

The Right to Prior Consultation in the Construction of the Plurinational State of Ecuador

*David CORDERO-HEREDIA**

Le droit à la consultation préalable dans la constitution d'un État équatorien plurinational

El derecho a la consulta previa en la construcción del Estado Plurinacional de Ecuador

O direito a consulta prévia na constituição do estado plurinacional do Equador

建设多民族厄瓜多尔国家过程中的事先征询权

Résumé

Les réformes juridiques sont-elles synonymes de changement social? Avec l'adoption de la Constitution de 2008, les

Abstract

Does legal reform mean social change? After the approval of the Constitution of 2008, the peoples of Ecuador

* Associate Professor of Law (Pontifical Catholic University of Ecuador). Doctor in the Science of Law candidate (Cornell Law School). This paper was the thesis of his Master of Laws program (Cornell Law School), and it was supervised by Professor Gerald Torres of Cornell Law School. The author would like to thank the following people for their useful comments and support: Ana Cecilia Navas, Professor Gerald Torres, Professor Mitchel Lasser, Katherine Camilleri, Crispin Logan, José Tomás Sánchez, Roberto Carrillo and the participants of the Second Conference for Junior Researchers of the Stanford Program in Law and Society (SPLS) at Stanford Law School (2015) on "Law and social transformations", and the 12th Annual Inter-University Graduate Conference at Cornell Law School (2016) on "Transnational Interests & the Globalization of (In)equality". The author would also like to recognize and to thank the following people for their research assistance: Monica Vera Puebla, Juan Francisco Cárdenas, Diana Carrión Mera, Victor Samaniego Rivera, and Jefferson Macías Quisaguano. Sources in Spanish were translated by the author unless indicated otherwise. Author's emails: dac393@cornell.edu or dacordero@puce.edu.ec.

peuples de l'Équateur ont instauré un nouveau modèle étatique: l'État plurinational. Ce dernier répond aux revendications des peuples autochtones visant à dépasser le paradigme de l'État-nation qui fragilise la diversité ethnique et historique de l'Équateur.

La notion d'État plurinational repose sur une conception multiculturelle de la société et sur le principe voulant que différents groupes politiques, ou nations, puissent coexister sur un même territoire en étant placés sous une seule autorité étatique souveraine et sur un pied d'égalité pour ce qui concerne le respect du droit à l'auto-détermination. Ces nations distinctes bénéficient du même poids au sein de la société et, partant, doivent pouvoir prendre part au processus décisionnel de l'État. En outre, la Constitution équatorienne de 2008 définit quatre mécanismes de l'État plurinational: (i) la protection de l'intégralité du territoire de chaque communauté, (ii) l'autonomie gouvernementale, (iii) l'application des règles coutumières de chaque nation, et (iv) le droit d'être consulté sans coercition et de prendre des décisions éclairées. Enfin, le but poursuivi par l'État plurinational est donc double: tout d'abord, protéger et respecter la diversité culturelle; et ensuite, s'assurer de la participation des nations autochtones aux décisions étatiques ayant une incidence sur leurs territoires et leurs cultures.

Cet article propose un bilan des premières années suivant l'entrée en vigueur de la Constitution équatorienne de 2008, en s'intéressant particulièrement au droit à la consultation préalable, mécanisme de dialogue interculturel entre l'État central et les nations autochtones. La portée de ce droit demeure l'objet de débats permanents, notamment en raison des enjeux

adoptés par le nouveau modèle de l'État plurinational. The Plurinational State was a claim of the indigenous peoples' movement to overcome the nation-state paradigm that undertakes the ethnic and historic diversity of Ecuador.

A Plurinational State starts with the principle that societies are multicultural and that different political groups or nations coexist in the same territory under the same state sovereignty and in equal conditions as a matter of respecting the right of self-determination. Nations have the same weight in a society and, therefore, must have a seat at the state's decision-making table. Furthermore, the 2008 Ecuadorian Constitution defines four mechanisms of the Plurinational State: (i) protection of the entire community's territory; (ii) self-government; (iii) application of each nation's customary laws; and, (iv) the right to be consulted on an informed basis and free of coercion. Finally, the Plurinational State seeks to accomplish a double goal: first, to protect and respect cultural diversity; and, second, to ensure that indigenous nations participate in the state's decisions that will affect their territories or culture.

This paper constitutes a diagnosis of the first years of the Ecuadorian Constitution of 2008, and it focuses on the right to prior consultation, which is a mechanism for intercultural dialogue between the central state and indigenous nations. The scope of this right remains the subject of permanent debate because of the economic implications related to natural resources in the territories of indigenous peoples. However, in a Plurinational State, the respect of territory and self-government should result in a version of this right that respects the decisions of each indigenous nation. The research re-

économiques liés à la présence de ressources naturelles sur les territoires autochtones. Toutefois, au sein d'un État plurinational, le respect du territoire et de l'autonomie gouvernementale devraient avoir pour conséquence une conception de ce droit qui respecte les décisions de chaque nation autochtone. La présente recherche démontre que l'Équateur a élaboré des règles et rendu des décisions ambiguës qui ont permis au gouvernement de déterminer seul l'issue de projets intéressant les peuples autochtones. Les lacunes dans la protection du droit à la consultation préalable le réduisent en effet souvent à une simple formalité dans le processus de prise de décision. À partir de documents officiels et d'entrevues, et à l'aune des standards internationaux en la matière, cet article met en évidence l'absence de mise en œuvre du droit à la consultation préalable en Équateur et les menaces qui pèsent sur la constitution d'un État équatorien plurinational.

Resumen

¿Reforma legal significa cambio social? Después de la aprobación de la Constitución de 2008, los pueblos de Ecuador adoptaron un nuevo modelo de Estado: el Estado plurinacional. El Estado plurinacional era una demanda del movimiento indígena para superar el paradigma del Estado nación y asumir la diversidad étnica e histórica del Ecuador.

Un Estado plurinacional parte del principio de que las sociedades son multiculturales y que los diferentes grupos políticos o naciones coexisten en el mismo territorio, bajo la misma soberanía estatal y en igualdad de condiciones de manera que se respete el derecho de libre determi-

sults show that Ecuador has crafted ambiguous rules (and rulings) that allow the government to make the final decision on projects affecting indigenous peoples. Moreover, the lack of protection of the right to prior consultation is turning it into a formality in the decision-making process. Using international standards, official documents and interviews, the research shows a lack of implementation of the right to prior consultation in Ecuador and a lagging debt on the construction of a Plurinational State in Ecuador.

Resumo

Reforma legal significa mudança social? Após a aprovação da Constituição de 2008, os povos do Equador adotaram um novo modelo de estado: o estado plurinacional. O estado plurinacional era uma reivindicação dos movimentos dos povos indígenas para superar o paradigma do estado-nação e comprometer-se com a diversidade étnica e histórica do Equador.

Um estado plurinacional parte do princípio que sociedades são multiculturais e que diferentes grupos políticos ou nações coexistem no mesmo território sob o mesmo estado soberano e em condições iguais como questão de respeito ao

nación. Todas las naciones cuentan con la misma importancia en una sociedad y, por lo tanto, debe asegurárseles un asiento en la mesa de decisiones del Estado. Por otra parte, la Constitución del Ecuador de 2008 define cuatro mecanismos del Estado plurinacional: (i) la protección del territorio común; (ii) el autogobierno; (iii) la aplicación del derecho consuetudinario de cada nación; y, (iv) el derecho a ser consultado, debidamente informado y libre de coerción. Por último, el Estado plurinacional busca cumplir un doble objetivo: en primer lugar, proteger y respetar la diversidad cultural; y, en segundo lugar, asegurar que las naciones indígenas participen en las decisiones del Estado que puedan afectar sus territorios o su cultura.

Este documento constituye un diagnóstico de los primeros años de la Constitución ecuatoriana de 2008, y se enfoca en el derecho a la consulta previa, el cual es un mecanismo para el diálogo intercultural entre el gobierno central y las naciones indígenas. La dimensión de este derecho sigue siendo objeto de permanente debate debido a las implicaciones económicas relacionadas con los recursos naturales en los territorios de los pueblos indígenas. Sin embargo, en un Estado plurinacional el respeto al territorio y al autogobierno debe dar lugar a una versión de este derecho que respete las decisiones de cada nación indígena. Los resultados de la investigación muestran que Ecuador ha elaborado normas ambiguas (y resoluciones) que permiten al gobierno tomar la decisión final sobre los proyectos que afectan a los pueblos indígenas. Más aún, la falta de protección del derecho a la consulta previa lo está convirtiendo en una formalidad en el proceso de toma de decisiones. Con la ayuda

de direito a autodeterminação. As nações têm o mesmo peso em uma sociedade e, portanto, devem ter assento à mesa de tomada de decisões do estado. Além disso, a Constituição equatoriana de 2008 define quatro mecanismos do estado plurinacional: (i) proteção de todo o território da comunidade; (ii) autogoverno; (iii) aplicação da lei consuetudinária de cada nação; e, (iv) o direito de ser consultado de maneira informada e livre de coerção. Finalmente, o estado plurinacional busca atingir um duplo objetivo: primeiro, proteger e respeitar a diversidade cultural; e, segundo, assegurar que as nações indígenas participem das decisões de estado que afetarão seu território ou cultura.

Este artigo constitui um diagnóstico dos primeiros anos da Constituição equatoriana de 2008 e se concentra no direito a consulta prévia, que é um mecanismo para o diálogo intercultural entre o estado central e as nações indígenas. O escopo deste direito continua sendo tema de debate permanente devido a suas implicações econômicas relacionadas aos recursos naturais e aos territórios dos povos indígenas. No entanto, em um estado plurinacional o respeito ao território e o autogoverno devem resultar em uma versão deste direito que respeite a decisão de cada nação indígena. O resultado desta pesquisa mostra que o Equador criou regras (e decisões) ambíguas, que permitem ao governo tomar a decisão final em projetos afetando os povos indígenas. Mais ainda, a falta de proteção do direito a consulta prévia está tornando-o uma formalidade no processo de tomada de decisão. Usando parâmetros internacionais, documentos e entrevistas oficiais, a pesquisa mostra uma falta de implementação do direito a consulta

de estándares internacionales, documentos oficiales y entrevistas, el resultado de la investigación demuestra la falta de aplicación del derecho a la consulta previa en Ecuador y una deuda pendiente en la construcción de un Estado plurinacional en Ecuador.

prévia no Equador e uma dívida pendente na construção do estado plurinacional do Equador.

摘要

法律改革就意味着社会变革吗？2008年宪法通过以后，厄瓜多尔人民采用了一种新的国家形式：多民族国家。多民族国家是土著民族运动试图克服民族国家范式的要求，植根于厄瓜多尔的族裔和历史多样性。

多民族国家的首要原则是：社会是多元文化的，各个政治群体或民族在一个主权之下的国土中平等共存，其自决权受到尊重。民族与社会具有相同分量，因此，民族必须在国家的决策机制中享有一席之地。另外，厄瓜多尔2008宪法确定了多民族国家的四大机制：（1）保护整个共同体的领土；（2）自治；（3）适用各个民族的习惯法；以及（4）知情协商权和免于强迫。最后，多民族国家旨在实现双重目标：第一，保护和尊重文化多样性；第二，确保土著民族参与影响他们土地或文化的国家决策。

本文分析评价了厄瓜多尔08宪法第一年的实施情况，重点关注事先协商权——一项中央政府与土著民族之间的文化间对话机制。由于涉及土著民族土地上自然资源的经济意义，对于此项权利的范围仍然争议不断。不过，在一个多民族国家，尊重领土和自治必然要求这项尊重各个土著民族决策的权利。研究结果表明，厄瓜多尔制定了模糊的规则（裁决），让政府在影响土著民族的项目上享有最终决策权。而且，缺乏对事先协商权的保护机制使得此项权利在决策程序中流于形式。本文通过研究国际标准、官方文件和访谈后发现，厄瓜多尔的事先协商权缺乏落实，多民族国家建设任重道远。

Table of Contents

Introduction	199
I. Rights of Indigenous Peoples	202
A. Liberal Perspective of Minority Groups.....	202
B. Self-Determination and the International Evolution of Indigenous Peoples' Rights.....	203
C. Neoconstitutional Approach	204
D. Plurinational State?.....	205
II. Right to Prior Consultation under International Law	209
A. The Consultation Process must be Conducted by States.....	211
B. Role of Traditional Authorities in the Consultation Processes	213
C. Participation on Designing and Planning the Consultation Process	214
D. Obligation of Conducting a Prior Consultation	215
E. Obligation of Conducting an Informed Consultation.....	216
F. Obligation of Conducting a Free Consultation.....	217
G. Conducting the Consultation Process following the Traditions and Institutions of the Consulted Population.....	218
H. Obligation of Good Faith and Prior Consent.....	219
III. Implementation of the Right to Prior Consultation in Ecuador	221
A. Implementation by the Executive Branch.....	223
1. Administrative Regulations.....	223

2. Administrative Decisions: the Case of the Amazon	
Consultation	224
a. The Ecuadorian State's Perspective	224
b. The Perspective of Indigenous Nations	226
B. Implementation by the Judiciary Branch	232
C. Implementation by the Legislative Branch	236
D. Application of Standards	238
1. On the Legislative Prior Consultation	238
2. On the Free, Informed and Prior consultation	239
Conclusion: Rethinking the Right to Prior Consultation	
in a Plurinational State.....	242

In 2008, the people of the Republic of Ecuador adopted a new constitution approved by referendum. The new Magna Carta is a legal document resulting from several public debates at the Constitutional Assembly, and it includes a number of social claims from different political figures, social groups, and other stakeholders.

One of the most important stakeholders in this process is the indigenous movement, which has gained much support from the *avant-garde* political groups seeking to put distance between them and the traditional parties. As a result, the preamble of the new Constitution of the Republic of Ecuador begins with the recognition of Ecuadorian society's multiculturalism; reference to the *Pachamama* (divinity of the Kichwa nation, literally means "Mother Earth") as part of society's existence; acknowledgement of the struggle against colonialism; invoking the wisdom of all cultures; and, reference to *Sumak Kawsay* (literally, "good way of living", a Kichwa concept referring to the relationship between people and nature) as a principle of public coexistence¹.

The first article of the 2008 Constitution states that Ecuador is a plurinational state². This is contrary to the traditional national-state view that has prevailed in the country's political theory and practice for the last three hundred years. A plurinational state is a political claim made by the indigenous movement and was conceived as an alternative to the national-state paradigm of modernism. The national state is linked to the idea of a nation as a group of people sharing the same history, past, customs, language, and identity that has settled in a certain geographical area for generations. Nevertheless, even in Europe, the birthplace of the concept, the national state was imposed by one dominant culture on another, so minority groups (or less powerful groups) had to adopt the idea of one nation. Consequently, a national state tends to reject multiculturalism in society, and its policies are likely to eliminate differences in order to achieve a homogeneous society.

¹ *Constitución de la República del Ecuador*, Asamblea constituyente, Official Registry No. 449 of October 20th 2008, online: <http://www.asambleanacional.gov.ec/documentos/constitucion_de_bolsillo.pdf>, Preamble (hereafter "CRE2008"). The translation to English of the CRE2008 used in this paper was made for The Political Database of the Americas of Georgetown University, online: <<http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>> (consulted on September 22nd 2016).

² *Id.*, art. 1.

A plurinational state starts with the principle that societies are multicultural, that different political groups or nations coexist in the same territory under the same state sovereignty and in equal conditions as a matter of respecting the right of self-determination. Nations have the same weight in a society and, therefore, must have a seat at the state's decision-making table. Furthermore, the 2008 Ecuadorian Constitution defines four mechanisms of the Plurinational State: (i) protection of the entire community's territory³; (ii) self-government⁴; (iii) application of each nation's customary law⁵; and (iv) the right to be consulted on an informed basis and free of coercion⁶. Finally, the Plurinational State seeks to accomplish a double goal: first, to protect and respect cultural diversity; and,

³ *Id.*, art. 57.4: "The following collective rights of indigenous communes, communities, peoples, and nations are recognized and guaranteed in accordance with the Constitution and human rights agreements, conventions, declarations, and other international instruments: [...] Without being subject to the statute of limitations, to keep ownership of their community lands, which are unalienable, immune from seizure, and indivisible. These lands are exempt from paying fees or taxes."

⁴ *Id.*, art. 57.15: "The following collective rights of indigenous communes, communities, peoples, and nations are recognized and guaranteed, in accordance with the Constitution and human rights agreements, conventions, declarations, and other international instruments: [...] To build and maintain organizations representing them within a context of pluralism and cultural, political, and organizational diversity. The State shall recognize and promote all forms of expression and organization."

⁵ *Id.*, art. 57.10: "The following collective rights of indigenous communes, communities, peoples, and nations are recognized and guaranteed, in accordance with the Constitution and human rights agreements, conventions, declarations, and other international instruments: [...] To create, develop, apply, and exercise their own legal system or common law, which cannot infringe constitutional rights, especially those of women, children, and adolescents."

⁶ *Id.*, art. 57.7 and 57.17: "The following collective rights of indigenous communes, communities, peoples, and nations are recognized and guaranteed, in accordance with the Constitution and human rights agreements, conventions, declarations, and other international instruments: [...] A prior informed consultation, free of charge, to take place within a reasonable period of time, on the plans and programs for prospecting, producing, and marketing nonrenewable resources located on their lands and that could bear an environmental or cultural impact on them; to have a share in the profits earned from such projects and to receive compensation for the social, cultural, and environmental damage inflicted on them. The consultation process to be conducted by the competent authorities is mandatory and has to take place opportunistically. If the consent of the consulted community is not secured, the steps defined in the Constitution and law will be taken. [And], to be consulted before a legislative measure that might affect any of their collective rights is adopted."

second, to ensure that indigenous nations participate in the state's decisions that will affect their territories or culture.

This research is centered on the right to prior consultation, which is a mechanism for intercultural dialogue between the central state and indigenous nations. This right is also listed in *Convention No. 169 of the International Labor Organization about Indigenous and Tribal Peoples in Independent Countries*⁷ and, since then, it has been continuously elaborated on in legislation, jurisprudence, and public policies in various countries. Nevertheless, the scope of this right remains the subject of permanent debate because of the economic implications related to natural resources in the territories of indigenous peoples. As a result, most states, including Ecuador, have crafted ambiguous rules that allow them to make the final decision on projects affecting indigenous peoples. Moreover, the lack of protection of the right to prior consultation is turning this right into a formality in the decision-making process.

This paper is focused on finding and organizing standards for consultation, using sources of international law for two purposes: (i) to establish a framework for analyzing the consultation (statutes, judgments, process, and so on); and, (ii) to allow indigenous peoples to seek judicial enforcement of this right in the case of the state breaching the standards. Part I will begin with a review of theoretical approaches to the recognition of the Rights of Indigenous Peoples. Next, Part II will discuss International Law standards pertaining to the right of prior consultation. Part III will use this framework to examine the exercise of consultation (in one case) and the regulation of the right to prior consultation in Ecuador. Finally, the conclusion answers the research question about whether using international law for prior consultation could be a step for implementing a plurinational state in Ecuador.

⁷ INTERNATIONAL LABOUR ORGANIZATION, *Convention (no. 169) concerning Indigenous and Tribal Peoples in Independent Countries*, June 26th 1989, 1650 R.T.N.U. 28383, (entry into force: 5 sep. 1991), online : <http://www.ilo.org/dyn/normlex/fr/f?p=NO_RMLEXPUB:1200:0::NO::P12000_INSTRUMENT_ID:312314> (hereafter "C169") (consulted on September 22nd 2016).

I. Rights of Indigenous Peoples

From the political theory perspective, there are different approaches for recognizing special rights for certain groups of people. Some of these rights are the result of social struggles for overcoming historical segregation from the political sphere. Four different perspectives address the indigenous peoples' particularity in debates about their rights: the liberal acceptance of minority rights, the international law theory of self-determination, new constitutional law perspectives concerning multicultural states, and the plurinational state concept. We will address each of these perspectives separately in the following sections.

A. Liberal Perspective of Minority Groups

Liberal theories support the idea that democracy is dominated by majorities; therefore, the rights of people that are excluded from the majority are called "minority rights"⁸. Based on liberal theory⁹, minority rights function as individual human rights and are designed to allow groups to keep their culture or achieve equality. Nonetheless, this vision does not address the importance of the collectiveness and the uniqueness of indigenous peoples. Collectiveness means a way of thinking about society as a life entity formed by ancestors, and the current and future generations; as a result, all rights get a different perspective. Kymlicka's work could be seen as applying liberal theories for recognizing special rights of cultural minorities. In his book *Politics in the Vernacular*¹⁰, Kymlicka proposes the concept of liberal culturalism, which enables groups to be entitled to special cultural rights. The most important aspect of his theory is the preservation of the culture of the minorities, so they can continue to use their language, religion, traditional dress, and so forth. For him, self-government should be permitted for "issues that are crucial to the reproduction of their language and culture"¹¹. In another book, *Multicultural Citizenship*¹², Kymlicka presents a theory to resolve the supposed contradiction between minority rights and liberal tradition and to explain the

⁸ John CHAPMAN, Alan WERTHEIMER, *Majorities and minorities* (1990).

⁹ Joseph RAZ, *Ethics in the public domain* (1994).

¹⁰ Will KYMLICKA, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (2001).

¹¹ *Id.*, p. 39.

¹² Will KYMLICKA, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995).

debates between collectivists and individualists¹³ regarding minority rights¹⁴. Nevertheless, he fails to take an explicit stance about this issue and instead argues how liberal institutions could include the two perspectives.

For the purposes of this paper, indigenous peoples' claims concerning the recognition of collective rights and global identity are important in the process of recognizing their right of self-determination; consequently, a liberal perspective of the relation between states and indigenous peoples would not be appropriate. In any case, the liberal theory offers the advantage of a developed system of legal remedies for violations of individual rights. The system's institutions could be used to enforce indigenous peoples' rights if the assertion of the right to take action becomes more frequent in the judicial system.

B. Self-Determination and the International Evolution of Indigenous Peoples' Rights

In his book *Indigenous Peoples in International Law*¹⁵, James Anaya builds his theory about Indigenous Peoples' Rights on the foundation of the right of self-determination as conceived in international law and political theory. Anaya stresses that this right is recognized in the *UN Charter*¹⁶, the *International Covenant on Civil and Political Rights*¹⁷, and the *International Covenant on Economic, Social, and Cultural Rights*¹⁸; histor-

¹³ Collectivists defend the idea of the necessity of recognition of collective ways to protect minorities' rights. Individualists state that minorities' rights are as enforceable as any other liberal right.

¹⁴ W. KYMLICKA, *supra*, note 13, p. 47.

¹⁵ James ANAYA, *Indigenous Peoples in International Law* (2nd ed. 2004).

¹⁶ *United Nations Charter*, art. 1: "The Purposes of the United Nations are: [...]" "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." (*Id.*, art. 2).

¹⁷ *International Covenant on Civil and Political Rights*, December 16th 1966, [1976] Can. Tr. S. No. 47, 999 U.N. Tr. Ser. 171 (entry into force in Canada: Aug. 19th 1976), art. 1.: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

¹⁸ *International Covenant on Economic, Social, and Cultural Rights*, December 16th 1966, [1976] Can. Tr. S. No. 56, 993 U.N. Tr. Ser. (entry into force in Canada: Aug. 19th 1976), art. 1: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

ically, however, these covenants were created to ensure recognition of peoples under colonial or racist regimes and were intended to gain the support of the international community in their sovereignty claims. As may be appreciated from the literature on self-determination and minority rights¹⁹, one of the main concerns of states is the potential of this claim ending up as an attempt to secede. Even though indigenous peoples (especially in Latin-America) do not have the capacity to fight states for the secession of their territories, politically speaking they do have self-determination as the foundation of their claims for rights could not be strategic. In fact, Anaya himself suggests in a different paper that, “International Law [...] can best accommodate ethnic autonomy claims if they are justified on human rights grounds and avoid absolutist assertions of independence statehood.”²⁰

C. Neoconstitutional Approach

Contemporary approaches to constitutional law address the cultural pluralism issue by putting forth proposals for institutional and legal development. Boaventura de Sousa restates topics from Marx and Foucault, by discussing cultural diversity, especially in Latin-America. In his book *El Milenio Huerfano*²¹, de Sousa defines two historical assimilation techniques in multicultural societies: subordination and exclusion. Subordination occurs when a less powerful culture is used for labor, and it allows members of the dominant culture to accumulate goods (step down). Exclusion means that the less powerful culture is criminalized by, and excluded from, society (step outside)²². De Sousa defends a “real” policy of cultural equality as expressed in the following statement: “[P]eople have the right to be treated equally if being different makes them inferior, and they have the right to be treated differently if equality forces

¹⁹ Will KYMLICKA, *The Rights of Minority Cultures* (1995). See also: Marc WELLER, *Political participation of minorities* (2010); J. CHAPMAN, A. WERTHEIMER, *supra*, note 9.

²⁰ James ANAYA, «The Capacity of International Law to Advance Ethnic or National Rights Claims», in W. KYMLICKA (ed.), *supra*, note 19, 321, 325 (1995).

²¹ Boaventura de Sousa SANTOS, *El milenio huérfano. Ensayos para una nueva cultura política*, Madrid, Trotta, 2005 (The Orphan Millennium, no translation to English available).

²² *Id.*, p. 133-147.

them to lose their cultural characteristics.”²³ Moreover, his theory boils down the implementation of constitutional change as enabling indigenous peoples to enjoy the benefits of being part of the main culture (political participation, access to economic development, and so on) without cultural assimilation.

Along the same lines, James Tully argues that multicultural societies need to rethink the concept of a state starting with its constitution²⁴. A constitution must be the instrument that establishes the rules of relationships among cultures. In order to enable a constitutional change, participation and dialogue are the most important factors. Both Tully’s and de Sousa’s theories look at the political will of the hegemonic culture to allow others to participate in the design of a new constitution, and this is not easy to address. This opportunity arose in Ecuador between 2007 and 2008; a new Constitution was enacted and includes several provisions about multiculturalism.

D. Plurinational State?

In the construction and analysis of the Plurinational State of Ecuador, plurinationalism is a new political theory continuously debated. The 2008 Constitution defines Ecuador as an intercultural and plurinational state, two concepts not quite defined in political and social sciences:

Functional interculturality is compatible with the logic of the neoliberal model. Here is the point: the way in which interculturality could be used both for boosting a socio-political transformation process and for encouraging an inclusive neoliberal multiculturalism (even conservative). Certainly, taking into consideration radical demands, such as the plurinational state, the social elites consider interculturality benign.²⁵

With the increasing need to recognize cultural policies in multicultural contexts, the elite tend to absorb revolutionary discourses, trans-

²³ Boaventura de Sousa SANTOS, *La caída del Angelus Novus: Ensayos para una nueva teoría social y una nueva práctica política*, Bogotá, Trotta/ILSA, 2003, p. 154, original text in Spanish: “Tenemos derecho a ser iguales cada vez que la diferencia nos inferioriza; tenemos derecho a ser diferentes cuando la igualdad nos descaracteriza.”

²⁴ James TULLY, *Strange multiplicity. Constitutionalism in an age of diversity* (1995).

²⁵ Catherine WALSH, *Interculturalidad, Estado, Sociedad. Luchas (de) coloniales de nuestra época*, Quito, Abya Yala, 2009, p. 83.

forming them into a milder version to avoid losing power over excluded groups²⁶. What the indigenous movement sought with the inclusion of the plurinational state was to eliminate the possibility of a gray area. This was discussed within the Constitutional Assembly. It was the opinion of many Assembly members, even from the indigenous movement, that the two terms can be contradictory:

While the Plurinational State emphasizes autonomy and differences, interculturality emphasizes relationships between diverse peoples and their productive and respectable encounters. [...] The Plurinational State proposal is strongly related to self-government, the participation of indigenous peoples in the extraction of natural resources, and their political participation and representation in the State's institutions.²⁷

Giving legal and political meaning to these concepts, in the context of the Ecuadorian Constitutional reform and legal system, is an ongoing task. Interpretations may be found in political, judicial, social, and scholarly works. The answer to what is the Plurinational State would change the policies regarding natural resources, the *mestizo*-indigenous relations, and the opportunity for self-government.

The perspectives of the right to self-determination and cultural rights are more advanced (progressive) versions of liberalism and stem from the conception of the theoretical idea of the existence of injustice. This is because mankind has not reached the perfect form of democracy where institutions work in a way in which all people can enjoy their rights. It is Rawls' theory of justice that is extended to include cultural diversity. In an ideal system, social conflicts do not exist; only different people who are right or wrong and a judge who decides who is right based on fairness. However, the reality of the multicultural system is more complex. When society recognizes its multicultural nature, politicians seeking legitimacy will be willing to adopt a more cultural-sensitive theory of liberalism as an "exhaust valve" for social pressure.

²⁶ A historical example was the role of the Republicans, especially President Lyndon B. Johnson, in passing the *Civil Rights Act* discussed by Taylor Branch. See, Taylor BRANCH, *Parting The Waters. America in the King Years 1954-63* (1988).

²⁷ Agustín GRIJALVA, «El Estado plurinacional e intercultural en la Constitución ecuatoriana de 2008», in Carlos ESPINOZA GALLEGOS-ANDA and Danilo CAICEDO TAPIA (ed.), *Derechos Ancestrales. Justicia en Contextos Plurinacionales*, Quito, Ministerio de Justicia y Derechos Humanos, 2009, p. 389, at page 398.

The purpose of an “exhaust valve” is clear: to stop protests. With the new constitution, which includes a wide catalog of human rights, several social movements in Ecuador relaxed their practices and thought that they had already won the battle because of the changes in law. However, the changes in law are the result of not just one moment in history, but of several decades of struggle and demonstrations.

Demonstrations have proven to be very effective for social movements in Ecuador; for without indigenous peoples’ strategies, no changes in law could have been achieved. However, with the indigenous peoples’ lack of economic or social power, the only opportunity they have for negotiating in the national arena is through their organization, legitimacy and demonstrations. The introduction of the Plurinational State and all of the indigenous peoples’ specific rights will be in vain if they cannot capitalize on them in terms of real participation replacing the power of demonstrations in both quality and quantity²⁸.

In light of the above, a liberal theory is not enough for implementing the Plurinational State. The right to prior consultation is a perfect example. In two of its aspects—good faith and consent—it is possible to see the difference between the Plurinational State and the interculturality. While consent means having the power of self-determination (Plurinational State) or to have the last word, good faith brings up the idea of respect for diversity and opinions of others (interculturality), but not the power to choose.

In the liberal scheme, conducting a consultation process compliant with legal standards means that even if the rule was followed, the state may make any decision it deems necessary. If the community wants to take the case to the courts, it will have to prove that certain standards were omitted. However, what would happen if a consultation process meets all of the standards and the result is the rejection of the community? Without the premise that voices of all cultures have equal value, that question would be difficult to answer²⁹.

²⁸ Clavero analyzes the gains and losses of the constitutional process in Latin America for indigenous peoples discussed in his book: Bartolomé CLAVERO, *Ama Llunku, Abya Yala. Constituyencia Indígena y Código Ladino por América*, Madrid, Centro de Estudios Políticos y Constitucionales, 2000.

²⁹ Jürgen HABERMAS, «Struggles for Recognition in the Democratic Constitutional State», in Amy GUTMANN (ed.), *Multiculturalism* 107, 129 (1994).

Nevertheless, the Plurinational State and the interculturality can be two complementary guarantees of protection, provided that interculturality means dialogue and Plurinational State means respect. A respectful dialogue is one in which all parties have the same weight, that promotes understanding, and that aims to reach a consensus. Real intentions to persuade using arguments are fundamental, but what is also fundamental is to reject the position of the “subject supposed to know” that *mestizos* assume with indigenous peoples.

In constructing an idea about the Plurinational State, it is important to look at what other theories may contribute. Kymlicka’s³⁰ stance and other liberal approaches would be helpful for analyzing the structure and justiciability of indigenous peoples’ rights. Anaya’s³¹ analysis of International Law and state accountability is significant for determining the sources of rules that could be applied to prior consultation processes. Finally, Tully’s³² work and de Sousa’s³³ work are the foundation for proposing the design of a prior consultation process that allows for the respect of indigenous peoples’ rights and genuine intercultural dialogue.

More importantly, however, indigenous peoples in Ecuador, Latin America, and all over the world have important things to say about this subject. One of the most significant features of the Plurinational State is its “southern” origin. If the Plurinational State is to be taken seriously, then what indigenous peoples have to say about coexistence, respect, the relationship with the *Pachamama*, development, and so forth should be taken into account. When indigenous peoples get involved in the discussion, some differences in the ways in which the debate processes could emerge ascribing more meaning to it:

These problems arise from a particular way of living the universe, embedded in an understanding that places the meaning of existence in a belief that life was created just for our express benefit. It seems to me that most Westerners, and many Native people, are locked into endless dilemmas because they/we cannot let go of the idea that this world and our land are here especially for us, to the exclusion of others we do not recognize as or have forgotten are

³⁰ See, *supra*, p. 202-203.

³¹ See, *supra*, p. 202-204.

³² See, *supra*, p. 205.

³³ See, *supra*, p. 204-205.

part of us. However, I also see a solution to this problem: co-authoring with each other and co-authoring with the land.³⁴

Understanding the Plurinational State as an open texture³⁵ is fundamental. Coexistence should have been defined by the cultural particularities of the participants in the dialogue. The right to prior consultation, for example, cannot be restricted to a number of rules shutting out the opportunity for real understanding. Even standards become insufficient if there is no respect for the other. The following part of this paper examines those standards and the application of the right to hold a consultation process in Ecuador. This short diagnosis looks to be a contribution to constructing a theory on plurinationalism. In order to do so, this paper demonstrates the potential of the right to prior consultation to create a genuine dialogue and its failure if used merely as an “exhaust valve” for the just claims of the indigenous peoples in Ecuador.

II. Right to Prior Consultation under International Law

This part presents how International Law has developed standards of interpretation on the right to prior consultation. The sources of the applicable law come from the institutions devoted to monitor compliance with the international treaties on human rights and indigenous peoples' rights. In the universal system, it is important to examine first the two covenants of indigenous peoples' rights under the International Labor Organization and its mechanism for settling claims. Second, there is the *International Convention on the Elimination of All Forms of Racial Discrimination*³⁶ and its Committee. Third, there is the *UN Declaration on the Rights of Indigenous Peoples*³⁷, and the special mechanisms under the Commission on Human Rights: the *Special Rapporteur on Indigenous Peoples*'

³⁴ Lorraine MAYER, « Ástam ánimotahtak (Come, let's talk, have a discussion) », in Sandra TOMSON and L. MAYER (ed.), *Philosophy and Aboriginal Rights*, Ontario, Oxford University Press, 2013, p. 296.

³⁵ Open texture means that the concept should be able to adapt to a number of different cultures, practices and customs. A similar idea could be found in Constitutional Law and International Human Rights when scholars use the expression “living text” usually meaning that the interpretation of legal norms should take into account the current situation and necessities of the society.

³⁶ 660 U.N. Tr. Ser. 195.

³⁷ *Declaration on the Rights of Indigenous Peoples*, Doc. off. G.A. U.N. A/61/295 (2007), art. 19 (hereafter “UNDRIP”).

Liberties, the *Expert Mechanism on the Rights of Indigenous Peoples*³⁸, and the *Working Group on Indigenous Populations*. With regard to the Inter-American regional system, this part shows how non-special mechanisms (the Inter-American Court of Human Rights (IACourtHR) and the Inter-American Commission on Human Rights (IACHR)) have been interpreting the *American Convention on Human Rights*³⁹ in order to cover indigenous peoples' rights within its scope. The purpose of this section is to present a systematization of the standards of the right to prior consultation taken from case law and reports by the above-mentioned institutions.

The indigenous peoples' right to prior consultation appeared in positive International Law in the *Convention No. 169 of the International Labor Organization about Indigenous and Tribal Peoples in Independent Countries*, specifically at articles 6 and 15⁴⁰. Aside from being present in these provisions, the right to prior consultation is included in several parts of the treaty about specific obligations of states such as special measures for the protection of indigenous peoples⁴¹, participation in the plans for national and regional development⁴², exploration and exploitation of natural resources in their lands⁴³, relocation in new lands⁴⁴, vocational training programs⁴⁵, and public education in their own languages⁴⁶.

The other international document that recognizes the right to prior consultation is the *U.N. Declaration on the Rights of Indigenous Peoples*⁴⁷. The Declaration emphasizes that states must not only consult indigenous peoples, but that an appropriate consultation process must obtain the consent of those consulted. Articles 19 and 32⁴⁸ talk about the consent as being the objective of the consultation process, but articles 10, 29, and 30

³⁸ Resolution 6/36 of the Human Right Council, online: <http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_6_36.pdf> (consulted on December 5, 2016).

³⁹ *American Convention on Human Rights*, November 22nd 1969, San José, Costa Rica (hereafter "ACHR").

⁴⁰ C169, *supra*, note 8, art. 6 and 15.

⁴¹ *Id.*, art. 4.

⁴² *Id.*, art. 7.

⁴³ *Id.*, art. 15.2.

⁴⁴ *Id.*, art.16.

⁴⁵ *Id.*, art. 22.

⁴⁶ *Id.*, art. 28.

⁴⁷ UNDRIP, *supra*, note 37.

⁴⁸ *Id.*, art. 32.

state that consent is necessary in cases of forced removal⁴⁹, provision of hazardous materials⁵⁰ and military activities in their lands⁵¹. Finally, articles 11 and 28 provide the obligation to redress indigenous peoples for actions taken without “their free, prior, and informed consent” when those actions have affected their cultural traditions and customs⁵² or their territories⁵³.

Nevertheless, the practices of states regarding consultation processes show that they have been used as a formality rather than as a substantive right. This assertion is confirmed in the findings of the *UN Rapporteur for Indigenous Peoples*⁵⁴. Professor James Anaya presents the issue of the misunderstanding of the right to prior consultation and the consent objective in the following terms:

This requirement that agreements should at least be an objective of the consultations means that the consultations cannot simply be a matter of informing indigenous communities about the measures that will affect them. Consultation processes must be crafted to allow indigenous peoples the opportunity to genuinely influence the decisions that affect their interest. This requires governments to fully engage indigenous peoples in the discussions about what the outcomes of those decisions should be before they are taken. It also requires procedural safeguards to account for indigenous peoples’ own decision-making mechanisms. Including relevant customs and organizational structures, and ensuring that indigenous peoples have access to all needed information and relevant expertise.⁵⁵

A. The Consultation Process must be Conducted by States

The first standard that can be found in case law and reports is the obligation of states to conduct consultation processes without delegating this task to private companies.

⁴⁹ *Id.*, art. 10: “No relocation shall take place without the free, prior and informed consent of the indigenous peoples”.

⁵⁰ *Id.*, art. 29.

⁵¹ *Id.*, art. 30.

⁵² *Id.*, art. 11.

⁵³ *Id.*, art. 28.

⁵⁴ James ANAYA, *Report of the Special Rapporteur on the rights of indigenous peoples*, Doc. U.N. A/HRC/24/41/Add.5 (September 6th 2013).

⁵⁵ J. ANAYA, *supra*, note 15, p. 154.

In its judgment on the merits and reparations of the case of *Sarayaku v Ecuador*⁵⁶, the Inter-American Court of Human Rights performed an in-depth analysis of the obligations of the State with respect to the right to prior consultation. The Inter-American Commission on Human Rights presented to the Court the case regarding the violation of the Sarayaku Kichwa Indigenous People's human rights to private property, life, judicial guarantees, judicial protection, freedom of movement, and personal integrity, which are established in articles 4, 5, 8, 21, 22, and 25 of the ACHR⁵⁷ with regard to the obligations to respect, to ensure, and to adopt domestic measures, in accordance with articles 1 and 2 of the ACHR⁵⁸.

The case concerns the activities of CGC oil company in the Sarayaku's territory from 1996 to 2003. In 1996, CGC signed a partnership contract with the State for the exploration and exploitation of crude oil in Block 23⁵⁹, which includes Sarayaku territory⁶⁰. The State did not give the Sarayaku people the opportunity to participate in the decision-making process, and the community fought against all of the company's attempts to research their territory for drawing up an Environmental Management Plan⁶¹.

In *Sarayaku*, the IACourtHR addressed several standards about the right to prior consultation, and that is why this case will be referred to throughout this paper. The first standard is that "the obligation to consult is the responsibility of the State"⁶².

This standard requires some explanations. First, states are responsible for the implementation of human rights, and delegation is possible only if a private stakeholder can offer the same guarantees as the state. For the exploitation of natural resources, private companies have a direct interest in the results of the consultation process, so they are not impartial participants. Second, if a company engages in the exploitation of natural resources, there must be a legal agreement with the state, and that agreement is

⁵⁶ *Kichwa Indigenous People of Sarayaku v Ecuador* (2012), Inter-Am Ct HR (Ser C) No. 245, at para 63 (hereafter "*Sarayaku*").

⁵⁷ ACHR, *supra*, note 39.

⁵⁸ *Id.*, art. 1 and 2.

⁵⁹ *Id.*, para. 64.

⁶⁰ *Id.*, para. 65.

⁶¹ *Id.*, para. 69 and 72.

⁶² *Id.*, para. 187.

to be the result of a prior decision in which the indigenous peoples should have been consulted. This last argument has a direct connection with the standard regarding the timing of the consultation process.

B. Role of Traditional Authorities in the Consultation Process

Another important question raised in reports and in cases is who should be taken into account for the consultation process. A prior consultation differs from other forms of social participation, such as referendums or plebiscites where the whole population is consulted by suffrage. Furthermore, suffrage is a Western concept, and indigenous peoples around the world have different kinds of participation and decision-making processes.

In the report by the Committee set up to examine the representation alleging non-observance by Ecuador of the *Indigenous and Tribal Peoples Convention*, made under article 24 of the ILO Constitution by the Ecuadorian Confederation of Free Unions of 2001⁶³, the ILO's tripartite committee addressed the alleged violation of the right to a prior consultation process of the Shuar Nation in the context of oil extraction in its territory. On April 27, 1998, Ecuador signed a contract for oil production in the Shuar territory without informing or consulting the people⁶⁴. Ecuador alleged that there was no obligation to consult or inform the Shuar because the Convention had not yet entered into force.

For the Committee, even if the convention did not apply to the jurisdiction of Ecuador because of *ratione temporis* considerations, its effects are extended in time beyond the date of the deposit of the ratification of the treaty (May 15th, 1999). Therefore, the obligation to conduct a consultation was applicable to the State acts after May 15th, 1999⁶⁵. On August 13th, 1998, the FIPSE assembly decided not to allow any negotiations with ARCO, an oil company. In response, the company tried to sign

⁶³ In Spanish: Confederación Ecuatoriana de Organizaciones Sindicales Libres – CEOSL. Report of the Committee in the case of the *Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL) v Ecuador*, (2001) ILO Committee under art. 24 procedure, (GB.277/18/4): (GB.282/14/2), para. 30 (hereafter “CEOSL”).

⁶⁴ *Id.* This occurred before the entry into force of the ILO Convention 169, *supra*, note 7.

⁶⁵ CEOSL, *supra*, note 63.

agreements with individuals and groups without the organization and institutions of the Shuar Nation.

In its conclusions, the Committee highlighted the importance of the principle of representation as a component of the right to prior consultation. Moreover, the Committee established that a consultation process without the true representative institutions fails to comply with the treaty⁶⁶.

In *Sarayaku*, CGC practices involved making contact with individuals of the community, offering them jobs and money. The IACourtHR found that these practices did not respect the international standards of the right to prior consultation⁶⁷.

C. Participation on Designing and Planning the Consultation Process

Case law and reports also established the standard of participation of indigenous peoples in designing and planning a consultation process. In its report, the IACHR said that indigenous and tribal peoples' rights over their ancestral lands and natural resources require that the true representatives of the indigenous people, as recognized by the community, are to be taken into account⁶⁸.

In order to determine how a consultation process can be culturally adequate, e.g. following the customary traditions and ancestral authorities, communities should participate in the design of the consultation process. In *Saramaka*, the Court said that it is not the State that should decide who is to conduct the consultation process; rather, it is the right of the Saramakas to choose their representatives according to their customary law⁶⁹.

⁶⁶ *Id.*, para. 44.

⁶⁷ *Sarayaku*, *supra*, note 56, para. 203.

⁶⁸ OAS – Inter-American Commission on Human Rights, *Special Report on Indigenous and tribal peoples' rights over their ancestral lands and natural resources*, Doc. off. OEA/Ser.L/V/II.56/09 (December 30th 2009), para 287.

⁶⁹ *The Saramaka People v Suriname* (2007) Inter-Am Ct HR, at para. 15 (hereafter “*Saramaka*”).

D. Obligation of Conducting a Prior Consultation

The timing of the consultation is a fundamental issue. Whether or not the results of the consultation are effective will depend on when the consultation takes place. A country's rules could create certain rights for interested companies, with opposition by the community involving legal conflicts and the possibility of judicial actions against the people's decision without their participation⁷⁰.

In *Saramaka*, the IACourtHR underlined the importance of the timing of the consultation. This judgment addressed the violation of the human rights of the Saramaka tribe, part of the maroon people, whose territory was subjected to timber and mining concessions that Suriname granted to private companies. The Saramakas alleged that the concessions were granted without a consultation process and that the effects of those activities were affecting their rights associated with the use of their lands. The Court found Suriname responsible for the violation of the right to private property, to legal personhood, and to judicial protection. In the matter of prior consultation, the Court was of the opinion that Suriname had to consult the Saramakas before the first stage of the project could start⁷¹.

In *Sarayaku*, the State never conducted a consultation process; however, the Court used the opportunity to advance criteria on when an adequate consultation should take place. For the Court, the consultation must be a constant process included at every stage of the implementation of the activity⁷².

The Court upheld its decision asserting that the effective impact of the consultation depends on its timing. A consultation that takes place in the first stages of a project offers an opportunity for influencing planning and implementation in order to create safeguards for the community's rights⁷³.

⁷⁰ Lloyd K. LIPSETT and David L. DEISLEY, «Free, Prior, and Informed Consent: Observations on “Operationalizing” Human Rights for Indigenous Peoples», in *International Mining and Oil & Gas Law, Development, and Investment*, Paper 2A, Paper 2A-19 (Rocky Mt. Min. L. Fdn. 2013).

⁷¹ *Saramaka*, *supra*, note 69, para. 147.

⁷² *Sarayaku*, *supra*, note 56, paras 183 and 184.

⁷³ *Id.*, para. 167.

Even if there is not a number of decisions implementing the precautionary measures, these measures detailed by the IACHR are important legal mechanisms to enforce the duty to consult. In 2011, the IACHR granted precautionary measures to several indigenous communities of the Xingu River Basin in Pará, Brazil, affected by the construction of the Belo Monte hydroelectric power plant. The IACHR requested that Brazil should suspend the project until a proper consultation is conducted. In the Belo Monte decision, the IACHR stated that a proper consultation should be:

free, informed, of good faith, culturally appropriate, and with the aim of reaching an agreement, [...] to be an informed consultation process, the indigenous communities should have access beforehand to the project's Social and Environmental Impact Study, in an accessible format, including translation into the respective indigenous languages.⁷⁴

Belo Monte gave rise to a debate on the competence of the IACHR to adopt such precautionary measures due to its non-conventional origin. Brazil, Ecuador and Venezuela, amongst others, reacted with proposals of restructuring the Inter-American system, which included the express exclusion of the precautionary measures granted by the IACHR. The same year, the IACHR changed its decision, lifting the ban targeting the construction of the dam, keeping the protection measures for indigenous peoples' rights, and declaring that the debate of the prior consultation is a matter of merits in petition, so it "goes beyond the scope of precautionary measures"⁷⁵.

E. Obligation of Conducting an Informed Consultation

Consultations must be carried out with all the important information about the project available to enable the community to have all of the elements for arriving at an informed decision. Therefore, the information must be adequate given the circumstances of the consulted population and must state the hazards and benefits of the activity in question. In addition, the circumstances to be taken into account include the degree of difficulty of the matter, the language, and the level of literacy of the population.

⁷⁴ *Indigenous Communities of the Xingu River Basin, Pará v Brazil*, (2011) Inter-Am Comm HR, PM 382/10.

⁷⁵ *Id.*

In *Saramaka*, the IACourtHR established that Suriname should have “ensured that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order for the proposed development or investment plan to be accepted knowingly and voluntarily”⁷⁶. In order to provide this information, the Court also stated that Suriname should have conducted a study on the environmental and social impacts of the project⁷⁷.

Furthermore, in *Sarayaku*, the IACourtHR indicated that the information provided must contain the potential environmental and health risks of the project⁷⁸. Moreover, the information produced by the parties must always be shared. In this case, the Court found that a presentation of only some information (socialization) was not enough to allow the Sarayaku people to have a basis for arriving at a decision and to participate actively in a dialogue about the project⁷⁹.

F. Obligation of Conducting a Free Consultation

The consultation process must be free. The IACourtHR, in *Sarayaku*, while discussing good faith, established that a consultation must be conducted with “the absence of any form of coercion by the State or by agents or third parties acting with its authority or acquiescence”⁸⁰. Furthermore, the right to prior consultation should be protected by rules that allow its achievement, and states must “avoid enacting laws that prevent the free exercise of those rights, and ensure that laws that protect these rights are not annulled or amended”⁸¹.

Free exercise of a right implies the possibility of refraining from exercising it. A prior consultation process conducted correctly must be an opportunity for indigenous peoples to have a real influence in the state decision-making process. Past practices have shown, however, that, for some states, the consultation process is a formality that does not take the opinion of indigenous peoples seriously. Therefore, the free standard also

⁷⁶ *Saramaka*, *supra*, note 69, para. 133.

⁷⁷ *Id.*, para. 155.

⁷⁸ *Sarayaku*, *supra*, note 56, para. 208.

⁷⁹ *Id.*, para. 209.

⁸⁰ *Id.*, para. 186.

⁸¹ *Id.*, para. 221.

means that legislation enabling states to continue with the project without the opinion of the communities if they refuse to be consulted is not compatible with the right to prior consultation⁸². In addition, states and companies cannot use force, reprisals, or intimidation to make indigenous peoples participate in the consultation process; i.e., consultants cannot use the provision of basic services or their continuation as a strategy of coercion⁸³.

G. Conducting the Consultation Process following the Traditions and Institutions of the Consulted Population

The respect for the traditions and institutions of the consulted people is a fundamental standard of the right to prior consultation. It implies that consultations must be flexible to adapt to people's own structures and decision-making processes. Therefore, consultations must be conducted in dialogue with the legitimate representatives of the peoples, planned with them, and scheduled respecting their own times, culture, and worldview.

The IACourtHR defined the standard of a culturally-appropriate consultation in *Saramaka*. States meet that standard when conducting a consultation process by following the customs and traditions⁸⁴ of the consulted people. For the Saramaka tribe, this means respect for their political organization (clans, captains, head captains, and the *Gaa'man*)⁸⁵ and their customary law⁸⁶.

In addition, in order to guarantee this right, states must adapt their policies to the flexibility that a culturally-adequate consultation warrants. To put it differently, states with indigenous peoples must have adequate legislation and institutions to deal with complex multicultural scenarios, because having an adequate ad-hoc process does not ensure that the consultation will also be conducted properly. In *Sarayaku*, the IACourtHR underlined this standard and established that the entire state apparatus must be organized so as to guarantee access to a culturally-adequate con-

⁸² J. ANAYA, *supra*, note 54, para. 25.

⁸³ *Id.*, para. 24.

⁸⁴ *Saramaka*, *supra*, note 69, para. 133.

⁸⁵ *Id.*, para. 81.

⁸⁶ *Id.*, para. 100.

sultation process; furthermore, states “must take into account the traditional decision-making practices of the people or community”⁸⁷.

H. Obligation of Good Faith and Prior Consent

Finally, the good faith standard and the object of achieving consent are the most problematic. The good faith standard is the sum of all other standards. Therefore, all elements must be provided in order to give a real opportunity to communities to participate in the decision-making process. Even though there is a consensus about the aim of the consultation process, the binding opinion of the people is not very clear. The standard for securing consent and the obligation to achieve it have been addressed in international law instruments. In this part of this paper, some elements of the debate will be presented.

The IACourtHR has addressed this issue in *Saramaka* and *Sarayaku* with two different standards. In the first case, the Court considered that consent is not merely an aim but a duty adopting the highest standard on the right to prior consultation. In this case, the Court also established a two-prong test to determine if consent is an obligation: (i) the project must be a large-scale one, and (ii) there must be the risk of a major impact on the peoples’ territory⁸⁸.

In *Saramaka*, besides the aforementioned test, the Court also found that “the difference between consultation and consent in this context requires further analysis”⁸⁹. However, in its next case (*Sarayaku*), the Court did not address this issue. In *Sarayaku*, the Court discusses the importance of good faith and the aim of an agreement. In the opinion of the Court, these two elements constitute a guarantee for real protection of the indigenous peoples’ rights instead of a mere formality in the decision-making process⁹⁰.

The Court continues with a comprehensive study about how good faith is an element in both domestic legislation and case law of several states. In a good faith consultation there is no place for practices such as coercion, bribing of leaders, negotiation with individuals, and the creation

⁸⁷ *Sarayaku*, *supra*, note 46, para. 177.

⁸⁸ *Saramaka*, *supra*, note 69, para. 137.

⁸⁹ *Id.*, para. 134.

⁹⁰ *Sarayaku*, *supra*, note 46, para. 186.

of a parallel organization⁹¹. Consequently, the right to prior consultation must be an opportunity for dialogue between states and indigenous peoples and must be based on mutual confidence and respect. If the indigenous peoples' opinions and decisions are not taken into account, then the consultation will not guarantee their rights.

The difference between consent as the aim or as the obligation is dealt with in other forums. The universal system has contributed to the doctrine of consent as a duty, and the ILO has remained in the discussion about the standard of a consultation process that aims for consent.

In the universal system, one of the most influential opinions of consent as a duty comes from the Committee on the Elimination of Racial Discrimination (CERD). Based on its competence for addressing general comments for a better application of the Convention on the Elimination of All Forms of Racial Discrimination (CEFRD), in 1997 the CERD adopted the *General Recommendation No. 23 on the rights of indigenous peoples*⁹². In this document, the CERD urges state parties of the CEFRD to:

ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.⁹³

Furthermore, the CERD maintained this position in its subsequent analysis about situations in specific countries; for instance, in its 2003 study of the situation in Ecuador, the CERD argued that for extracting oil or minerals from the subsoil, consulting indigenous peoples was not enough due to the magnitude of the impact on their territory, thus obliging the State to secure the consent of indigenous peoples⁹⁴. The same statement was made when reviewing the situation in Bolivia⁹⁵.

Special Rapporteurs have been using the consent duty as a standard to analyze the situation of indigenous peoples under their mandates. In

⁹¹ *Id.*, para. 186.

⁹² COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, *General Recommendation No. 23: Rights of Indigenous Peoples*, Doc. U.N. A/52/18, Annex v (August 18th 1997).

⁹³ *Id.*, at 122, para. 4.d.

⁹⁴ COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, *Annual Report*, Doc. off. G.A. 62-63 sess, suppl. no. 35, Doc. U.N. A/58/18 (November 23rd 2003), para. 62.

⁹⁵ *Id.*, para. 339.

his 2003 report to the Human Rights Council, Rapporteur Rodolfo Stavenhagen concluded that for resource extraction projects inside indigenous peoples' territories, states must take all provisions in order to protect their rights. Therefore, these projects cannot be executed without the free, prior, and informed consent of the indigenous peoples affected; "whose right to development means the right to determine their own pace of change, consistent with their own vision of development, including their right to say no"⁹⁶.

James Anaya, the next Rapporteur, maintains this position in his reports. In his 2013 report about extractive industries and indigenous peoples, the Rapporteur states that the general rule is "that extractive activities should not take place within the territories of indigenous peoples without their free, prior, and informed consent"⁹⁷. He argues that this principle is gaining acceptance in national legislations, and it is well established in International Law.

In conclusion, even without the right to consent in international treaties, the informed and free right to prior consultation must be understood as a right to consent when the magnitude of the project could violate other rights of indigenous peoples. Indeed, projects that include displacement, deforestation, contamination, or other activities that have a major impact on the territory, culture or subsistence of indigenous peoples cannot be performed without their full consent, since indigenous peoples are entitled to those other rights too⁹⁸.

III. Implementation of the Right to Prior Consultation in Ecuador

The right of indigenous peoples to prior consultation has been part of the Ecuadorian legal system since June 27, 1989, when Ecuador signed the *Convention concerning Indigenous and Tribal Peoples in Independent Countries of the International Labor Organization (Convention No. 169)*⁹⁹. On

⁹⁶ Rodolfo STAVENHAGEN, *Report of the Special Rapporteur on the rights of indigenous peoples*, Doc. U.N. E/CN.4/2003/90 (January 21st 2003), para. 66.

⁹⁷ J. ANAYA, *supra*, note 54, para. 27.

⁹⁸ James ANAYA, *Report of the Special Rapporteur on the rights of indigenous peoples*, Doc. U.N. A/HRC/21/47 (August 30th 2012).

⁹⁹ C169, *supra*, note 7.

April 30, 1998 the President passed *Executive Directive 1787*¹⁰⁰ with the prior approval of Congress¹⁰¹, ratifying *Convention No. 169*¹⁰². In that same year, the process to reform the Constitution ended with a referendum approving the *Political Constitution of the Republic of Ecuador of 1998* (the 1998 Constitution)¹⁰³ that entered into force as of its publication in National Registry No. 1 on August 11, 1998. These two documents established the right to a prior, free, and informed consultation. Moreover, this right is also present in the new *Constitution of the Republic of Ecuador of 2008* (the 2008 Constitution)¹⁰⁴. In addition, the 2008 Constitution includes the right of indigenous peoples to a legal, prior consultation.

Since 1989, the implementation of these rights in practice, jurisprudence, and secondary regulations has been limited. First, there is no statute contributing to the application of such rights, even though Congress has the constitutional duty to develop them, legislatively speaking. Second, administrative regulations (*reglamentos*) failed to respond to the international standards of the right to prior consultation. Finally, the decisions of the lower courts and the Constitutional Court (formerly the Constitutional Tribunal) neither have ascribed an *effet utile* to *Convention No. 169*¹⁰⁵ nor have they applied the direct effects of the new Ecuadorian constitutions. In this part of the paper, Ecuador's legal framework will be studied in order to understand the law that governs the activities of the three branches of the Ecuadorian State regarding the right to a prior consultation in order to analyze their behavior.

The 2008 Constitution states that Ecuador has a pluralist system of legal sources, especially concerning indigenous peoples' rights. The text of article 57 establishes both the right of prior consultation and the system of sources for interpreting it¹⁰⁶. In the first paragraph of the article, the Con-

¹⁰⁰ President of the Republic of Ecuador, *Executive Directive No. 1387*, Official Registry No. 311, (Ecuador: May 6th 1998) at 3.

¹⁰¹ Ecuador, National Congress of Ecuador, *Parliamentary Resolution of April 16, 1998* in Official Registry No. 304 (April 24th 1998) at 2.

¹⁰² C169, *supra*, note 7.

¹⁰³ *Constitución Política de la República del Ecuador*, Asamblea constituyente, June 5th 1998, online: <<http://pdba.georgetown.edu/Parties/Ecuador/Leyes/constitucion.pdf>> (consulted on September 22nd 2016).

¹⁰⁴ CRE2008, *supra*, note 1.

¹⁰⁵ C169, *supra*, note 7.

¹⁰⁶ CRE2008, *supra*, note 2, art. 57.

stitution establishes that Indigenous Peoples' Rights will be recognized and guaranteed "in accordance with" specific sources of applicable law: the Constitution itself and human rights agreements, conventions, declarations, and other international instruments.

A. Implementation by the Executive Branch

The President of the Republic of Ecuador has two main sets of functions. One set is the administrative function consisting of the formulation of public policies, law enforcement, and public administration. The other set refers to legislative powers through administrative regulations enacted by executive directives, but this function depends on the existence of a statute on the matter¹⁰⁷.

1. Administrative Regulations

Two executive directives were passed to regulate the right to prior consultation: *Directive No. 1040* and *Directive No. 1247*. Constitutional provisions establish that human rights may only be regulated through a statute enacted by the National Assembly, pursuant to the Ecuadorian Constitution¹⁰⁸, and the two directives do not stem from a proper legislative act. Nevertheless, they have been in application since their enactment. The reasons for this restriction are to allow for a representative democratic debate on the statutes that could limit human rights and the international standard on limitation of human rights. Notably, the *American Convention on Human Rights* (ACHR)¹⁰⁹ prescribes that states can only limit human rights through statutes under its article 30.

For the Inter-American Court, the word "laws" at article 30 of the ACHR means:

a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated

¹⁰⁷ *Id.*, art. 147: "The following are the attributions and duties of the President of the Republic, in addition to those stipulated by law: [...]13. To issue the regulations that are needed to enforce laws, without infringing them or altering them, as well as those that are required for the sound functioning of the administration."

¹⁰⁸ *Id.*, art. 142.

¹⁰⁹ ACHR, *supra*, note 39.

according to the procedures set forth by the constitutions of the States Parties for that purpose.¹¹⁰

With such an important issue as human rights regulation, it is important to engage in a democratic debate ascribing legitimacy to the future regulation¹¹¹. According to the Constitution and the International Law, regulating through directives is not legal practice; it diminishes the opportunity to engage in a democratic debate and involves the threat of arbitrary acts. Hence, having no statutory regulation, but rather an arbitrary administrative regulation, generated several processes where some standards of the indigenous peoples' right to prior consultation were not respected. Due to its magnitude as well as its importance to the self-determination of a number of indigenous nations at risk, the case of the Amazon Consultation will be addressed in the following paragraphs.

2. Administrative decisions: the Case of the Amazon Consultation

a. The Ecuadorian State's Perspective

In 2012, the Ecuadorian government launched an international bidding round for the production of oil in thirteen oil zones in the Ecuadorian Amazon Region¹¹². The process has been named the South Orient Round or the Twenty-First Oil Round, and it is involving the provinces of Pastaza, Morona Santiago, Orellana, Napo, Morona Santiago, and Pastaza¹¹³. The initiative seeks to boost the country's oil production to 192.5 million barrels a year for social and industrial investment¹¹⁴. However, the oil zones overlap the ancestral territory of seven indigenous nations: Kichwa, Wao-rani, Andoa, Sapara, Achuar, Shiwiar, and Shuar¹¹⁵. Therefore, the law cited in the preceding paragraphs applies to this operation.

¹¹⁰ *The Word "Laws" in Article 30 of the American Convention on Human Rights*, Uruguay, (1986) Inter-Am Ct HR (Ser A) No. 6, OC-6/86, decision.

¹¹¹ *Id.*, para. 22.

¹¹² President of the Republic of Ecuador, *Call for Tenders for the South-Orient Round*, 2012, online: <<http://www.rondasuroriente.gob.ec/ronda-sur-orient/convocatoria/>> (consulted on September 22nd 2016).

¹¹³ SECRETARÍA DE HIDROCARBUROS, *Ecuadorian South-Orient Round. Technical, Legal, Economic, Environmental and Social Aspects*, 2013, p. 13, online: <http://www.hidrocarburos.gob.ec/wp-content/uploads/downloads/2013/08/ronda_surorientecuador1.pdf> (consulted on September 22nd 2016).

¹¹⁴ *Id.*, p. 11.

¹¹⁵ *Id.*, p. 53.

The bidding process was preceded by an “Amazon Consultation.” Through this process, the State endeavored to meet its obligation to conduct a prior, free, and informed consultation involving the indigenous peoples affected by the project¹¹⁶. Furthermore, the government defined the process as an opportunity for getting information and participating in the decision-making process regarding the possible award of oil zones¹¹⁷. When the Amazon Consultation took place, the ruling was issued for *Sarayaku*¹¹⁸ and the Constitutional Court also decided on another case (the unconstitutionality claim against the *Mining Statute*¹¹⁹). This means that several standards directly applicable to the process were available to the authorities. Conversely, the government based its consultation process on *Executive Directive No. 1247*.

According to the authorities, the Amazon Consultation accomplished its goals and respected the indigenous peoples’ rights. It was an opportunity to engage in an intercultural and democratic dialogue with indigenous nations. In addition, it allowed consulted individuals to access information and to participate in the decision-making process and the design of programs for local development¹²⁰. Furthermore, the consultation employed diverse mechanisms such as informative workshops, assemblies, and work meetings with the legitimate representatives of the nations to ensure broad participation¹²¹.

The Amazon Consultation was conducted as an informative process that aimed to offer revenue for the communities that agreed to oil extraction in their territories. Furthermore, informative flyers were translated to Kichwa, Shuar, and Waorani and addressed the revenue distribution¹²², although the environmental and cultural impact studies were only available in Spanish. The *Secretaría de Hidrocarburos* (SHE, Secretariat for Oil Activities) set up 45 permanent offices, 106 itinerant offices, 37 public

¹¹⁶ *Id.*, p. 56.

¹¹⁷ *Id.*, p. 56.

¹¹⁸ *Sarayaku*, *supra*, note 56.

¹¹⁹ *Mining Statute*, 2009, Official Registry No. 517 of January 29th 2009, art. 27.

¹²⁰ SECRETARÍA DE HIDROCARBUROS, *Prior Consultation of the South-Orient Round*. Promotional Video, Puyo, 2013, online: <<https://www.youtube.com/watch?v=9ZgRNjWifRE>> (consulted on September 22nd 2016) (hereafter “*Prior Consultation of the South-Orient Round*”).

¹²¹ *Id.*

¹²² *Id.*

meetings, and 32 feedback meetings. According to the SHE, approximately ten thousand people partook in the process¹²³. As a result, 63 agreements were signed, but only 13 with indigenous peoples groups¹²⁴. The agreements contain provisions on how the resources from oil extraction would be invested in the community. They also include a clause on the acceptance of the fulfillment of the right to prior consultation under the *Executive Directive No. 1247*¹²⁵. However, State investment in public services would be made with petroleum profits that would go solely to the communities that had signed an agreement¹²⁶. In other words, services such as free education, health care, drinking water, and so on that are available for the citizens of cities are also available for the indigenous peoples of the Amazon Region, but only if they agree to cooperate with the oil industry. This cooperation is explicit in a clause of the agreement that stipulates the community's duty to not interfere in oil activities and instead cooperate¹²⁷.

b. The Perspective of Indigenous Nations

The perspective of indigenous peoples is different, however. From the start of the process, the CONAIE and the *Confederación de Nacionalidades Indígenas de la Amazonía Ecuatoriana*¹²⁸ rejected the implementation of the process. In addition, the affected nations, even the ones who had agreed early on to engage in the consultation process, expressed serious concerns about the State's practices. They claimed that the state had employed coercion and intimidation, had even attempted to divide communities, while failing to respect the internal decision-making process and provide information about the impacts of the project, and supporting illegitimate representatives.

Leaders of the Sapara Nation claimed that the State had signed agreements with non-Sapara people who tried to pass as Sapara authorities. The

¹²³ *Id.*

¹²⁴ SECRETARÍA DE HIDROCARBUROS, *Social Investment Agreements. Ecuadorian South-Orient Round*, Puyo, 2013, online: <<http://www.rondasuroriente.gob.ec/consulta-previal/acuerdos-de-inversion-social/>> (consulted on September 22nd 2016).

¹²⁵ SECRETARÍA DE HIDROCARBUROS, *Social Investment Agreement with the Communities of the Oil Extraction Zone 28*, Puyo, 2013, p. 1.

¹²⁶ *Id.*, p. 2.

¹²⁷ *Id.*, p. 6.

¹²⁸ In English: "Confederation of the Ecuadorian Amazon Indigenous Nations", CONFENIAE.

Sapara Nation has approximately three hundred members left and has allowed other indigenous peoples to live in their territory for several decades¹²⁹. When oil companies started their activities in the Amazon region in the seventies, the Sapara sheltered people of other nations in their territory, and these people now outnumber the Sapara. As an extended strategy of negotiation and disruption in the internal affairs of the communities, oil companies have funded private indigenous organizations with legal standing in the *mestizo* world. This is the case of the Sapara people that formed the Organization of the Sapara Nation in Ecuador (NASE), presided by Basilio Mucushigua, who was not part of the Sapara Nation. Although the Sapara of the nation had decided to reject oil production in their territory, Mucushigua signed agreements on behalf of the NASE. By the time Mucushigua negotiated the agreements, he had been accused of misappropriating public funds and that his designation, as rightful representative of the Sapara people, was flawed. In January 2013, the Sapara Nation met and decided once again to forbid oil activities in their territory and to reject the agreements signed by Mucushigua¹³⁰; nevertheless, the government still views those agreements as part of their consultation success. In that meeting, a new representative of the Sapara Nation was appointed and was acknowledged by the CONAIE and the CONFENIAE, but not by the government.

In late April 2013, a new assembly rejected the Mucushigua agreements again, and it was informed about the Amazon Consultation process conducted in their territory. It was determined that Mucushigua did not consult any Sapara or non-Sapara in the communities of the Sapara territory before signing the agreements. Furthermore, Musuchigua had submitted signed sheets of support to state authorities that did not originate from the inhabitants of the Sapara territory¹³¹. Internal conflicts turned violent and ended with the death of a thirteen-year-old Sapara boy. Meanwhile, the government had been using Mucushigua as a symbol of the consulted indigenous peoples of Ecuador in videos for viewing by potential investors in the South Orient Round¹³².

The Shiwiar also had similar complaints. At the time of the land reform statute in the seventies, the Shiwiar Nation had to organize five

¹²⁹ Interview of Klever Ruiz, President of the Sápara Nation (2003) in Puyo, Ecuador.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Prior Consultation of the South-Orient Round, supra*, note 120.

peasant associations in order to obtain titles for their lands. Although the five associations still have legal status, the Shiwiar Nation established a general organization called the Nacionalidad Shiwiar del Ecuador (NASHIE, “Shiwiar Nation of Ecuador”) to enable the associations to get land titles unified into one indigenous territorial title¹³³. The NASHIE representatives have to consult the Shiwiar Assembly on every important decision; although this condition ascribes high legitimacy to their leaders, it falls short of Western standards¹³⁴.

When the SHE authorities first talked with the NASHIE’s *consejo de gobierno* (“board of directors”), the Shiwiar Nation had already discussed some of the implications of oil production, made a preliminary decision to reject the activities, and agreed to let State authorities voice their opinions in one of their assemblies. After that, the SHE never again tried to discuss with the NASHIE¹³⁵. As a result, the SHE changed its tactics and looked to engage in negotiations with the associations by hiring young people from the communities to act as community facilitators. Under those circumstances, the SHE signed agreements with three communities (towns)¹³⁶. In September, the NASHIE joined forces again in an assembly and rejected the attempts of the SHE to divide the nation and upset its harmony. The NASHIE called on the signatory communities to respect their traditional institutions and organizational practices; otherwise, they could be penalized under their customary law¹³⁷.

The Shiwiar Bufo Tunkintza Shiwiar Association (ASHIB-T) received an offer of eight million dollars in exchange for their support in the SHE initiative; consequently, the Association is trying to separate from the Shiwiar Nation. The legal consequences regarding their legal protection and their status as indigenous peoples could be affected by these actions. However, the deliberate division of the nation over oil interests is of utmost concern¹³⁸.

In the communities where the SHE has gained access, the prior consultation process involved conveying the economic advantages of oil pro-

¹³³ Interview of Fernando Santi, President of the Shiwiar Nation (2013) in Puyo, Ecuador.

¹³⁴ Francesca POLLETTA, *Freedom is an Endless Meeting*, p. 12-15 (2002).

¹³⁵ Interview of Fernando Santi, *supra*, note 133.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

duction; however, the social, cultural and environmental risks were not included in the information provided. When responding to claims by some critics about the impact that oil activities have had on other indigenous communities in the northern part of the Amazon, the SHE said that it was due to lack of control and that the same mistakes will not be made again¹³⁹. Finally, the SHE warned that oil activities would be carried out in spite of the opposition by indigenous peoples, so the smart thing was to negotiate an agreement to receive economic benefits¹⁴⁰. The process was conducted in Spanish.

In response to the agreements signed by certain communities, a new assembly of the Nation took place in November 2012. The Shiwiar Nation decided to reject the agreements and refused to comply with state resolutions concerning oil production in their territory¹⁴¹. Moreover, they declared that they would exercise their constitutional right to resist based on their right to self-determination and thus stopped any oil exploration or production activities from being carried out in their territory¹⁴².

Another nation that is affected is the Kichwa of the Amazon. This Nation is spread across the entire Amazon region and is one of the most affected by oil pollution in the north. The Sarayaku people are part of the Kichwa Nation. They have set an effective resistance strategy that has allowed them to keep oil production from taking place in their territory for almost two decades now. Their strategy includes the implementation of sustainable alternatives for the community to earn money (community tourism, small transportation business, and so on); political and communicational tactics (including a documentary, web page, lobbying, and so forth); and litigation that concluded with a ruling by the Inter-American Court of Human Rights¹⁴³. However, they are worried about the government's new initiative to produce oil in their territory¹⁴⁴.

In 2013, municipal authorities (*juntas parroquiales*) tried to secure access for the SHE to enter the Sarayaku territory and talked with people from the communities. The representatives rejected the proposal because

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Sarayaku, supra*, note 56.

¹⁴⁴ Interview of José Gualinga, President of the Sarayaku People (2013) in Puyo, Ecuador.

the people from there believed that an invitation to establish a dialogue should have been made to them directly or through the indigenous organization (CONAIE and CONFENIAE). They saw a lack of transparency in the SHE's approach as they believed that the SHE wanted to divide indigenous communities once again¹⁴⁵.

After these incidents, the assembly of the Sarayaku people decided to deny the SHE access to their territory¹⁴⁶. However, the SHE ignored the decision of the Sarayaku and entered the Sarayaku territory through the Molino community. The Sarayaku authorities rejected this action and fought with the Molino authorities¹⁴⁷. Moreover, the internal relationships of these people have been deteriorating due to the SHE's tactics of hiring young Sarayaku to disseminate the government's financial promises among the communities¹⁴⁸.

The SHE's interpretation of the impacts is very limited. Due to the zone's hydrological system, the contamination of upstream water sources directly affects the Sarayaku people. Nevertheless, the agreements signed by the government and peasants or people from urban areas might lead to pollution of the Bobonaza River and directly affect the Sarayaku.

As with the Shiwiari, the information that the SHE presented to the Molino community was incomplete. The government's information only conveyed economic opportunities but not the environmental risks posed by oil production¹⁴⁹. Although José Gualinga, leader of the Sarayaku people, knows what rejecting the SHE proposal means—that is not to receive financial assistance from the State—they are willing to move forward anyway with the rejection of the SHE proposal¹⁵⁰.

Presently, the Sarayaku are forging an alliance with other Kichwa people to build a united front for future negotiations with the State. In 2011, the Boberas and Parkayaku peoples joined the Sarayaku in an

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

initiative to create an indigenous political district¹⁵¹. The people of the future Kichwa territory of the Bobonaza Watershed (Circunscripción Territorial Autónoma Kichwa del Bobonaza – CITAKIB) have already discussed their priorities to agree on a common position with regard to the oil issue. For the people of Bobonaza, it is important to tell the government that they have a “life plan”, that they are thinking about their future, and that oil is not part of their plans. They signed the Declaration of Harmonious Coexistence among the Kichwa (Ayllu, Llaktapura and Sumak) to express their view of the world, their relationship with their land, and their plans for the future. In their words: “The CITAKIB is a hard zone clear of oil, mining, and timber extraction; it is not a nature services market and it is not prey to bio-piracy. It is a barrier protecting life, *Kawsay Sacha* (living forest)”¹⁵².

The Sarayaku people have been steadfast in their decision to exclude oil extraction from their development agenda. Instead of conducting a prior consultation process based on international standards, the government insists on employing its tactics of sparking division among the communities and signing agreements with individuals who do not represent them¹⁵³.

For indigenous peoples, the Amazon Consultation was a violation of their right to a free, informed and prior consultation. It did not respect international law and failed to be an opportunity for real dialogue where indigenous opinions have the chance of actually influencing the government’s decision-making process. The Amazon peoples of all nations united in the CONFENIAE in order to agree on a common position on the South-Orient Round and the Amazon Consultation. A congress of indigenous leaders was formed in April 2013 and arrived at a unanimous, common position to reject the new round for oil extraction¹⁵⁴. Again,

¹⁵¹ Under the Territorial Organization Statute, if more than 50 % of a municipality’s population is indigenous, an Indigenous Territorial District can be created. This concept differs from that of an indigenous territory, and it is designed to give indigenous people a chance to be their own local authorities under the *mestizo* political scheme.

¹⁵² CITAKIB, *Declaration of Harmonious Coexistence – Kichwa Ayllu Llaktapura Sumak*, 2011, online: <<http://sarayaku.org/?p=159>> (consulted on September 22nd 2016).

¹⁵³ Interview of José Gualinga, *supra*, note 144.

¹⁵⁴ Communities and Social Movements of the Amazons on the XI Oil Tender Round, Press Release, “Pronunciamento de las nacionalidades comunidades y organizaciones

some of them claimed that the agreements signed with the State were never discussed or consulted with the communities.

B. Implementation by the Judiciary Branch

The 1998 and 2008 Constitutions included remedies for guaranteeing fundamental rights. Some cases were brought to court under the 1998 Constitution for failure to enforce indigenous peoples' right to a prior consultation, but just two reached the Constitutional Tribunal (the former higher court on constitutional issues) without a profound analysis, made in a classical private law style¹⁵⁵. Under the paradigm of the Plurinational State, one case has been resolved by the Constitutional Court: the case of the unconstitutionality of the *Mining Statute*¹⁵⁶, addressing the right to a prior consultation.

The Constitutional Court decided on the most recent case based on the 2008 Constitution. In March 2009, the CONAIE filed a lawsuit requesting a judicial review of the recently enacted *Mining Statute*. The action sought the declaration of unconstitutionality based on one formal and two material arguments. The formal argument was the breach of indigenous peoples' right to legislative, prior consultation, because indigenous

sociales amazónicas frente a la xironda petrolera en la amazonia centro sur" (April 10th 2013), online: <<http://lalineadefuego.info/2013/04/11/pronunciamiento-de-las-nacionalidades-comunidades-y-organizaciones-sociales-amazonicas-frente-a-la-xironda-petrolera-en-la-amazonia-centro-sur/>> (consulted September 22nd 2016).

¹⁵⁵ In 2000, the Independent Federation of the Shuar People (FIPSE) filed a lawsuit against ARCO Oil Company demanding that all activities in their territories be stopped because their right to a prior consultation had not been respected. The Tribunal found ARCO's practices to be attempts to divide the community and was therefore against the good-faith standard of the right to a prior consultation, and that it constituted a serious breach of specific rights of indigenous peoples: Constitutional Tribunal of Ecuador, March 16th 2000, *FIPSE v ARCO Oil*, judgment 247-RA-00 (hereafter "FIPSE"). The other case resolved by the Constitutional Tribunal was *Waorani v AGIP*. In 2001, AGIP Oil Company signed agreements with members of the Waorani nation in order to start extraction activities in its territory. The CONAIE lodged a lawsuit on behalf of the Waorani nation, demanding that the Tribunal disregard those agreements because they violated the right to a prior consultation. The Tribunal ruled against the plaintiff because the CONAIE is devoid of *locus standi*, without addressing the merits of the case: Constitutional Tribunal of Ecuador, July 3rd 2003, *Waorani v AGIP Oil*, judgment CTE 0054-2003-RA.

¹⁵⁶ *Mining Statute*, *supra*, note 119.

people were not consulted during the legislative approval process. The two material arguments referred to the incompatibility between statute norms and the rights to territory and prior consultation. In April 2010, the Constitutional Court made a controversial decision in the case.

With respect to the formal argument, the Court stated that the legislative, prior consultation is a collective right of indigenous nations that forms part of the legislative process for enacting statutes¹⁵⁷.

A legislative, prior consultation is not just a formality in the process, but a substantial right that allows indigenous peoples to participate in major decisions concerning their rights. Moreover, conducting a legislative consultation is mandatory and a *sine qua non* requirement; so without it the enacted piece of legislation would be unconstitutional¹⁵⁸.

Nonetheless, the Court came up with a doctrine of the novelty of the Constitution, which means that in the absence of norms on how to apply the Constitution, the State should use its discretion while trying to keep the spirit of the constitutional text. In reality, the Court negated the Constitution's direct effects and justified the breach of fundamental rights when there are no statutes or any other inferior legislation. For this reason, the Court accepted the exchange of letters between the CONAIE President and a group of Assemblies as a prior consultation process¹⁵⁹.

The Court then decided to establish a set of minimum regulations and procedures for conducting a legislative, prior consultation until the Ecuadorian National Assembly enacts a regulation for this subject¹⁶⁰. Furthermore, these rules are extremely specific and include three general principles (exclusivity, specificity, and relevance), and several specific procedure provisions. On the principles, the legislative, prior consultation must be "exclusive," meaning conducted only for peoples and nations prior to enacting any piece of legislation, "specifically" enough to not be confused with the other two kinds of consultations, and the decision of the people should be "relevant" to objectively protect their collective rights¹⁶¹.

¹⁵⁷ Constitutional Court of Ecuador, March 18th 2010, *CONAIE et al. v National Assembly et al.*, judgment 001-10-SIN-CC, p. 11 (hereafter "CONAIE").

¹⁵⁸ *Id.*, p. 13.

¹⁵⁹ *Id.*, p. 16.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

The procedure provisions include a definition of the consulted parties, the consulter, and the stages¹⁶². The Court stated that local ways of decision-making should be respected throughout the process; nevertheless, it established a rigid procedure where indigenous people do not participate in the design of the process; e.g., the agenda is determined by the consulter¹⁶³; the consulter also decides which population is to be consulted¹⁶⁴; the consulted parties have to sign up for the process within five days after the announcement of the consultation process¹⁶⁵; within twenty days the community has to write its decision on the standard forms designed for the process, the forms should include a description of the internal deliberation process¹⁶⁶; and, in twenty days thereafter the leaders of the consulted communities join the authorities for a roundtable discussion¹⁶⁷.

On the first material objection, the plaintiffs alleged that the *Mining Statute* created a model of consultation that is incompatible with the constitutional and international standards. In order to come to a decision on the matter, the Court declared that although there are no constitutional norms on prior consultation, sources of international law have afforded the Court the elements necessary to establish the applicable law in the case¹⁶⁸. The international sources used by the Court are the rulings by the Inter-American Court of Human Rights, the decisions of the Colombian Constitutional Court, the recommendations of the International Labor Organization and the reports by the *UN Rapporteur on Indigenous Peoples' Rights*¹⁶⁹.

Consequently, the Court named the standards it deemed applicable to the case, such as the following: consultations should be flexible enough to be adapted to the specific culture of each people; they must be conducted at the beginning of each stage of the project; the process must be public and offer complete information to the consulted group; consultations cannot merely be an informative process but rather a systematic process of

¹⁶² *Id.*, p. 17.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*, p. 17 and 18.

¹⁶⁷ *Id.*, p. 17 and 18.

¹⁶⁸ This ruling was issued before *Sarayaku*.

¹⁶⁹ *CONAIE, supra*, note 157, p. 22.

dialogue and negotiation; the consulted parties should act in good faith; and the duration of each part of the process should be reasonable¹⁷⁰.

The Court stressed that a consultation must be a concerted procedure, so that the people be involved in the planning of the process, starting by designating the participants through their representatives and using traditional decision-making processes. Moreover, the opinion of the people should be recorded as part of the State's decision-making process, yet it is not binding on the State; however, the Court ascribes the peoples's decision in the decision-making process to the status of "soft law" in International Law. Finally, the Court highlighted that the State act will be void in the case the State fails to consult¹⁷¹. Furthermore, it said that these standards should apply until the National Assembly enacts a statute on prior consultation¹⁷².

On the second material objection, the right to territory, the CONAIE argued that the Statute allows the State to take away their lands pursuant to Western rules and based on the land's commercial value. For indigenous people, however, the value of their ancestral territory cannot be measured by the same standards. Indeed, several articles of the Statute refer to mining easements and expropriation processes when mining so requires, but the Statute does not make any distinction between its application to private property and to indigenous territory.

The Court considers that IACHR's definition of indigenous peoples' right to territory differs from the right to property, stating that territory is a living space indispensable for the material and cultural existence of an indigenous people. Hence, territory cannot be limited by modern institutions with regard to individual rights, such as the declaration of eminent domain. The Court arrived at the conclusion that the norms of the *Mining Statute* (thirteen articles) cannot be applied to the territory of indigenous peoples, so under that condition the articles are not void¹⁷³.

Despite the positive aspects of the ruling, the Court was harshly criticized for not declaring the *Mining Statute*¹⁷⁴ void because no consultation

¹⁷⁰ *Id.*, p. 22 and 23.

¹⁷¹ *Id.*

¹⁷² *Id.*, p. 25.

¹⁷³ *Id.*, p. 22.

¹⁷⁴ *Mining Statute, supra*, note 119.

was conducted. The only possible theory behind that decision is the indirect application of the Constitution and International Law. Moreover, in a civil law country, the rulings of higher courts are not regarded as general law, so the real power of the Court was to rule the Statute void and not to make rules. Accordingly, the ensuing acts of both the Executive (as was analyzed in the last part with respect to the Amazon Consultation) and Legislative branches did not respect the decision for this case, as explained below.

C. Implementation by the Legislative Branch

Since 2008, some statutes and regulations have been enacted for matters that could affect indigenous peoples' rights, such as the *Food Sovereignty Statute*, the *Territorial Organization Statute*, the *Mining Statute* and the *Petroleum Statute*, among others. The indigenous peoples of Ecuador were not consulted on any of them. The most paradigmatic piece of legislation was the *Mining Statute* because of the trial about its constitutionality.

The *Mining Statute* is a general statute that establishes the mining law for the entire territory of Ecuador, even though the main mineral deposits are located in indigenous territories. Besides the operational norms concerning tenders regarding deposits, revenue distribution and stages of operations, the Statute contains rules on easements, expropriations and prior consultation. About prior consultation, the Statute establishes a procedure that should take place at the beginning of the stage for initiating mining, i.e., prospection, extraction, distribution of profits, casting, refinement, commercialization and closing. Nevertheless, there is no consultation process for the call for bids. The community is consulted only when there is no real chance that they might reject mining¹⁷⁵. In this stage, the State decides which company will be awarded the mining contract; consequently, companies will have economic expectations and earn rights that eventually may entitle them to file a torts lawsuit against the State if they are not allowed to continue their activities.

In the prior consultation, as explained in detail above, the Statute ascribes the same treatment to the consultation of indigenous people as in the environmental consultation (for non-indigenous peoples). Consequently, there is a significant reduction of standards, the most important

¹⁷⁵ *Mining Statute, supra*, note 119.

being the need of consent from indigenous people for large-scale projects (such as open-pit mines) to take place in their territories as the IACHR stated in *Saramaka*¹⁷⁶.

The Constitutional Court analyzed the constitutionality of the *Mining Statute* in the above mentioned ruling. In the document, three specific orders were given to the National Assembly: (i) based on the decision of the Court, the Assembly must conduct legislative, prior consultations addressed to indigenous peoples following the procedure indicated in the ruling; (ii) the Assembly should pass legislation on the right to legislative, prior consultation; and, (iii) the Assembly should enact legislation on the (administrative) prior consultation right.

None of the three have been fully implemented yet. The Assembly passed more legislation that should have been the subject of consultation with indigenous people, but was not, and there were no talks with them either. There is no statute with rules on the right of indigenous people to a free, informed and prior consultation. However, the Assembly drew up “instructions” on the application of the legislative, prior consultation¹⁷⁷, but they have no legal status. Although the “instructions” are not a source of law in the Ecuadorian system, they were approved by the Council of Legislative Administration. This Council is formed by five members and the President of the Assembly. Again, the Assembly ignored the Court’s clear instructions to pass legislation on the matter.

In general, the “instructions” reflect the wording of the Court’s decision, specifying certain things, such as the timing of the consultation within the legislative process¹⁷⁸. In addition, the document provides the following elements: principles of the process¹⁷⁹, the creation of regional meetings prior to the national roundtables¹⁸⁰, the shortening of the time of the roundtables from twenty to five days¹⁸¹, and the direction that the agreements will be directly included in the legislation proposed for the

¹⁷⁶ *Saramaka*, *supra*, note 69, para 147.

¹⁷⁷ ADMINISTRATIVE COUNCIL OF THE NATIONAL ASSEMBLY, *Instructions on the Application of the Legislative Prior Consultation*, Official Registry No. 733 of June 27th, 2012.

¹⁷⁸ *Id.*, art. 5.

¹⁷⁹ *Id.*, art. 3.

¹⁸⁰ *Id.*, art. 18.

¹⁸¹ *Id.*, art. 19.

second debate at the Assembly¹⁸²; however, after that point there are two more opportunities to modify the bill.

Finally, the instructions were approved without the indigenous people and nations of Ecuador having been first consulted.

D. Application of Standards

1. On the Legislative Prior Consultation

Article 57.17 of the Constitution¹⁸³ recognizes the indigenous peoples' right to "be consulted before the adoption of a legislative measure that might affect any of their collective rights". Article 6.1.a of the *Convention No. 169* of the ILO lays down that:

governments shall [...] consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.¹⁸⁴

Additionally, the *UN Declaration on the Rights of Indigenous Peoples* at article 19 sets down that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.¹⁸⁵

From these provisions of Constitutional and International Law comes the conclusion that the legislative prior consultation is not optional for the Ecuadorian State¹⁸⁶. Since 2008, the State has violated this right on at least three occasions: the expedition of the *Rules for the Free, Informed and Prior Consultation in Tender Process of Oil Extraction Zones (Executive Directive 1247)*, the approval of the Instructions for the Legislative Prior Consultation, and the approval of the *Mining Statute*. The first went into law after the decision of the Constitutional Court on

¹⁸² *Id.*, art. 20.

¹⁸³ CRE2008, *supra*, note 1, art. 57.7.

¹⁸⁴ C169, *supra*, note 7, art. 6.1a.

¹⁸⁵ UNDRIP, *supra*, note 37, art. 19.

¹⁸⁶ *Sarayaku*, *supra*, note 56, para. 181.

the *Mining Statute* case that should have been the last valid legislative process without consultation¹⁸⁷.

2. On the Free, Informed and Prior Consultation

Article 57.7 of the Constitution recognizes the right the indigenous people have to:

free prior informed consultation [...] on the plans and programs for prospecting, producing and marketing nonrenewable resources located on their lands and which could have an environmental or cultural impact on them.¹⁸⁸

Article 6.1.a of the *Convention No. 169* of the ILO lays down that governments shall consult indigenous peoples on “administrative measures which may affect them directly”¹⁸⁹. Additionally, the *UN Declaration on the Rights of Indigenous Peoples* contains the same provisions as article 19¹⁹⁰.

States cannot consider the prior consultation right as a mere formality; instead, it must be a real instrument of participation and dialogue based on mutual trust and respect with the goal of reaching a consensus between the parties¹⁹¹. This means that the fulfillment of the duty to consult does not only include performing a consultation; in addition the process should be conducted in good faith and in compliance with the right’s standards:

This entails the duty to organize appropriately the entire government apparatus and, in general, all the organizations through which public power is exercised, so that they are capable of legally guaranteeing the free and full exercise of those rights. This includes the obligation to structure their laws and institutions so that indigenous, autochthonous or tribal communities can be consulted effectively, in accordance with the relevant international standards. Thus, States must incorporate those standards into prior consultation procedures, in order to create channels for sustained, effective and reliable dialogue with the indigenous communities in consultation and participation processes through their representative institutions.¹⁹²

¹⁸⁷ CONAIE, *supra*, note 157, p. 13.

¹⁸⁸ CRE2008, *supra*, note 1, art. 57.7.

¹⁸⁹ C169, *supra*, note 7, art. 6.1.a.

¹⁹⁰ UNDRIP, *supra*, note 37, art. 19.

¹⁹¹ *Sarayaku*, *supra*, note 56, para. 186.

¹⁹² *Id.*, para. 166.

Although the South-Orient Round had a consultation process (the Amazon Consultation), several breaches of the law applicable to prior consultation could be pointed to in the practice of the Ecuadorian government.

First, the consulted should be part of the planning and designing of the process of consultation¹⁹³. The Amazon Consultation was a process ruled in detail by the *Executive Directive 1247*, so this rigid process could not be adapted to the particularities of each people. Furthermore, the State failed to open a dialogue with the leaders of the nations in order to identify those particularities including the number and location of the communities and the internal deliberation process to adjust the times of the consultation. As a result, the government obtained the mistrust of the nations Sapara and Shiwiar, and the Sarayaku people from the starting point. The agreements signed with individuals who were non-representatives of the groups just made it harder to build a productive relationship between the parties. As a result, the three groups decided not to participate in the rest of the process after internal discussions.

Second, any contact with the consulted should be established through their legitimate authorities¹⁹⁴. A large scale project like the South Orient Round should include the national indigenous organization (CONAIE) and the indigenous regional organization (CONFENIAE). The six nations affected by the project are members of both organizations. Moreover, each nation has a *consejo de gobierno* (“board of directors”) that represents the nation or the people under the command of the community assembly. The Ecuadorian government did not try to reach the CONAIE and CONFENIAE, and the approaches to the nations stopped any time when they found any real intention to discuss the feasibility of the project. In all the cases, the Ecuadorian government preferred to look for allies inside the nations and sign agreements with them. These practices divided the communities and generated disharmony between its members¹⁹⁵.

Third, the consultation should be prior to any decision about engaging in a project that affects indigenous peoples’ rights¹⁹⁶. The key to identify-

¹⁹³ CONAIE, *supra*, note 157, p. 23.

¹⁹⁴ *Id.*, p. 22 and 23.

¹⁹⁵ CEOSL, *supra*, note 63, para. 44.

¹⁹⁶ CONAIE, *supra*, note 157, p. 22 and 23.

ing the moment when the prior consultation should be implemented is at “the first stages of the planning or preparation of the proposed measure, so that the indigenous peoples can truly participate in and influence the decision-making process”¹⁹⁷. In the South-Orient Round, the geographical distribution, the environmental impact assessment, the timeline and the tender process were settled before starting the Amazon Consultation. Furthermore, in the information sessions, the State agents said to the communities that exploitation will occur with or without the peoples’ consent. Hence, the decision to extract oil from indigenous peoples’ territory was taken before the consultation.

Fourth, the informed characteristic of the consultation means that the State should provide all relevant information necessary to arrive at a reasoned decision in an accessible way to the consultants¹⁹⁸. This information should include both benefits and risks of the project¹⁹⁹. In the Amazon Consultation, the environmental impact assessment was only in Spanish, and the information distributed by the SHE personnel was only related to the distribution of revenues. The information about environmental and social risks of the activity came from past experiences with oil and mining companies or from testimonies of other indigenous peoples from the North-Orient part of the Amazon region (with 40 years of experiences in oil extraction).

Fifth, a consultation should be conducted without any kind of treath or coercion. The indigenous leaders denounced that the SHE agents told the communities that the extraction was imminent, and that their cooperation was the their option for obtaining benefits from the oil extraction.

Finally, the consultation must be conducted in good faith aiming to obtain the consent of the indigenous peoples consulted²⁰⁰. Even though this is the lesser objective of the standards, there are some conditions that can be found in a case by case analysis. Signs such as the decision taken before the consultation process, avoiding the establishment of a dialogue with the traditional authorities of the peoples, using social investment (that the State should be doing no matter what) as a coercion mechan-

¹⁹⁷ *Sarayaku, supra*, note 56, para. 167.

¹⁹⁸ *CONAIE, supra*, note 157, p. 22 and 23.

¹⁹⁹ *Sarayaku, supra*, note 56, para. 177; *Saramaka, supra*, note 69, para 133.

²⁰⁰ *CONAIE, supra*, note 157, p. 22 and 23.

ism, amongst other particularities of the Amazon Consultation, clearly show how the Ecuadorian government conducted the process as a mere formality with no intention of respecting the peoples' decision.

In conclusion, even if the right to a free, informed and, prior consultation and its standards are part of the law, its implementation shows a negative balance. The reasons are complex and are related to the lack of effective remedies as well as the change in the law without a change in the cultural vision of the relationship between the *mestizo* and indigenous worlds.

Conclusion : Rethinking the Right to Prior Consultation in a Plurinational State

Poverty and abandonment have been present in the Amazon provinces since the colonization period. President Rafael Correa has been using social investment as his government's propaganda and it is, in fact, one of the positive aspects of his administration. However, these policies are also used as an excuse for more oil and mining activities. Since his first term, President Correa has changed his discourse from rights-based to giver-based. When the new Constitution was approved, all of the social investment went to enforcing social rights that had been largely abandoned by neoliberal administrations. Now, social investment is a gift from the State, but not for everyone; it is only for those people who contribute to the government's plan for development.

From a rights perspective, the investment in health, education, sanitation, housing, and so on, responds to the State's duties concerning social, economic, and cultural rights recognized by the Ecuadorian Constitution and international treaties. Despite the ongoing discussion about the nature of the duties regarding social, economic, and cultural rights, undoubtedly equality is the guiding principle or the minimum standard for application. Moreover, in countries such as Colombia, the United States, or Spain, where social rights are neither constitutional rights nor bear a direct effect, equal protection by the law has been the means for courts to establish standards on social rights. From a giver's perspective, investment is a prize, something that governments can use to reward the population.

If Ecuador is taking rights seriously, then the rights-based perspective should prevail, and resources would be distributed throughout the entire territory using reasonable criteria. On the other hand, the giver-based perspective is arbitrary and allows for the bribing of communities in need of resources with them having to give (or to take upon) something that the State wants.

The division in the Amazon region in Ecuador responds to that logic. After decades of contamination, sickness, cultural extermination and so forth, the people in the region (both indigenous and *mestizos*) do not believe that oil extraction is good for their communities, but there are certain people who believe that oil production is their only chance for achieving a decent quality of life. After the first barrel of oil was exported (1972), the ever-present promise of regional development remains unfulfilled, and this does not appear to be a coincidence. The government craves attention from communities. If communities had access to social rights, then their standards of health, clean environment and culture would rise. This makes poverty and abandonment fundamental for the State's plan to increase oil production.

The Amazon Consultation was the last attempt by the State to gain from the poverty and abandonment of these people. In one way, this is true because the State consulted *mestizo* communities on the same process even though they were not subjects of collective rights of indigenous peoples. Similarly, instead of discussing the risks of oil production, the Government offered resources to the communities who agreed to sign agreements with it.

Even if the State's good intentions are taken for granted, these good intentions continue to stand as an idea of cultural superiority. From that perspective, the State knows one thing that the indigenous people do not: how the Western world works and what's best for them. If the Government only conceives one way of development, then there is no chance for intercultural dialogue.

A plurinational state is a wager for a different conception of the affairs between cultures in an extremely multicultural environment. It does not only mean institutions with indigenous peoples' participation, collective rights, or cultural rights, but also is an epistemological approach to intercultural relationships, where *mestizos'* knowledge of how the State and the

society must be is not imposed but enriched by the “knowledge” of 13 other nations²⁰¹.

The right to a prior, free, and informed consultation offers the opportunity to make that happen. Some of the consultation standards will help to make it enforceable in terms of liberal individual rights. Its connection with the concept of self-determination will contribute to it gaining protection at the international level and will start the discussion about indigenous peoples and nature rights as resistance to neocolonialism. The interaction of this right with other indigenous peoples’ rights will add coherence to the new system of rights and remedies in the domestic system and to the new theories of constitutionalism. Most importantly, however, is that it creates the opportunity for reaching a mutual understanding, for making different positions flexible and for building a new society where all the different worldviews may coexist in peace and respect for one another.

This is an effort to which several indigenous leaders, activists, politicians, and scholars are committed today in Ecuador and also in other multicultural countries, fostering the idea that colonialism should be replaced by intercultural relationships. This project needs to overcome the conception of knowledge from the binary construction of “me” and “them”. Since more than one culture is participating in a common ground, the challenge is not to list the differences but to respect them and to return to our own cultures and internalize both respect for others and the fact that diversity is present everywhere. Enjoying human dignity depends on the possibilities of collective and individual development which are based on each one’s culture. Cultural imposition destroys that chance; if a decision is imposed, any opportunity for respecting human rights is not possible, even with a high-standard, prior consultation. Consequently, the right to a prior consultation (or any other human rights mechanism) will be the means for achieving a plurinational state only if all stakeholders work to go in the same direction.

An important step in that direction was taken by the Inter-American Court of Human Rights in *Awas Tingni*. In that judgement, the Court tried to understand what territory means to indigenous peoples, using as reference the right to private property:

²⁰¹ Ramiro ÁVILA SANTAMARÍA, *El Neoconstitucionalismo transformador*, Quito, Abya Yala, 2011, p. 238.

Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.²⁰²

The right to a prior consultation should be the place where elements such as religion, connection with the land, spirituality and worldview are taken into account along with the *mestizo* culture's need for natural resources. Furthermore, indigenous peoples continue to be the group in the worst economic situation in the country, making social investment urgent for them. Such investment, however, must come hand in hand with respect for the rest of the population, and it cannot be used as a way of coercion or threat.

President Correa has responded to critics against the South Orient Round by saying that it is a contradiction to ask for resources while resisting oil extraction. In addition, he has said that a small group of people cannot attempt to stop the development of the whole society. After five hundred years of violence, death and slavery, it just is not right to ask them to take another bullet for all of us.

The *mestizo* culture has deep roots in the indigenous world and there must be a latent knowledge that the Western world is ignoring. The prior consultation is a mechanism for protecting indigenous peoples' rights, but it should also be an opportunity for learning and remembering. At a time when cultures are dying and the *Pachamama* is suffering, it is important to reconnect with the land and with our heritage in order to protect the lives of current and future generations.

²⁰² *Yakye Axa Indigenous Community v Paraguay* (2005), Inter-Am Ct HR (Ser C) No. 125, at para. 149.

