexibility and institutional rigidity* (Leiden: Brill Nijhoff, 2017), 96

¹⁰⁴ L. Lixinski ‘Constitutionalism and the other: Multiculturalism and indigeneity in selected Latin American countries’ *Anuario Iberoamericano de Justicia Constitucional* 14 (2010)

¹⁰⁵ Colombian Constitution Art 9; Nicaraguan Constitution Art 5

governments (*'consejos indígenas'*) according to their own customs.¹⁰⁶ Yet, given the multiplicity of distinctive groups, consultations are led by indigenous organizations. Instead, Nicaragua defines a regional level of government with own competences. When alluding to IPs, the constitution mostly addresses the Autonomous Regions (AR) of the Atlantic Coast,^{107 108} with multiethnic population.¹⁰⁹

Nicaragua IPs articulation creates different standards. Firstly, the AR of Caribbean Coast North and South¹¹⁰ received great attention and autonomous regulation: acknowledgement of particular rights of self-government organs (*'Consejos Regionales'*,¹¹¹ Directive board and Regional coordinators), right to language and own competence for education¹¹² in coordination with national Ministry.¹¹³ Secondly, within the AR, Nicaragua recognizes communal indigenous territories, emanating from the communal property of the land.¹¹⁴ They are ruled by own traditional institutions of assemblies and authorities, under the AR supervision.

Outside AR, thirdly, some specific IPs in rivers Coco, Bocay, Indio and Maíz are acknowledge.¹¹⁵ They are subject to a national authority, in some areas as regarding the National Commission for Demarcation authorities.¹¹⁶ Finally, Chorotega, Nahoa, Xiu-Sutiaba

¹⁰⁶ Colombian Constitution, Arts. 286; 287; 321; 329; 330. Organic law of Territorial ordinance 1454 (2011). Decree n° 1953 (2014) establishing Indigenous Territories. It acknowledges 'consejos' or similar collective assembly as self-governments.

¹⁰⁷ Nicaraguan Constitution. Art. 89-91, 180-181

¹⁰⁸ Some IPs in Nicaragua had previously some degree of autonomy in XIX century. Indigenous organizations of Miskitus, Sumus, Ramas and Kriols had a part in the Sandinista Revolution. Consultations held during the constitution-making successfully consolidated the demands of autonomy. See: M. Cunningham 'Indigenous Peoples' Conflicts and the Negotiation Process for Autonomy in Nicaragua', In: *Indigenous Peoples' Rights and Unreported Struggles: Conflict and Peace*, Institute for the Study of Human Rights (Columbia University, 2017)

¹⁰⁹ M. González. 'Autonomías territoriales con permiso y sin permiso' (Territorial Autonomy with and without state permission) *Boletín de antropología americana*, 38 (2002), 214

¹¹⁰ Statute of Autonomy N.28 (2016) (previous Act n.28 of 1987, amended by Act 926 of 2016). Since then, the region's names were replaced by Caribbean Coast regions. Arts. 15, 19, 27, 29.

¹¹¹ Assemblies with 45 members which must have representation of the different ethnic communities according to electoral rules

¹¹² Supra n.110 Arts. 8, 11.

¹¹³ National Assembly. Regulation Decree 3584 (2003). Art. 9

¹¹⁴ National Assembly. Act 445 (2003)

¹¹⁵ Ibid Art. 41

¹¹⁶ Members from state organs (regional authorities, public institutes...), representatives elected by Traditional Authorities and the mayors of disputed areas

and Matagalpa peoples in the Pacific, North and Center (PNC) area are recognized only by laws on municipalities.¹¹⁷ It acknowledges traditional authorities, whose members have coordinated under a common National Council of IPs in PCN of Nicaragua. This group has struggle for recognition, attaining a law proposal so far, and some attention regarding health.¹¹⁸ It was also disputed regarding the disparities of measure of IPs in 2005 Census, despite warnings on the lack of self-recognition methodology.¹¹⁹

Therefore, an initial obstacle for any kind of consultation is the lack of recognition as IPs. It later prevents this population from exercising any right attached to their status and self-determination. Nicaragua puts its AR in the center, which creates IPs invisibilization both by default and excess. It excludes external IPs giving them less attention and competences. But the AR also creates an artificial governmental level, similar to parliamentary system. The AR institutionalized the multi-ethnic demands, making it its main purpose. It strengthened indigenous claims and agenda of their IPs, supported by a strong civil society and organizations within the AR that have taken part in national and regional development of policies.¹²⁰ But they were also compartmentalized in these areas.

Moreover, at the institutions of the regional level, the fact that they share the government with other population, IPs' autonomous claims can be diluted. Moreover, its varied populations can replicate the IPs struggle when there is a majority culture, as when the Regional Councils are subjected to majority mestizo population and tehri presence in the regional organs could be just a symbolically representation.¹²¹

¹¹⁷ National Assembly. Reforms to the Act n.40 'Law on Municipalities' (1997)

¹¹⁸ OACNUDH, *supra* n.18, 382, 390

¹¹⁹ CERD. *Concluding observations on Nicaragua* (2008). CERD/C/NIC/CO/14 para.13

¹²⁰ M. Hooker Coe. 'Consulta sobre la Sociedad Civil de las Regiones Autónomas de la Costa Caribe de Nicaragua' (Consult about the Civil society of the Autonomous Regions of the Caribbean Coast of Nicaragua) *Kepa's working papers n:o 10* (2006)

¹²¹ CERD. *State report Nicaragua* (2008) CERD/C/NIC/14

3.2 Involved actors

Besides the constitution, addressing the normative framework of education and language, as cultural matters affecting IPs, various legal acts were enacted. Hence, IPs' participation is evaluated based on how those laws define the design of IPs educational or language programs and the involved actors in those decisions. Who are the IPs representatives engaged?

On the one hand, the Colombia education system adopted an *intercultural ethno-education* approach. The indigenous claims of own culture led to a General Act¹²² developed by a Presidential Decree¹²³ and the actual Decree on the Education system.¹²⁴ The ethno-education is led by the principles of linguistic diversity, autonomy, community participation and interculturality. Complementarily a broader act on Native Languages was also adopted.¹²⁵

The Educational System Decree regulates some common areas. Due to its decentralization, these matters are coordinated through assisting committees for the policy creation. The most relevant organ where the IPs involvement is envisioned is the National Commission on Labor and Concertation in Education (Fig.1).¹²⁶ This body reunites different members: state representatives from the Ministry of Education, Interior and Justice, indigenous delegates of the Permanent Board of IPs, associations and delegates of educational programs.¹²⁷

Moreover, the commitment to language diversity¹²⁸ and the principle of concertation are emphasized in the Act of Native Languages. The adoption of this Act was the result of a process of negotiations,¹²⁹ with delegates of the great indigenous organizations in Colombia. Moreover,

¹²² Colombian Congress, General Act of Education 115 (1994), Art 55

¹²³ Decree 804 of 1995

¹²⁴ Ministry of Education. Decree 1075 of 2015 on Educational Sector

¹²⁵ Colombian Congress. Act 1381 of 2010 *Lenguas Nativas* (Native Languages).

¹²⁶ Created by Decree 2406 (2007)

¹²⁷ Ibid. Art. 3.

¹²⁸ Several rights are specified to native speakers (such as non-discrimination, use of their native language in public and private sphere) alongside with learning Spanish. Equally, it includes the right to use toponyms, names and language in relation with the authorities (courts, administration, health system...).

¹²⁹ Colombian Ministry of Culture. 'Política de protección a la diversidad etnolingüística' (Policy on Etnolinguistic diversity protection) *Compendio de políticas culturales* (2010), 367

during the adoption of such act, Ministry of Culture also carried out 30 ‘concertation assemblies’ where 76 of the 94 censused groups were consulted; it was discussed with national organizations (ONIC, OPIAC, CIT), regional organizations and local cabildos.¹³⁰

Furthermore, the law provides that the interpretation and application of language regulations are subjected to concertation with the authorities of ethnic groups.¹³¹ The measures are designed under the Ministry of Culture,¹³² and it creates the National Assistant Council on Native languages (Fig.1).¹³³ This organ brings together various representatives:¹³⁴ 3 members of ministries; representatives of the different ethnic groups¹³⁵ elected by their communities; linguistic experts, and other potential participants. Its members must be Colombian and be elected democratically. The ethnic representatives must additionally be a speaker or have knowledge on the native language and documentation to verify their belonging to that ethnic group. Among the IPs, this body is formed by one representative from each of the indigenous national organization members from the Permanent Board, namely ONIC, OPIAC, CIT and Regional Councils of the Atlantic Coast (CORPES).

The concertation principle recognizes that no unilateral decision on this matter should be made by state authorities without the cooperation of indigenous communities. This principle of action can be analyzed under the FPIC criteria. Internally, members of IPs should be able to participate in their collective will-formation according to their governance structure, whereas, externally, people ‘as a whole’ must be represented.¹³⁶

This negotiation-scheme is currently used in Colombia, by creating Boards or Commissions, for specific areas with representatives of states and IPs authorities. It constitutes

¹³⁰ Ibid p.369

¹³¹ Language Act, supra n.125 Art 3

¹³² Ibid Arts. 23, 24

¹³³ Regulated by Decree 1003 (2012)

¹³⁴ Ibid Art. 3

¹³⁵ IPs, 2 Roma, 2 Raizal and 2 Palenquera people

¹³⁶ Rombouts, supra n.21, 406-407

one model of consultation. It reunites state members and IPs representatives. It is characterized by including national and regional organizations by which IPs have organized themselves. This associations convey IPs' demands. In Colombia, they originated in the intense indigenous movement that mobilized population during the 70s, channeling the dialogue with the state.¹³⁷ ONIC, OPIAC and CIT are member in all the discussed board, although in some other actors are involved. These soft institutionalization structures represent indigenous claims in consultative organs, even though some also participated in the electoral process. A collective identity serves to agglutinates dozens of small and disperse IPs. Bing present in different organs thy can act intersectionality.

Their representativeness benefits from their organic creation, it can fairly be more legitimate to IPs. Following the self-government recognition, it would be questionable to assess the internal process by which they representative are elected. Yet insofar they are considered highly representatives by the IPs that are to be affected by any decision themselves, they are suitable for consultations. Nevertheless, these structures also face the inherent challenges of representation, whether a common stable message is behind the speakers, the connection between group and representative, the non-exclusion of interests... or practical challenges arise from its conformation.¹³⁸

¹³⁷ N.C González Piñeres. 'The indigenous movement and its paradigms of interpretation' *Guillermo de Ockham* 2, no.2(2004)

¹³⁸ M.C. Brilman. "La Mesa Permanente de Concertación con los pueblos y organizaciones indígenas. El diálogo es su propio fin." (The permanent concertation board with indigenous peoples and organizations. Dialogue is its own end) *Revista de Derecho Público* 31 (2013), 9

Figure 1: Members of consultative institutions in Colombia

	IPs representatives	State representatives	Others
Permanent Board of Concertation	Indigenous senates, former Constitutional deputies, ONIC, OPIAC, CIT, delegate from macroregion CORPES* *Regional Councils of Economic and Social development in the Atlantic Coast, Amazonia, Oiniquia, Occident and Central-Orient	Minister of Interior, Agriculture, Environment, Finances, Mining, Health, National Education, Head of National Department of planning, Counselor of Borders and Counselor of Social Policy	ILO, IAComHR, Conferencia episcopal
National Commission on Labor and Concertation in Education	Indigenous delegate from the Permanent Board of Concertation ONIC, OPIAC, AICO, CIT, Org. del Putumayo; Asociación de Cabildos y Autoridades Tradicionales del Pueblo Uwa; Org. del Caquetá o Guaviare; delegates from educational programme from: Consejo Regional Indígena del Cauca; Cabildo Mayor Regional Indígena Zenú; Valle del Cauca; Asociación Regional Indígena EmberaWounana; Asociación de Cabildos de Arauca; Org. de Antioquia; Consejo Mayor de Educación del Pueblo de los Pastos; Consejo Regional Indígena del Tolima; Regional Indígena del Vaupés; Pueblo Wayuu; Org. del Bajo Orinoco; Gonawindua – Tairona	Minister of Education and their delegates, Director of Ethnicity from Ministry of Interior and Justice	Delegate of the Committee of ethno-educators & other traditional authorities
Concertation assemblies (approval of Act of Native Languages)	ONIC, OPIAC, CIT, regional organizations* and local cabildos *no specific information available	Ministry of Culture	
National Assistant Council on Native languages	One representative from each indigenous organizations of the Permanent Board	Minister of Culture, Technology & Education (delegate on ethnic education)	Linguistic experts from universities

Source: own elaboration

On the other hand, Nicaraguan educational system and languages are constructed mainly around the Autonomous Regions, with competences on education,¹³⁹ programs for language reactivation and the bilingual intercultural education were established. Indigenous languages have the official status in the Autonomous regions since 1993.¹⁴⁰ Besides, the scope of the law is restricted to the AR and exceptionally to some other departments outside¹⁴¹ concerning a close list of languages: miskitu, creole, sumu, garifona y rama. Moreover, these AR run the Autonomous Educational Subsystem according to the National Law on Education.¹⁴² Once again, no mention to the IPs from the PCN region, although their languages are today extinct.¹⁴³

At the regional level, as part of this subsystem, the AR of the Caribbean have created specific programs of *intercultural bilingual education*, whose curriculum is offered in miskitu, mayangna and creole languages in certain areas. Another achievement was the creation of the

¹³⁹ Statute of Autonomy, supra n.110 Art 8

¹⁴⁰ National Assembly. Act N.162 of official languages in the Atlantic Coast Communities of Nicaragua -(1993)

¹⁴¹ Department of Jinotega and Nueva Segovia

¹⁴² National Assembly. General Education Act N.582 (2006) Chapter IV

¹⁴³ D. Salamanca. 'Los idiomas mesoamericanos de Nicaragua en el contexto centroamericano' (Nicaraguan Mesoamerican languages in the Central-American context), *WANI* 62 (2010)

AR university that develops intercultural and indigenous superior education. These regions enabled the participation of ethnic minorities and have the diverse discourse at its core. As commented earlier, the pressure of the regional organizations of different IPs and ethnics were influential for defining the agenda of AR, organized in Committees with civil society.¹⁴⁴ The process of decentralization was planned by the national Ministry of Education in cooperation with the corresponding organs of the RA as indirectly speakers of the communities. However, the IPs outside these regions, in the Pacific and Center region, given that they do not such have specific status, they are subjected to national regulation.

The overall coordination of education rests on the Ministry of Education. The assembly and board-directive of the National Council of Education¹⁴⁵ are composed by a variety of state actors (Fig.2). No delegate from IPs nor any ethnic community is present as such, only representatives of the regional Commissions.

This is a second model of consultations led by the regional authorities. Although there are relevant national associations, indigenous organizations and different coordinated IPs' authorities created as part of the indigenous movement,¹⁴⁶ the regional authorities have a central role to voice ethnic communities as representatives. This 'regional model' has been used by the national authorities in the Council of Education or the decentralization negotiations.

This model only attains an indirect representation. Given the few members in AR that are part of the delegation for the dialogue with the national system (usually the president or secretaries), these representatives are indeed acting on behalf of the whole population, although this is a weaker connection to the IPs members than consulting with the organizations themselves. Moreover, for the IPs to be potentially included in those AR members they need to participate on the regional structures to get some representation, running for elections under

¹⁴⁴ Supra n.120, 8

¹⁴⁵ General Education Act, supra n.142 Art. 58

¹⁴⁶ FIDA Indigenous peoples Office. *Nota técnica de país sobre cuestiones de los pueblos indígenas República de Nicaragua* (Technical note on the states on indigenous issues. Republic of Nicaragua) (2017)

indigenous organizations or political parties. Being a part on these representatives does not follow from their self-organization but they are subjected to external constraints.

From a starting point, this indicates lack of recognition of education as part the autonomous self-government of IPs and autonomy. ‘Competences in education’ belong to AR, not recognized as part of IPs’ culture. If that was the case, it would reinforce the idea of consultation with the IPs themselves or any other organizational structure that they construct. Instead, these regulations recognized diversity and interculturality, but these qualifications can be weak to obtain a fully cultural-pertinent education and indigenous involvement in their definition.

However, a different trend is arising. A recent national initiative under the Ministry of Education was the Plan for Indigenous and Afro-descendant peoples in 2017. This was a remarkably highly discussed project with 105 peoples, including 3 consultations workshop with each AR and the PCN region (Fig.2).¹⁴⁷ Regarding the AR, IPs were in this case represented by members of their territorial government. The state directly engaged with the civil society and indigenous organizations. However, regarding the PCN consultation, no direct involvement of IPs was ensured initially; only in 2019, updating the plan, new consultations were carried on as workshop and in the three regions, where IPs’ authorities took part, even from PCN.

Although the development of the specific education plans regarding IPs was assigned on the autonomous authorities, this recent approach articulates the negotiations around the involved areas and actors, being more inclusive to the different affected population. It points to a movement towards the use of a ‘Board model’. However, the AR authorities are still part of it, resulting in a more hybrid model. Despite the workshop style could raise concerns to define the degree of meaningful involvement, it is out of the scope of this discussion.

¹⁴⁷ Ministry of Education. *Plan de Pueblos Indígenas y Afrodescendientes (PPIA)*. (Plan for Indigenous and Afro-descendant peoples) (2019), 50

Figure 2: Members of consultative institutions in Nicaragua

	IPs representatives	State representatives	Others
National Council of Education (Board-directive)	- Indirectly: President of Education Commission from AR	Vice-President, Minister of Education, President of Commission of Education from the National Assembly	Director of National Technological Institute, President of National Council of Universities, 1 representative from private universities, 2 representatives of educators
National Council of Education (Assembly)	- Indirectly: Secretaries of Education from Regional Government	Vice-President, Minister of Education, President of Commission of Education from the National Assembly	Director of National Technological Institute, teachers trade unions, non-teachers trade unions, professional associations of journalist and social workers, 1 of civil society organization, 1 representative of Family parents, 1 of students, 1 of private schools, 1 of each student representative, 1 representative from private universities
Commissions for decentralization	- Indirectly: Regional institution responsible for education	Ministry of Education	
Consultative workshops ('Plan for Indigenous and Afro-descendant people', 2017)	- North AR: 14 Presidents of IPs Territorial Governments, - South AR: 6 Presidents of IPs Territorial Government, 6 members of the garifun, ulwa, creole & Miskitu communities	Regional delegate of Ministry of Education - North AR: 4 delegates from Regional Government, President of the Municipal Education Commission, 1 Director of Regional Government - South AR: 1 delegates from Regional Government, President of the Municipal Education Commission	- North AR: 16 teachers, 3 school principals, 1 pedagogic assistant of the AR - South AR: 18 teachers, 3 school principals, 1 pedagogic assistant of the AR, 1 representative from the Nicaraguan Institute of Culture - PCR: 18 teachers, 2 school principals & 2 subprincipals
Consultative workshops ('Plan for Indigenous and Afro-descendant people', 2019)	- North AR: 2 leaders of IPs Territorial Governments, - South AR: 4 Presidents of IPs Territorial Government - PCN: 4 members from the authorities IPs	Regional delegate of Ministry of Education, 2 municipal delegated of the Ministry - North AR: 2 delegates from Regional Government - South AR: Director of the regional secretary, Director coordinator Ministry-SEAR, 1 delegate from Regional Government, 1 regional delegate, 1 municipal delegate	- North AR: 14 teachers, 3 school principals, 2 municipal techics, 1 pedagogic assistant of the AR, 2 technic coordination SEAR, 1 vice-mayor - South AR: 7 teachers, 10 school principals, 2 pedagogic assistant of the AR - PCR: 13 teachers, 6 school principals & 2 vice-principals

Source: own elaboration

In general, Colombia shows that it has applied a consultative process in the adoption of their regulations and IPs involvement is ensure in implementation these subjects via their organizations. Those legal acts created specific organs of co-formulation of policies. In Nicaragua, although there has been development towards indigenous education and languages, it was framed around the AR. As more institutionalized system, national and regional authorities alone negotiated, disregarding direct involvement of IPs autonomous organizations. Only recently organizations are gaining prominence. This offers a more flexible engagement that can trump the limitations of the regional level. This more hybrid model provides direct participation of IPs but still including the AR authorities. If a state has this regional level in place, this combination serves more effectively for IPs' representation and it is also more respectful with their autonomy to organized themselves in their most suitable manner.

4. Conclusion

This research has focused on the relationship of participatory and cultural rights for indigenous peoples. Indigenous communities have struggled to obtain recognition at the national and international sphere, now recognized in the principle of self-determination in the UNDRIP. It acknowledges self-government and control on areas that concerns them, in coexistence with the framework of states. Consequently, autonomy and participation of IPs in state decisions that could affect them are two faces of the same coin.

However, indigenous identity and native languages faces extreme risk nowadays, spoken by minority groups and being subjected to assimilationist policies. Language and education are relevant channels for cultural transmission so it is an area where IPs must not be disregarded. My position is that language and educational regulations and policies must be developed interculturally with meaningful IPs involvement by qualified consultative process, being Free Prior Informed Consent a well-suited framework. To do so, it has been carried out a comparative analysis of the jurisdictions of Colombia and Nicaragua. Due to their different institutional arrangements, these case-studies offer different practices on how they carry consultations with their IPs.

Being aware that FPIC requires flexibility to adapt to the different situations and the diverse IPs, the consultations need to adjust to the specific ways IPs self-organized. Thus, it is relevant to recognizing, identifying the IPs groups and include all the affected groups in a way appropriate to their own organization.

As showed in Chapter 2, there is support in international and regional human rights law to adopt a consultative approach with IPs from a cultural perspective. The UNDRIP, the ILO C169 and the American Declaration on the Rights of Indigenous Peoples acknowledge the indigenous distinct culture and provide general rights to consultation in education and language. Yet, IPs rights cannot be read alone but in conjunction with civil, political, economic, social,

and cultural rights positivized in international and regional conventions, in which the value of culture and diversity sustains an intercultural approach.

The variety of references to participation shows the necessity to create a dialogue with IPs. Remarkably, FPIC qualifies their involvement in decisions that can affect them to ensure their effective participation. Firstly, its value rests in its origin, since FPIC derives from the recognition of indigenous distinctive culture, self-determination and autonomous education system and language. Secondly, because FPIC offers a stablished framework to materialize indigenous' right on participation in an equal footing than states. And practically, because FPIC serves as a platform for intercultural dialogue.

Among the different elements of the FPIC, I have focused on the representativeness of the process, meaning the involvement of IPs in legal or administrative decisions related to education and language regulations, since the agency of IPs' consent and participation presupposes forms of representations.¹⁴⁸ FPIC requires foremost the recognition of the communities to get them involved at the initial stage of carrying consultation. Different territorial arrangements under the constitutional scheme can influence the practical recognition of IPs. Remarkably, the definition in Nicaraguan constitution of the Autonomous Regions created a different standards. They strengthened the relevance of IPs within these regions and their autonomy claims, although the presence of IPs representatives in this artificial regional level is fairly weak. Simultaneously, it made IPs from outside those territories invisible, acknowledging less autonomy. An initial obstacle for any kind of consultation is the lack of recognition as IPs, which later prevents the population of exercising any right attached to them.

Moreover, my analysis of the case studies of Colombia and Nicaragua shows two models of consultations according to the involved subjects. The first version is the 'Board' style negotiations that relies in indigenous organizations, which agglutinates and channels

¹⁴⁸ Rombouts, *supra* n.21, 406

indigenous demands. These broad-reaching groups are central in consultative processes, they are characterized by their organic mobilizing creation, more in line with the indigenous self-organization and are more likely to be representative of all the IPs affected in consultations. The second approach rest on Regional institutions, the national authorities negotiates with the organs of the Autonomous Regions. The regional member only attains an indirect representation of IPs, with few members in place to participate in the processes and not necessarily indigenous belonging. Moreover, IPs are obliged to take part on the regional structures to get some representation. However, these are not clear-cut define strategies of consultation, i.e. Nicaragua recently adopted new educational programs were IPs organizations from all the areas using were directly involved. Hence, I conclude that the ‘Board’ style with organizations is a more effective representative scheme, respectful with indigenous self-determination and inclusive with the diverse IPs involved. Yet, if a state already has a regional level in place, to avoid solely regional representation IPs organization should be included; a hybrid combination of both models would be suitable.

Therefore, the obligation to consult to effectively protect IPs self-determination results from the recognition of a distinct indigenous culture. My position is that the FPIC approach has the potential to be used beyond land rights, whenever indigenous cultures are affected, as the areas discussed in this research, or extensively in all culturally significant matters for IPs. Nevertheless, this research has only focused in their representative aspect, a further analysis on other elements of FPIC will be relevant, such as the level of shared information, the timing, the degree of free input and the actual influence in the final outcome. It will protect indigenous participatory rights and help protect their distinct culture. It is not only about receiving education with some indigenous flavor, but about being present in the discussion when these decisions are being taken, being asked and contribute. It matters being part in the conversation.

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Annex 1. Practical component: Policy brief

Constructing inclusive education in partnership with communities:

Promoting participation of indigenous organizationsⁱ

Summary:

This policy brief provides with insight regarding the development of the recent educational Plan for Indigenous and Afro descendants Peoples. It aims at the development and better quality of the communities and this goal cannot be achieved in disregard of indigenous direct involvement.

Between the different strategies that the Ministry has employed, our evaluation is that the methodology for the participatory workshops must be standardized, because of its greater inclusion of indigenous organization and adequacy to ensure participation and autonomy. Our recommendations are 1) Recognizing education as cultural identity, 2) Integrating consultations in the Ministry practice, 3) Identifying Indigenous peoples, 4) Continuous assessment, shared information and dialogue

Introduction:

In the context of the development of the new **Plan for Indigenous and Afro descendants Peoples** (PPIA in Spanish), with the support of the World Bank, the aim is encouraging community development and improve the quality of education. The diversity of the Nicaraguan population results in an educational system that respects the principles of *intercultural bilingual education* for the different communities. It is aimed at all the regions: NCCAR, SCCAR and PCN.ⁱⁱ

The presence of indigenous languages in Nicaragua is a valuable cultural domain, worth of preserving. For their protection, education is an essential factor. These interconnected areas belong to the indigenous identity. Their voice in the definition of these educational program cannot be silenced. Instead, state must promote their effective participation, according to their

international obligations under the ILO Convention 169.

The World Bank itself follows a policy of involvement of indigenous population. Additionally, the United Nations Sustainable Development Goals and Agenda pledges the purpose of **“leaving no one behind”**. It points to the necessity of being aware of the different layers of the problematic. Hence, considering indigenous voices and the variety among themselves plays an important piece in developing a comprehensive education effectively.

Policy implications

In the construction of the PPIA so far, some consultations have been carried out. In 2017, 3 **participatory workshops**, with members of indigenous organizations from the Autonomous Regions, regional authorities,

and professionals of education. In its actualization in 2019, other 3 workshops were established, with further indigenous authorities. (Fig.1)

However, the **National Council of Education** remains without direct representation of indigenous population (Fig.2). It is not enough to plan some participatory events, but to ensure the indigenous voice. Hence, we highlight several challenges:

- Inconsistent approach. Only some inclusive consultations have been carried lately, and it contrast with the National Council. Future inclusion is up to the definition of the plan.
- The presence of indigenous representatives has grown, although authorities form the region PCN were only included in the last workshop.
- Its foundation is the right of indigenous populations to receive education in their mother tongue and according to their culture, administered by the Autonomous Regions. A shift of the interpretation is needed, to see education also as integrating cultural self-determination. Hence, it is not just as a right to receive

education, but to be part on their formulation.

Therefore, the second methodology is evaluated as far more inclusive for the participation of the communities alongside regional authorities and experts. Our proposition is the **standardization** of that model in all stages and areas of the definition of the educational plan.

Policy Recommendations

A successful strategy for education must include indigenous voices:

1. Recognizing education as part of the **indigenous cultural identity**.
 - Acknowledging cultural self-determination in this interpretation, by modifying the legal acts regarding indigenous population
2. **Integrate the practice of consultation** as the regular action of the Ministry, in respect of the indigenous right of Free, Prior, Informed Consent.
 - This requires involving indigenous population in the following monitoring stages and implementation of the PPIA. Modify the Ministry regulations and



Figure 1 Members of the participatory workshops

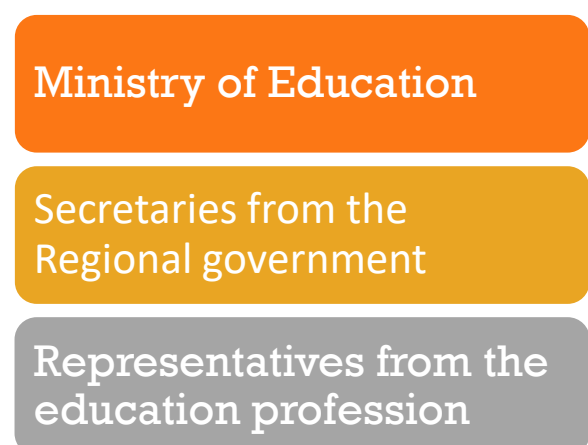


Figure 2 Members of the National Council of Education

specifying future steps foreseeing indigenous inclusion.

- In a long run, representatives of indigenous organization must be included in the National Council of Education.

3. **Identifying Indigenous Peoples.**

Determining the communities that can be affected and contacting with their indigenous authorities.

- Revising the methodology of the national Census, updating its methodology according to the principle of self-determination and providing disaggregated data.

- Improving the collaboration with the other state institutions that keep track of their indigenous population, as the Ministry of Interior and the Regional Councils

- Identifying representative actors: Public authorities must contact IP and indigenous organizations with the aim of knowing which institution IPs prefer for negotiation.

4. **Continuous assessment** of the decision, **sharing of information** with the involved representatives, including translation if needed, and **dialogue**. Consultations implies mutual communication. Employing FPIC standards for the decisions.

Resources:

International Labor Organization. *Convention 169 on Indigenous and Tribal Peoples* (1989)

United Nations Sustainable Development Group. *Leaving No One Behind: A UNSDG Operational Guide for UN Country Teams (Interim Draft)* (2019)

World Bank, The inspection panel. *Working paper Emerging lessons series No. 2. Indigenous peoples* (2016)

ⁱ Addressees: Ministry of Education in Nicaragua, Autonomous Regions Councils and other indigenous organizations.
By: Nicaraguan NGO promoting the consolidation of the autonomy recognized to communities and the engagement with the public sector in a more inclusive way, respectful with indigenous self-determination.

ⁱⁱ NCCAR: North Caribbean Coast Autonomous Region
SCCAR: South Caribbean Coast Autonomous Region
PCN: Pacific, Center and North Region