

## **Legal pluralism and autonomous protocols**

*Upon the weakening of the consultation of indigenous peoples set forth in ILO Convention 169 and as a result of a long process of land and political vindication, indigenous protocols are instruments of governance that coexist with the legal regulations of a State and give way to a more complex and plural legal system that contributes towards pacific coexistence.*

**By Valentina López Garrido - October 1st, 2020**

During the last two decades, a series of autonomous protocols have emerged in Latin America. These protocols were drafted by indigenous peoples establishing principles and rules for the exercise of collective rights as regards their internal organization and their relationship with the State and other actors. Mainly, the instruments are to be applied in the process of free, prior and informed consultation of projects that may affect their territories, natural resources and way of life. The name, content and scope vary according to each people. Likewise, the impact on the guarantee of their rights and the relationship with the domestic and international legal background vary according to their social, political, cultural and economic context.

Protocols have been elaborated in Argentina, Honduras, Brazil, Canada, Costa Rica, Belize, Suriname, Colombia, Guatemala, Paraguay, Bolivia and Chile. In Peru, the protocols are in the process of being drafted. In Mexico and Bolivia, there are no protocols. However, self-determined mechanisms related to indigenous autonomy and already acknowledged by the State have been adopted. The experience in the continent takes place in a global context that led indigenous peoples, afrodescendant groups and local communities to prioritize autonomous strategies in their struggle for their rights. Additionally, these instruments have stricken the attention of international organizations, States and the peoples themselves, diversifying the approaches and multiplying the experiences to be analyzed.

## **From indigenous autonomy to legal pluralism**

International regulations recognize autonomy and self-determination of the indigenous peoples as one of the pillars of human rights. Consequently, the indigenous autonomies have adopted treaties, agreements and peace processes as a constitutional acknowledgement of their autonomy: by means of local administration structures, functional autonomies or permanent collaboration instances.

As regards Latin America, this right has been greatly developed. The Political Constitutions of Mexico (2001) and Bolivia (2009) expressly recognize self-determination. Others grant special political autonomy to the indigenous peoples and other ethnic groups, such as Nicaragua (1987), Colombia (1991), Ecuador (1998 and 2008), México (2001) and Bolivia (2009). Moreover, many laws have been enacted in Nicaragua (Statute of Autonomy of the Atlantic Coast Regions, Act No. 28, 1987), Bolivia (Autonomy Framework Act No. 031, 2010), Colombia (various laws that regulate participation in shelters). In the case of Colombia, we also need to highlight case law by the Constitutional Court, which reaffirms their autonomous nature when threatened by State actions. Additionally, legislation in Panamá has established five indigenous regions with high levels of autonomy during the 50s.

The Colombian human rights and intercultural conflicts expert, Gladys Jimeno Santoyo, mentions that, [with the States' recognition, the indigenous people exercise their traditional methods of self-governance including their own rules](#). Concerning their internal organization, this means establishing and accomplishing their own development projects, solving internal conflicts and regulating their people's relationship with nature and spiritual matters. As regards the external dimension, they can set up rules and dialogue mechanisms to participate in the adoption of those decisions that affect them, to strengthen their government structures and regulations, to establish their development priorities and, in general, to participate in the decision-making process as equals.

The autonomous protocols are part of these autonomy processes, they are the expression of indigenous normative systems and they give rise to the legal pluralism, that is, the coexistence of indigenous normative systems and the state's legal system. Legal pluralism

was first mentioned in legal anthropology studies carried out in non-western societies, which showed there were normative systems that differed from state law.

In most cases where there is indigenous and state legal systems, legal pluralism is manifest. According to Brian Tamanaha, Professor at Washington University School of Law, [this happens when the state recognizes non-state orders](#) that may even be clearly contradictory: “What makes it manifest legal pluralism is that everyone sees these as diverse legal forms, with stark contrasts plainly visible between the content and operation of official state law and customary or religious law”.

Therefore, as mentioned by the [specialist in Legal Pluralism from the Amsterdam Law School, André Hoekema](#), and [doctor in Sociology of Law, Boaventura de Sousa Santos](#), autonomous protocols appear as a result of a situation of interlegal conflict among different legal systems. In these problematic areas, the protocols created by the indigenous peoples come as a legal expression that acquires structure and validity.

### **From the weakening of indigenous consultation to autonomous protocols**

Protocols are the result of a long process of land and political vindication: they imply a debate within indigenous communities; the internal articulation of their governance structures with the political and social organization; and the search for strategies to control and manage their territories from a social and environmental perspective. This has happened in Brazil, Peru, Honduras, Mexico and Bolivia; and in land demarcation processes as took place in Brazil and Honduras.

They all explain the conflict among indigenous people, the State and private actors who are threatening their territories and way of life. In Brazil, the case of the Munduruku people was due to the delay in land demarcation; while the case of the Juruna people is related to a mining project proposal in their lands. In Chile, the protocol of the Yaghán people originated by the increasing impact of scientific tourism within their territories.

A key factor in the emergence of protocols is related to the weakening of the indigenous consultation as an effective participation mechanism used by indigenous peoples regarding matters that affect them, either because there is an insufficient national legal framework or

due to factual gaps to implement the law. In some cases, they are created as a response to consultation bills that could be regressive in guaranteeing this right (Honduras, Brazil, Mexico or Colombia). Generally, they coexist along with other strategies, such as land self-demarcation, strategic litigation and interethnic political relations.

As regards the elaboration process, protocols are created according to each people's own mechanisms: their stages, methods and length of discussion and deliberation; while the adoption and promotion will depend on the social, political and legal organization, as well as the context. Sometimes, they are assisted by non-governmental organizations. After elaboration, protocols are presented before national government organizations as an official communication act and, then, socialized internationally and regionally, depending on whether they are public or bilateral.

Concerning their collective rights, they refer to the identity, principles and fundamental rules of their people, and they provide a framework as to their application context and the conflict covered by the protocol. Each instrument establishes the people's development priorities and their main concerns and threats. Indigenous consultations, on the other hand, address topics such as: duties and subjects of consultations; matters to be consulted and consented; rules related to the internal decision-making processes; regulations that guide their communication with the State and their relationship with non-state agents (companies); financing; technical, academic and government support; risks and threats; assessing and closing methods of the consultation process; the protocols' reference to land rights of indigenous peoples.

Having said the above, it can be established that protocols have normative purposes since they are invoked as legal rules used in conflicts or situations included in the protocol itself in order to solve them legitimately. However, there are non-legal aspects involved: the strengthening of indigenous self-determination and land governance; the knowledge of the diverse political and social organization methods of the peoples; and the mediation tools when proposing an intercultural dialogue to improve their position when facing external actors.

**Final thoughts**

Case studies shed light on the emergence and development of autonomous protocols and other self-determined management instruments used to enforce their collective rights. They are the expression of the indigenous people's own law and its content is notoriously influenced by international law and state legal frameworks. Nevertheless, protocols do exist notwithstanding the state or international recognition or lack of it. They are the result of internal articulation processes that include their customs, practices, rules and institutions, which are revived with these instruments.

Indigenous autonomous processes; the legal system of the state; the relationship with human rights: social, the political and economic aspects; the legal traditions and culture of a social area; as well as the historical processes of the peoples and their relationship with the State or higher entities are some of the factors to consider when it comes to applying protocol. They also define the exercise of rights and, ultimately, the indigenous autonomies. For this reason, each protocol should be studied according to its context.

Additionally, the empirical study of the protocols is relevant to understand how they actually operate and how they are invoked as they own right. The implementation of protocols creates challenges regarding the state's recognition of collective rights and the institutionalization of shared power mechanisms.

The majority of studies about autonomous protocols conclude that they aim at promoting values, principles and rules of the people to improve dialogue and negotiation with the State and other peoples. However, we believe that this may be a hasty conclusion. It is still necessary to study whether the protocols open the door to a legal pluralism scenario where the state and the indigenous legal systems coexist, regulating consultation processes and the exercise of other collective rights in a conflicting way.

As such, protocols may be invoked as the right of the indigenous people to regulate a situation or solve a particular conflict collaboratively and legitimately. This approach could increase the protocols' purposes, which will contribute to the articulation and harmonization of the relationship between the indigenous people and the State. These

considerations could allow us to create a more complex and plural law that contributes to the pacific coexistence of the State, the peoples, society and the environment.

**Valentina López Garrido is a lawyer at the Human Rights Research Center of the University of Chile School of Law and an assistant researcher in the project “Study of cases regarding autonomous protocols of indigenous consultation in the American continent”.**