PRIOR CONSULTATION AS A FUNDAMENTAL RIGHT OF COLLECTIVE OWNERSHIP OF INDIGENOUS, AFRO-DESCENDANT, RUM AND TRIBAL PEOPLES AND ITS INEFFECTIVENESS IN THE PROTECTION OF PROTECTED TERRITORIES

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DOI: 10.37594/cathedra.n16.548

Reception date: 20/05/2021 Revision date: 30/06/2021 Acceptance date: 27/10/2021

ABSTRACT

Prior consultation, as a fundamental right of collective ownership of ethnic peoples, is an instrument of defense not only of the territory of ethnic minorities, but also an instrument, a fundamental right and a human right that promotes the defense of other basic rights of the community and its members, such as culture, beliefs, staff integrity, food security and survival itself, for which prior consultation should become an effective right of material protection and not a right of merely formal protection. Making the right to prior consultation a mechanism or right of only formal protection would constitute an instrument of denial of other rights protected in the Political Constitution of Colombia and in international instruments such as the American Convention on Human Rights. For this reason, this article seeks to generate a document that motivates the transformation of this legal instrument of formal protection to become an instrument of effective protection, of material protection of rights, in different legal systems.

Keywords: fundamental right, ethnicity, prior consultation, territory, guarantee, environment, cosmogony

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1. GENERAL INFORMATION

1.1. BACKGROUND TO PRIOR CONSULTATION

Prior consultation is a fundamental right of collective ownership held by the ethnic communities, which allows them to intervene whenever a decision is to be made that may affect them directly or when projects, works or activities are intended to be carried out within their territories[1] that may affect them directly or indirectly. Through this mechanism, the aim is to reach an agreement or achieve consent, in addition to making effective the duty to protect the cultural, social and economic integrity[2] of the state and guarantee the right to participation of these collectivities Rodriguez, La Consulta Previa de los Pubelos Indigenas y las Comunidades Afrodescendientes en Colombia, 2010 (Rodriguez, The Prior Consultation of Indigenous Peoples and Afro-descendant Communities in Colombia, 2010). In this order of ideas, the consultation and participation of indigenous and tribal peoples are essential to define the policy and the way in which ILO Convention No. 169 should be applied.

For Lopera and Dover (2013), Prior Consultation is a right of participation reserved to ethnic groups aimed at assuming control of their own institutions, ways of life and economic development, by the members of the community (Dover, 2013).

According to Gloria Amparo Rodriguez (2010):

"Prior consultation is the fundamental right that indigenous peoples and other ethnic groups have when measures (legislative and administrative) are taken or when projects, works or activities 37 are to be carried out within their territories, thus seeking to protect their cultural, social and economic integrity and guarantee the right to participation." (Rodriguez, The Prior Consultation of Indigenous Peoples and Afro-descendant Communities in Colombia, 2010).

1 According to ILO Convention No. 169, the Colombian State has the obligation to consult with indigenous peoples through appropriate procedures and, in particular, through their representative institutions, whenever legislative or administrative measures likely to affect them directly are envisaged. Such consultations shall 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.

2 In Colombia, the exploitation of natural resources in indigenous territories must be carried out without detriment to the cultural, social and economic integrity of the indigenous communities. In the decisions adopted with respect to such exploitation, the government shall encourage the participation of the representatives of the respective communities (paragraph of Article 330 of the Political Constitution of Colombia).

For the Constitutional Court, prior consultation is a fundamental right and a basic instrument to preserve the ethnic, social, economic and cultural integrity of the indigenous communities and to ensure their subsistence as a social group[3] (Decision SU - 383 of 2003), subsequently the Honorable Colombian Constitutional Court reiterated that prior consultation is based on the principle that Colombia is a social and democratic state of law, having as a basis the respect and protection of its multiethnic and multicultural character, so this is an obligatory fundamental right of indigenous and Afro-descendant communities to be consulted on legislative and administrative decisions that may affect them and put at risk their culture, their ancestral uses and customs (Constitutional Court, T - 175 of 2009).

For the Constitutional Court in judgment T - 660 of 2015, being magistrate Dr. Jorge Ignacio Pretelt Chaljub, when resolving a matter on this subject in relation to the substantiation of the right to prior consultation said:

> *"[...] The fundamental nature of prior consultation is a consequence of its link to the defense of the cultural integrity of these communities, as well as the conditions that allow their survival as distinct peoples. Prior consultation constitutes a specific guarantee of the requirements of distributive equity and participation, -proper of environmental justice, in relation to ethnic groups- being a concept that takes as a starting point the paragraph of Article 330 of the Political Constitution, which establishes the state obligation to ensure the participation of indigenous communities prior to the exploitation of natural resources in their territories."* (Colombian, Constitutional Court, 2015, Tutela Judgment 660 with Report of Magistrate Jorge Ignacio Pretelt).

1.2. Characteristics

The main characteristics of prior consultation are the following:

a. <u>It is a Fundamental Right:</u> Its purpose is the protection of the ethnic rights of the indigenous, black, raizal, palenquero and Afro communities; it constitutes a fundamental right of the group or community, whose ownership is collective and the object of protection is the community in its culture, uses and customs.

b. <u>It is an obligation of the State:</u> The Political Constitution orders the State to watch over and protect the ethnic and cultural diversity of the nation of which the ethnic groups that comprise it are a part, guaranteeing the effective protection of their rights to autonomy, ethnic and cultural identity, to territory, understanding this not as the portion of land where they have settled their homes and plots, but as the environment in which they have lived and developed ancestrally and have carried out their survival practices and harmony with the environment, as well as their rights to participation and self-development.

3 Decision SU-039 of 1997 M.P. Antonio Barrera Carbonell, the Court temporarily protected the rights of participation, ethnic, cultural, social and economic integrity and due process of the U'WA indigenous people, ordering that they be consulted before issuing an exploration resolution in their territory. In the same sense, among others, T-652 of 1998 -notes 92 and 160-.

c. **It is a Right and Duty of the Ethnic Groups:** In addition to being a fundamental right as mentioned above, prior consultation brings with it duties for the ethnic groups and their representative bodies for the protection of these ethnic rights enshrined and recognized by national jurisprudence, constituting one more tool that allows them to guarantee their survival.

d. **It is a Process:** Prior consultation must be understood as a procedure whose purpose is to reach a concerted agreement on the implementation of activities, works or projects that affect the ethnic rights of these communities in the face of the different visions of development of the parties, but not as a mere procedure where the real and effective participation of the ethnic groups is omitted, with the exclusive purpose of moving forward with the implementation of the work, project or activity.

2. EFFECTIVE JUDICIAL PROTECTION OF RIGHTS

For us, the effective judicial protection of the rights of citizens should not be seen only as the possibility that the partners have to agree before the judicial apparatus for the protection of their rights, but that such rights are effectively protected, in such a way that the measures adopted by the administrator of justice, actually protect the right that is considered violated or threatened.

For the Colombian Constitutional Court in judgment C - 086 of 2016:

Effective judicial protection has been considered *"core expression of the democratic and participatory nature of the State"* and *"fundamental pillar of the structure of our current Social State of Law"*. It finds support not only in the text of the Political Charter but also in the instruments that are integrated to it through the block of constitutionality. Its link with the Preamble is of the first order as it is "directly related to justice as a fundamental value of the Constitution". It aims at the fulfillment of the essential purposes of the State (arts. 1 and 2 CP), including guaranteeing the effectiveness of rights, promoting peaceful coexistence, ensuring respect for legality and human dignity and ensuring the protection of associates in their life, honor, property, beliefs and other rights and public freedoms. In addition, its express consecration as a right of every person reinforces the value that the Constituent of 1991 wanted to give it in the legal system (art. 229 CP).

In the words of this Court, the -fundamental- right to effective judicial protection *"translates into the possibility, recognized to all persons residing in Colombia, of being able to resort on equal terms before the judges and courts of justice, to advocate for the integrity of the legal order and for the due protection or restoration of their rights and legitimate interests, strictly subject*

to previously established procedures and with full observance of the substantial and procedural guarantees provided by law".

The concept of *"effectiveness"* that accompanies this right implies that access to justice is not limited to the existence of nominal mechanisms to implement the administration of justice, but requires an institutional effort to restore the legal order and ensure the prevalence of substantive law (art. 228 CP). (Constitutional Court; Sentence C - 086 of 2016).

In view of the development of the Constitutional Court on effective judicial protection, this is not limited only to access to justice, on the contrary, it calls upon the administrators of justice and the executive officer to guarantee their rights in a complete manner, that is, not only to exhaust the procedure to access the right, but also to guarantee and materialize the right.

For Rocío Araujo (2011), the right to effective judicial protection, in addition to including the guarantees that impose the fullness of procedural guarantees and that tend to protect the citizen against the procedural processing of the case, which are summarized in the right of access to justice, due process and the right to defense, In addition to these rights, it constitutes a constitutional mandate addressed to all State bodies, whether administrative or judicial, so that in their actions they effectively protect the rights of individuals, in the face of a claim or request for protection against a violation or threat (Araujo, 2011).

Having clear the concept of effective judicial protection, specifically related to the work of judges in the protection of the right, we consider that the effective protection of rights must go beyond the process and the jurisdictional body, it must be an imperative of the daily work of those who exercise public function, that is, if the ultimate purpose of prior consultation is to protect the biocultural rights of ethnic communities to be able to participate and decide on actions, decisions, works or activities that have an impact on their territory, the concept of these derived from the consultation should have a binding effect, which would result in an effective protection of their rights.

However, taking into account the fundamental nature of the right to consult with ethnic minorities on administrative or legislative measures that may affect their collective rights and the fact that, even though it is fundamental, prior consultation does not entail per se, the possibility of vetoing or preventing the implementation of projects, works or activities, if an agreement is not

reached between the parties, since in such a case the proportionality test is applied, which will be in the hands of the Ministry of the Interior, The Ministry of the Interior is in charge of analyzing the need for the work or project and that it corresponds to the interests of the government, so that the refusal of the community does not constitute an impediment to its execution, which would make this a right of formal and not material protection, and we say that of formal protection, because it is not possible that the refusal of the community paralyzes, makes impossible the intervention in its territory, if after the proportionality test the intervention to be carried out is of national interest, in other words, it is state policy based on its government program and development plan.

The above statement because the same International Labor Organization, precise that the right to prior consultation does not constitute a right to veto, what the ILO indicates in Article 7 is that governments consult with ethnic communities that lead them to take part in the decisions that are adopted and affect their territory, an affirmation accepted by our constitutional court in judgment T - 661 of 2015.

Not allowing that in the process of prior consultation the ethnic communities can veto the realization of some type of intervention in their territory, makes this fundamental right, a merely formal right and not a consecration for the material protection of the ethnic rights of the resident minorities in a country; the consecration of the fundamental right of prior consultation, as it is currently regulated is a protection to the right of information and not a right to the protection of the ancestral rights of the social group.

Claudia Jimena Abello (2012) states that such limitations tend to make this Constitutional Right and Guarantee ethereal and ineffective, which, if properly applied and exercised, could become a fundamental pillar for the continuity and conservation of the C.N.A.R.P. and its members (Abello, 2012).

As stated by Carlos Eduardo Salinas (2011):

"it is important to distinguish free, prior and informed consultation from free, prior and informed consent; the first institution was established through ILO Convention 169, approved by Colombia through Law 21 of 1991, while the second institution arises from the United Nations Declaration on the Rights of Indigenous Peoples, within the framework of the 61st session of the United Nations Assembly.

Free, prior and informed consent in Convention 169 is restrictive and exceptional (only

when it is necessary to relocate the community), and without this consent it is not possible, even though it does not constitute a veto, so we allow ourselves to transcribe Article 16 of ILO Convention 169" (Salinas, 2011).

The veto as a response to the consultation carried out to an ethnic community and that this has effects on the non-implementation of the activity or work to be carried out, would constitute a true materialization of the protection of ethnic rights, since the ethnic right seeks to protect the communities' culture, customs, beliefs, healthy environment, understood as a fundamental human right (Vivas, 2018) and their territory; to have prior consultation as a formal right, in which the obligation of the state is simply to consult and the product of the consultation, in case of refusal, not to comply with it, for whatever reasons it may be wished to wield, makes prior consultation a deceptive right and procedure in relation to the realization and material protection of the rights described above.

2.1. THE EFFECTIVENESS OF THE FUNDAMENTAL RIGHT TO PRIOR CONSULTATION

As indicated by Francisco J. Bastidas, in the work The General Theory of Fundamental Rights in the Spanish Constitution of 1978:
"The effectiveness of fundamental rights, like that of any other constitutional norm, can only be measured in legal terms from the aptitude of its normative content for the achievement of its object, the guarantee of a certain sphere of staff freedom" (Francisco J. Bastidas, 2004).

For Jose Juan Anzures Gurria (2010), fundamental rights, from the objective perspective, are values recognized by the whole society and serve as a basis to legitimize the existence of the state, and it is up to the state as a political organization to give effectiveness to the content of the right, so that it does not become a merely formal consecration, but a real protection of the interests of the individual and the community. (Anzures, 2010).

What is an effective right? To answer this question, we will start by giving the meaning of effective according to the Royal Academy of Language (RAE):

Effective: adj. Real and true, as opposed to chimerical, doubtful or nominal (Spanish, Real Aacademia, 2017).

Taking into account the above definition, a right is effective to the extent that the consecration contained therein, becomes a real and true protection of the legal property or legally protected interest, its protection is not chimerical, it is not simply formal or nominal, its protection is real or materially protects the right that is intended to be safeguarded.

Having said this, we proceed to ask the following question: Is prior consultation an effective right? We must warn from the outset that for us it does not turn out to be an effective right, the consecration and existing regulation today of prior consultation turns out to be a formal procedure, to consult the communities that think about some project or activity that affects them in their territory, beliefs and culture, without the concept or decision of them in the consultation process, The State, by applying the test of proportionality referred to above, concludes that this intervention is part of the development policies of said government, although in the application of said test of proportionality in relation to the development of said community, a development model is being applied, It is worth noting here that the application of this test and the fact that the decision of the community is ignored (a decision that is adopted through the veto in the consultation) constitutes a clear violation of Articles 7 and 8 of the 1991 Political Constitution, since it would not be respecting the worldview and cosmogony of the ethnic peoples, inasmuch as the ethnic and cultural diversity of the nation demanded by the Constitution would not be respected, much less would the State be complying with the obligation brought in the aforementioned article 8 to protect the cultural wealth of the nation, as it is consecrated, the prior consultation does not materially protect the rights of the ethnic communities, its consecration makes this fundamental right a formal protection.

The protection demanded by the ethnic communities of their rights is aimed at granting them the capacity to decide on the fate of the territory they have ancestrally occupied and conserved; although the constitutional court has indicated in its jurisprudence that the right to prior consultation does not imply a power of veto on the part of the consulted communities, it is necessary that the legislator make a real protection of ethnic rights and give life to the principles brought in the constitution itself, which clearly tend, as we have already indicated, to the protection of cultural diversity and with it the thinking of the peoples in their vision of development, which would translate into respect for the right of self-determination of the peoples, who can decide their model of development according to their worldview; The above demands a much stricter regulation of prior consultation, where the non-consent of the community is translated into a veto to the legislative or administrative measures to be applied, this would constitute a true protection of the right to ethnicity, a right to ethnicity that contemplates several rights among them the right

to territory, to culture, to their traditional practices, to self-determination, use and enjoyment of the environment, etc.

The effectiveness of rights is an imperative of the states, for this reason ILO Convention No. 169, in its Article 2 indicates:

> *"1. Governments shall assume the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity. 2. This action shall include measures: a) to ensure that the members of these peoples enjoy, on an equal footing, the rights and opportunities which national laws and regulations grant to other members of the population; b) to promote the full realization of the social, economic and cultural rights of these peoples, while respecting their social and cultural identity, their customs and traditions, and their institutions"*
>
> *" **Article 7** 1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands which they occupy or otherwise use, and to control, to the extent possible, their own economic, social and cultural development. Furthermore, these peoples shall participate in the formulation, implementation and evaluation of national and regional development plans and programs likely to affect them directly".*

It is clear from the aforementioned articles of ILO Convention 169 that the member states of the Convention must seek the full effectiveness of the rights of ethnic communities, granting them the right to decide their own development model in a way that does not affect their lives, beliefs, ancestral institutions, territory and the general welfare of the community.

2.2. LEGAL AND JURISPRUDENTIAL BASIS FOR PRIOR CONSULTATION IN COLOMBIA

The right to prior consultation has a legal basis in national norms, as well as in international instruments, which make prior consultation not only a fundamental right, but also a human right, which states have the duty to respect and which we list as follows:

a. National Instruments.

- ✓ ***Political Constitution of Colombia of 1991***, in our charter we find several articles that refer to the right of ethnic communities to be consulted, in order to defend the right to

their cosmogony, as follows:

> ***Article 7.*** The State recognizes and protects the ethnic and cultural diversity of the Colombian Nation.
> ***Article 63.*** Assets for public use, natural parks, communal lands of ethnic groups, protected lands, the archaeological heritage of the Nation and other assets determined by law, are inalienable, imprescriptible and unattachable.

Paragraph Article 330. The exploitation of natural resources in indigenous territories shall be carried out without detriment to the cultural, social and economic integrity of the indigenous communities. In the decisions adopted with respect to such exploitation, the Government shall encourage the participation of the representatives of the respective communities.

- ✓ ***Law 21 of 1991 of March 4, 1991.*** With the enactment of this law, the Colombian State ratified Convention 169 of the International Labor Organization (ILO) adopted by the 76th Session of the ILO General Conference in Geneva, 1989.

- ✓ ***Law 70 of 1993.*** By which transitional article 55 of the Political Constitution is developed. Thus, in Chapter I, which establishes the purpose and definitions, Article 1 states that:

> ***Article 1.*** The purpose of this law is to recognize to the black communities that have been occupying uncultivated lands in the rural areas bordering the rivers of the Pacific Basin, in accordance with their traditional production practices, the right to collective property, in accordance with the provisions of the following articles. It also aims to establish mechanisms for the protection of the cultural identity and the rights of the black communities of Colombia as an ethnic group, and the promotion of their economic and social development, in order to ensure that these communities obtain real conditions of equal opportunities compared to the rest of Colombian society.

- ✓ ***Law 99 of 1993***, which organizes the National Environmental System, SINA, and establishes other provisions.

> ***Article 76.*** Indigenous and Black Communities. The exploitation of natural resources shall be carried out without detriment to the cultural, social and economic integrity

of the indigenous and traditional black communities in accordance with Law 70 of 1993 and Article 330 of the National Constitution, and decisions on the matter shall be made after consultation with the representatives of such communities.

- ✓ ***Law 165 of 1994.*** Approving the "Convention on Biological Diversity", made in Rio de Janeiro on June 5, 1992.

  Article 8. Conservation in situ. Each Contracting Party, to the extent possible and as appropriate: (…).j) In accordance with its national legislation, shall respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities embodying traditional styles of life relevant to the conservation and sustainable use of biological diversity and will promote their wider application, with the approval and participation of those who possess such knowledge, innovations and practices, and will promote that the benefits derived from the use of such knowledge, innovations and practices are shared equitably.

- ✓ ***Decree 1320 of 1998.*** By which the prior consultation with the indigenous and black communities for the exploitation of natural resources within their territory is regulated.
  Article 2. Determination of territory. Prior consultation shall be carried out when the project, work or activity is intended to be developed in areas of indigenous reservations or reserves or in areas adjudicated in collective property to black communities. Likewise, prior consultation shall be carried out when the project, work or activity is intended to be developed in areas not titled and regularly and permanently inhabited by said indigenous or black communities, in accordance with the provisions of the following article.

- ✓ ***Decree 2820 of 2010.*** By which Title VIII of Law 99 of 1993 on environmental licenses is regulated. Here it is found that, in relation to our object of study, in Article 15, there is a direct mandate regarding the participation of communities in relation to the intervention by the State or private parties in their territories, in Article 15 as follows:

  Article 15. Participation of the communities. The communities shall be informed of the scope of the project, with emphasis on the impacts and proposed management measures, and shall evaluate and incorporate in the Environmental Impact Study,

when considered pertinent, the contributions received during this process.

Where required, the provisions of Article 76 of Law 99 of 1993 must be complied with regarding prior consultation with indigenous and traditional black communities by the Ministry of Environment, Housing and Territorial Development.

- ✓ ***Law 1437 of 2011, Article 46 (CPACA).*** Whereby the Code of Administrative Procedure and Administrative Disputes is issued. In Chapter II, it deals with Prior Consultation Mechanisms, Article 46 states:

  Article 46. Mandatory consultation. When the Constitution or the law orders the realization of a consultation prior to the adoption of an administrative decision, such consultation must be carried out within the terms indicated in the respective norms, under penalty of nullity of the decision that may be adopted.

- ✓ ***Presidential Directive 001 of March 26, 2010.*** Which establishes as a primary issue the guarantee of the Fundamental Right to Prior Consultation of National Ethnic Groups, we find that in numeral [4], paragraph a), establishes the phases that must be fulfilled as follows: a) Pre-consultation4, b) Opening of the process, c) Workshops for identification of impacts and definition of management measures, d) Pre-Agreements, e) Meeting of Protocolization, f) Systematization and monitoring of compliance with agreements, g) Closing of the Prior Consultation process. These phases will be understood as a protocol suggested by the Prior Consultation Group, and their application will be subject to the agreements established by the community being consulted and the interested party.

- ✓ ***Presidential Directive 010 of November 7, 2013.*** Where in its main subject it establishes a guideline for conducting prior consultation. In summary, we have that this directive develops the process of Prior Consultation which indicates that it is integrated by: (a) certification, (b) coordination and preparation, (c) pre-consultation, (d) Prior Consultation, (e) Monitoring of agreements.

4 Pre-consultation phase defined by the Honorable Constitutional Court in Decision 461 of 2008.

b. International Instruments.

Among these we can highlight the following:

- ✓ ***United Nations Declaration on Indigenous Populations of 2007.***

  Article 5 of this declaration states that indigenous peoples have the right to maintain and strengthen their own political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so desire, in the political, economic, social and cultural life of the State.

  Article 34. Indigenous peoples have the right to promote, develop and maintain their institutional structures and their own customs, spirituality, traditions, procedures, practices and, where they exist, legal systems or customs, in accordance with international human rights standards.

- ✓ ***Universal Declaration of Human Rights of 1948.:***

  Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States and among the peoples of territories under their jurisdiction.

- ✓ ***ILO Convention 107 of 1957.*** Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Entry into force: June 2, 1959). Generally, enshrines certain rights of indigenous peoples over the territories they have traditionally inhabited, but at no time does it address the issue of community consultation as a mechanism for the protection of these rights. This convention was widely criticized by the international community for tending towards the integration of indigenous peoples into modernity, because it referred to them as *"populations"*.

Regarding ILO Convention 107 of 1957, it is necessary to clarify that it was not ratified by Colombia.

- ✓ ***American Convention on Human Rights:*** Article 1 establishes that *"the States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition".*

  And in Article 21, which deals with the right to private property, paragraph 1° indicates: 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the social interest.

3. Development of Prior Consultation in the jurisprudence of the Inter-American Court of Human Rights.

- ✓ ***Case of the Kichwa indigenous people of Sarayaku vs. Ecuador:*** Judgment of June 27, 2012, the facts of this case occurred in the region of the province of Pastaza, where the Kichwa indigenous people of Sarayaku live. This population subsists on collective family farming, hunting, fishing and gathering of agricultural products; a participation contract for the exploration of hydrocarbons and exploitation of crude oil in Block No. 23 of the Amazon Region, The Sarayaku People were not informed of the terms of the negotiation between the State and CGC nor of the conditions under which the Act was entered into.

For the Inter-American Court of Human Rights,
"(...) there was no adequate and effective process to guarantee the right to consultation of the Sarayaku People before undertaking or authorizing the program of prospecting or exploitation of resources that would exist in their territory. In short, the Sarayaku People were not consulted by the State before oil exploration activities were carried out, explosives were planted or sites of special cultural value were affected (...).

"(...) The Court established that the recognition of the right to prior, free and informed consultation of the indigenous and tribal communities and peoples is based, among others, on the respect for their rights to their own culture or cultural identity, which must be guaranteed, particularly in a pluralistic, multicultural and democratic society; furthermore, consultation should not be exhausted in a mere formal procedure, but should be conceived as a true instrument of participation, which should respond to the

ultimate objective of establishing a dialogue between the parties based on principles of mutual trust and respect, and with a view to reaching a consensus between them".

"(...) For the court, by disregarding the ancestral right of the indigenous communities over their territories, other basic rights could be affected, such as the right to cultural identity and the very survival of the indigenous communities and their members. Since the effective enjoyment and exercise of the right to communal ownership of land guarantees that the members of indigenous communities preserve their heritage, States must respect this special relationship in order to ensure their social, cultural and economic survival. Likewise, the close link between territory and traditions, customs, languages, arts, rituals, knowledge and other aspects of the identity of indigenous peoples has been recognized, noting that depending on their environment, their integration with nature and their history, the members of indigenous communities transmit this intangible cultural heritage from generation to generation, which is constantly recreated by the members of indigenous communities and groups" (Inter-American Court of Human Rights, 2012).

- ✓ ***Case of the Yakye Axa Indigenous Community v. Paraguay:*** Judgment of June 17, 2005 At the end of the 19th century, large tracts of land in the Paraguayan Chaco were sold. At the same time and as a consequence of the acquisition of these lands by British businessmen, several Anglican missions began to be established in the area. Also, some cattle ranches were built in the area. The indigenous people who inhabited these lands were employed on these ranches.

  This Court has emphasized that the close relationship that the indigenous people maintain with the land must be recognized and understood as the fundamental basis of their culture, spiritual life, integrity, economic survival, and its preservation and transmission to future generations.

  For the Inter-American Court of Human Rights, (...) the culture of the members of the indigenous communities corresponds to a particular way of life of being, seeing and acting in the world, constituted from their close relationship with their traditional territories and the resources found there, not only because these are their main means of subsistence, but also because they constitute an integral element of their cosmovision, religiosity and, therefore, of their cultural identity (...). Consequently, the close ties of the indigenous

peoples to their traditional territories and the natural resources linked to their culture that are found there, as well as the incorporeal elements that derive from them, must be safeguarded by Article 21 of the American Convention. In this regard, on other occasions, this Court has considered that the term *"property"* used in Article 21, contemplates *"those material things that can be appropriated, as well as any right that may form part of the patrimony of a person; this concept includes all movable and immovable property, tangible and intangible elements and any other intangible object susceptible of having a value"* (Inter-American Court of Human Rights, 2012).

Finally, the court indicates that by disregarding the ancestral right of the members of the indigenous communities over their territories, other basic rights could be affected, such as the right to cultural identity and the very survival of the indigenous communities and their members.

- ✓ ***Case of the Mayagna (Sumo) AwasTingni Community v. Nicaragua:*** the State granted a 30-year concession for the management and harvesting of approximately 62,000 hectares to the SOLCARSA company, without the Community having been consulted on the matter. The community asked various state agencies not to move forward with the granting of the concession and at the same time to delimit its territory.

  In this decision, the Inter-American Court of Human Rights specified that the existence of a property title is not necessary for the State to protect the territory where the indigenous population is settled, that the mere possession of these based on their customary law grants them the right to the use, enjoyment and protection by the State, which has the duty to delimit and identify the territories owned by the community and the free use and enjoyment of the goods found within said territory (Inter-American Court of Human Rights, 2001).

CONCLUSIONS

Prior consultation is a fundamental right of collective ownership held by the ethnic communities, whenever a decision is to be made that may affect them directly or when it is intended to carry out projects, works or activities within their territories that may affect them directly or indirectly. This mechanism seeks to reach an agreement or achieve consent, in addition to enforcing the duty to protect the cultural, social and economic integrity and guarantee the right

to participation of these communities (Rodriguez, The Prior Consultation of Indigenous Peoples and Afro-descendant Communities in Colombia, 2010).

Prior consultation as a fundamental right and at the same time a human right of ethnic communities, aims to protect the territory where they settle in their uses, beliefs, culture and customs according to their worldview.

Prior consultation as a fundamental right, turns out to be an ineffective right, because the refusal or veto of the community in the face of an administrative decision, work or investment does not make its implementation impossible, to the extent that such intervention is part of a state policy on development or economic matters, in these cases prior consultation is only a procedure and with a content of formal protection but not material; the above except for the three cases covered by ILO Convention 169 and developed by the jurisprudence of the Inter-American Court of Human Rights namely: A) Transfer of the lands they occupy and their relocation. B) Storage or disposal of hazardous materials in the lands or territories of indigenous peoples. C) In the case of large-scale development or investment plans that would have a greater impact within the territory; only in these cases does the lack of consent of the community constitute a veto or prohibition on the implementation of an activity that affects the integrity of the group.

In order for prior consultation to be an effective right and thus protect the ethnic rights of individual titling as well as those of collective ownership such as territory, it is necessary that prior consultation, together with the result of the consultation, become a real and true protection of the legal right or legally protected interest; that it transcend from what today exists as formal or nominal protection to real or material protection, at which point we could speak of the effectiveness of the right to prior consultation.

The protection demanded by the ethnic communities of their rights through prior consultation is aimed at granting them the real autonomy to decide on the fate of the territory they have ancestrally occupied and conserved; although the constitutional court has indicated in its jurisprudence that the right to prior consultation does not imply a power of veto on the part of the consulted communities, it is necessary that the legislator make a real protection of ethnic rights and give life to the principles brought in the constitution itself, which clearly tend to the protection of ethnic-cultural diversity and with it the thinking of the peoples in their vision of development, This would translate into respect for the right to self-determination of ethnic peoples, who can decide their development

model according to their worldview, which includes several rights including the right to territory, culture, traditional practices, self-determination, use and enjoyment of the environment.

Making prior consultation a merely formal right would constitute a denial of the rights that constitutionally and in international instruments are recognized as claims of the ethnic communities. Prior consultation must necessarily go from being a checking procedure, to leave evidentiary records of its realization, to becoming the effective fundamental right demanded by the jurisprudence of the constitutional court but adding to it that the lack of consent of the community would make it impossible to carry out any type of intervention in their territory, the latter would make prior consultation an effective right, in our understanding.

The lack of effectiveness of this human right of the ethnic communities leads to a systematic disregard of international instruments and with it the block of conventionality, which is of imperative compliance, for the states that adhere to a treaty, pact or convention that protects rights not only to individuals but to the community in general.

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