

TOWARD A NEW PARADIGM OF HUMAN RIGHTS PROTECTION FOR INDIGENOUS PEOPLES: A CRITICAL ANALYSIS OF THE PARAMETERS ESTABLISHED BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS*

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1 Introduction

In Latin America, indigenous peoples find themselves in a situation of extreme vulnerability, characterized by racial, social and economic discrimination. Estimated at between 35 million and 55 million (NAÇÕES UNIDAS, 2005, p. 48), the indigenous population is the poorest in the region, remaining on the fringes of the social, political and economic structure developed by Latin American countries (NAÇÕES UNIDAS, 2010).

This historic situation is a consequence of an unjust logic of colonization that continues to this day through discriminatory and exclusionary state policies that result in the progressive loss by indigenous peoples of their ancestral lands, the break-up of communities and the denial of their most basic rights (NAÇÕES UNIDAS, 2005, p. 50). While we recognize a change in posture by States, particularly over the past 20 years, with the adoption of domestic legislation and the ratification of international treaties, this change has been insufficient to guarantee the realization of the rights of indigenous communities.

This topic is extremely important in the current context of Latin America. Given the economic development models adopted by Latin American countries, one of the phenomena that should be receiving more attention is state and private

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intervention in indigenous areas for the execution of large-scale infrastructure and bioprospecting projects, and for the exploitation of minerals, hydrocarbons and other natural resources. Driven by these motives, States and multinational companies repeatedly violate the rights of indigenous peoples and, consequently, place their integrity and survival at risk (MONDRAGÓN, 2010, p. 31).

Given this backdrop, this paper proposes to demonstrate the need for the adoption of a new inclusive and intercultural paradigm for protecting the human rights of indigenous peoples in Latin America. Through a critical analysis of the jurisprudence of the Inter-American Court of Human Rights,¹ some of the advances and limitations in the attempt to construct new alternatives for indigenous issues in the region will be identified. This analysis will be conducted through a study of the three fundamental parameters established by Court precedents thus far: the concept of the right to life with dignity, the protection of communal property, and the right of indigenous peoples to prior consultation.

2 The modern Western paradigm of colonization

It is important to note that development has always been the argument used in Latin America to create a political discourse based on the notion of modernity and the capitalist model (QUIJANO, 2010, p. 49-51). The concept of development, adopted historically by Latin American States and reproduced to this day, is associated with an anti-democratic notion of the exploitation of nature, the commercialization of natural resources, and justified by a productivist and predatory ethic.

Within the current context of Latin America, we cannot lose sight of the fact that indigenous issues ought to be debated against a backdrop of the following two historical processes: (i) the coloniality of power, through which the hierarchy of races was introduced as a means of exploitation and social domination, with eurocentrism being imposed as the model of production and control of subjectivity (QUIJANO, 2005, p. 33); and (ii) the imposition of the hegemonic paradigm of Western modernity, based on individualism and anthropocentrism, the idea of linear and absolute progress, the opposition between society and nature, the commercialization of nature and privatization of the environment, and economicism, according to which quality of life and well-being are measured strictly by the criterion of economic development (ECHEVERRÍA, 1995, p. 140-155).

In addition to the economic and political dimensions, colonialism had a strong epistemological dimension that did not end with the independence of the colonies. According to Santos, colonialism was responsible for a genuine epistemicide, i.e. for the death of alternative knowledge and the subsequent liquidation and subalternity of the groups that subsisted on this alternative knowledge (SANTOS; MENESES; NUNES, 2006, p. 17). The same author explains that modern Western thinking is an abyssal thinking, since it is characterized by the impossibility of co-presence with other types of knowledge, imposing nonexistence, invisibility and non-dialectical absence on different knowledge (SANTOS, 2010, p. 32). As a result of the imposition of a form of hegemonic

Western knowledge, the knowledge of the indigenous peoples was reduced to irrationality and a condition of inferiority and, therefore, largely excluded from history.

Note that the modern Western paradigm, which is founded on the capitalist notion of development, is in direct contrast with the traditional lifestyles, cultural expressions, customs and practices of indigenous peoples, which are based essentially on their collective form of organization and on the spiritual relationship they have with their ancestral lands and with the environment. By ignoring the characteristics of indigenous peoples and preventing their participation in the decision making that affects their interests, the economic development policies established by States and international organisms in Latin America have excluded the indigenous population from the social, political and economic sphere, thereby subjecting them to the current situation of extreme vulnerability in which they find themselves.

Although these peoples are one of the groups that has suffered the most, and continues to suffer the most, from systematic violations of their rights through genocide and epistemicide, the passage of time has demonstrated their capacity for resistance and survival. The indigenous struggle, the result of the historic battle by these peoples against the paradigm of hegemonic modernity and resistance to coloniality, is essentially geared towards the construction of an alternative to the neoliberal capitalist economic system and the current model of power (MACAS, 2010, p. 15). The hegemonic civilizatory and developmental models in the region are reaching, if they have not already reached, complete exhaustion, illustrated by the serious climatic and environmental crises that we are experiencing (HUANACUNI, 2010, p. 18).

The analysis of indigenous issues in Latin America reveals, therefore, the need to go beyond the mere assertion of formal equality for indigenous peoples and demand the construction of alternatives that clear the way for a real decolonization of social, political and economic relations (QUIJANO, 2005, p. 34).

3 The inclusion of indigenous demands in the framework of International Human Rights Law

More recently, the inclusion of indigenous rights in the international human rights agenda has enriched the debate on this topic and strengthened the indigenous struggle to surmount the modern Western paradigm of colonization. Over the past two decades, due primarily to the resistance and activism of indigenous peoples, their demands have been progressively incorporated into the international order, gaining ground in the United Nations, the OAS and the regional human rights protection systems, among other international institutions (ANAYA, 2004b, p. 14).

As a result of this process, an innovative body of international norms and practices for the protection of indigenous peoples has emerged that seeks to recognize them as the subject of collective rights on the international level. Most notable are the creation of the UN Permanent Forum on Indigenous Issues in 2000, which met for the first time in May 2002; the adoption of ILO Convention

169 on Indigenous and Tribal Peoples in 1989; and, more recently, the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007.

Nevertheless, the inclusion of indigenous demands and claims in the international legal framework does not preclude a criticism of International Human Rights Law. As Herrera Flores points out, it is always important to take a critical stance and question to what extent an immense normative and jurisprudential edifice can, in some way, break with the structure of dominance and exploration of the social, economic, political and legal relations of capitalism (HERRERA FLORES, 2009, p. 129).

Under the modern paradigm, International Human Rights Law has often served, historically, as an accomplice of the colonizing mentality that removed indigenous peoples from their lands and suppressed their cultures and institutions (ANAYA, 1996, p. 39). The cornerstone of the modern Western conception of human rights rests, originally, on the assertion of an abstract universalism that, by proposing a homogeneous identity and formal equality of all human beings, ends up overlooking essential characteristics that identify us and distinguish some people from others.

As such, modern law, through its abstract and universalizing rationality, has contributed to the exclusion of indigenous peoples from the legal and political sphere, by preventing a holistic vision of society and imposing Western lifestyles, organizations and social practices that are incompatible with the lifestyles of indigenous peoples (DANTAS, 2003, p. 97). Criticism of the abstract universalism of human rights is even more important when addressing indigenous issues, since the rights claims of these peoples are not only related to their abstract condition as human beings, but primarily to their concrete condition as indigenous peoples (ETXEBERRIA, 2006, p. 65, 70).

It should be pointed out that this paper does not intend to discredit International Human Rights Law as a possible instrument of change, as an effect and consequence of political struggle, but to make it clear that this is only one of the instruments available to indigenous peoples in the struggle against the colonial capitalist model that is still in place. The indigenous struggle extends far beyond the legal sphere.

Note that by opting to conduct a critical analysis of the decisions of the Inter-American Court on indigenous issues, we are not ignoring the inherent complexity of this matter, but instead, through this focus, identifying some limitations and advances in the construction of new alternatives for indigenous issues in the region. We recognize that, within this recent context of internationalization of indigenous demands, the jurisprudence of the Court has been playing an important role (RODRÍGUES-PIÑEIRO ROYO, 2006, p. 153), contributing in part to the break with the modern paradigm of exclusion and oppression of indigenous peoples in the Americas.

This paper will address three fundamental parameters developed by the court in its jurisprudence: the concept of the right to life with dignity, the protection of communal property, and the right to prior consultation. Note that only contentious cases that directly address these three parameters will be examined throughout the text.²

4 The concept of life with dignity in the jurisprudence of the Inter-American Court

In Inter-American jurisprudence, the right to life is understood not only as the right of all human beings to not be arbitrarily deprived of their life, but also as the fundamental right of all people to have access to the necessary conditions for life with dignity (CORTE IDH, 2010. *Xákmok Kásek Indigenous Community vs. Paraguay*, para. 186; CORTE IDH, 2006. *Sawhoyamaxa Indigenous Community vs. Paraguay*, para. 150). Through this broader interpretation of the right to life, the Court has not only asserted the negative obligation of the State to not illegally deprive citizens of their lives, but it draws attention to the positive duty of the State to act and create the necessary conditions to guarantee life with dignity for all people.

In other words, the right to life in the jurisprudence of the Court is intrinsically linked to economic, social and cultural rights, with the State acting as a guarantor, meaning it has the responsibility to guarantee conditions conducive to the full development of individuals. This implies a guarantee of other fundamental rights, such as the right to work, to education, to health and to food, among others contained in the American Convention on Human Rights (ACHR) (GARCÍA RAMÍREZ, 2006, para. 18, 20).

This broader concept of the right to life as life with dignity, appears in Inter-American jurisprudence in three cases that specifically address the protection of the rights of indigenous peoples: *The Yakye Axa Indigenous Community v. Paraguay* of 2005, *the Sawhoyamaxa Indigenous Community vs. Paraguay* of 2006 and the *Xákmok Kásek Indigenous Community vs. Paraguay* of 2010.³

In these three cases against the State of Paraguay, the indigenous communities, after being driven off their lands on account of the historic process of privatization of the Paraguayan Chaco, first claimed the return of their ancestral lands from the State. As a result of the failure of the State to demarcate and confer title to their territories, the members of the communities were prevented from accessing their lands, producing an extreme state of nutritional, medical and sanitary vulnerability that continually threatened the survival and integrity of these communities.

When analyzing the cases in question, the Court asserted that the State has the responsibility, in its capacity as a guarantor, to adopt concrete positive measures designed to genuinely protect the right to life with dignity, particularly in cases of people who are in a situation of vulnerability or risk. In the case of indigenous peoples, the Court emphasized that access to their ancestral lands and the use of natural resources are directly linked to the obtainment of food and, consequently, the survival of these peoples. (CORTE IDH, 2005, *Yakye Axa Indigenous Community vs. Paraguay*, para. 162; CORTE IDH, 2006, *Comunidade Indígena Sawhoyamaxa vs. Paraguai*, para. 153; CORTE IDH, 2010, CORTE IDH. *Xákmok Kásek Indigenous Community vs. Paraguay*, para. 186)

In the three precedents under analysis, the Paraguayan State was held responsible for violating the right to life with dignity of the members of the communities, since, by not permitting access to their ancestral territories, it deprived the communities of exercising their right to health, to education and to

nutrition, among other fundamental rights. The Court established, as reparations for violating the right to life with dignity, the obligation of the State to adopt regular and permanent measures to provide the affected indigenous community access to drinking water, public medical services, sufficient quantity and quality of food, adequate sanitation services and bilingual schools with the necessary material and human resources (CORTE IDH, 2006, *Comunidad Indígena Sawhoyamasa vs. Paraguai*, para. 230).

Note that while the assertion of the right to life with dignity is a pivotal step that should be recognized as an important victory in the protection of the rights of indigenous peoples, it is not sufficient to break with the modern paradigm of exclusion and exploration of these peoples. This is because the Court, in its jurisprudence, developed its conception of life with dignity strictly related to economic, social and economic rights which, while fundamental, are not capable of including the richness of the alternative ways of life of indigenous peoples and their eagerness for self-determination.

By asserting the right to life with dignity without an intercultural dialogue, i.e. without including the indigenous peoples themselves in the debate on what constitutes the essential conditions of life for these peoples, the conception of life with dignity has ended up being reduced to a Western notion of “well-being”. Consequently, the concept of life with dignity developed by the Court is constrained by the vision of the Western subject, contributing to the imposition of a Western way of life on these peoples.

Accordingly, the Court can and should go beyond its current conception of life with dignity, incorporating new discussions that have emerged in the Latin American context. This debate has progressed more quickly in some countries in the region but it has been gaining ground throughout Latin America in virtue of the development of the idea of “Living Well” of indigenous peoples, driven by the need to find new alternatives to the current economic and social model, which is in severe crisis.

Over the past decade, the renewal of the collective conscience of indigenous peoples in Latin American countries has been gaining new momentum, and traditional concepts such as *Sumak Kawsay* and *Suma Qamaña* – used by the indigenous peoples of Ecuador and Bolivia to criticize the current model of development and to assert the need for a cultural, social and political reconstruction – now constitute key elements of the discussion on the protection of the life of indigenous peoples in Latin America (HOUTART, 2011, p. 2).

Note that the concept of Living Well, developed through ongoing dialogue with indigenous peoples in the contemporary Latin American debate, is not coterminous with the defense of dignity and is very different from the concept of life with dignity adopted by the Court. As pointed out by David Choquehuanca, an Aymara Indian, the idea of Living Well attaches importance to community living, democracy, balance with nature, indigenous identity and its customs and traditions (CHOQUEHUANCA CÉSPEDES, 2010b). He explains that Living Well is more concerned with the identity of indigenous peoples than it is with dignity. The concept of life with dignity, since it is not open to an intercultural dialogue, asserts the need to improve quality of life without, however, requiring profound

structural changes, which ends up imposing a Western way of life on indigenous peoples (CHOQUEHUANCA CÉSPEDES, 2010a, p. 11).

According to Luis Macas, Living Well is a concept and a practice that is fundamentally community based, a collective construction founded on the coexistence of human beings with nature, a way of living and thinking that constitutes a fundamental pillar in the process of social construction of the community system in the Americas (MACAS, 2010, p. 17). Eduardo Gudynas, meanwhile, stresses how the concept contrasts with the conventional model of development – which defends obsessive, perpetual economic growth underpinned by the commercialization of nature. Instead, it pursues substantive changes through a commitment to quality of life and the preservation of nature. This author emphasizes that Living Well is not simply about assistance policies, insofar that it calls for profound changes in economic dynamics, in the production chain and in the distribution of wealth (GUDYNAS, 2010, p. 41-43).

The ideas of Living Well appear expressly in the constitutions of Ecuador and Bolivia, through the concepts of *Sumak Kawsay* and *Suma Qamaña* respectively. Although there are some doctrinal differences between these two concepts, their importance lies in the connection between the idea of Living Well and indigenous knowledge and traditions, and in the pursuit of structural changes in society. In both cases, there is a deliberate effort to revive the knowledge and conceptions that have been hidden for so long, and to give a voice to the indigenous peoples who have historically been victims of a silence imposed by colonization.

In the current Latin American context, significant changes have been occurring in this respect. Countries such as Ecuador, Colombia, Peru and Bolivia, after the constitutional reforms of the past two decades, have begun to recognize the pluri-cultural and multiethnic character of the configuration of the State (YRIGOYEN FAJARDO, 2003, p. 173), which is based on the possibility of various indigenous nations with their own economic, social, political and legal entities existing inside the same State (MACAS, 2010, p. 36).

One good example is the constitution of Bolivia, which recognizes 36 indigenous languages in addition to Spanish as official languages of the State. In Ecuador, meanwhile, the National Plan for Living Well 2009-2013 proposes a change of paradigm, through which the idea of indigenous Living Well is recognized as a reaction to the notion of neoliberal development. The new paradigm promotes an inclusive, sustainable and democratic economic strategy that goes beyond the extractivist notion of exploitation of nature (GUDYNAS; ACOSTA, 2011, p. 107-108).

Even though it is an open concept that is still under construction, Living Well is an important element in the struggle to surmount the modern paradigm of colonization. The concept challenges the rationality of the current model of development, its emphasis on merely economic aspects and the pursuit of unlimited progress. It contributes, therefore, to challenging the dualism that imposes the separation of society and nature, seeking to reestablish the harmony between man and the environment through criticism of the anthropocentric and utilitarian logic adopted by development policies in the vast majority of Latin American countries (HOUTART, 2011, p. 4).

This change of paradigm should always be viewed as a process and, therefore, it should not be considered something that is predetermined, but instead under constant construction (HOUTART, 2012, p. 2). The jurisprudence of the Court has taken some steps in this direction and provided important elements for the protection of the rights of indigenous peoples, but it has stopped short by limiting life with dignity to the guarantee of economic, social and cultural rights. Living Well, in contrast, changes the very ideas, radically questioning the concepts of development and progress, introducing alternative ways of conceiving the world, by restoring the relationship between quality of life and nature, and proposing concrete projects and political actions (GUDYNAS, 2011, p. 2). This concept is important because it gives a voice to indigenous peoples, casting doubt on the official narrative shaped by society and politics that concealed and justified centuries of oppression, exploitation and exclusion (ALIMONDA, 2012, p. 32).

Therefore, the criticisms made here are not intended to belittle the advances of Inter-American jurisprudence, but rather to address the need for greater openness by the Court to the current Latin American debate on Living Well and the quality of life of indigenous peoples.

5 Protection of communal property in the jurisprudence of the Inter-American Court

As the Inter-American Commission on Human Rights (IACHR) has itself pointed out, one of the main problems that is currently faced in the protection of the rights of indigenous peoples is the fact that these communities, without title deeds to their ancestral territories, are being severely affected by the implementation of projects, whether state or private, to exploit natural resources on their lands (CIDH, 2009).

Given this situation, the Court has played an important role in the consolidation of a conception of property that aims to go beyond the concept of private property imposed by the modern Western paradigm based on the divisibility of land, individual ownership, alienability, commercial circulation and productivity. This modern concept of property is entirely incompatible with the indigenous concept of territoriality, which draws on the idea of community and the holistic conception of the right to life (GARCÍA HIERRO, 2004, p. 4).

When addressing the right of indigenous peoples to communal property, the Court has adopted an alternative interpretation of this right, introducing a collective, cultural and social dimension of property, which has contributed to an intercultural debate on the communal property of indigenous peoples in Latin America (BRINGAS, 2008, p. 132, 144).

5.1 *The legitimacy of communal property of indigenous peoples*

According to the Court, the legitimacy of indigenous communal property is based primarily on the cultural, spiritual and material relationship of these peoples with their ancestral lands. This relationship exists, but also the right to reclaim their territories, including in cases when the community has been unwillingly separated

from their traditional lands, as occurs in the vast majority of cases in which indigenous peoples are forced off their lands (CORTE IDH, 2012. *Kichwa Indigenous People of Sarayaku vs. Ecuador*, para. 146. CORTE IDH, 2006. *Sawhoyamaya Indigenous Community vs. Paraguay*, para. 132).

In the understanding of the Court, the relationship of indigenous peoples to the land is not merely a matter of possession or production, but a material and spiritual element which they must have the right to enjoy in full, including to transmit their culture and traditions to future generations (CORTE IDH, 2001, *Mayagna (Sumo) Awás Tingni Community vs. Nicaragua*, para. 149; CORTE IDH, 2006, *Sawhoyamaya Indigenous Community vs. Paraguay*, para. 118; CORTE IDH, 2010, *Xákmok Kásek Indigenous Community vs. Paraguay*, para. 124, 131). Accordingly, the Court discards the modern paradigm and recognizes that territoriality acquires, for indigenous peoples, a transgenerational and cross-border dimension that goes far beyond the merely economic functions of the land. For indigenous peoples, the territory is much more than a simple geographic boundary; it is a spatial representation of their collective identity (TINEY, 2010, p. 9).

Note that the right to communal property has been granted to indigenous peoples in virtue of a criterion of traditional occupation, according to which the ancestral territories are defined based on the collective memory of the current generations who are still connected, physically or spiritually, to the lands being claimed (GARCÍA HIERRO, 2004, p. 7). The criterion of traditionality, in this sense, is not related to chronological time, i.e. it does not depend on how long a given territory has been occupied, but instead refers to the traditional way in which the territory is conceived by the community (SILVA, 1997, p. 782).

The conception of indigenous traditionality applied by the Court in its jurisprudence is in compliance with article 14 of ILO Convention 169 and with article 26 of the United Nations Declaration on the Rights of Indigenous Peoples that recognize the right of these peoples to the protection of their relationship with lands traditionally occupied and owned.

Taking this into consideration, the Court has asserted that, although the indigenous notion of land ownership and possession does not correspond to the classic concept of property, it deserves equal protection under article 21 of the ACHR that addresses the right to property in the Inter-American System. In its interpretation, the concept of property and possession acquires a collective meaning when related to indigenous communities, since it is not centered on the individual, but rather on the group as a whole (CORTE IDH, 2012. *Kichwa Indigenous People of Sarayaku vs. Ecuador*, para. 145. CORTE IDH, 2006, *Sawhoyamaya Indigenous Community vs. Paraguay*, para. 143. CORTE IDH, 2001. *Mayagna (Sumo) Awás Tingni Community vs. Nicaragua*, para. 149).

Furthermore, in the understanding of the Court, communal property consists not only of the territory itself, in its physical sense, but it also covers the right of indigenous peoples to freely enjoy their property and the natural resources found therein, in accordance with their traditions and customs (CORTE IDH, 2012. *Kichwa Indigenous People of Sarayaku vs. Ecuador*, para. 145. CORTE IDH, 2007. *Saramaka People vs. Suriname*, para. 146). This position, based on ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples, implies that these peoples

have the right to possess and control their territories and the natural resources found therein without any kind of external interference, while the States have the responsibility to guarantee them the right to manage and exploit their territories in accordance with their communal traditions.

It is important to point out that the rights of indigenous peoples exist independently from property titles or the state statutes that recognize them, which means that the exercise of indigenous territorial rights is not dependent on express state recognition or any formal property title (THORNBERRY, 2002, p. 352). Moreover, in the understanding of the Court, a legal system that conditions the rights of indigenous peoples to the existence of a private property title to ancestral lands cannot be considered a suitable system for the protection of these peoples (CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 111).

Based on the traditional interpretation of communal property of indigenous people, the Court has established in its jurisprudence that: (i) traditional possession by indigenous peoples of their lands has the equivalent effect of full property title granted by the State (CORTE IDH, 2001, *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua*, para. 128); (ii) traditional possession also entitles indigenous communities to demand official recognition of ownership and registration (CORTE IDH, 2005, *Yakye Axa Indigenous Community vs. Paraguay*, para. 215; CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 194); (iii) indigenous peoples who have unwillingly left or lost possession of their traditional lands still maintain the communal property rights thereto, despite the lack of legal title (CORTE IDH, 2005, *Moiwana Community vs. Suriname*, para. 133); (iv) indigenous peoples are entitled to restitution of their lands or to obtain other lands of equal size and quality even when these lands have been lawfully transferred to third parties in good faith (CORTE IDH, 2006, *Sawhoyamaza Indigenous Community vs. Paraguay*, para. 128-130).

5.2 State obligations in the protection of communal property of indigenous peoples

Historically, the extermination and domination of indigenous peoples is associated with the capitalist dynamic of dispossession that began with the colonial invasion and continued with the loss of lands on account of the expansion of the agricultural frontier, the extractivist pressure on natural resources, the development of large infrastructure projects and, finally, the pressure exerted by business on the systems of traditional knowledge and the biodiversity of indigenous territories (TOLEDO LLANCAQUEO, 2005, p. 85). Consequently, one of the front lines of decolonization must involve the defense of ancestral territories and the subsequent state recognition of this right (GRAY, 2009, p. 35).

The Court has played an important role in this sense. Through the legitimacy of the right to communal property of indigenous peoples, it has established that official recognition of their ancestral territories is not up to the discretion of the State, but is instead an obligation that imposes on the State the duty to delimit, demarcate and confer title of the land to the members of the communities. The delimitation and demarcation of indigenous ancestral territories is a precondition

for the exercise of their rights, and the State must therefore adopt special measures that guarantee the effective exercise of the right to communal property (CORTE IDH, 2001, *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua*, para. 138).

Nevertheless, in the understanding of the Court, communal property, despite being considered a fundamental right, is not absolute and may be subject to certain limitations and restrictions. However, the Court has expressly determined that a State may only restrict the communal property of indigenous peoples when the restrictions are: (i) previously established by law; (ii) necessary and proportional; and (iii) intended to achieve a legitimate objective in a democratic society.

Although these requirements may be criticized for their imprecision, the Court has established that, when applied to indigenous communities, they must also take into account that any restriction on communal property may not amount to a denial of their traditions and customs, or threaten the subsistence of the community and its members. Note that subsistence does not just mean physical survival, but also covers the need to preserve and guarantee the special relationship of the indigenous communities with their traditional territories so they can continue to live their way of life in accordance with their cultural identity, social structure, customs, beliefs and traditions (CORTE IDH, 2012, *Kichwa Indigenous People of Sarayaku vs. Ecuador*, para. 156; CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 127, 128; CORTE IDH, 2005, *Yakye Axa Indigenous Community vs. Paraguay*, para. 144-145).

In the case of limitations on communal property resulting from development projects and exploration concessions on indigenous lands that could affect, directly or indirectly, the way of life of these peoples, the Court has also determined that States must observe three essential requirements. First, the State must assure the effective participation of the members of the community in the planning and execution of any development or investment projects in their territory, and it must also obtain the free, prior and informed consent for large-scale projects that would have a major impact. Second, the State must guarantee that the members of indigenous communities benefit reasonably from any project that is developed on their land. Finally, the State must assure that prior environmental and social impact assessments are conducted by independent and technically competent entities in order to evaluate the potential risks and damage to the community (CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 127).

5.3 Reparations established by the Court for violating communal property rights of indigenous peoples

In its jurisprudence to date, the Court has judged six cases dealing with the right to communal property of indigenous peoples.⁴ In each one, the Court declared that the States violated the right to property of the affected indigenous communities and established reparations that include restitution, satisfaction, non-repetition, as well as material and non-material damages. Some relevant aspects of the reparations ordered by the Court shall be addressed below.

First, the Court has established that, in terms of reparations, it is the duty of the States to adopt the legislative and administrative measures and any others that may be necessary to create an effective mechanism to delimit, demarcate and confer

title to the indigenous territories, with the full participation of the communities (CORTE IDH, 2001, *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua* para. 164). Note that the Court is not responsible for determining which ancestral territory is to be demarcated. This is an obligation to be fulfilled by the State in dialogue with the indigenous peoples, respecting their values, uses and traditions (CORTE IDH, 2005, *Yakye Axa Indigenous Community vs. Paraguay*, para. 216, 217).

Moreover, the Court understands that the States, in protecting the right to communal property of indigenous peoples, first have the duty to prevent the communities from being dispossessed from their traditional lands or impeded from making use of them. Nevertheless, if an indigenous community is prevented from accessing its ancestral territories and the resources necessary for its subsistence, the States must assure the right of restitution of these territories even when they are in the lawful possession of private owners. This is because returning ancestral lands to indigenous communities is considered by the Court to be the measure that comes closest to full restitution. Until the ancestral territories have been demarcated and returned to the communities, the Court has determined that the States must abstain from any act that could cause its agents or third parties to prevent the community from developing its particular way of life (CORTE IDH, 2001, *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua* para. 163; CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 194; CORTE IDH, 2010, *Xákmok Kásek Indigenous Community vs. Paraguay*, para. 291).

Moreover, in the event that a State is unable, on objective and reasoned grounds, to adopt the necessary measures to return the ancestral lands, it must provide the affected indigenous community with alternative lands of equal size and quality, which must be chosen by agreement with the members of the community, respecting their own consultation and decision procedures (CORTE IDH, 2005, *Yakye Axa Indigenous Community vs. Paraguay*, para. 217; CORTE IDH, 2006, *Sawhoyamaxa Indigenous Community vs. Paraguay*, para. 136, 210; CORTE IDH, 2010, *Xákmok Kásek Indigenous Community vs. Paraguay*, para. 281-286).

On the subject of non-material damages, the Court has said it is necessary to take into consideration the special significance of the land for indigenous peoples. Any deprivation of access to the ancestral territories results in suffering and anguish, and in irreparable damage to the life, identity and cultural heritage of the indigenous communities (CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 79, 194, 200; CORTE IDH, 2012, *Kichwa Indigenous People of Sarayaku*, para. 315 e 322; CORTE IDH, 2005, *Yakye Axa Indigenous Community vs. Paraguay*, para. 202, 203).

It is worth pointing out that the position of the court on reparations has been subject to criticism, because although it recognizes the collective character of the communal property of indigenous peoples, it maintained for a long time a traditional position that was limited to declaring a human rights violation and its respective reparation only in relation to the members of the communities individually, without doing the same, explicitly and directly, in relation to the indigenous community as a collective and an independent subject (VIO GROSSI, 2010).

This position is based on the interpretation of article 1.2 of the ACHR, which defines the concept of “person” as the human being, and the individual as the holder of rights and freedoms. However, the individualization of victims may

go against the very culture of indigenous peoples, proving to be inadequate, useless and unjust, since it imposes on the community the need to list all its members in order to litigate in the Inter-American System (CHIRIBOGA, 2006, p. 47).

In 2012, in the judgment of the case of the *Kichwa Indigenous People of Sarayaku vs. Ecuador*, the most recent case to date on the violation of the rights of indigenous peoples, the Court took the first step towards altering its position, by expressly declaring that the injured party of the human rights violation analyzed in the judgment was the Sarayaku people and, therefore, they should be considered collective beneficiaries of the established reparations (CORTE IDH, 2012, *Kichwa Indigenous People of Sarayaku*, para. 284). This new position adopted recently by the Court strengthens the indigenous struggle and enables the realization of their claims to communal property, since the claims are always made in the name of the community and not as the individual property of each member of the community (COURTIS, 2009, p. 61). It is hoped, therefore, that in future cases the Court will consolidate this position and assert that indigenous communities are autonomous collective subjects.

In conclusion, on the matter of the protection of the right to property of indigenous peoples, the jurisprudence of the Court illustrates the importance of viewing communal property within a new paradigm that takes into consideration the unique collective way of life of these peoples. Note that communal property is distinct from the liberal concept of private property typical of modern civil law. The construction of a new paradigm for the protection of indigenous rights, therefore, reveals the need for us to understand the communal property of ancestral territories as an institution with its own characteristics, based essentially on the specific relationship of these people with the land and necessarily analyzed in conjunction with their customs and traditions.

6 The right of indigenous peoples to prior consultation in the jurisprudence of the Inter-American Court

The right of indigenous peoples to prior consultation on matters of their interest is one of the most difficult and controversial issues of international law (RODRÍGUEZ GRAVITO; MORRIS, 2010, p. 11). The participation requirement, in addition to being a right of these peoples and a duty of the States, is a necessary condition for the realization of respect for the cultures, ways of life, traditions and rights of indigenous communities (SALGADO, 2006, p. 95).

ILO Convention 169 on Indigenous and Tribal Peoples, ratified by 15 States of Latin America and the Caribbean,⁵ is the international instrument that most clearly addresses this issue, by establishing in article 6 that governments have the duty to consult the peoples concerned through appropriate procedures, respecting their representative institutions, whenever legislative or administrative measures are adopted that could affect them directly. In other words, the States have the obligation to make available the necessary means for indigenous peoples to participate freely and equally at all levels of decision making on policies and programs that could in some way affect their lives.

In accordance with articles 18 and 19 of the United Nations Declaration on the Rights of Indigenous Peoples, these peoples have the right to participate in all decisions that affect their interests, and also to maintain and develop their own decision-making institutions. Accordingly, it is the duty of the State to 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 for adopting and implementing legislative or administrative measures that could affect them.

In the Inter-American System, meanwhile, article 23 of the ACHR enshrines the right of all citizens to take part in the conduct of public affairs, directly or through chosen representatives; the right to vote and be elected; and the right to have access, under conditions of equality, to the public service of their country. Moreover, the right of indigenous peoples to prior consultation has been recognized by the Court as being present in the ACHR, based on a socially informed reading of article 21 of the Convention in relation to communal property (ABRAMOVICH, 2009, p. 22).

Nevertheless, despite the existence of an international normative framework on the subject, some ambiguities concerning the right of indigenous peoples to consultation and participation still remain, particularly in relation to whether these peoples can veto the action of the State when it conflicts with their interests (ANAYA, 2005, p. 7). This begs the question as to whether it is enough to hold prior consultations to hear the opinion of indigenous peoples, or whether, in addition to consultation, the free, prior and informed consent of the indigenous communities is required for the State or third parties to implement the measures that affect in the interests of these peoples.

Analyzed from the perspective of the indigenous communities, consultation and participation should be conceived not just as a means of exercising their political rights, but also, and primarily, as a necessary means of expressing their self-determination (CLAVERO, 2005, p. 46), by virtue of which, according to the UN Declaration on the Rights of Indigenous Peoples, in articles 3 and 4, all peoples have the right to freely determine their political status and freely pursue their economic, social and cultural development. Consequently, in exercising their self-determination, indigenous peoples ought to have the right to autonomy and self-government in matters relating to their internal and local affairs.

Viewed as a human right, self-determination is the assertion that all human beings, individually or as groups, have the right to exercise control over their own destinies and participate equally in the construction and in the development of the governing institutional order in which they live, so that it may be compatible with their ways of life (ANAYA, 2004a, p. 197).

One of the corollaries of the right to self-determination is the recognition that indigenous peoples have the right to reject or veto actions of the State in their territories when these actions could affect their physical or cultural integrity. It is vital that indigenous peoples receive all the information necessary so they can freely reach a decision on the advantages or disadvantages of allowing the State to develop activities on their ancestral territories (MACKAY; BRACCO, 1999, p. 74). The right of indigenous peoples to participation and consultation, with the recognition

of consent as a necessary requirement, is therefore a condition that is inherent to the exercise of the right to self-determination by indigenous peoples.

This position is established in the UN Declaration on the Rights of Indigenous Peoples, which determines in articles 19 and 32 that States must obtain the free, prior and informed consent of the indigenous peoples before adopting measures that could affect their interests, whether these measures are legislative or administrative.

The States, meanwhile, in the vast majority of cases, have adopted a limited interpretation of the right of indigenous groups to prior consultation, according to which the duty to consult is fulfilled after engaging in dialogue with the communities, while the result of this dialogue is in no way binding on the State (RODRÍGUEZ GARAVITO; MORRIS, 2010, p. 80). This same position is adopted by ILO Convention 169, in article 6.2, according to which the consultations must be undertaken in good faith with the objective of achieving an agreement or consent, although this is not a condition that must be met by the State.

The indigenous organizations involved in the drafting of ILO Convention 169 consider the principle of consultation contained in the Convention to be inadequate, since it does not reflect the need to require States to take into account the opinion of the indigenous peoples when implementing projects in their territories (SALGADO, 2006, p. 100). According to this interpretation, consent is viewed merely as the desired outcome of the consultation, and not as an essential condition for these peoples to exercise their self-determination. This raises doubts about the real and effective participation of indigenous communities in matters of their interest, since an action or policy by the State or third parties on indigenous ancestral territories may be considered legitimate even without their consent.

In the Inter-American System, the Court has already established and has been further developing its jurisprudence on the subject, having ruled on the right of indigenous peoples to prior consultation in three cases⁶ to date.

In its first judgment on the subject, in the case of *Saramaka People vs. Suriname*, in 2005, the Court analyzed how the State granted private companies concessions for the exploration of natural resources in the ancestral territories of the Saramaka people, without any prior consultation with the members of the community. According to the Court, before issuing concessions for the exploitation of natural resources within traditional territories and, therefore, restricting the rights of the indigenous and tribal peoples on their communal property, the States must put in place three safeguards: guarantee the effective participation of the affected communities; ensure that reasonable benefits are shared with the members of the communities; and perform prior environmental and social impact assessments. The Court added that the State has the duty to ensure the effective participation of the members of indigenous and tribal peoples, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan or project within their ancestral territory (CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 79, 142, 146).

On the right to consultation, the Court has asserted that: (i) the consultations must be made in advance and in good faith, through culturally appropriate procedures and with the objective of reaching an agreement between the parties; (ii) the States

must ensure that the communities are aware of the potential risks, including environmental and health risks, in order that the proposed project to be implemented in their territory is accepted knowingly and voluntarily; (iii) the consultation must take into account the traditional methods of decision-making of the indigenous and tribal communities (CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 133).

It is important to point out that, in the case in doubt, the Court explained the difference between consultation and consent. According to its understanding, consultation is always necessary, but the prior consent of the community is only required in the case of large-scale projects that would have a major impact within the ancestral territory (CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 134, 153, 154).

Some years later, in the case of the *Xákmok Kásek Indigenous Community vs. Paraguay*, in 2010, the Court analyzed a situation in which the State, without previously consulting the community, established a private nature reserve on part of the indigenous ancestral territory, within which indigenous occupation and traditional activities such as hunting, fishing and growing crops was prohibited. The Court determined that the States have the obligation to ensure the effective participation of the members of the community in any decision that could affect their traditional lands. It also warned that the declaration of nature reserves, even when established by law and allegedly intended to preserve the environment, could constitute a new and sophisticated mechanism to obstruct indigenous claims to their right to communal property (CORTE IDH, 2010, *Xákmok Kásek Indigenous Community vs. Paraguay*, para. 169).

More recently, in 2012, in the case of the *Kichwa Indigenous People of Sarayaku vs. Ecuador*, the Court examined a situation in which the Ecuadorian State granted a permit to a private oil company to carry out oil exploration and extraction activities inside the ancestral territory of the Sarayaku People without previously consulting its members. In addition to expressly recognizing the international responsibility of the Ecuadorian State, the Court in its judgment made a point of highlighting the importance of the right to prior consultation for the protection of indigenous peoples, by asserting that: (i) the obligation to carry out prior consultation, in addition to being a conventional standard, is also a general principle of International Law; (ii) it is the duty of the State to carry out prior consultation with indigenous peoples, a duty that cannot be delegated to third parties; and (iii) the violation of the right to prior consultation of indigenous peoples directly affects their cultural identity, their customs, their worldview and their way of life (CORTE IDH, 2012, *Kichwa Indigenous People of Sarayaku*, para. 164, 198, 220).

It is important to point out that the Court, in its jurisprudence, has partially broken with the limited position adopted by States and by ILO Convention 169 on the requirement for free, prior and informed consent of the indigenous communities. According to the understanding of the Court, in cases that may have a major impact on the integrity of the indigenous community, the State has the obligation not only to carry out prior consultation, but also to obtain the consent of the community.

Nevertheless, this move has only been partial, since consent is only required for large-scale projects planned in indigenous territories. The requirement for consent only in special cases, although a significant step, continues to raise doubts about the effective participation of members of the communities in matters of

their interest, since even projects that have a medium or small effect on the way of life of an indigenous community can cause irreparable damage to its cultural integrity. In this respect, consent in Inter-American jurisprudence is still largely considered a desired outcome and not an essential condition for indigenous peoples to exercise their self-determination. Note that when we talk about the need for the consent of indigenous peoples on matters related to their territories and natural resources, we are dealing with lands and resources that would not even exist were it not for the non-predatory indigenous system of organization. What is needed, therefore, is to abandon the idea that indigenous peoples are merely “guardians” of their territories and natural resources, while the administration and control of these resources remain in the hands of the States (CLAVERO, 2005, p. 46).

Therefore, to construct a new paradigm of human rights protection for indigenous peoples, it is necessary to recognize the right to self-determination of these peoples in all its dimensions in order to guarantee that, through effective participation, they can enjoy the freedom and autonomy necessary for the preservation of their physical and cultural integrity. The Court has already taken an important step in this direction, but it still needs to go further and recognize the intrinsic relationship between consultation, participation and the necessary consent of indigenous peoples for the exercise of their self-determination.

7 Final considerations

This paper sought, through a critical analysis of the jurisprudence of the Inter-American Court of Human Rights, to demonstrate the need to break with the modern Western paradigm of colonization, which is oppressive and exclusionary, and commit to the construction of a new inclusive and intercultural paradigm for protecting the human rights of indigenous peoples in Latin America.

The Court, though its jurisprudence, has been assuming an important role in the realization of this change of paradigm, seeing as it has: (i) contributed in part to the development of the concept of life with dignity applied to indigenous peoples; (ii) broken with the modern concept of private property, by asserting the right to communal property that is collective and intercultural in nature, and more recently recognizing indigenous peoples as collective subjects of rights; and (iii) asserted the need for States to guarantee the right of indigenous peoples to prior consultation on matters of their interest, establishing important guidelines for Latin American countries on this subject.

However, despite these significant advances, criticisms of the Court have been presented throughout this paper, inasmuch as its jurisprudence still has some limitations that could and should be overcome in order to ensure the effective protection of the human rights of indigenous peoples.

First, the Court needs to effectively promote an intercultural dialogue with indigenous communities over its conception of life with dignity, so as to not restrict the concept of life with dignity to a Western vision, limited to the guarantee by States of the exercise of economic, social and cultural rights. While these rights are fundamental, they are insufficient to encompass the richness of the way of life

of these communities, in particular the spiritual relationship they have with their territories and with nature.

Second, this paper identified the need for the Court to consolidate its most recent position adopted in the case of the *Kichwa Indigenous People of Sarayaku vs. Ecuador*, to recognize indigenous peoples as collective subjects of rights. In the context of indigenous peoples, the individualization of the victims, which was required until this case, has proven to be incompatible with their form of community organization.

Finally, the paper criticized the position of the Court over the right of indigenous peoples to consultation, according to which the consent of these peoples is largely considered a desired outcome and not an essential condition for the exercise of their self-determination. The requirement for consent only in special cases, although a significant step, continues to raise doubts about the effective participation of these peoples, since even projects that have a medium or small effect on the way of life of an indigenous community can cause irreparable damage to its cultural integrity.

Therefore, the intention of this paper, by analyzing the jurisprudence of the Court, was to identify the advances and limitations of its action, demonstrating the breakthroughs achieved and the obstacles to be surpassed in the construction of a new intercultural and inclusive paradigm for protecting the human rights of indigenous peoples in Latin America.

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NOTES

1. The Inter-American Court is the judicial body of the Inter-American Human Rights Protection System. This system was developed in the second half the 20th century within the framework of the Organization of American States (OAS) and it currently operates through two bodies: the Inter-American Commission on Human Rights (IACHR) and Inter-American Court of Human Rights. The IACHR is an autonomous institution whose function is to promote the observance and defense of human rights in the Americas and to serve as an advisory body to the OAS on human rights. As part of its mandate to promote and defend human rights, in 1990 it decided to create the Rapporteurship on the Rights of Indigenous Peoples, whose primary purpose is to facilitate the access of these peoples to the Inter-American System. The Court, meanwhile, as a judicial institution, performs two distinct functions: adjudicatory, consisting of analyzing cases and ordering provisional measures on violations of the American Convention on Human Rights (ACHR) committed by States Parties; and advisory, through which the Court interprets the ACHR or any other treaty relating to the protection of human rights in the Americas. Note that the adjudicatory function only applies to States that have expressly accepted the contentious jurisdiction of the Court. Finally, its decisions are not binding on the States.
2. We decided not to analyze the provisional measures ordered to date, but instead to focus on the contentious cases that directly address the three parameters. The cases to be developed throughout the course of this paper are: *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012); *Xákmok Kásek Indigenous Community v. Paraguay* (2010); *Saramaka People v. Suriname* (2007); *Sawhoyamaxa Indigenous Community v. Paraguay* (2006); *Moiwana Community v. Suriname* (2005); *Yakye Axa Indigenous Community v. Paraguay* (2005); *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001).
3. It is important to stress that in the case of the Kichwa Indigenous People of Sarayaku v. Ecuador (2012), although the Court analyzed the violation of the right to life, it did not specifically address the topic of life with dignity. In this case, the Court asserted that the Ecuadorian State was responsible for violating article 4 of the ACHR, since it placed the lives of the members of the Sarayaku People at risk by permitting a private company conducting oil exploration on its ancestral territory to use high-powered explosives, which exposed this people to constant danger (INTER-AMERICAN COURT OF HUMAN RIGHTS. *Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 249).
4. *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua* (2001), *Yakye Axa Indigenous Community vs. Paraguay* (2005), *Sawhoyamaxa Indigenous Community vs. Paraguay* (2006), *Saramaka People vs. Suriname* (2007), *Xákmok Kásek Indigenous Community vs. Paraguay* (2010) and *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012).
5. Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru, Venezuela and Nicaragua.
6. It is worth noting that the Court mentions the importance of consultation for indigenous peoples in other cases, but only in the three precedents examined in this paper does the Court specifically address this topic in depth.

RESUMO

Este trabalho tem por objetivo demonstrar a necessidade de adoção de um novo paradigma, inclusivo e intercultural, de proteção dos direitos humanos dos povos indígenas na América Latina. Por meio de uma análise crítica da jurisprudência da Corte Interamericana de Direitos Humanos, são apontados alguns avanços e limites na tentativa de se construir novas alternativas para as questões indígenas na região. Esta análise será realizada por meio do estudo de três parâmetros fundamentais estabelecidos pela Corte em seus precedentes: o conceito de vida digna; a proteção da propriedade comunal; e o direito à consulta prévia dos povos indígenas.

PALAVRAS-CHAVE

Povos indígenas – Direitos humanos – Corte Interamericana de Direitos Humanos – Vida digna – Propriedade comunal – Consulta prévia

RESUMEN

El objetivo del presente trabajo es demostrar la necesidad de la adopción de un nuevo paradigma inclusivo e intercultural de protección de los derechos humanos de los pueblos indígenas de América Latina. Por medio de un análisis crítico de la jurisprudencia de la Corte Interamericana de Derechos Humanos, se presentan algunos avances y limitaciones de las propuestas de construcción de nuevas alternativas para las cuestiones indígenas en la región. Este análisis será realizado a través del estudio de tres parámetros fundamentales establecidos por la Corte en los precedentes existentes hasta el momento: el concepto de vida digna; la protección de la propiedad comunal; el derecho a la consulta previa de los pueblos indígenas.

PALABRAS CLAVE

Pueblos indígenas – Derechos humanos – Corte Interamericana de Derechos Humanos – Vida digna – Propiedad comunal – Consulta previa