



## RELEVANT INTER-AMERICAN JURISPRUDENCE ON PRIOR CONSULTATION

Joaquín A. Mejía Rivera

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## **1. THE PRINCIPLE OF SELF-DETERMINATION OF PEOPLES .\***

Nicaragua, the Inter-American Court of Human Rights has developed a rich jurisprudence with respect to the collective property of indigenous and tribal peoples, from which a series of fundamental legal principles for understanding, interpreting and protecting indigenous territory can be inferred: the collective nature of indigenous property, the special relationship of peoples with their lands and territories, the customary origin of collective property rights, state obligations with respect to indigenous property, the resolution of possible conflicts between collective property and third party rights, and the extinguishment of indigenous property rights.

This implies the obligation of States to guarantee that indigenous peoples are duly consulted on matters that affect or may affect their cultural and social life, in accordance with their values, uses, customs and forms of organization, since their right to self-determination is concretely expressed in their power to govern themselves, that is, in the right to possess, enjoy and control their lands and territories, as well as to dispose of the natural resources found therein. Therefore, the right to their territories and the natural assets existing therein cannot be legally extinguished or altered by the public authorities without the full and informed consultation and consent of the affected community.

## **2. STANDARDS AT STANDARDS OF CONSULTATION AND CONSENT.**

Before approving a development plan or granting an extractive concession that affects the territories of indigenous peoples, the State has the obligation to comply with three fundamental conditions: carry out a prior and informed consultation, guarantee reasonable participation in the benefits and carry out a

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\* This text is based on the following works: Mejía Rivera, J. A., Hernández, E. and Cardoza, G. (2017). *El derecho a la consulta y a la participación frente a proyectos de desarrollo a la luz de cuatro experiencias comunitarias*. Tegucigalpa: ERIC-SJ; Mejía Rivera, J. A. (2019). "El derecho a la consulta previa a la luz del principio de autodeterminación de los pueblos indígenas y garífuna". In *Revista Envío-Honduras*. Year 17. N° 57. Tegucigalpa: ERIC-SJ.

prior environmental and social impact study conducted with community participation.

## **2.1. Carrying out a prior and informed consultation**

Community participation is a central element of the right to self-determination, which is why the State has the duty to establish norms and develop practices that ensure such participation through effective consultations that allow members of the communities to give their full and informed consent regarding the implementation of any project in their territories.

This requires, at a minimum, that all members of the community be fully informed of the nature and consequences of the process, and of the potential environmental and health risks, if any, that they may face if they accept the implementation of a project, development or investment plan. To ensure that consultation is an effective mechanism for preventing conflicts and human rights violations, it must be governed by a series of unavoidable guiding principles.

Firstly, the principle of *good faith*, which implies that the State should carry out the consultation in a climate of trust, with the intention of taking into account the opinion expressed by the consulted peoples without trying to deceive them, betray them or provide biased or partial information. Thus, the consultation processes and the decision of the communities should not be considered a mere formality to legitimize the projects. In this sense, merely socializing with the community or providing information does not necessarily comply with the minimum elements of adequate prior consultation, since it does not constitute a genuine dialogue as part of a participatory process to reach an agreement.

It is important to emphasize that the principle of good faith in the consultation processes is key for them and the results obtained to be considered valid and legitimate for the indigenous and Garifuna peoples, the State and the companies, and compatible with international human rights standards on the matter. Consequently, this principle is incompatible with some State practices, such as the destruction of the social cohesion of communities through the corruption of some of their leaders,

the establishment of parallel leadership or the conduct of negotiations with individuals who individually are contrary to standards on community consultation and participation.

Secondly, the principle of *prior* consultation, since the moment in which this is carried out is key for a true exercise of decision making by the potentially affected communities. Consultation should take place in the early stages of the development or investment plan and not only when the need to obtain community approval arises. Advance notice provides time for internal discussion within communities and to provide an appropriate response to the State.

Thirdly, the principle of *freedom*, even as a true consultation exercise requires that it be carried out free of external interference, coercion, intimidation and manipulation. Therefore, conditioning basic social services such as education or health to consent to a project implies coercion with respect to the free decision of the consulted communities, as well as a violation of their economic, social and cultural rights, which should never be conditioned to the implementation of a project. Thus, presenting communities with the dilemma between development or continued poverty can be considered a form of coercion.

Fourth, the principle of *information* in the sense that the communities must have sufficient information to enable them to make a decision regarding the consulted project. This information must include (a) the nature, size, impact and scope of the project; (b) the reason or objective of the project; (c) its justification; (d) duration and timing of the project; (e) locations and areas that will be affected; (f) assessment of the probable economic, social, cultural and environmental impact; (g) possible risks and benefits; and (h) elements of possible displacement.

And fifth, the consultation must be culturally appropriate, that is, it must be carried out through culturally appropriate procedures and in accordance with the customs and traditional decision-making methods of indigenous and Garifuna peoples. All matters relating to the consultation process, whether to obtain the consent of the people, determine the

reasonable benefits and the beneficiaries, adequate compensation and their cooperation in carrying out social and environmental impact studies, must be determined and resolved by said people "in accordance with their traditional customs and norms.

In addition, the will of the people as a whole, channeled through the corresponding customary mechanisms, must be taken into consideration. At this point it is important to highlight the principle of full participation of the entire community, which requires that its members have the opportunity to play a full or effective role in the selection, authorization or instruction of those who act on behalf of the people before the authorities.

## **2.2. Profit sharing**

States must guarantee that the members of the communities will reasonably benefit from the plan to be carried out within their territory, as well as from the commercial application of their traditional knowledge on the use of such resources, since one of the objectives sought is to improve the living conditions of such communities. The States have the obligation to guarantee the participation of the communities in the determination of the benefits that the proposed plans or projects will produce, through appropriate procedures.

Therefore, the authorities must ensure that the benefits to be received by the communities and the possible compensation for any environmental damage are established within the framework of the prior consultation procedures, taking into account their own development priorities. On the other hand, the determination of benefits and beneficiaries should be made in consultation with the communities and not unilaterally by the States or by the companies benefiting from the concessions.

In the event that an internal conflict arises among the members of the indigenous or Garifuna people as to who has the status of beneficiary, this matter should be resolved by the people themselves in accordance with their own customs and traditional norms, and not by the States. It is also important to insist that benefit-sharing should not be confused with the provision of basic social services, which in any case corresponds to the provision of basic social services.

The Company has also provided to the States in accordance with their constitutional obligations in the area of economic, social and cultural rights, such as health centers, street paving, construction or repair of educational centers, development of electrification projects or drinking water services, among others.

### **2.3. Conducting impact studies**

States must guarantee that no concession will be issued within the territories of the communities unless and until independent and technically capable entities, under the supervision of the State, carry out a prior social and environmental impact study that assesses the social, spiritual, cultural and environmental impact that the planned project activities may have on such communities.

The objective of these studies is not only to have some objective measure of the potential impact on natural assets and people, but also to ensure that community members are aware of the potential environmental, cultural, social, economic and health risks, so that they accept the proposed development or investment plan knowingly and voluntarily. However, States must be clear that the ultimate purpose of this type of study is to preserve, protect and guarantee the special relationship of indigenous and Garifuna peoples with their territories and ensure their subsistence as peoples.

Evidently, impact studies must be conducted and concluded prior to the approval and granting of the respective concessions, since one of the objectives of requiring such studies is to guarantee the right of the communities to be informed about all proposed projects to be executed in their territory. Consequently, the obligation of the States to supervise these studies coincides with their duty to guarantee the effective participation of indigenous and Garifuna peoples in the process of granting concessions within their territories.

States should not approve a project that may threaten the physical or cultural survival of a community and when one under implementation is causing significant ecological or other damage to collective territories,

must be declared illegal and, consequently, the authorities have the obligation to suspend it immediately, repair the environmental damage and investigate and sanction those responsible for it.

Finally, in order to guarantee the legitimacy of the social and environmental impact studies, it is essential to comply with two conditions: first, that the States be the actor responsible for carrying out the impact studies, who can carry them out directly or entrust them to be carried out under their strict supervision; in this sense, it would not be in accordance with Inter-American human rights standards if the social and environmental impact studies were carried out by personnel or contractors of the concessionary companies or if the selection of those who carry them out is not based on the required technical expertise.

Second, the participation of the communities in the process of carrying out the social and environmental impact studies, since, as stated in article 7.3 of Convention 169, the authorities must ensure that they are carried out "in cooperation with the peoples concerned, in order to assess the social, spiritual, cultural and environmental impact that the planned development activities may have on these peoples". To the extent that these studies seek to document the possible negative impacts of development plans on the relationship of indigenous and Garifuna peoples with their territories, the knowledge of their members is necessarily required to identify such impacts and possible alternatives and mitigation measures.