Rights and indigenous peoples: objective progress, subjective weaknesses

Rights and indigenous peoples: objective advances, subjective weaknesses

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Summary
After decades of invisibilization, indigenous peoples have managed to strengthen their protagonism, albeit with enormous differences depending on the case, on the Latin American political scene. This emergence has been accompanied by various processes of international and constitutional recognition of collective rights. Years after the approval of the two texts that reflect the greatest advances in the matter, the United Nations Declaration on the Rights of Indigenous Peoples (2007) and the Political Constitution of Bolivia (2009), we find ourselves faced with the need to take stock: should these normative advances be viewed with hope or disenchantment? This text attempts to provide elements that may be useful in this assessment. To this end, a brief review is made of the texts cited, followed by a focus on the significance of the right to free, prior and informed consultation. Finally, a reflection on the very meaning of rights is addressed, as it is considered essential for understanding the relationship between indigenous peoples, the State and the dominant society.

Key words: Indigenous peoples; collective rights; right to free, prior and informed consultation; cultural diversity.

Abstract
After decades of invisibility, indigenous peoples have managed to strengthen their role, with enormous differences depending on the case, in the Latin American political scene. This emergency has been accompanied by various processes of recognition, both international and constitutional collective rights. Years after the adoption of the two texts containing the most progress on the issue, the United Nations Declaration on Rights of Indigenous Peoples (2007) and the Constitution of Bolivia (2009), we are facing the need to make a balance: should these regulatory developments be viewed from the hope or the disappointment? This article tries to provide useful elements in such an evaluation. In first place, a brief review is made of the legal texts cited; after that, we focus on the significance of the right to free, prior and informed con- sent. Finally, a reflection on the very meaning of the rights, as it is considered essential to the understanding of the relationship between indigenous peoples, state and mainstream society.

Keywords: Indigenous peoples; collective rights; right to free, prior and informed consent; cultural diversity.

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1. Introduction

In recent decades, the struggle of indigenous peoples for their survival has generated a wave of recognition of rights both in the field of international law and in the various state systems, and especially, to a greater or lesser extent, in practically all Latin American constitutional texts.

At the international level,[1] , we should highlight advances such as the approval of the United Nations Declaration on the Rights of Indigenous Peoples (September 2007); the establishment of the Permanent Forum on Indigenous Issues; the creation of the Special Rapporteur on Indigenous Rights; and the adoption in 1989 of Convention No. 169 of the International Labor Organization (ILO) on Indigenous and Tribal Peoples in Independent Countries.

In the Americas, despite the lack of specific normative provisions at the regional level, in recent years the Inter-American Commission and the Inter-American Court have done very important work. A stage that began with the judgment of the Inter-American Court in the *Awas Tingni* case, on August 31, 2001, the first pronouncement by an international human rights court recognizing the collective rights of indigenous peoples over lands and natural resources[2] .

At the domestic level, the reforms undertaken by most Latin American countries are noteworthy. Only five of the twenty-one constitutional texts make no mention of the rights of indigenous peoples. It is true that in some cases the provisions are limited to general statements of a rather symbolic or at most programmatic nature, but in others they recognize authentic rights, even in detail, as in the cases of Colombia (1991), Venezuela (1999), Bolivia (1994 reform and 2009 Constitution), and
Ecuador (1998 and 2008)[3] .

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[1] For this issue, see James Anaya (2004).

[2] See Felipe Gómez (2003) and Luis Rodríguez-Piñero (2004).

[3] A development of these issues can be found in Cletus Gregor Barié (2003) and also in Marco Aparicio Wilhelmi (2001).

After the recent constituent processes in Ecuador and Bolivia, there are those who consider that the period of progress in the recognition of indigenous peoples' rights and reforms in Latin America has come to an end. There would be a series of symptoms of this end of cycle. These include the obvious weakness and lack of enforceability of recognition, which would be evident, for example, when confronted with free trade and intellectual property regulations, which are highly conditioned by international norms that ignore safeguards -or if they exist, they are extremely weak- that ensure respect for indigenous rights in terms of access to and control of resources, biodiversity or traditional knowledge.

In this context, the clever distinction between *hard law* and *soft law* ("hard" law, with enforcement mechanisms, and "soft" law, at the expense of the will of the enforcer), and the logic of *governance*, that is, the management of public affairs through mediations in which private (and private interests) are often signified and given reinforced coverage. With such a distinction, the sum of both international and domestic law places the advances in the protection of the interests and needs of indigenous peoples far behind the privatizing offensive that continues and intensifies the material and spiritual genocide.

The United Nations High Commissioner for Human Rights himself, in his evaluation of the Decade of the Rights of Indigenous Peoples (1994-2004), concluded that "with respect to indigenous peoples, the basic values and principles that are the basis of national and international legal systems are not being applied fairly and in a non-discriminatory manner. Imputability for violations of indigenous peoples' human rights is widely tolerated"[4] .

Critical reflection must go beyond the specific norms to refer in their entirety to the policies of recognition of cultural diversity encompassed in so-called multiculturalism. At this point, there are many voices that point out how this type of response would have operated fundamentally as a factor of superficial, aesthetic correction of the profound - and conscious - blindness with respect to the cultural differences existing in Latin American societies. The multicultural policies of liberalism would have left intact the ethnocentric character of a model developed as a colonial continuity that reproduces a profound dissociation between formal reality, institutional and legal unity, and factual reality, full of diversity.

Currently, many organizations are denouncing a certain exhaustion of the struggle for rights. With respect to indigenous rights, their limited scope and the enormous "implementation gap", i.e., the distance between what is preached by international or constitutional norms and what is actually achieved, have been noted.

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[4] Office of the High Commissioner for Human Rights, "Evaluation of the International Decade. Urgent need for mandate renewal and improvement of the UN standard-setting process on Indigenous Peoples' Human Rights", Geneva-New York, May 2004.

developed by ordinary legislation, regulatory development, judicial activity, enforcement of resolutions, etc.

Faced with such a situation, one option would be to advocate the strengthening of subjects rather than rights, at least as long as the latter are understood in terms of the patterns set by the state. The question is whether or not this strengthening should be supported by legal discourses or whether it is preferable to turn exclusively to the field of practices far removed from the spaces pre-formed by normativity.

It should be noted that not all indigenous peoples are in the same position, nor do they opt for the same strategies and tactical resources. So much so that, depending on the scope of our reflection, we could even question the very category of "indigenous peoples". The most notable differences can be seen in the Andean countries, where the conditions in which the lives of the peoples of the highlands develop are very different from those of the peoples of the lowlands. The difference is based on the different ways of insertion in the market, their relationship with the State, their organizational patterns, etc. This has led since ancient times to numerous moments of contradiction of interests, and today there are many situations in which there are disputes over access to resources and spaces for participation, within the framework of conditions imposed by the State and the capitalist economic model[5] .

Nevertheless, and despite the nuances that must be incorporated on a case-by-case basis, this text will defend the usefulness of the category "indigenous peoples" as collective subjects in which dynamics of social and cultural domination converge, that is, lines of colonial continuity, in the terms that will be referred to below.

The question around which this paper will revolve is the following: beyond a general and abstract assessment of the progress made in the recognition of the rights accorded to indigenous peoples, what practical scope, in terms of shaping new realities, can they have? Has the various legal recognitions led to the strengthening of the collective political subjectivity of indigenous peoples and with it the transformation of their relationship with or insertion into the realities of the State? Have the structures of the States been transformed? With this objective in mind, we will now situate the starting point in two normative milestones that allow us to underline the theoretical significance of the advances referred to: first, the United Nations Declaration on the Rights of Indigenous Peoples, and specifically in the recognition of the right to self-determination enshrined therein; second, the normative paradigm shift represented by the 2009 Bolivian Constitution in the framework of the recognition of the right to self-determination of indigenous peoples; and third, the normative paradigm shift represented by the 2009 Bolivian Constitution in the framework of the recognition of the right to self-determination of indigenous peoples, as well as in the recognition of the right to self-determination of indigenous peoples.

of plurinationality with communitarian roots.

[5] A good example is the controversial construction of the road that crosses the TIPNIS

(Territorio Indígena Parque Nacional Isiboro-Sécure) in Bolivia. It is a major infrastructure designed to provide an inter-oceanic connection within the framework of the Initiative for the Regional Integration of South America (IIRSA). The human rights organization FIDH has prepared a report on the matter: http://www.defensoria.gob.bo/archivos/Informe_del_del_consulta_en_el_TIPNIS_APDHB_FIDH.pdf

After this, and from a less descriptive perspective, we will refer to the nature and scope of one of the rights most demanded by indigenous peoples, and at the same time surely the right that best represents or exemplifies the limits of the liberal recognition of collective rights if the aim is to advance in material (social and cultural) equalization. This is the right to free, prior and informed consultation.

Lastly, we will open up a space that could be described as an "agitation of doubts": on the one hand, those referring to the nature of the approach, to the type of theoretical approach possible to questions that relate diverse, disparate and enormously complex socio-cultural realities. This will lead us to epistemic questions, cautions about the ways of seeing and counting; secondly, we will address doubts about the role of rights, in general terms - doubts about their function in the framework of the liberal-capitalist States, and also with regard specifically to the rights of indigenous peoples, or rather, rights recognized for indigenous peoples.

Finally, doubts lead us to the very nature of the State as it is configured today: to what extent are the State and the inter-national legal and political order capable of incorporating into its structure the social and cultural pluralism that really exists? Can the institutional and legal structure of the State allow for a break with the unitary logic? Can we think of a deep pluralist transformation, truly inclusive, of the institutional structures and the modes of State normative production? Can the State be decolonized?

2. Brief exemplification of normative advances in the area of indigenous rights

As has been advanced, the purpose of this section is to note the progress achieved in the two main milestones in the recognition of indigenous rights: the Declaration on the Rights of Indigenous Peoples (2007, hereinafter DRIP) and the Bolivian Political Constitution (2009). Both texts will be approached from a general, abstract perspective, as a mere description of some of their possible theoretical scope, without attending, for the time being, to the concrete, acted out terrains in which the conditions of the relationship between subjects with more power and subjects with less power are violently disputed.

2.1. The United Nations Declaration on the Rights of Indigenous Peoples as a statement of colonial continuity

In September 2007, after more than twenty years of work, the United Nations General Assembly approved the Declaration on the Rights of Indigenous Peoples. Article 3 of the Declaration, probably the most debated and one of the main reasons for the delay, states that:

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

It is clear that this is a reiteration, with the mere addition of the adjective "indigenous" to the subject of the right, the "peoples", of the first article of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966). As is well known, these are the two main human rights covenants, responsible for translating the rights contained in the 1948 Universal Declaration of Human Rights into international conventions.

The importance of the fact that the right to self-determination is enshrined in identical terms in the IDRL is enormous. As is well known, after the adoption of the 1966 covenants, the intention was to restrict the subject of the right to those peoples still subject to a relationship of colonial domination (on the basis of a doctrine known as "blue water" or *salt water*). It was thus considered that the recognition of individual human rights had to be based on a prerequisite: the elimination of the colonial relationship as a form of collective domination. The assumption is clear: the effectiveness of human rights can only be achieved in societies that are not subject to colonial relations.

The saltwater doctrine had to face different challenges and, although it was subject to some nuances, in general it can be said to have been firmly maintained. For this reason, the fact that the 2007 Declaration chooses to include the same right implies its updating to the context in which indigenous peoples subsist. Beyond the precautions that the Declaration itself incorporates to limit the scope of indigenous self-determination[6] , there is no doubt that it reinforces the understanding of human rights based on the relationship between the collective and the individual, reaffirming that, as long as there are situations of domination of some peoples over others, the validity of rights, both collective and individual, will be in permanent question.

In other words, the conclusion to be drawn from any legal reasoning, and even more, from common sense itself, is the following: if after forty years of insistence on the decolonizing - and only decolonizing - sense of the right to self-determination, its mimetic recognition for indigenous realities means that the States that signed the IDRL, and the UN as a whole, recognize that at present, indigenous peoples are subjected to a situation of colonial domination, *internal* if you will.

The United Nations thus situates - consciously or unconsciously - the starting point of the relationship between indigenous peoples and States in the continuity of colonialism. This colonial continuity has been denounced by authors such as González Casanova (1969), who in his *Sociology of Exploitation* already spoke in 1969 of "internal colonialism", or Rivera Cusicanqui (2010), who picks up and develops the proposal to analyze the Bolivian reality. And these are voices belonging to

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[6] Art. 4 already insists on the internal and limited dimension of self-determination as "self-government in matters relating to their *internal and local* affairs". Likewise, as a closing of the Declaration, and as a result of pressure from the United States, the following wording was included (art. 46.1): "nothing in this Declaration [...] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the *territorial integrity or political unity* of sovereign and independent States".

The most critical reflection of the American continent, those that have denounced in greater depth the way in which the States have maintained a structure of colonial domination consubstantial with the capitalist economic system.

2.2. Bolivia and the Plurinational Community State as a new constitutional paradigm

In order to understand the scope of the Bolivian constitutional proposal, we must briefly refer to the context in which it took shape. At the turn of the century, the so-called "rebel cycle" began in Bolivia, accumulating episodes and forces of frontal, radical contestation of the neoliberal model implemented throughout the 1990s, and of the party system that sustained it. During the government of the general and former dictator Hugo Bánzer (1997-2001), the water management of a large part of the Cochabamaba valley was handed over to the North American company Be-chtel. Practically all social sectors responded in a united manner in the Coordinating Committee for the Defense of Water and Life (Coordinadora de Defensa del Agua y la Vida). Another episode in the cycle of mobilizations was the "Gas War", which arose from the popular reaction to the announcement by President Sánchez de Lozada that a consortium of transnational companies (*British Gas, British Petroleum* and *Repsol-YPF*) would take charge of transporting liquefied gas to Mexico and the United States through a Chilean port.

The capacity of the social forces mobilized in the face of the plundering of the commons to disestablish the constitution, from 2006 to 2008, would give shape to a constituent process of great transformative capacity. This process was driven by the so-called Unity Pact, which brought together diverse social organizations, among which the role of the indigenous organizations stood out: CONAMAQ -for the peoples of the highlands- and CIDOB -for those of the East or lowlands. Indeed, the indigenous thrust of the constituent process is evident in the approved text (January 2009).

The Bolivian Constitution outlines the elements of a new constitutional paradigm based on the definition of the State as a "Plurinational Community State" (art. 1). *Plurinationality* is the concept that serves to overcome the reference, common in the constitutional texts reformed throughout the 1990s, to *pluriculturality*. This is intended to establish the political and prescriptive dimension of the recognition of the existence of different cultures or cultural groups. As opposed to the descriptive understanding of the existence of different cultures, plurinationality would push for transformations in the insti- tutional and legal structures of the State.

Its second article specifies the basis of plurinationality: "Given the pre-colonial existence of the indigenous native peasant nations and peoples and their ancestral dominion over their territories, their self-determination is guaranteed within the framework of the unity of the State, which consists of their right to autonomy, self-government, their culture, the recognition of their institutions and the consolidation of their territorial entities, in accordance with this Constitution and the law.Further on, Article 9.1 establishes among the essential purposes and functions of the State "to constitute a just and harmonious society, based on decolonization, without

discrimination or exploitation, with full social justice, in order to consolidate plurinational identities".

It also includes a specific chapter on indigenous rights ("of the indigenous and aboriginal farming nations and peoples", according to the Constitution), where the rights that are the backbone of their existence and development as such are included, in line with the contents of the DRIP. II.1), "to their cultural identity" (30.II.2), "to self-determination and territoriality" (30.II.4). To prior consultation "through appropriate procedures and in particular through their institutions, whenever legislative or administrative measures likely to affect them are envisaged" (30.II.15), or "to autonomous indigenous territorial management" (30.II.17).

Another of the central aspects is the realization of the right of indigenous peoples to self-determination, which, according to the constitutional text, consists of "self-government as an exercise of self-determination of the indigenous native peasant nations and peoples, whose population shares territory, culture, history, languages, and their own legal, political, social and economic organization or institutions" (art. 289).

But surely it is not the right to self-determination that will bring about a paradigmatic change or transition. It should be borne in mind that despite its theoretical scope, it is a right that has managed to fit comfortably into the monochord structure of the liberal State, based on its limited understanding at the level of local autonomy without affecting the colonially rooted territorial logic.

The right that would announce a different horizon is the right "for their institutions to be part of the general structure of the State" (Article 30.II.5). This is a novel and transcendental provision in that it modifies the logic of the contrast between the State and indigenous peoples. This is the logic in which the guaranteeing dimension of rights moves, seen as counter-majoritarian tools, barriers in the hands of indigenous peoples in the face of the power of the dominant society, articulated in the State and State law. Once the indigenous peoples and their institutions are understood as part of the State, the political organization that must accommodate the different collective subjects, if you will, is necessarily reconfigured.

From this starting point, the reformulation of the state building as a whole is projected, since once indigenous institutions have been incorporated as their own, the next step consists in the articulation of common institutions called to en- caste the participation of the different collectivities. Specifically, the Plurinational Legislative Assembly[7] and the Plurinational Constitutional Court[8] .

[7] The constitutional regulation of the Plurinational Legislative Assembly requires for the election of its members the existence of special indigenous constituencies (indigenous native peasants, according to the constitutional terminology), deriving its development to subsequent legislation, with the limit that they do not transcend departmental boundaries and that "they shall be established only in rural areas, and in those departments in which these indigenous native peasant peoples and nations constitute a population minority" (art. 146 VII).

[8] With respect to the Constitutional Tribunal, its plurinational character is established constitutionally in a very brief manner. It states that its members will be "elected with criteria of plurinationality, with representation of the ordinary system and the original indigenous peasant system" (art. 197 I), by means of universal suffrage (art. 198). It is also established that the

It is evident that the plurinational horizon is, with greater or lesser intention, pointed out. But it is also clear that there is a complex mixture of aspects rooted in the purest liberal constitutional tradition with elements of a *dialogic* constitutionalism (Agustín Grijalva, 2008: 49-62), that is, aimed at achieving conditions of dialogue and equality between different collective subjects. This offers a panorama of intense promiscuity: an amalgam of factors in tension, which could allow -as always depending on the existing balance of forces- a counter-hegemonic use of hegemonic political and conceptual instruments which, following Boaventura de Sousa Santos (2010: 60) implies "the creative appropriation by the popular classes of those instruments for themselves in order to advance their political agendas beyond the political-economic framework of the liberal State and the capitalist economy". We could speak then, following the same author, of an experimental and, surely, transitional constitutionalism.

3. The right to free, prior and informed consultation: a non-indigenous right

3.1. The content of the right

Since ILO Convention No. 169 was approved in 1989 and most Latin American countries signed and ratified it (throughout the 1990s), the right to free, prior and informed consultation was almost immediately at the top of the agendas of indigenous mobilization spaces.

Specifically, this is the provision contained in art. 6 of the aforementioned agreement[9] :

1. In applying the provisions of this Convention, Governments shall:
(a) To consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may have a direct bearing on them; [...] (b) To consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may have a direct bearing on them; [...].
2. Consultations carried out pursuant to this Convention shall be conducted in good faith and in a manner appropriate to the circumstances, with a view to reaching agreement or consent to the proposed measures.

Candidatures may be proposed "by organizations of civil society and indigenous and aboriginal peasant nations and peoples" (art. 199 II).

[9] In general terms, Article 6.1(a) establishes the obligation of governments to "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly", requiring that consultations be carried out "in good faith and in a manner appropriate to the circumstances, with the aim of reaching agreement or obtaining consent to the proposed measures" (Article 6.2). It further specifies the right to consultation in

specific areas, such as the involvement of natural resources (art. 15.2), the alienation of land (art. 17.2), the implementation of vocational training (art. 22.1), and in the field of education (art. 27.3).

The United Nations Declaration on the Rights of Indigenous Peoples (art. 19) contains the same institution in a very similar way. Specifically, it provides that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their representative institutions before adopting and implementing legislative and administrative measures affecting them, in order to obtain their free, prior and informed consent.

There are no major differences with respect to Art. 6 of Convention No. 169, which already spoke of consultation "with the aim of reaching agreement or obtaining consent to the proposed measures". Article 19 is somewhat more demanding in setting as an objective the achievement of "free, prior and informed consent", although the right of peoples remains the same: to be consulted in good faith and in advance.

It is worth noting that the right to prior consultation must necessarily be situated in the more general context of the political rights recognized by the Declaration and, among them, the right to self-determination in Article 3. It is based on the recognition of the right to self-determination, but without seeking the isolation of peoples, but rather a rethinking of the pattern of relations. For this reason, the establishment of procedures to channel dialogue in cases where there may be a contradiction of interests takes on central importance.

The debate, as exemplified by the 2008 Ecuadorian constituent process, has focused on whether or not indigenous peoples have a veto right under Article 19 of the Declaration, which could be used against development plans, such as those related to hydrocarbon and mineral extraction.

On a theoretical level, it could be said that the Declaration's approach is to advance in the areas of participation of indigenous peoples in the political life of the State, and in this context it would not be possible to interpret art. 19 as a right of veto without further ado. Rather, consultation and consent would be devices that would seek to avoid the imposition of one party over the other in search of spaces for mutual understanding and consensus in decision-making.

However, for the same reason, if the exclusion of indigenous peoples from decision-making processes continues, it should be possible to claim the right to consultation as a right that would legitimize opposition to the imposition of state decisions, especially in those cases in which their most basic rights or their very survival as peoples would be endangered.

An interpretation criterion could be established on the scope of the right according to its nature, its raison d'être. The starting point is that it is a device by means of which, with respect to indigenous peoples, the State recognizes the inadequacy of institutional mechanisms for participation in decision-making. Therefore, the greater this inadequacy, that is, the greater the

The greater the exclusion of peoples in state decision-making, the greater the capacity of indigenous peoples to oppose or veto such decisions. But also in the opposite direction: the greater the ability of the affected communities to influence state decisions (due to their geographic location, organizational capacity, insertion in the mechanisms of institutional power, social dialogue, etc.), the less legal centrality should be given to prior consultation.

This interpretation criterion should also be modulated according to the level of impact of the decisions at stake. That is to say, if it is a question of carrying out an energy or road infrastructure project that entails a substantial modification of the living conditions and development of the communities, the centrality should be greater. And this must be demanded both at the administrative decision-making stage and, if necessary, in the courts: it will be in the hands of the courts to annul any decision that does not give sufficient weight to the criteria set out.

Despite the resistance and erratic judicial decisions in this regard, it can be said that there are elements of the criteria set out in the way in which the right to consultation set out in ILO Convention 169 has been deployed. This can be seen in various cases: specifically, in a claim against the State of Ecuador regarding the signing of an oil exploitation agreement in the territory of the Shuar people, a tripartite committee of the ILO Governing Body was appointed, which decided that a "mere information meeting cannot be considered in accordance with the provisions of the Convention"[10] , and that consultations should involve "organizations, institutions or indigenous and tribal organizations that are truly representative of the affected communities". It thus concluded that the exclusion of the main organization of the Shuar people in the signing of the agreement was a violation of the right to consultation provided for by the Convention[11] .

In the event that the State respects the requirements of the consultation procedure referred to in Art. 19 and, even so, the people concerned refuse to give their consent, can the State still impose its decision? No closed answer can be given. Leaving aside political considerations, from a legal point of view, the criteria of the Inter-American Court of Human Rights in the case of *Saramaka v. Suriname*[12] , where it responds to situations in which the measure could substantially endanger the basic physical or cultural well-being of the indigenous community, may be useful.

This interpretative line is confirmed by the Declaration itself when, in Article 10, it prevents the removal of indigenous peoples from their lands or territories "without the free, prior and informed consent of the indigenous peoples concerned, nor without a

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[10] Report of the Committee set up to examine the complaint alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), submitted under Article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), GB.282/14/2 (14 November 2001), para. 38.

[11] Ibid., para. 44.

[12] *Saramaka* v. *Suriname*, I.D.H. Court, Judgment of November 28, 2007, paras. 133-137.

prior agreement on fair and equitable compensation...". And likewise, in art. 29.2, in which it establishes that

> States shall take effective measures to ensure that hazardous materials are not stored or disposed of on the lands or territories of indigenous peoples without their free, prior and informed consent.

In short: like any other right, prior consultation should function as a counter-majoritarian tool, as a counter-power. In other words, the starting point is t h e realization that there is a majority society, a dominant culture, with more power, capable of articulating decision-making spaces in accordance with its own patterns of understanding and its own interests. In the face of such a society, the compendium of rights contained in the DDPI would aim to facilitate the incorporation of indigenous peoples into state society, but into a society that, ideally, would cease to be clearly homogeneous, monocultural. This normative horizon would be drawn through the recognition of the different collective subjectivities with the existence of special rights, among which the one referring to prior consultation stands out for its transcendence.

The arrival scenarios outlined by the Declaration would provide spaces for dialogue between diverse interests, in which the imposition or veto of any of the parties would not fit. However, although these objectives are still far from being achieved, the important thing about the IDRL is that it outlines paths for their attainment, within the framework of a process that must be built. The collective rights of indigenous peoples are, like any right, a means and an end: their effective realization is the objective, and their vindication and exercise a way of advancing towards it.

3.2. Prior consultation as a mechanism of dispossession: a non-indigenous right; a non-right.

We have just pointed out how rights have a dual nature: they are both an objective and a means or mechanism at the same time. It may be added that, in reality, their objective is the disappearance of the very need for their existence. That is to say, rights act in contexts in which the inequality of power makes it advisable for the most vulnerable party in the relationship to endow itself with signifiers that stage the conflict, the dispute. This staging seeks to make it possible to force, if necessary, the activation of mechanisms to curb power (the guarantee of rights against the will of the subjects with more power). Whether or not the guarantee mechanisms can really be activated, and to what extent this is done, will depend, once again, on the power relationship, on the threat capacity of the subjects in a situation of greater vulnerability. But the very existence of the right implies the recognition of inequality, the recognition that a group of subjects, because of their position of lesser power, may see the realization of legitimate needs threatened.

What does the right to prior consultation imply? It would mean a response to colonial con- tinuity based on a tool designed to confront the conditions of the colonial era.

The political communities are deeply diverse and yet are structured in an ethnocentric way.

In other words: articulating a prior consultation procedure implies that the State is aware that indigenous peoples are in a position of under-representation, that their relationship with the institutions and representative channels of liberal democracy place them in an inferior position (sometimes to the point of exclusion) to make their voices heard in the mechanisms called upon to shape the "general will".

As is well known, historically, the contributions called to legitimize the liberal State have gravitated around the foundation of the way in which the "general will" is formulated. Contractualist approaches have sought to underpin the legitimacy of power on the basis of the translation of the agreement between free individuals into the political decision of their representatives, which would therefore be endowed with general and imperative effects.

Well, if the fiction of equality between individuals (as a result of profound material inequalities) has called into question these legitimizing attempts from the outset, inequality between collective subjects turns the fiction of equality into a farce. It is within this framework that indigenous rights, and especially the right to prior consultation, must be read.

Indeed, collective rights, including those of indigenous peoples, arise as a response to inequality between groups. The problem in the case of indigenous rights is that in most cases this equality reaches extremes that radically deactivate their possibilities of impact. The example of prior consultation is paradigmatic: its configuration and, above all, its practical implementation is leading to the deactivation of even its mere symbolic dimension. Let us see why.

As is well known, since the 1990s, Latin America (and many other regions) has witnessed a rampant dispossession of natural resources (extractive industries, expansion of the agro-industrial model and especially transgenic plantations, appropriation of biodiversity and traditional knowledge). This is what David Harvey (2004:127) has called "accumulation by dispossession" ,[13]

[13] It would consist of a project of universal privatization and commodification, the current phase in the development of the capitalist model, which seeks to address the problem of overaccumulation experienced since 1973. One way is to bring cheap raw materials into the system and another is the devaluation of the existing assets of capital and labor power. The over-accumulated capital can then buy the devalued capital assets at bargain prices and recycle them profitably. The explanation is *rabidly* topical: as the author points out, for profit to exist "a prior devaluation is necessary, which means a crisis of a certain magnitude". The author refers to the cases of the Asian and Mexican financial crises, which, as we see today in Greece (and also in Portugal, Spain and Italy) become "mechanisms to provoke transfers of property and power to those who keep their own assets intact in a position to offer credit". In this sense, "the corporatization and privatization of hitherto public institutions (such as universities), water and other public goods [...], is a re-enactment on a gigantic scale of the enclosure of communal lands in 15th and 16th century Europe" (Harvey, 2004: 118-120).

which is nothing more than the actualization of the mechanisms of capitalist accumulation already described by Karl Marx (1987: 607-658): original or primitive accumulation and expanded accumulation. Let us recall that according to his thesis, the process that engenders capitalism is that of the "dissociation between the worker and the property over the conditions of his work", the basis of this process being "the expropriation that deprives the rural producer of his land". Thus it is: the category of original accumulation is in Marx the starting point of the capitalist regime of production, and it would be to political economy what the "original sin" is to theology: the moment in which the poverty of the majorities begins[14] .

The validity of these mechanisms can be found, without a doubt, in the privatization processes, which, according to Roy, essentially consist of "the transfer of productive public assets to private companies. Among these productive assets are natural resources: land, forests, water, air. These are assets that the State owns on behalf of the people it represents [...]. Taking them away to sell them to private companies represents a barbaric process of dispossession, on a scale unprecedented in history" (Quoted in Harvey, 2004: 127).

In view of this process, it is possible to propose two perspectives for analyzing the scope of the normative changes in the area of indigenous rights. On the one hand, it could be argued that constitutional advances, and especially the implementation of prior consultation processes, have served as a brake, albeit limited, on the indiscriminate exploitation of resources. According to this view, the fact of having to go through prior consultation with the communities involved in private or public investment projects would have led to avoid, slow down or qualify the negative impacts of such projects. At the same time, it would have served as a space for the insertion of indigenous peoples in administrative decisions and thus a certain reconfiguration of the State more in line with the cultural plurality it harbors.

Another reading would underline, beyond specific cases in which it may have had a mobilizing effect on resistance, the coincidence of the recognition of the right to prior consultation, and of the set of constitutional reforms in this area, with the deployment of neoliberal policies. This observation, it is pointed out, should lead us to think that the objective of such reforms was already from the beginning the re-legitimization of a political regime that sought to deepen the hollowing out of the State required by the development of the economic model imposed by neoliberal globalization.

Indeed, although the ILO, as well as different jurisprudential pronouncements, have insisted that the consultation should be carried out by the State and not by the companies, on many occasions it has been the companies themselves that have directly carried out or conducted the consultation process, with a final certification by the State. This corporate protagonism was clear at the beginning of the deployment of the procedures.

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[14] The original accumulation consists, as Boaventura de Sousa Santos reminds us, in the appropriation "with recourse to extra-economic mechanisms (political, coercive), of the land,

natural resources and labor force necessary to sustain expanded reproduction", which would be the one that, in short, would operate through economic mechanisms (De Sousa, 2010: 79-80).

The consultation process, although it has been subsequently nuanced. In any case, it should be noted that although formally the State is ultimately responsible for the promotion and development of the consultation, materially the capacity of the investing companies to condition its effective implementation is very great.

Thus, the recognition of the right to prior consultation could be seen as a manifestation of the privatizing effect that neoliberal reforms have had on the law. That is to say, the law would increasingly appear not as an expression of the decisions of public entities but as a space for the proceduralization of agreements between private parties, whose relationship is not precisely egalitarian. This is what some authors have called "privatizing proceduralization", which, as Estévez Araujo puts it, would be that which "implies the transfer to a greater or lesser degree of the power to determine the content of legal norms to the representatives of the interest groups affected. In this modality, the State may reserve more or less power to regulate the decision-making and implementation process: it may be in a position to dictate the rules of the negotiation process, or it may leave the interest groups to regulate themselves and then limit itself to putting the official stamp on their decisions". This type of proceduralization would be different from that of a "democratizing" nature, which implies an increase in the power of participation in the process of production of legal norms of the people as citizens (Estévez Araujo, 2006: 61).

The point is, as we shall see below, that rights should not be limited to establishing mere procedures, instructions for the management of a space of domesticated pluriculturality where everything is negotiable in the name of "governance".

Let us take the Colombian case as an example, in which the right to prior consultation is deployed on the basis of detailed state regulation and in accordance with different jurisprudential decisions. At present, in addition to Convention No. 169 and the constitutional framework, there are at least eight legal texts in force in Colombia that regulate prior consultation. In addition, there is a draft Statutory Law on the subject. The first thing that stands out is that the Ministry in charge of guaranteeing the procedure is the Ministry of the Interior, specifically the Directorate for Prior Consultation, which in turn is divided into four areas: certification (responsible for accrediting the presence of peoples with the right to prior consultation); management (responsible for the development of the process); legal area; and resource area (financial and administrative). According to the set of rules in force, the consultation process has several phases: a) pre-consultation;
b) opening; analysis and agreement on impacts and measures; c) protocolization of agreements; d) systematization and follow-up; e) closing.

Without going into the casuistic details of the specific procedures that have been carried out, what we wish to highlight is that the high degree of legal formalization of prior consultation has not been able to guarantee a prior element for it to really be an expression of a mechanism for intercultural dialogue. This prior element is none other than the power relationship between the parties involved in the consultation. In effect, beyond the procedural mediations, prior consultation has not been able to guarantee a prior element for it to be a true expression of an inter-

cultural dialogue mechanism.

that the right to consultation implies, there are no minimum guarantees regarding the material conditions in which it takes place. Therefore, although progress can be detected in the implementation of the formal aspects of the process, thanks to pressure from indigenous organizations and different jurisprudential pronouncements, in reality these formal aspects would camouflage the material inequality in the conditions of dialogue or possible agreement of interests.

To put it more bluntly: as long as the vital needs of indigenous peoples are not drastically reduced, consultation processes cannot ensure the protection of their interests or needs since, not being in a material position to negotiate, they are forced in most cases to accept the compensation that the company is willing to grant. This is, in short, a somewhat more elegant version of some of the mechanisms used by the colonial invader to satisfy its voracity over natural resources.

According to Asier Martínez de Bringas, we would be facing an expression of the "transition from a political process of intense repression (exclusion) to a lighter one, at least in the intensity of violence, although not in the long-term consequences (inequality)...". This transit would have to do "with the value (of use) of the biodiversity that indigenous peoples occupy and have, and with the fertility that indigenous ancestral knowledge possesses for the logic of capitalism in the new global scenario". Therefore, he warns, "we must be aware of the dangers of this *negotiated multiculturalism*, which allows indigenous peoples to be interlocutors in this negotiation, but only in a strategic way, that is, due to the fact that the spaces they occupy and inhabit, as well as the resources they contain, have an unprecedented utility and potential for the dynamics of multinational capitalism" (Martínez de Bringas, 2006: 103).

Therefore, if we understand that prior consultation, as it is currently configured, does not serve as a mechanism for protecting the needs of indigenous peoples, in reality what we must reject is that it is an indigenous right, or even a right at all. Rather, it would be an administrative procedure aimed at ensuring a certain participation of affected communities in the implementation of investment priorities previously decided by a State that has scarcely been reconfigured by the predicate of interculturality.

4. Rights and indigenous peoples: objective progress, subjective weaknesses

The previous section has sought to exemplify, on the basis of a concept of law, the limits of legal discourse when power relations are abysmally unequal. Taking up the distinction between normality and normativity made by Hermann Heller in the interwar period, we would say that the norm can hardly have an impact on power relations if reality harbors insurmountable inequalities. This is undoubtedly the situation that practically always arises when a standard is proposed to "coordinate" the interests of transnational corporations with those of indigenous communities.

In fact, any legal norm that, as a consequence of collective mobilization processes, improves the position of certain subjects,

implies in itself progress, but at the same time it implies closures, brakes to the development of a collective force of rupture and deeper transformation.

The use of legal discourse and the articulation of demands for the attainment of rights must be understood as options derived from a strategic calculation that depends not only on what the normative texts establish or may establish, but also on the force accumulated to make them effective and truly affect power relations. This is no exception, far from it, to the different recognitions of indigenous rights, nor to Constitutions such as the Ecuadorian and Bolivian ones.

The issue is how we situate ourselves from the theoretical analysis: do we invalidate the results and processes or do we try to reinforce these new normative meanings as lines of legitimization for collective action that must continue to push to change power relations?

For this reason we understand that the example of the Bolivian Constitution is particularly interesting: as we have been able to mention, the transcendence of its advances is unquestionable and its importance is evident in terms of the construction of *common sense* (Gramsci, 2003), that is, of beliefs, even intuitions, that shape a certain social imaginary. It is, in the opinion of many, a normative advance that embodies a new discursive hegemony under construction. In any case, it has important effects in terms of weakening the liberal hegemonic conception of the State and the Law as parameters of uniformity and of rights as an attribute of individuality. This is not a minor issue: we are talking about factors that open up processes of cultural transformation.

It would happen that, even in the case of the greatest juridical advances, the Bolivian, the real scope of the transformation in the common sense would reach, at least for the moment, more to the appearance than to the essence, to use Hegelian terms.

The essence, surely, is different: while the range of individual and collective rights is expanding, the advance of the logic of dispossession/accumulation continues its course and has an increasingly intense and irreparable impact on the very conditions of existence and survival of indigenous peoples. In reality, what is at stake is the very continuity of life, and the indigenous peoples are not the only ones affected, although they clearly exemplify this, since the logic of capitalist accumulation is today waging one of its main battles against them.

However, it would be rather unproductive to try to analyze the extent to which advances in the field of recognition of indigenous rights have slowed down or softened the negative effects of the productivist and extractive economic policies deployed in a particularly intense manner i n recent decades throughout Latin America. Firstly, because we would be starting from a factual assumption, from which too much certainty is not usually extracted, and secondly, because a broader time perspective is probably necessary to be able to assess processes of collective political resignification such as the one experienced in the case of Bolivia.

If it is understood that the dispute over power and meanings goes beyond legal texts and proclamations, it will be more feasible to defend a process that aims at the

transformation of the material conditions of existence, of the political subjectivity of the collectives present.

Note the need to emphasize the political dimension of rights and their link to the subjects and their practices.

4.1. The meaning of rights: from the legal "must be" to the social "will be".

In the field of indigenous peoples' rights, the aforementioned concept of "*implementation gap*" became famous, used in various reports by Rodolfo Stavenhagen during his time as United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. The purpose of this term was to s h o w that despite the progress made in human rights legislation, the main stumbling block in the area of indigenous rights was the lack of development and application of both international and constitutional provisions. The fact of identifying the problem at the moment of implementation may lead to pointing mainly to the lack of political will on the part of local governments, thereby omitting a no less relevant area of analysis: the function and scope of rights in contexts of profound inequalities. socio-economic and cultural factors.

However counter-hegemonic the use of rights may be, it cannot b e forgotten that they tend to guarantee *legal security through the* individualization of subjects, who can claim their legal status on the basis of precise circumstances that the law is responsible for collecting and categorizing. In fact, this individualizing effect clashes with, or is perhaps the consequence of, a kind of ontological tension of rights in the liberal state, which Bauman has captured as follows: "it is in the nature of 'human rights' that although they have been formulated to be enjoyed *individually* [...] it is necessary to fight for them and conquer them *collectively*" (Bauman, 2003: 91). Undoubtedly, the irruption of collective rights, collectively held and exercised, implies a radical questioning of that effect (or function) as far as the individual dimension is concerned, hence the angry rejection they have generated in conventional legal doctrine. As we know, the rights of indigenous peoples occupy a prominent place among such rights. However, even collective rights do not cease to imply a segmentation of subjects that can lead to a tendency towards separation, towards the construction of *identity* trenches[15] .

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[15] Bauman has sought to explain the implication between the struggle for rights and the reinforcement of group identity: to become a right, "difference must be shared by a group or category of individuals sufficiently numerous and determined that they must be counted on [...] (This) results in intense community building [...], trench digging, training and arming assault units: preventing intruders from entering [...].(This) results in intense community building [...], trench digging, training and arming assault units: preventing intruders from entering, but also insiders from leaving [...]. This is why the principle of human rights acts as a catalyst that triggers the production and self-perpetuation of difference and efforts to build a community around it" (Bauman, 2003: 93).

that seek to reinforce the distinctive elements between groups, rather than the common elements. This separation, together with that generated by individual rights, instead of reinforcing, can weaken the capacity to challenge globally the conditions (economic, social, cultural) that generate exclusion and inequality between groups and individuals. But let this statement not be misunderstood: it is not identities that generate exclusion; it is exclusion that reinforces the tendency to emphasize differences rather than similarities, in accordance with the rules of the game that the State imposes through its law and public policies.

Rights, from this perspective, would be seen as tools of distinction, of separation, which could end up undermining the possibilities of joining forces on the part of collectives in a position of lesser power vis-à-vis subjects with more power. However, this should not necessarily lead us to believe that in any case they can serve as a tool for confrontation and change. Rather, they should be understood as elements which, although they alone will not generate a transformation of the relations of domination, can be seen as useful pieces, in interrelation with other mechanisms (mobilization, interaction with other actors), to balance the negotiation positions in which the different subjects find themselves. It is therefore a matter of emphasizing the political dimension of the conflict above all other considerations, and this implies not allowing ourselves to be dazzled by the scope of the legal "ought to be", of the "must be" of rights considered in isolation.

Rights serve to a large extent to cover up the shame of inequality, to make it less obscene; to speak of rights is to speak of weakness, of under-representation. Their nature is based on an unavoidable contradiction: their effectiveness depends on the real strength of those to whom they are addressed, and the greater this strength (or capacity to threaten), the less necessary they are.

For this reason, the proliferation of legal texts, both state and international, that recognize rights does not necessarily result in their greater significance (generally scarce), a situation that worsens as inequalities increase.

However, when the position of the rights-holder is not one of exclusion or profound inequality, i.e., when they attain a certain position of strength, certain loopholes may open up that allow rights to develop a catalytic effect, to serve as a mobilizing lever. Indeed, rights can be seen as performative fictions, capable of generating imaginaries, reinforcing shared meanings, opening up spaces for dialogue between different social actors. This can lead to moments of organization and collective action, when the legal "ought to be" abandons its merely discursive plane to be realized by the social "want to be".

This is the political dimension of the conflict in which rights are inserted, which must be identified if their scope and potential are to be understood. Depending on the accumulation of strength of the subjects, rights may have mobilizing effects or, on the contrary, they may have more of an impact on the political dimension of the conflict, which must be identified if their scope and potential are to be understood.

paralyzing, disintegrating, and even legitimizing deeply unequal structures.

The above reflections are not exclusive to the context in which the claims of indigenous peoples are developed, but are also relevant to any context of inequality, especially when it derives not only from social injustice but also, and in a deeply related way, from cultural injustices. However, the attention we pay to their struggles would be justified, among other reasons, because they teach us that the demands and practices of decolonization are capable of unveiling and weakening the paradigm of colonial modernity, with its developmentalist dogma of unlimited material growth and its rhetoric of liberal equality in democracies that are formally representative and substantially exclusive.

In this struggle, which is a dispute of legitimacy and meaning, the indigenous peoples have not only targeted the substance of the liberal democracies that *really exist*, but also the very idea of the State and, above all, have managed to reject "the politicization of the State as the only possible public space in which to construct and conceive cultural processes". This would lead us to ask ourselves "whether it is possible to construct *another history* in which it is feasible to eliminate that sort of ideology that considers the life of the State as the central element for constructing and understanding history"[16] .

If this text has achieved its main objective, we would be closing it with more concerns than we had at the beginning of its reading. Escobar (2010: 45) has picked it up as follows: "is it possible to think and go beyond capital as the dominant expression of the economy, of Euromodernity as the dominant cultural construction of socio-natural life, and of the State as the central expression of the institutionalization of the social?".

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[16] Reflection of Martínez de Bringas (2006: 94) supported by Guha (1996: 1-12).

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