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INDIGENIZING THE PRIOR CONSULTATION: RE-THINKING THE PROTECTION OF INDIGENOUS PEOPLES

INDIGENIZANDO LA CONSULTA PREVIA: RE-PENSANDO LA PROTECCIÓN DE
LOS PUEBLOS INDÍGENAS

INDIGENIZANDO A CONSULTA PRÉVIA: RE-PENSANDO A PROTEÇÃO DOS
POVOS INDÍGENAS

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Abstract

For many years it has been discussed the necessity of protecting effectively indigenous peoples and their territories from the interventions of companies and States. Nevertheless, the legal framework established for this purpose, particularly the prior consultation as one of the most iconic mechanisms, is ineffective in practice, which justifies the necessity of re-think its purpose, elements and its application. This is due mainly to the existence of structural and ideological flaws since the inception of this instrument, especially to the capitalist ideas, through which biopower has been exercised, as an expression of “legitimate” imperialism.

Keywords

Prior consultation. Indigenous peoples. Colonialism. Protection.

Resumen

Durante años se ha discutido sobre la necesidad de proteger efectivamente a los pueblos indígenas y sus territorios de las intervenciones de empresas y los mismos Estados. Sin embargo, el marco normativo establecido actualmente para dicho propósito, particularmente, la consulta previa como uno de los mecanismos más icónicos, resulta ser poco efectivo en la práctica, lo que justifica la necesidad de re-pensar su propósito, elementos y aplicación. Esto obedece principalmente a fallas estructurales e ideológicas existentes desde la concepción misma de dicho instrumento de participación, especialmente las ideas capitalistas a través de las cuales se sigue ejerciendo el biopoder como una forma de imperialismo “legítimo”.

Palabras clave

Consulta previa. Comunidades indígenas. Colonialismo. Protección.

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Resumo

Durante anos, foi discutida a necessidade de proteger efetivamente os povos indígenas e seus territórios das intervenções das empresas e dos Estados. Entretanto, o marco normativo atualmente estabelecido para esse fim, particularmente a consulta prévia como um dos mecanismos mais icônicos, está se mostrando pouco efetivo na prática, o que justifica a necessidade de repensar seu propósito, elementos e aplicação. Isto se deve, principalmente, a falhas estruturais e ideológicas na própria concepção desse instrumento de participação, especialmente as ideias capitalistas através das quais o biopoder continua a ser exercido como uma forma de imperialismo "legítimo".

Palavras-chave

Consulta prévia. Povos indígenas. Colonialismo. Proteção.

1. INTRODUCTION

With the end of the Cold War, the concept of development emerged as the main goal of humanity. This was the era of decolonization, influenced by the strengthening of the state and the need for development through international law. This combination of decolonization and development resulted in the creation of international institutions that ended up having a considerable impact on the Global South. Convention 169 of the International Labor Organization (hereinafter ILO) was not exempt from the influence of development on international law.

As a result of this context, some instruments and mechanisms of international law have been built over an idea of development which was traced by the predominant economic model, capitalism, which has taken root in the ideals of governance of the “third world” countries. One of those mechanisms is the prior consultation, which was conceived after the recognition of indigenous peoples as titleholders of human rights. This premise itself is controversial in the understanding that ethnic peoples need recognition, when their existence goes back even before the very existence of states.

Following that idea, it is important to wonder about the effectiveness and appropriateness of the prior consultation as the maximum instrument of participation of indigenous and tribal peoples among western societies. For a long time, this mechanism has been questioned, as the consciousness about colonialism and neocolonialism as a strategy to bend entire societies in favor of the interests of capitalism, has been increasing in the last decades. Hence, is the purpose of this contribution to demonstrate that the prior consultation, despite having the best intention as its purpose, leaves aside a fundamental aspect, the perspective and real necessities of the title holders of that right, which are the indigenous peoples.

Consequently, this article will analyze how the prior consultation is an instrument created from a western outlook to “protect” indigenous people’s rights from the same interventions of capitalism in their territories. To reach this conclusion, it will be analyzed in first place, the origin and implications of the creation of developmental states through international law. Having that context clear, the next part attempt to demonstrate how the development doctrine influenced the negotiations of Convention 169 and its current obligations. Then, it will develop how is the prior consultation

structured and applied, and finally, it will demonstrate its structural failures in the practice, through the analysis of some particular cases of its application.

2. FROM A PATTERN OF POWER TO BIOPOWER

2.1 THE LANGUAGE OF DEVELOPMENT

A developmental state is one that guide its administrative, legal and democratic branches towards the scope of development (Eslava, Obregón and Urueña, 2016, 36). But what is it that develops? It is not an entire state that enjoys the consequences of development, it is "a pattern of power or, in other terms, a society" (Quijano, 2000, 73-74), specifically a capitalist society which until today has endured following the path of development (Wallerstein, 1996, 197-198). Therefore, capitalism, understood as "a pattern of domination and exploitation that is articulated around the capital" (Quijano, 2000, 74), is the cause and consequence of the need for development, shaping institutions and worldviews of the Global South.

After the end of World War II, the United States became the new center of the world order. It decided to use development as an essential element in coordinating international relations. Through the Mandates and Trusteeship systems, development was presented as a tool to end colonialism. As President Harry Truman established, only through development "the benefits of scientific advances and industrial progress could be available for the improvement and growth of underdeveloped areas" (1949). In that sense, development acquired a favorable connotation, seeking economic growth for all nations and an expansion of scientific and industrial advances. It became the key element on the formal decolonization processes in Africa, Asia and the Pacific. Meanwhile, the Global South became convinced that its economic and social underdevelopment was its responsibility, hence access to its resources would now be accepted and allowed to achieve development.

Development also permeated international relations, influencing international organizations such as the International Monetary Fund (hereinafter IMF) and the World Bank (hereinafter The Bank). From 1950 onwards, both institutions focused on the need for development in "Third World" countries. After the failure of the World Bank in its mission to support the reconstruction of war-torn countries in Europe, the Bank found a new purpose in providing economic assistance for the development of the underdeveloped countries (Alacevich, 2009, 2-3). In fact, the Bank began to use the then-novel concept of Gross Domestic Product (GDP) to "measure the levels of economic growth and the development capacity of states" (Eslava, 2019, 42).

In addition, starting in the 1990s, the Bank began to make its loans conditional on the adoption of laws or regulations. For this organization, only after the establishment of a rule of law would it be possible to promote development, since it allowed regulatory predictability and legal economic certainty (Eslava, Obregón, Urueña, 2016, 44). Thus, The Bank became a transforming organization

worldwide, promoting a new kind of structure of the states under the aim of development. On the other hand, the IMF was created in 1944 with the purpose of regulating the international monetary and financial system and to helping states parties to address their balance of payments imbalances, seeking international monetary stability. Nevertheless, this organization has been characterized for defending a particular economic policy, which has come to be known as neoliberal in nature (Eslava, Obregón, Urueña, 2016, 70-74).

After examples such as the loans for structural adjustment programs, which conditioned the granting of loans to the reform of economic policies in the states of the South, hand in hand with and similar to what was done by The Bank, at the beginning of the 1990s, the IMF was particularly involved in the Washington Consensus. This was a neoliberal economic program of free markets and unfettered competition, designed for countries that were just developing. If states did not comply with a series of determined policies, they would not receive credits and financial aid from the IMF. Among other policies 5 must be highlighted: i) the opening of foreign direct investment; ii) privatization of public enterprises; iii) liberalization of interest rates; iv) fiscal discipline; v) strengthening of property rights (Morandé, 2016, 3). The result was the strengthening of private property and the distancing of the State from the management of the economy.

The result of the expansion of this kind of economic policies from North to South has been widely documented and the consequences are not encouraging for those who claim the demise of imperialism. As mentioned by Girón:

In reality, the reforms that were the hope for governments, at least in Latin America, after the "lost decade", were implemented without taking into account the specificities of each country. Not only did they not favor the strengthening of national entrepreneurs in the face of foreign competition that invaded the industrial and financial sector, but they even weakened public institutions. For example, the importance of development banking in strategic infrastructure development sectors was blurred in countries such as Mexico (2008, 56).

By virtue of development, the Global North was able to empower its vision, influencing the distribution of resources and the construction and management of institutions of apparently independent states. Perhaps the international community has established the principle of sovereign equality among states, understood as the right of states to "freely choose and develop their political, social, economic and cultural systems" (United Nations General Assembly, Resolution 2625), it seems to apply only to countries that follow the model of development.

In consequence, at first, it would be possible to argue that there is no violation of the principle of sovereignty of the states, under the understanding that the countries of the South agreed to incorporate these policies voluntarily. However, analyzing the context in which states decided to modify economic policies or ratify bilateral investment treaties, the answer is different. Although these countries accepted and there was no direct imposition over them, international policies, indexes and

parameters, such as GDP, GINI, the Doing Business index, among others, necessarily end up bringing the states round to the loss of the free selection of their social and economic policies, in order to be in accordance with a global order and defined to benefit a classic pattern of power or a specific society, since what has been developed by following the global guidelines has not been a complete state, but a specific society within it.

2.2 THE IMPERIALISM AND THE RENAISSANCE OF CAPITALISM

The development doctrine, silently and through its policies of strengthening private property, strengthening private economies and opening to foreign investment, led to this naturalization of exploitation¹, where it is understood that the production and distribution of resources are characteristics of human nature. This support to the culture of exploitation reinforced the domination² of the Global North over the South, a situation that can be evidenced in some aspects, such as the modification of their institutions and policies. At last, both, domination and exploitation, as explained at the beginning, are characteristics of capitalism.

Capitalist society was - and still is - the one that benefits most from the expansion of the concept of development. To ratify this premise, the case of import substitution industrialization strategies illustrates how this economic strategy sought the development of states by supporting young industries (Eslava, 2019, 44). Hence, the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) proposed the application of tariffs, import quotas, exchange rate controls, preferential measures for the importation of capital goods and subsidized loans. In the end, this strategy ended up benefiting capitalist society. In Eslava's words:

(...) import substitution policies, due to their dependence on capitalist interests, ended up subsidizing the profits accumulated jointly by an international bourgeoisie and politically well-connected local elites. In this model, the losers, once again, were the local consumers, who in the medium and long term ended up paying much higher prices for "subsidized" products (2019, 52).

In that sense, the doctrine of development acted as a mechanism through which the reconfiguration of the power of capitalism took place. This time it was not installed in the world with colonialism, but with a discourse based on science, technology and development, silently instrumentalizing the states to impose its rules over them. Hence, it is said that imperialism is the highest phase of capitalism. For Lenin, imperialism is characterized by the concentration of production that leads to monopolies; the union of the industry with banking that leads to creating financial capital; and the export of capital that leads to the formation of international monopolistic unions (Vela, 2019,

1 Exploitation, understand as obtaining one's own benefit from the work of others without equivalent retribution or sharing with them (Quijano, n.d., 8-9).

2 Domination is defined as "the control that some exercise over the behavior of others" (Quijano, n.d., 8-9)

381 - 382). As is evident, those who were encharged of these unions ended up instrumentalizing the states.

In the words of David Harvey:

[i]n this decade it was the large corporations (...) that dominated national markets and began to exercise excessive monopoly power. It was these corporations, such as United Friot in Central America or ITT in Chile, that began to exercise international monopoly power and to be behind coups d'état and military regimes, as for example in Chile (2014, 135 - 136)

The large companies, favored by the developmental environment, ended up exploiting the states and, by controlling their behavior, dominating them. In that sense, there is an informal or silent exercise of imperialism, as the maximum expression of capitalism. Through the language of development, the inequalities between the North and the Global South have been reinforced. This indirect affectation, as opposed to the direct imposition of colonialism, is informal imperialism or imperialism in the broad sense. Contrary to the direct violation of the independence and sovereignty of states, through broad imperialism instructions are imposed and sovereignty is violated with indirect mechanisms that seem to have a good purpose, but in the end favor the usual society.

2.3 BIOPOWER AS A RESULT

This imperialist exercise was not limited to controlling social, economic or legal policies, since it was consolidated as a civilizing process, through which it sought to educate and modernize the Third World. Imperialism was - and is - an exercise of power through which certain paradigms are imposed on different populations. Among these paradigms there is certainly development, as well as science and technology, but also history was used as an instrument to minimize the memory of the periphery, or how it is called nowadays, the minorities. This is how knowledge became dominated by the Global North, centralizing it and using it in its favor. Western scientific rationality became the dominant paradigm, a totalitarian model disguised of democracy, that ended up annulling all forms of knowledge that did not follow its epistemological principles or its methodological rules (Santos, 2009, 21 - 22).

The same inhabitants of the South ended up replicating these paradigms, believing in development, scientific rationality, the importance of private property, among others. Consequently, the well-known pattern of power ended up taking over even the body and life, defining even what should live and what should die. As Foucault explains, the creation of hierarchies between races, defining some as inferior to others, or some as good and others not, is an expression of power. It is the establishment of a "censorship that will be of a biological type within a domain that is postulated, precisely, as a biological domain" (Foucault, 2000, 230 - 231). Thus, this power, being politically and economically entitled to define what should live and what should die, became biopower.

Biopower is not limited to human life, it is also applied to the environment (Cayón, 2021, 75 – 77). In the pursuit of development and economic prosperity of capitalist society, companies,

production and distribution were placed above the conservation of the territory and nature in general. Scientific and development rationality, as the basis of biopower, led to the ignorance of the existence of spirits in every tree, every river and every mountain of the indigenous territories. Hence, the respect for the environment and natural resources was replaced by the culture of exploitation, which explains why "a large number of transnational corporations settled in indigenous territories to carry out extractive activities" (Yrigoyen, 2011, 4).

America has been one of the "third world" regions that are more attractive for transnational companies, as it is recognized as pluricultural and biodiverse, which means, rich in natural resources and multiple cultural groups. All of them have unique ways of life and worldviews, but one point they have in common is that close relationship with the earth and their territory. Unlike the western civilizations, indigenous and tribal peoples establish a deep connection with the place they live, beyond a relation of property, it is about a physical, cultural and spiritual vitality that can be expressed in different ways (IACHR, 2009). In that sense, their territories represent a fundamental element to preserve their culture from one generation to other.

However, by virtue of development, now transformed into biopower, the territory, like people, became hierarchical, defining an efficient territory and an inefficient one. The former is that which generates gross profit or GDP by being suitable for extracting resources, while the latter is empty and useless. Accordingly, development also triggered extractivism and exploitation, as natural resources were needed for production, then, those countries rich in natural resources have been the center of extraction and production of raw materials, while the others assumed the manufacturing processes. This leaves the formers with a very low national benefit while the latter take advantage of these resources (Acosta, 2012).

The extractivist thinking of the American states is hegemonic because most of its economies depend on these activities. For instance, Ecuador and Colombia have set the extractivism as one of its main incomes, laying on it an important part of its economy. This situation illustrates "the paradox of the abundance", which explains the situation of most of the American countries that are rich in natural resources, but with poor economies (Acosta, 2012). In the same direction, the Interamerican Development Bank (IDB) has defended what its reports named as a "geographical determinism of development", in which the richest countries in natural resources and closer to the Equator are condemned to be more backward and poorer (Gudynas, 2009).

Thus, the idea of development ended up reviving the domination experienced with formal colonialism. This time, imperialism became so strong that it even managed to define a line between what lives and what dies. The need to obtain natural resources for production and distribution led to the destruction of entire ecosystems. This destruction benefited capitalist society, but it ended up affecting mainly the environment itself and, by connection, it impacted deeply the territory, identity and wellness of ethnic communities. The reason behind those damages relies on the meaning that

indigenous peoples have at the eyes of capitalist societies, they are seen as underdeveloped, which means they are not an obstacle to avoid development. From the West, societies used and keep using biopower as a tool to achieve growth and economic progress.

3. A(NOTHER) DEVELOPMENTAL CONVENTION

3.1 FROM THE CONVENTION NO. 107 TO THE NO. 169

In 1957, the International Labour Organization (ILO) developed the Indigenous and Tribal Populations Convention (No. 107). By then, this was the only international instrument relating to indigenous peoples. It sought to improve their living and working conditions. However, with the emergence of international indigenous movements and the United Nations' focus on environmental protection, it was argued that Convention 107 was incorrect in its approach and that, in fact, it destroyed the aspirations of the emerging indigenous movement (Swepston, 2015, 16).

The Convention No. 107 of 1957, established the obligation of the States parties to develop “coordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries” (ILO, Convention 107). Clearly, the Convention was based on the idea that indigenous peoples were temporary societies that would disappear promptly (Santamaría, 2016). In response to these criticisms, a Meeting of Experts was convened in 1986 to consider the revision of the Convention. This was the first time that the emerging indigenous movements appeared before the ILO, as the usual tripartite participants of the Organization (government, employer and worker representatives) were replaced by indigenous, employer and government members, plus some NGO representatives (Swepston, 2015, 16). At last, the Meeting of Experts approved the revision in order to reduce the integrationist approach of the Convention, thus, once the revision was on the agenda, delegates who had never been present before at the ILO, met in 1988 and Convention No. 169 was approved in 1989.

In its preamble, the ILO Covenant 169 of the rights of indigenous and tribal peoples (hereinafter, the Covenant) establishes the wishes of indigenous communities of assuming control of their institutions, its economic development and of maintaining their identities, languages and their worldview (Figuera & Ortiz, 2019). Nevertheless, since the beginning of its development, this Convention determines the aims of the international community towards indigenous peoples, without consulting their perspectives, necessities, and real aspirations. As will be explained, an imperial perspective prevailed in the Convention.

From this point on, it will be demonstrated how, in spite of seeking to reduce this integrationist approach, which ended up extinguishing the different worldviews and, consequently, the communities, the Convention was tainted by the developmental context. Through the analysis, it will become evident that this instrument is a tool that, at its core, serves and favors capitalism

development ideas, even if in the background it had a good intention. Hence, it will be argued that the problems in the application of the international mechanism of prior consultation arise due to its developmental nature.

The Convention is an agreement between companies, governments and indigenous peoples. Such an arrangement, during the rise of informal imperialism under development, would undoubtedly be problematic. For instance, one of the main problems in the development of the Convention was related to the terms "consultation" and "participation". These expressions resulted from the dispute to reduce the impact of activities that might interfere with the rights of indigenous peoples. Consequently, the communities proposed that states and companies should grant them "consent" and "control" over such decisions, but neither of them agreed, instead they chose to grant participation and consultation. This decision is problematic, but it is more complicated when there is no specific definition or determined scope of those concepts.

The application of participation and consultation are found in Articles 6 and 7 of the Convention. Article 6 states that "governments shall consult the peoples concerned, through appropriate procedures and in particular through their representative institutions". However, what are the appropriate procedures? The answer is that those may be the procedures that the company or the government considers, but no specific procedures or guidelines are established. The impact of this omission will be reflected in the problems of prior consultation. Regarding participation, the same article explains that "establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programs which concern them" (ILO, Convention 1989, Article 6). It is therefore required that the means for indigenous peoples to participate be guaranteed, but what is meant by participation? The answer was left open to governments' understanding, to determine the minimum and maximum levels of participation.

Article 7 of the Convention also fails in explaining the scope of the agreements, as it mentions that indigenous peoples have the right to "participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly" (ILO, Convention 169, Article 7). All this shows that the interests of indigenous peoples were left aside, and the positions of governments and companies prevailed during the drafting of the Convention. By seeking participation and consultation and not the consent and control of indigenous peoples, the possibility for them to veto development policies is lost. Therefore, the decision over their ancestral territories which, in theory, were recognized as theirs by the same Convention, ended up being of the power of those who intervene them.

Thus, companies and governments started from the premise that development cannot find limits in the views of indigenous communities, establishing a hierarchy between the perspectives of the two worlds. The reflection of the developmental context is evident in the debate, seeking to

preserve development by preventing indigenous peoples from having a veto over policies that affect them. In Schulting's words: "Many Indigenous representatives feel that their lack of veto power allows governments too much freedom to do as they please" (1997, 11). In the end, as it has been explained, the capitalist society ends up winning even during the drafting of a Convention to protect communities. By imposing participation and consultation over control and consent, the capitalist society exercised its biopower, putting development above indigenous territory and, therefore, the environment.

3.2 PEOPLES AND TERRITORY CONTROVERSIAL DEFINITIONS

The problems with the drafting of the Convention did not end there. Another of the most heated debates was the inclusion of the term "peoples". The representatives of the indigenous peoples sought to have them referred to as "peoples", since they are organized societies with their own distinct identity. However, governments opposed the term on the grounds that the label "peoples" implied their right to self-determination, which would allow them to define their political status and freely pursue their economic, social and cultural development in accordance with the International Covenant on Civil and Political Rights (Schulting, 1997, 11).

The result of this debate was a new victory for governments and corporations. Article 1 of the Convention states that the "use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law" (ILO, Convention 169). Thus, indigenous peoples would not be entitled to exercise the rights derived from the constitution as "peoples" in international law, which would avoid limiting imperialist policies on their territory.

On the other hand, the indigenous peoples argued that the term "territories" should be used to cover all lands and resources belonging to indigenous peoples. This, as explained above, would seek to protect the indigenous peoples' different conception of territory, where territory is not limited to a place, but to a spiritual connection or a representation of their ancestors or gods. However, in Articles 14 and 15 of the Convention, the position of the governments was materialized. Article 14 mentions that "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized" (ILO, Convention 169, article 14), while Article 15 states that "The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources" (ILO, Convention 169, Article 5).

Article 14 recognizes the ownership of indigenous peoples over their territories, but Article 15 states that indigenous peoples have the right to the use, management and conservation of these resources. The contradiction between the two is evident, while the first recognizes the ownership of the indigenous peoples, the other grants them the right to participate in the use, management and

conservation of their resources. This shows that governments continue to have the last word regarding natural resources within indigenous territories (Schulting, 1997, 11).

Both, the adopted definition of peoples and the definition of indigenous territory and resources demonstrate how, through companies and governments, the development context was able to impose itself over indigenous visions. Imperialist actors succeeded in limiting the juridical defense of indigenous peoples against their economic and social policies by preventing them from being considered as "peoples". Moreover, by granting them the right to participate in the use, management and conservation of their resources, their ownership of the territory is ignored, allowing governments to have the last word on the management of one of the main objectives of the development doctrine: natural resources.

Clearly, the Convention was not exempt from the influences of development. As expressed by indigenous representatives:

The Convention (1) unnecessarily limited the rights of indigenous communities as peoples under international law; (2) denied indigenous consent by only requiring consultation of indigenous communities rather than their prior agreement to measures affecting them; (3) recognized indigenous customs and institutions only to the extent they were not incompatible with national law; (4) included an unacceptably ambiguous definition of the term 'lands' that could be used to curtail the territorial rights of indigenous communities; (5) only recognized land rights based on present, and not past, occupation; and (6) did not sufficiently protect the ancestral lands of indigenous communities from natural resource exploitation (Minority Rights Group International, 2019).

The negotiations of the Convention No. 169 themselves reflect a pro-development context, not a pro-indigenous context. This international instrument, while seeking to limit the consequences of the development context, avoid the integrationist approach of Convention 107 and protect communities, ends up reiterating the supremacy of development. Even when the purpose of this instrument was to commit all the states to respect the aspirations of its indigenous peoples regarding the decisions that might affect them (Figuera & Ortiz, 2019), the practice shows that this was a mere good intention of the international community that was, and is being limited by the interests of a capitalist society. The scope of biopower becomes evident as another developmental Convention was created.

4. THE PRIOR CONSULTATION AS AN APPARENT MECHANISM OF PROTECTION OF INDIGENOUS PEOPLES

The prior consultation emerges from the ILO Conventions No. 107 and No. 169. It emerged as a method for limiting the impact of development on the indigenous peoples. However, after 30 years of the Convention No. 169, the limitations of this mechanism are evident. In this chapter, it will be explained what the prior consultation is, its actual application and its discontents.

Despite being one of the main tools for the protection of the rights of indigenous peoples, the prior consultation represents, in the words of Santamaría, “a normative construction that does not agree with deliberative democracy”, which represents its main contribution, since it supposes the expression of individuals interests by the participants, as well as the possibility that one of the parties exercises some kind of power over the other to influence the outcome (Santamaría, 2016).

The ILO Convention No. 107 was the starting point to recognize the importance of the relation between the indigenous communities and the territory in which they develop their ways of life and manifest their worldview. Likewise, the IACHR in different judgments has accepted that “*there is a community tradition over a form of collective land ownership, as the property is not focused on an individual, but in the group and its community*”.³ It also has set that the original title of the indigenous peoples is the historical occupation of their territories and their spiritual, cultural and material relation with it what makes the communities worthy of this property (Figuera & Ortiz, 2019).

For these reasons, the ILO Convention set the most important parameter of participation of indigenous peoples, under the light of international law principles, such as, good faith. It also established this mechanism as mandatory in the implementation of exploitation programs that might affect the natural resources of their territory (art. 15), in cases of land alienation or transmission (art. 17), among other matters. In that sense, under this Convention, the prior consultation should comply with six main characteristics:

- i) It is a right of the ethnic groups and an obligation for the States and third parties.
- ii) It must apply when existing a threat against the ethnic community.
- iii) It should be done with the presence of the traditional authorities of the community.
- iv) It should be done under the good faith principle.
- v) It should be done in a proper way.
- vi) With the aim of achieving an agreement or the consent of the affected peoples (Santamaría, 2016).

Following this mandate, other instruments developed the prior consultation in a specific way, for instance, the UN Declaration of Indigenous Peoples, approved in 2007, which complement the VI requirement, establishing that the consent must be free and informed (art. 19) especially in cases of displacement of the ethnic communities or in the development of exploitation of natural resources. Otherwise, the states must establish effective mechanisms of remediation (art. 11.2).

In the regional scope, the Commission established the Office of the Rapporteur of the Rights of Indigenous Peoples in 1990, in order to focus special attention in those matters in America. Since that date, it has published different thematic reports regarding Indigenous Peoples situations under

3 See: IACHR. Case Mayagna Awas Tigni vs. Nicaragua. Judgement of August 31st of 2001; Case Saramaka vs. Suriname. Judgement of November 28th of 2007.

the light of the Interamerican criteria, and the recent American Declaration on the Rights of Indigenous Peoples (2016). This instrument develops the prior consultation in its article 24.4, but it has been the Interamerican Court of Human Rights (IACHR) the one that has established how should be developed the dialogue for the prior consultation. The IACHR has set in a clear way that this must be always i) previous, which means, in the planning stage;⁴ ii) it must be done in good faith, with the aim of achieving an agreement and not just as a requirement; iii) in a suitable and accessible way through proper and representative procedures and institutions; and iv) it must be informed, which means that the indigenous peoples must be aware of the measures to be adopted and the consequences (Santamaría, 2016).

Despite of all these efforts to protect the rights of indigenous peoples, since its inception, the prior consultation, seen as one of the main successes of international law for the protection of the ethnic groups, also constitutes an important issue that raises discussions regarding its effectiveness in achieving its objective. Perhaps its main purpose is to guarantee active participation of indigenous and tribal peoples in public decisions that may affect them (Figuera & Ortiz, 2019), this mechanism is the result of years of trial and failure of its application that, at last, reaffirms the need of a change of perspective, especially on behalf of the states and companies, who see it as an obstacle for the economic development of the countries and business (Santamaría, 2016).

For one sector, the main problem is in the realization of the requirements established since the ILO Convention, as its mandatory character becomes relative in its application. For instance, the discussions around the necessity of prior, informed and free consent suggest that besides the consult, it is needed only in scenarios of large-scale investment projects, that represents a deep impact in the life of ethnic groups.⁵ In the case *Saramaka vs. Suriname* the IACHR determined that the purpose and importance of the consent in the prior consultation for large-scale projects is its value for the subsistence of the ethnic group (p. 206).

On the other side, the main problem on the application of the prior consultation is that for the companies and different business sectors, this instrument has turned into a simple checklist that should be completed to proceed with the interventions on the community's territory. Even when the IACHR has emphasized into the importance of the dialogue and communication between the interest actors, through processes that should be adjusted to the culture of the ethnic peoples (Figuera & Ortiz, 2019), the practice shows that the prior consultation is a mechanism that was developed by the Western society, imposing the criteria that, since its perspective, was the best to protect different millennial cultural identities and rights of indigenous and tribal peoples.

4 See: IACHR. Case Pueblo Indígena Kichwa de Sarayaku vs. Ecuador. Judgement of June 27th of 2012.

5 This has been understood by the IACHR, following the UN Special Rapporteur on the situation of human rights and fundamental freedoms of the indigenous peoples and the UN Committee in the Elimination of all forms of Racial Discrimination.

In fact, the prior consultation process is seen as an obstacle for the economic development of projects and for investments for two main reasons. The first problem relies in the cost of carrying out this process, which may be assumed by the company or by the State, and that could increase depending on the particularities of each case (the necessity of experts, compensations, among others). The second is the length of the prior consultation, which has a direct impact in the first consideration, and depends on the capability of the parties to arrive to common and equitable solutions.

Nevertheless, by all the structural flaws described above, these solutions and “common agreements” usually are not as fair and equitable as should be. This can be explained again, since the perspective of “development” or imposition of instruments that force indigenous peoples to maintain, what Camargo calls an ambiguous relationship with “liberal legality” (Sierra-Camargo, 2017). Hence, those communities end up using western institutions and mechanisms, as prior consultation, to defend their rights, especially their territories, and, paradoxically, they are exposed to the implicit limitations introduced in these instruments since its inception, by the capitalism exercising biopower.

In the same way, Merino affirms that *“the struggle of indigenous peoples for their self-determination and their social emancipation through the appropriation of the liberal legality and beyond, reveals the dispute over the logic of liberal legality inclusion or exclusion”* (Merino, 2015). At this point, there are new and different economic models being developed by academics, politicians, scientists, among others, for instance, bioeconomics or the Third Way Economy (Mohammadian, 2005), which promote an inclusive economic development, in which the leading role of knowledge belong to ethnic peoples, as experts in the harmonious coexistence with their territories and natural resources, in a relationship based on respect and balance.

Nevertheless, the prior consultation seems to be an institution called to remain between us – as mentioned at the beginning – it represents one of the most important conquest for the “protection” of indigenous and tribal peoples. Hence, it is important to wonder if through this mechanism is possible to advance in an effective decolonization, or if, on the contrary, it is necessary to re-think the prior consultation, deconstructing the idea of persuading through liberal postulates (Sierra-Camargo, 2017). A starting point for this purpose of re-think this institution, is to accept that its application as it is known implies an ambiguous agreement under the speech of global governance. This ends up perpetrating colonialist ideas of capitalist domain over natural resources, territories and peoples.

Consequently, these practical problematics of the prior consultation are the result of its developmental nature. As was explained, Convention 169, regardless of its objectives, was influenced and decided by businesses and governments, leaving the indigenous perspectives behind particularly in politics that affect them. Instead of consent and control, participation and consultation were installed, maintaining the hierarchy of imperialism. In that way, this is a mechanism that actually does not protect indigenous people’s rights, and what is more, under the idea of multiculturalism, it denies the violence of the colonialism “recognizing” these peoples as subjects of law, as long as, they comply

certain imposed conditions that end up favoring the interests of states and companies (Lematitre-Ripoll, 2009).

5. INDIGENIZING THE PRIOR CONSULTATION: THE LIMITS OF BIOPOWER

5.1 BIOPOWER THROUGH PRIOR CONSULTATION: THE CASE OF THE JATENI DTONA

As mentioned, prior consultation arises from the ILO Conventions. Its purpose is to allow the exercise of the right to consultation and participation of indigenous peoples on policies that affect them. Consultation thus acts as a kind of bridge between indigenous perspectives and the need for development on the part of capitalist society. However, as is evident, rather than a bridge, the consultation has been a closed road for the indigenous. Hereinafter, the reasons that support this hypothesis will be developed and then, this article attempts to present a better structure for prior consultation.

As explained in the second chapter, the inclusion of the terms participation and consultation came about thanks to the approach of governments and companies in the negotiations of Convention No. 169. In consequence, the ambiguity of the concepts of participation and consultation has led to their misapplication. In fact, the Government of Ecuador presented an amendment to add a paragraph to Article 2 with the intention of making it more specific, facilitating the consultative process and making it clear who was to be consulted under the terms of Article 6. The State considered that the addition of administrative detail would endanger the future of the text" (Swepston, 2015 182). Contrary to this position, it is precisely the ambiguity of the text that is endangering the future of indigenous peoples.

The procedure of participation in processes such as the one carried with the Jateni Dtona Community, in Colombia, demonstrates a process far from the dynamics and reality of indigenous peoples. This community was forced to use prior consultation due to the construction of a road, located less than 20 meters from their Maloca. The community was not consulted initially because it was not registered with the Ministry of the Interior. Since they were not registered, the entities in charge of the road construction did not take them into account and proceeded with the construction. There is no responsibility on the part of the entities, since their obligation is to consult with the communities registered by the Ministry. Thus, in the process of construction of the highway, some members of the community were forced to travel to Bogota to, ironically, register their existence (Corte Constitucional de Colombia, Sentencia T-541 de 2019).

The problem in this case is not with the defendant entities, nor with the judges, nor with the community. The problem is the structure of the prior consultation, and what is more, this case allows

to reach an even more alarming conclusion, which is the need for recognition of indigenous peoples vis-à-vis the State, when they are peoples, whose tradition has existed for millennia. If there was a true bridge or midpoint between both worlds, would it really be necessary to travel to Bogotá to register as an indigenous community with the Ministry of the Interior? Does the State or the companies enter the Maloca, seek to hear the stories of the communities or at least, have a sincere dialogue with its members?

Furthermore, the procedure of participation and consultation in this case ignored a central element: the community communicates through conversation, orally, not in writing. Western law requires writing skills and also requires compliance with terms. Should the indigenous people then learn to write, study law and reconcile with their ancestors immediately? The apparent solution when there is an impact on their territory is to seek legal advice, some entity or collective to handle the process. This also demonstrates the immense limitations of prior consultation. The indigenous people need someone to do the work for them or someone to teach them how to defend themselves and, as if that were not enough, to comply with a time frame determined by the other world in order to comply with western legal requirements such as immediacy.

This explains the problems of the ambiguity of the elements of participation and consultation. These concepts were left at the expense of the Western vision, resulting in procedures with requirements that do not take into account the perspectives of the indigenous communities. Prior consultation has acted according to the interests with which it arose: the prevalence of development over the vision of the communities and their territories. Prior consultation is, in effect, a tool for the diffusion and exercise of the biopower of capitalist society. Is it an indigenous right or a right of the Western civilization to legitimize its power?

5.2 AN INDIGENOUS PRIOR CONSULTATION

Certainly, with prior consultation the societies have fallen into the condition widely denounced by Antony Anghie (2012) and Anne Arford (2016). Both explain that, as the American internationalist James Brown Scott wrote, Francisco de Vitoria:

“There were peoples in an imperfect state of civilization; but they were human beings, and human beings, in his way of thinking, should not be subject to exploitation but should be educated - if they were not already - to enjoy the rights of all human beings” (Scott, n.d., 287).

Scott took it upon himself to collect Vitoria's thoughts in order to publish and expand them in the United States in the middle of the twentieth century. By comparing the fundamentals of the Berlin Conference, the mandates and institutions of Bretton Woods and the invasion of Iraq, Anghie found that they were the same as those Vitoria had expressed: free trade, liberalized economies and protection of fundamental rights.

In that sense, Vitoria's thinking is still with us. The instruction is for communities to accommodate to prior consultation, as according to the West, it is a fundamental right that belongs to them. By virtue of that vision, governments and societies have contributed to the extinction of customs, forcing the communities to approach Western law, but distancing them from their own law. As in Rome, communities have their own normative systems, but western societies decided to impose theirs as the "universal" one. In the end, with roads, judgements, guidelines, damages, calls and money, prior consultation ends up recolonizing the indigenous peoples. Will it be possible to listen to indigenous norms and jurisprudence in order to, together with ours, create a truly intermediate consultation?

For the prior consultation to be a true bridge between worlds, it is necessary to listen to the position and necessities of the indigenous people on the decisive points. For this, it is necessary to reduce the influence of capitalist society on international law and the protection of communities. The countries of the Global South must be aware of the negative impacts that the doctrine of development has had on their territories and their economy. Since its dissemination through international organizations, development has not reduced the inequality between North and South, but has contributed to the deterioration of the natural resources of the latter and to the satisfaction of the interests of the capitalist society of the former. The countries of the South must limit the impact of this doctrine and a restructuring of the prior consultation is one of the ways to find that aim.

Such restructuring begins by listening to indigenous communities and taking their knowledge and perspectives seriously. As Ilich Bacca explains:

It is not a matter of representing indigenous knowledge as it appears in particular cosmologies, but as an exercise in which international legal ethnographers allow themselves to be seduced by the reflections of indigenous jurists. I understand this ethnographic act of seduction as the possibility of actively interacting with indigenous concepts, words, and cosmologies to transform the conceptual matrix of state-centric laws and indigenous international standards (Ilich Bacca, 2019, 144).

By taking their knowledge seriously, it is possible to reform the conception of territory, taking into account what it means to them. It is also possible to recognize the importance of guaranteeing them the consent and control over the policies that could affect them, instead of participation and consultation that, not being well defined, end up affecting them more than it protects them.

The ignorance of indigenous knowledge arises from the hegemony of scientific rationality, where the only way to acquire knowledge is through reason and experience. This scientific rationality became a totalitarian model, closing the door to different forms of knowledge. However, as Boaventura de Sousa Santos states, rationality promotes a "disenchanted and sad knowledge that transforms nature into an automaton" (Santos, 2009, 21).

By turning prior consultation into a process in which the communities have a veto over decisions, a true equality between the two ways of seeing the world is achieved. Through this guarantee it would be possible to limit the exercise of biopower, preventing the capitalist society from using the consultation as a mere check-list and proceeding with its objectives. Additionally, it is important to clarify that such a veto must be applied after a dialogue between both worlds. There must be a communication between the community and the issues of the policy that will affect its territory. Such communication cannot be subordinated to the inclusion of a certain community in a national registry, but to the community's manifestation. In addition, it must take into account indigenous perspectives, avoiding generalizations and consulting the characteristics of decision-making in each community.

Once the particularities of the community in question are identified, the dialogue will proceed. This should also be exercised in good faith, but should respect the times and customs of the community. Once the proposals from both sides have been heard, an attempt will be made to achieve a balance between the two worlds by means of the controlled equivocation (Viveiros de Castro, 2004). Through this tool, both worlds will be able to communicate and understand what is really at stake. Once the dialogue has taken place, if the community is not satisfied with the proposal or the alternatives, it will be able to exercise its right to veto, preventing the biopower behind the development project affecting its territory from manifesting itself.

In that sense, the recognition of the importance of indigenous knowledge, a dialogue through controlled equivocation and a right to veto make prior consultation a truly indigenous right. Capitalist society would find a limit to its biopower over the territory through this consultation, which would turn it into a true defense of the communities and the Global South.

6. CONCLUSIONS

The inception of the Convention No. 169 of the ILO was preceded by a large number of discussions around the recognition of indigenous peoples as titleholders of human rights. This debate was permeated by capitalist ideologies, especially by the concept of development, understood from an economic growth perspective. It was this speech of progress, imposed by the global North to the South, the same that ended up tracing the destiny of “developing” countries, through the paradox of the abundance.

Under this influence, the Convention set some rights of indigenous and tribal peoples, among others, the right to be consulted of any decision that could affect them or their territories. Nevertheless, the term “consult” is implicitly pointing out the concessions that the western society imposed on indigenous peoples, as the replacement of the terms “control” and “consent” for “consultation” and “participation”, which ended up denying the property recognized over the

territories to indigenous communities in the article 14 of the Convention. Instead, this disposition reaffirms the domain of capitalist ideas, illustrating an expression of imperialism over these peoples.

Hence, even when the purpose of the prior consultation is to commit all the states to respect the aspirations of its indigenous peoples regarding the decisions that might affect them (Figuera & Ortiz, 2019), the practice shows that this was a mere good intention of the international community, as the instrument conceived for this purpose has reported several failures in different countries. For instance, the experience in Colombia shows that as the Jatani Dtona community, there are many other relevant cases in which cultural identity is in danger thanks to the interventions made by States and companies in the territory of different indigenous nationalities.

This demonstrates that beyond the mechanism itself, it is the business culture and the capitalist concept of development, what makes the prior consultation weak in practice. Despite the attempts of the international community to reaffirm in multiple cases of different jurisdictions, the importance of protecting and respecting the human rights of indigenous peoples, which means, to prevent and refrain from causing them any harm or affectation, the cases continue increasing every day. This situation has forced many communities to adapt to western processes and mechanisms to receive attention and, at list, be recognized as a member or an indigenous community.

Hence, the proposal of this contribution is to bet on a new way of applying prior consultation, to re-think its definition and structure to guarantee effectively the rights of indigenous peoples in practice. In fact, the first change should be the purpose for what this instrument was established and to delimit the difference between the concepts of *control* and *consent* from *participation* and *consult*, allowing the indigenous communities to have the firsts as the expression of the veto power over any decision that affect them. This does not mean that participation should disappear as an element of the prior consultation, on the contrary, it must be present throughout the process to guarantee a real dialogue between the parties, in which both positions must be heard and taken into account, respecting the times and customs of the indigenous peoples, as well as the companies procedures.

Having both proposals clear, the main goal is to achieve a balance between them to arrive to a common conclusion, through the controlled equivocation as a way to make both worlds to dialogue. Once this proces has taken place, it is necessary to assess if the proposed solution contributes to prevent, mitigate and if possible, avoid the risks for the indigenous communities. If it do not achieve that purpose, the communities will be able to exercise its right of veto, as a manner to protect its rights, preventing the exercise of biopower over them and their territories.

In consequence, the prior consultation has been the focus of many discussions that, in the end, are generated by the little success that this instrument has had in practice, as nowadays, the impacts caused by business activities over the human rights of indigenous peoples, are each time bigger and disregarded by the responsible of those damages, this is, the states and companies. Now, the biggest challenge is to rethink the basis, the definition, the elements and its application of prior consultation,

based on the real interests and necessities of indigenous peoples. Additionally, it is important to consider the role and power of business in the transformation of all the economic agent's culture, including the state, as other important challenge that might contribute to the deconstruction of the prior aim.

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