

## **The Force of the Self-Determination of indigenous peoples in Colombia**

*In contradiction to their original purpose, private companies and the state are conducting consultations once the decision to intervene in indigenous territory has already been taken. In this way, the right to prior consultation is ceasing to be a right of indigenous peoples and becoming a mere bureaucratic transaction. Because of this context, autonomous protocols have emerged from Colombian ethnic communities as legal instruments that are strongly rooted in their traditions, practices, customs and traditional laws, and which inscribe themselves within their rights to autonomy and free determination that have been recognized by the international system.*

**By Diana Alexandra Mendoza - October 1st, 2020**

By April 2020, the Interior Ministry of Colombia informed that [there were about 10,200 prior consultation processes actively taking place in the country](#). These involve the ethnic peoples and communities in whose territories there are administrative decisions being sketched or investment projects being developed, most of them related to the extractive industries or to mega infrastructure projects.

What at first sight would seem as a big state deployment to safeguard the fundamental collective rights of these peoples to participation and autonomy, following the Political Constitution and the ILO's Convention No. 169, is truly a coverup for the standardization of consultative mechanisms and their degeneration into a mere procedural requirement, one which legitimizes the interventions of third parties in ethnic territories.

The legal frameworks, administrative mechanisms and institutional architectures designed by governments reveal that, as a general rule, the prior consultation process is only implemented once the decision to intervene in collective territories has already been taken. That is, once the concessions, the tenders, the contracts, the technical studies, and all types of decisions that compromise the lives of communities have already been finalized, without there being any type of prior communicative process informing the communities of these legal acts from the moment of their conception.

A recent example of this type of practices is [the awarding of six wind farms in the collective territories of the Wayúu people of la Guajira](#), as part of a renewable energy auction that concluded in October of 2019. Recently, long past that date, the state and the benefitted companies began the processes for prior consultation through a mechanism called “Guajira consults and acts” (Guajira consulta y actúa), which was approved, promoted and conceived by the government without any involvement from indigenous communities.

## **The paradoxical impact of prior consultation**

The ILO’s Convention No. 169 marked the beginning of an international legal space that advocated for the right of ancestral peoples to have a say in the decisions of third parties whose activities could compromise their collective territories and integrity. Since the enactment of the Convention, the indigenous and tribal peoples, the states that ratified it and some national and international courts, have all continued to expand the catalogue of rights to which the peoples are entitled to as collective subjects.

However, the rights of ethnic peoples and communities to prior consultation and consent regarding policies, works or projects that could affect them, do not constitute strictly binding elements for states. Specifically in the case of Colombia, the content and sphere of application of the rights to prior consultation (PC) and to free, prior and informed consent (FPIC) have been established through the case law of the Constitutional Court of Colombia. In one of its multiple statements regarding the nature of FPIC as a correlate of the right to PC (Sentence T-129 of may 2011), the high court highlighted the fact that, in addition to the realization of an official consultation, the state is obliged to seek out the consent of the implicated communities.

However, the Court also highlighted the legal problems surrounding the obligatory nature of consent, and made an active effort to dispel the momentum that had been gained by the interpretation of “consent” as a form of tacit veto right. And so due to their lack of binding legal force, the consultations have fallen into inertia and, paradoxically, have ended up serving as legitimizing tools for projects that infringe upon other collective rights of indigenous peoples, such as the rights to autonomy and self-determination. Moreover, the projects for whose benefit they have been utilized, usually hinder the integrity of ancestral

territories and the right to freedom of movement throughout them; they limit the access and availability of water and other key resources; promote the loss of biodiversity and of sacred spaces that are fundamental for the preservation of culture; disrupt daily life and social bonds in the community, or weaken the indigenous peoples' own systems of government and justice.

Since its enactment, the ILO's Convention No. 169 and [the United Nations Declaration on the Rights of Indigenous Peoples](#) have become the most important instruments within the international legal system for the defense of the rights of ethnic peoples and communities. Both documents built up a sphere of autonomy for those indigenous and tribal peoples that have been subjected to the will of national states, and narrowed down ambiguous terminology like autonomy, free determination and self-government to concrete meanings within the sphere of these people's local and internal affairs, basically, to serve as concrete tools for the determination of their own political condition and the pursuit of their economic, social and cultural development.

In this context, prior consultation has become the mechanism par excellence for engaging in dialogue with the state and external private individuals. However, on the other hand, it has also become an instrument that legitimizes the asymmetries of power between the state and the ethnic peoples and communities, and which serves as a vehicle for outside interventions in indigenous territories, resources and systems of self-government.

Such is the current state of affairs, in which, faced with the declining meaning of the rights to autonomy and self-determination, and with hundreds of negative experiences in consultative processes, both indigenous and afro-Colombian communities and organizations have nevertheless continued to vindicate their fundamental right to being consulted and to have a say in those matters that affect their territories, societies and cultures. Taking into account that the mere concepts of PC and FPIC are frequently called into question by established powers within Colombian society, indigenous peoples have taken it as their struggle to re-frame these processes as fundamental rights within the sphere of their autonomy and self-determination, in so far as they constitute a legal safeguard for their survival within the nation-state. Following that same line, they have created new legal

instruments that are known as autonomous mandates or protocols for prior consultation and relationship with external actors.

## **The autonomous protocols**

In Colombia, the history of these legal instruments goes back more than a decade, when some communities began to propose solutions for what they observed were problems inherent to consultations and their lack of binding legal force. Back then, some communities and organizations [vindicated, without success, their right to oppose and veto any intervention that could affect their territories and societies.](#)

Between 2014 and 2017, with the support of organisms such as the Office of the United Nation's High Commissioner for Human Rights and the Spanish Agency for International Development Cooperation, new work processes were advanced which involved wide participation from indigenous and afro-Colombian territories. Out of these resulted a series of autonomous protocols such as those of the Arhuaco people of Sierra Nevada de Santa Marta; of the Resguardo Nasa de Cerro Tijeras; of the Black Norte-Caucano People from the community councils of the municipalities of Suárez and Buenos Aires; and of the Black People of the Cuencas de los Ríos Mayorquín, Raposo y Anchicayá. These autonomous instruments for consultation and relationship with the state and private individuals were enshrined in legal documents that put forth diverse emphases, trajectories and resolutions.

The [Autonomous Protocol of the Arhuaco People \(2017\)](#) builds from the foundation of their traditional law, the Seyn Zare, their ontological perspective, the constitutive principles of their society, their traditions, their way of relating with the bunachu (the non-indigenous), and their restrictions upon certain behaviors. The document is presented as a mandate "that our authorities must enforce and the younger brother must respect, as the former rule for the benefit of our territory".

This protocol develops a set of valuation parameters that weigh the gravity of infringed damages based on the level of harm caused to the elements of the cosmos and their preservation. Similarly, it advocates for a perspective of caring around these elements, and argues that any human intervention that could hamper them, should be either avoided or forbidden. The mandate also describes the structure of self-government and establishes the

ways of engaging with third parties; in this last segment are included certain aspects relating to prior consultation. In sum, the protocol introduces a new correlation between Consult and Free, Prior and Informed Consent, as it flips the terms of the discussion by defining beforehand those affairs that cannot be consented to and which, therefore, have no reason to be consulted about.

For its part, the protocol of the [Nasa People of Cerro Tijeras](#) builds from their culture and collective identity, which are intimately linked to animals, the sun, the water and the territory. All of these elements are affected by armed violence and by the construction of La Slavajina dam, a mega infrastructure work that is being constructed without any consultation or participation from local inhabitants. In fact, the dam wall was built over the spirit of water: the Xia Kue.

In the protocol, the introduction of the key pillars for engaging with the outside is followed by a description of those government and authority bodies and institutions charged with tending to spirituality, the harmony of the territory, administration and government. There, it is established that the social, cultural and spiritual orders fall under the responsibility of the ancestral authorities, the Thé Wala. They are the bearers of knowledge and medical and ritual wisdom.

In terms of prior consultation, the Autonomous Protocol of the Nasa People of Cerro Tijeras also outlines those matters that can not be the object of consultations or consent, and highlights that the Thě'' Walawesxare the only legitimate authority to represent the community within consultative processes. It is through them that the indigenous peoples' system of government and the [Special Indigenous Jurisdiction](#) are articulated in their territories, following their procedures, practices and customs. On that same line, the protocol enumerates offenses and punishable crimes that are extensive to those third parties which may infringe on the norms within their territory. In such a circumstance, the case is to be brought before an indigenous court, without dismissing the processes of other judicial authorities or institutions such as the Ombudsman's Office of Colombia.

From a different perspective, [the protocol of the black people of the Consejos Comunitarios de Suarez y Buenos Aires in the northern part of the Cauca](#) reaffirms their tradition and

identity as a part of an afro- descendent people that was enslaved, but that never receded in its struggle for liberty and autonomy. The document establishes the mechanisms to which the prior consultation processes must adhere to, asserting the authority of internal regimentation, the plan of use and management, and the plan for the ethnodevelopment of communities. The protocol places an emphasis on three topics that are essential for the people, but ambiguous and controversial for the economic interests of companies and governments.

The first of these topics refers to the form of financing prior consultations. One of the difficulties that is presented within the consultative processes is the asymmetry of power in the dialogues and negotiations, which can be largely attributed to the fact that the consultations are financed by those same companies that have an interest in their outcome. The protocol establishes that it is the state, not the companies, who has a duty to finance the processes of consultation under the principles of transparency and impartiality, and which must overlook their execution through the appropriate entities. A second topic is the preliminary evaluation of the interested company, which basically consists in rating its social responsibility: if it has ever caused any harm or prejudice to other peoples or communities, it must rectify those harms before the consultation takes place. Finally, the third topic is that of conferring binding legal powers to the right to free, prior and informed consent, in close relation to cultural and environmental objections. This signifies that in the unfolding of a PC, a decision could be reached that denies the authorization to intervene in the collective territory, after a truly free and independent assessment has taken place regarding the impacts of the specific work, project or administrative measure.

### **A state reluctant to recognize autonomy and self-determination**

The national government, the private individuals interested in developing their projects in ethnic territories, the mechanisms for prior consultation and for free prior and informed consent, all of these respond to a same development model that is eminently extractive, and to a procedural logic which is far from the minimum procedural standards dictated by the case-law of the [Inter-American Human Rights System](#) and the Constitutional Court of Colombia. The latter establish that:

- Consultations must be conducted prior to any intervention.
- Consultations must be conducted in good faith and with the objective of reaching an agreement.
- Consultations must be culturally appropriate.
- Consultations must provide adequate, truthful and sufficient information regarding the projects, works or measures being discussed.

To the breach of the governing principles of prior consultations by the national government, one can add the indifference of private companies, which, according to [constitutional case law](#), have frequently violated the standards of diligence in the fulfillment of their duties within consultative processes. They have done so by refusing to recognize the communities that are affected by their projects; by disregarding those communities' ancestral titles to land, territories and recourses; and, in general, by ignoring the official regulations in matters of prior consultation.

In this context, it is difficult for the autonomous protocols to be implemented in the short term. In fact, [the Interior Ministry has publicly stated that is not supportive of these initiatives](#), a reaction which tacitly exhibits the lack of guarantees for ethnic peoples and communities in the country that try to exercise their rights to autonomy and free determination.

Currently, the position of the Executive and of the business class regarding the autonomous protocols for prior consultation is very clear: they don't consider them to be viable, basically, because they would interfere with their own processes and interests and with the "development" of the country. In this sense, the opinion of companies has been identical to that of the government, and there seems to be little substantive progress in understanding or adopting the protocols.

On the other hand, the progress of case-law in matters of autonomous protocols for prior consultation and relationship with external actors, is practically non-existent. Except for a marginal reference in 2014 regarding a filing of an [amparo de tutela](#) (a protective action of constitutional rights) by black communities to safeguard their right to PC, in the context of

the passing of some new legislative measures, tribunals have made very little progress in the conceptualization of these autonomous instruments.

At 30 years since its formalization through the ILO's Convention No. 169, the fundamental rights to prior consultation and free, prior and informed consent are undergoing a crisis of credibility and efficacy. This has resulted in autonomous initiatives that could potentially allow the Colombian ethnic peoples and communities to have a truly symmetrical relationship with the state and with private individuals, and a real influence in the affairs that affect their collective life, territories and resources.

Under these circumstances, the autonomous protocols for prior consultation and relationship with external actors, which have emerged from ethnic Colombian peoples and communities, do not only have a strong rooting in their traditions, practices, customs and traditional laws, but inscribe themselves coherently in that catalogue of rights that has been acknowledged by international law. However, their full integration will have to go through a path of dialogue and organization at both the national and international levels, to mobilize the competent spheres of power and force them to guarantee the collective rights of these peoples and communities, beyond the right to Prior Consultation.

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