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PRIOR CONSULTATION IN LATIN AMERICA SYMPOSIUM

Symposium: Prior consultation in Latin America – The Case of Colombia

Prior Consultation in Colombia: Paradoxes of Inclusion through Tribalization

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Prior Consultation in the Colombian Context

After a five-decades-old internal conflict that hurts mainly rural areas, Colombia is currently one of the most unequal countries in the world (12^o place by Gini index of family income). It has one of the highest homicide rates worldwide

(10^o place in 2013, with an average of 80 massacres per year from 1980 to 2012) and around six million people have been forcibly displaced, ranking as the second largest internal displacement crisis in the world –only outranked by Syria. As a result, peasants have systematically lost land by violent means; land concentration has worsened from 0.81 in 2002 to 0.85 in 2009 in the Gini index for land inequality (in the interval of 0 and 1 of the Gini index, 1 means absolute inequality), and at least one-third of the country's indigenous groups are in risk of disappearance. This intricate context sets harsh limits to the exercise of ordinary mechanisms for participation and political deliberation, particularly in rural and semi-rural areas.

In view of the risks of socio-political involvement, prior consultation has become one of the few legitimate and accepted ways to articulate demands before the government and the national courts, and an instrument to retain the local control over the natural resources, or at least to be heard and to negotiate before such control is transferred.



During the last two decades, invoking ethnicity in Colombia has enabled different groups to appeal to ILO Convention 169, which recognizes the rights of collective ownership of tribal and indigenous peoples over the lands which they traditionally occupy. This has increased the incentives among local actors to (re)define themselves and be recognized as “indigenous” or “tribal” groups and therefore, to be entitled to the right of prior consultation. Progressively, the Constitutional Court has extended this

right to all Afro-Colombians through an anachronistic categorization as “tribal peoples”. Conversely, non-ethnicized local groups (particularly landless peasants) remain widely excluded.

The Tribalization of Afro-Colombians and the Exclusion of Peasants

As ILO 169 does not define who “indigenous” and “tribal peoples” are, defining the right holders of prior consultation has become a domestic issue, thus legal categorizations of what it means to be indigenous may vary from country to country. In Colombia, the 1991 Constitution recognized the compulsory character of prior consultation only in favor of indigenous peoples. However, in 2003 the Constitutional Court stated that rural Afro-descendants of the Pacific region organized as “black communities” also enjoy the right to prior consultation. To fit with the ILO 169 requirements, the Court characterized them as “tribal” peoples. That means that Afro-descendant groups must prove that their social, cultural and economic conditions distinguish them from other sections of the national community, and that their status is regulated by their own customs or traditions (Article 1 ILO 169). Thus, paradoxically, in order to be heard and included, rural Afro-descendants shall adopt the label of “tribes” (with the potential negative connotations and stereotypes of the term), remain in their lands, and maintain customs and traditions that are different to that of the majoritarian society. Reviving anachronistic categorizations and conditioning prior consultation to the occupation of a rural territory in the praxis excluded different Afro-descendant groups –e.g. those who were victims of forced displacement and now live in urban areas. In view of intra-group representation deficits and unequal treatment, the

Court has extended in subsequent decisions the Afro-Colombian groups who are entitled to prior consultation but the procedures are currently negotiated.

On the other hand, in the absence of other operative participatory mechanisms for affected local communities, prior consultation entails a judicial selection of local actors who have a say by distinguishing between indigenous peoples and non-indigenous groups. This indigenous/non-indigenous dichotomy has reinforced social tensions in certain locations under violent conjunctures. Rural peoples that do not fit into the ethnocentric model (in particular, non-ethnicized peasants) are excluded from prior consultation procedures, a situation that is connected to the lack of recognition of their land rights. Consequently, non-ethnicized peasants, who historically have had few opportunities to engage in formal arenas to present their concerns to the State, are facing unequal treatment when comparing to their indigenous and tribal neighbors in situations where land property and control of local resources are at stake.

Current discussions on alternatives to solve representation deficits and to include non-ethnicized rural communities highly depend on the agreements in the framework of the ongoing peace negotiations between the Colombian government and the Revolutionary Armed Forces of Colombia (FARC). Both parties have already reached agreement on economic measures for social inclusion in rural areas and the provision of land to poor peasants, and have set a deadline of 23 March 2016 to sign a final peace deal.

Projections

Would Colombia adopt legal mechanisms for the inclusion of peasants through their ethnicization? Some scholars and political actors suggest that it is possible to conceive peasant communities as culturally diverse collective subjects, and consequently, as holders of collective rights (including prior consultation). And it seems that the Constitutional Court is moving in this direction when it speaks of a “peasant culture” and of the holding of the right to land, independently of legal property titles (cf. Ruling T-763/2012). Nevertheless, I doubt that a further ethnicization of identities will reduce the sharp inequalities that have come to condition the effective participation of rural peoples in the decision-making process.

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