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Protection of the panamanian indigenous peoples' rights within the framework of the inter-american system of human rights

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Abstract: This scientific work analyzes the relationship between Panama and the protection of the Rights of Indigenous Peoples within the scope of the Inter-American Human Rights System (IAHRS). For this, the participation of Panama in the Inter-American Indigenist Institute is analysed, as well as the contemporary relationship in the field of Indigenous Rights, highlighting the role of the IASHR in the reception of cases related to the Embera, Kuna, Ngobe and Naso indigenous communities, when it was determined measures for the Panama State to increase efficiency in protecting the Indigenous Peoples Rights. Throughout the text, the main elements of the standards for the protection of the Rights of the Panamanian Indigenous Peoples within the scope of the IAHRS are identified. In conclusion, it is indicated that the regulation of the Indigenous Peoples Rights in Panama must comply with the standards established within the framework of the IAHRS.

Keywords: American Convention on Human Rights, American Declaration of the Rights and Duties of Man, American Declaration of the Rights of Indigenous Peoples, Inter-American System of Human Rights, Inter-American Court of Human Rights, Inter-American Commission on Human Rights, Panama, Indigenous Rights.

Америкааралық адам құқықтары жүйесі негізінде панаманың жергілікті халықтарының құқықтарын қорғау

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Түйіндеме: Бұл жұмыс Америкааралық адам құқықтарын қорғау жүйесіндегі Панама мен жергілікті халықтардың құқықтарын қорғау қатынастарын талдайды. Ол үшін Панаманың Америкааралық индихенистік институтқа қатысуы, сондай-ақ құқық саласындағы байырғы халықтарға бағытталған замануи қатынастар талданып, Панаманың осы байырғы халықтарының құқықтарын қорғаудың тиімділігін арттыру шаралары ретінде,

Америкааралық адам құқықтарын қорғау жүйесінің Эмбер, Куна, Нгобе және Насо байырғы халықтарына қатысты істердің қаралуы атап өтіледі. Жұмыс барысында Панаманың байырғы халықтарының құқықтарын қорғау стандарттарының негізгі элементтері Америкааралық адам құқықтарын қорғау жүйесі шеңберінде анықталған. Қорытындылай келе, Панамадағы байырғы халықтардың құқықтарын реттеу осы жүйеде белгіленген стандарттарға сәйкес жүзеге асырылуы керектігі анықталады.

Негізгі сөздер: Американдық адам құқықтары туралы конвенция, Американдық адам құқықтары мен міндеттері туралы декларация, Американдық байырғы халықтардың құқықтары туралы декларация, Америкааралық адам құқықтарын қорғау жүйесі, Америкааралық адам құқықтары жөніндегі комиссия, Америкааралық адам құқықтары соты, Панама, байырғы халықтардың құқықтары

Защита прав коренных народов панамы в рамках межамериканской системы прав человека

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Аннотация: Эта работа анализирует отношения между Панамой и защитой прав коренных народов в рамках Межамериканской системы защиты прав человека. Для этого анализируется участие Панамы в Межамериканском индигенистском институте, а также современные отношения в области прав коренных народов, подчеркивая роль Межамериканской системы защиты прав человека в рассмотрении дел, связанных с коренными народами Эмбера, Куна, Нгобе и Насо, когда были определены меры для Панамы по повышению эффективности защиты прав этих коренных народов. По всему тексту определены основные элементы стандартов защиты прав коренных народов Панамы в рамках Межамериканской системы защиты прав человека. В заключение указывается, что регулирование прав коренных народов в Панаме должно соответствовать стандартам, установленным в рамках этой системы.

Ключевые слова: Американская конвенция о правах человека, Американская декларация прав и обязанностей человека, Американская декларация прав коренных народов, Межамериканская система защиты прав человека, Межамериканская комиссия по правам человека, Межамериканский суд по правам человека, Панама, Права коренных народов.

Introduction

The rapid expansion of the Indigenous Peoples' Rights in the Inter-American Human Rights System (hereinafter IAHRS or Inter-American System) has generated

good results in the countries of the region. It happens in a context of fast development of various forms of cooperation at the United Nations (UN) and other international organizations such as the Organization of American States (OAS) to ensure compliance with the Rights of Indigenous Peoples under International Law. This article is written in order to fill the gap of a work that systematically analyzes the Rights of Panamanian Indigenous Peoples within the framework of the Inter-American System. In this regard, comprehensive compliance with what is determined by the IAHRs and other Human Rights Mechanisms in order to guarantee the Rights of Indigenous Peoples has been seen as a necessary measure to be taken in Panama.

Materials and methods

The theoretical and methodological basis of the study is a branch of materials produced within the UN and the Inter-American Human Rights System related to the protection of Indigenous Rights in Panama, such as the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man, the American Declaration on the Rights of Indigenous Peoples the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), ILO Conventions 107 and 169, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The theoretical and methodological basis also include some Law of Panama, materials of national programmes to guarantee indigenous rights and works of Russian and foreign scientists about the protection of indigenous rights in the Inter-American System of Human Rights.

During the research, system and structural approach were used through the application of some scientific research mechanism such as analysis, synthesis, and others methods as comparative-legal, historical and sociological. Although the Inter-American Human Rights System is copied from the European one, the OAS system has a particular situation, since within it there are two bodies, the Commission and the Court, which exercise control and act simultaneously as if they were two subsystems. The American Convention of 1969 is the basic document for the work of the Court, and the American Declaration of 1948 is considered the basis for the work of the Commission [1].

Basing on this, the article discussion is divided. Initially, the research focuses on examining the progress made in safeguarding the rights of Panama's Indigenous Peoples within the Inter-American System. It further investigates the activities of the Inter-American Commission and Court, which are discussed in two distinct subchapters.

Discussion

With the global trend towards the strength of the Indigenous Peoples' Rights in International Law, the fight against persistent economic and ethnic exclusion in the Americas has been perceived as one of the priorities of the Organization of American States. The acknowledgment of these rights in Inter-American System has been the result of extensive experience gained not only within the OAS, but also from its

predecessor, the Pan American Union, within which the First Inter-American Indigenist Congress was held at Patzcuaro (Mexico) from April 14-24, 1940.

During the congress, the Patzcuaro Convention was adopted, and the Inter-American Indigenist Institute was established. It operated in Mexico City until its dissolution in 2009, aiming to facilitate collaboration among experts working on Indigenous Peoples' issues across the Americas. The Patzcuaro Congress was attended by official delegates, advisers, other guests and delegates of Indigenous Peoples. Among them was Ruben Perez Kantule, who belongs to the Kuna ethnic group residing in Guna Yala, a semi-autonomous indigenous province situated along the eastern coast of the Caribbean and encompassing several islands of the San Blas archipelago [2].

Therefore, Panama ratified the Patzcuaro Convention in 1945 and was part of the Inter-American Indigenist Institute until its dissolution, as well as Panama participated in the Inter-American Indigenist Congresses, held in eleven editions between 1940 and 1993, but it did not always manifest in favour of the decisions of this body. For example, in the Ninth Inter-American Indigenist Congress held in 1985, in Santa Fe (New Mexico, USA), which emphasized the opposition to the integration of Indigenous Peoples under International Law [3], Panama abstained on the resolutions that established discussions in the next congress on territorial rights and their consequences on Human Rights (Resolution No. 19) and on the recognition of the customary norms of Indigenous Peoples (Resolution No. 20), probably due to the particular Panamanian legislation that elevated to constitutional rank the rights of Indigenous Peoples to their lands and respect for their traditional authorities and norms [4]. By this time, the Panama's Constitution of 1972 included norms related to the regional autonomy of some indigenous groups and recognition of the right of bilingual education [5].

On the other side, recently Panama has demonstrated a willingness to be active in the development of new documents on Indigenous Rights, voting in favour of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and the American Declaration on the Rights of Indigenous Peoples, which were adopted, respectively, in 2007 and 2016. In this sense, Panama has pledged to ratify the International Labour Organization (ILO) Convention 169, but has not yet ratified it and still bound by the ILO Convention 107 (1957), which was ratified by the Central American country in June 4, 1971.

According to the 2010 Panamanian census, the Indigenous Peoples of Panama represent about 12% of its population. They are divided in 7 ethnic groups (Guna, Teribe, Buglé, Ngäbe, Naso, Embera and Wounaan), and half of them have already sued Panama within the Inter-American System of Human Rights. The Panamanian legislation has recognized the existence of six indigenous regions or "comarcas" (Guna Yala (1938), Embera-Wounaan (1983), Guna Madungandi (1996), Ngäbe-Buglé (1997), Guna Wargandí (2000) and Naso Tjër Di (2020), which have an administrative autonomous regime based on the Indigenous Peoples' Rights. The Naso and Bribri Nations are trying to legalize their comarca likewise [6].

The Ngäbe-Buglé Comarca is the largest and most populous of Panama's indigenous regions, but such other regions it has not been able to reach has achieve high degrees of political and cultural control and consolidated self-government structures as Guna Yala [7], the first indigenous region created in 1938. Within the Inter-American System of Human Rights, Panama has already been condemned by violating Indigenous Rights. In this sense, at the Inter-American Commission, two cases were examined, that pertained to the Ngobe and Naso indigenous communities residing in the north-western region of Panama, as well as Panama was also condemned on October 13, 2015 by the Inter-American Court in the case of the Kuna Indigenous People of Madungandi and the Embera Indigenous People of Bayano and their Members.

Protection of the Panamanian Indigenous Peoples' Rights within the Inter-American Commission on Human Rights

The 169th Session of the Inter-American Commission on Human Rights, along with preceding hearings, placed significant emphasis on addressing the delimitation and demarcation of lands belonging to the Indigenous Peoples of Panama. The public hearing conducted on October 5, 2018, specifically focused on this crucial matter [8]. The event took place in the presence of Panamanian indigenous leaders and was situated within the broader context of recent efforts aimed at safeguarding the rights of Panama's Indigenous Peoples within the Inter-American Commission. These efforts have involved the granting of provisional measures to provide protection of these rights and the submission of cases to the Inter-American Court of Human Rights.

As an example, the Naso and Ngobe-Bugle indigenous communities from the northwest region of Panama lodged a complaint against Panama before the Inter-American Commission. In response, the Commission granted them precautionary measures to ensure the protection of their rights. These measures are used frequently by the Commission and granted separately for each situation. They are not based on the American Convention, but on the Commission Rules of Procedure [9].

The Naso people has been pushing for the recognition of their territorial land as an administrative autonomous region since 1970, suffering acts of violence or intimidating measures by the State. It was asserted by the IACHR when it asked Panama to take the measures necessary to prevent the continuation of collective forced evictions and/or removal of dwellings of the Naso indigenous people. As precautionary measures granted by the IACHR, on November 30, 2009 it asked the State of Panama to take the measures necessary to prevent the continuation of collective forced evictions and/or removal of dwellings of the Naso indigenous people [10].

The Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, concluded that Panama should re-examine the proposal put forward by the Naso people regarding the establishment of a comarca as a means of safeguarding and securing official recognition of their territorial rights [11]. Recently, the

Panamanian Government did not deny that there is no legal barrier to title Indigenous lands inside of protected areas during a 2018 hearing at IACHR, and on November 12, 2020, the Supreme Court of Panama ruled the State had a duty to guarantee Naso communities' right to their collective lands [12]. In the Ngobe and Bugle People vs. Panama case, initially the IACHR guaranteed the Precautionary Measures [13], but they lost their effect about one year before due to the decision of Inter American Court to revoke Provisional Measures granted to the community [14].

These Inter American bodies among other things focused their efforts on the necessity to fulfill the right of the Ngobe and Bugle people to achieve an adequate standard of health and live in suitable environmental conditions, protecting the community members whose health was at risk due to environmental pollution during the construction of a dam on the site of their traditional use of nature. Currently, with the support and regular consultations of Pan American Health Organization (PAHO), the Panama National Commission for the Protection of Health is functioning to protect the health of Indigenous Peoples [15]. This cooperative work is necessary to guarantee the effectiveness of the measures of the Inter-American System.

Protection of the Panamanian Indigenous Peoples' Rights within the Inter-American Court on Human Rights

On October 14, 2014 the Inter-American Court of Human Rights concluded the judgment of the Case Kuna Indigenous People of Madungandí and the Embera Indigenous People of Bayano and their members vs. Panama.

The petition of the victims was sent to the Inter-American Commission on May 11, 2000, which on April 5, 2011 granted precautionary measures "to protect the ancestral territory of the communities of the Kuna indigenous people of Madungandí and the Embera indigenous people of Bayano from invasion by third parties and from the destruction of their forests and crops". According to the Court's decision, historical records indicate that the Kuna people have been residing in the Bayamo region since at least the 16th century [16] and also have a long history of engagement in a struggle to secure their rights at the national and Inter-American level. The Kuna people has gained some internal autonomy after the signature of the Peace Treaty of May 4 1925, in which Panama recognized its duty to abstain military actions in the region and respect its indigenous rights [17]. The province of Guna Yala was created on September 16, 1938 and was later reorganized by the Organic Law 16 of 1953 as an indigenous region. The Kuna Ruben Perez Kantule participated on the 1940 First Inter-American Indigenist Congress and contributed with the work of the Inter-American Indigenist Institute.

Over time, more Panamanian ethnic groups conquered rights similar to those of the Kuna. The creation of the Embera Region on 1983 is an illustration of it. However, the Law that established this Region made no reference to the Embera who moved to the Bayano area at the east Panama. Due to the construction of the Bayano Hydroelectric Complex, which involved the flooding of approximately 350 km² of the area and the displacement of the Kuna and Embera peoples between 1972 and

1976, without success with the various negotiations and agreements and invasions by non-indigenous people, which resulted on the recognition of international responsibility of Panama by the Inter-American Court of Human Rights.

The judges unanimously declared that Panama violated Articles 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 8 (Right to a Fair Trial), 21 (Right to Property), and 25 (Right to Judicial Protection) of the American Convention on Human Rights, to the detriment of the Kuna community of Madungandí and the Embera community of Bayano and their members, owing to the failure to delimit, demarcate and grant title to their territories, to the absence of domestic laws on the delimitation, demarcation and titling of indigenous territories prior to 2008 and to non-compliance with the principle of a reasonable time in relation to certain domestic proceedings. The court did not recognize the violation of Article 24 (Right to Equal Protection), even though this has been previously argued by the Commission [18].

When interpreting the Article 21 (Right to Property), the Court has found it useful and appropriate to use international treaties other than the American Convention, such as the ILO Convention 169 and the UN Human Rights Covenants of 1966 to interpret their provisions based on the evolution of the jurisprudence of the Court, which has emphasized in their jurisprudence the close relationship that Indigenous Peoples have with the land as the basis of their cultural and economical survival. Although this concept of the ownership and possession of the land does not necessarily correspond to the classic concept of property, it deserves equal protection under the Article 21 of the American Convention [19]. The Court also mentioned that the obligation to delimit, demarcate and grant title to the lands of the Indigenous Peoples has been recognized by many States of OAS, and Panama has adopted the 2007 UN Declaration on the Rights of Indigenous Peoples, that established on Paragraphs 2 and 3 of Article 26 that the States shall give legal recognition and protection to the lands, territories and resources of the Indigenous Peoples. The territory demarcation may follow consultation with the indigenous and neighbouring peoples [20].

Three resolutions were issued to validate compliance with the sentence, on August 28, 2015, May 23, 2017 and November 18, 2020. The resolutions indicated that Panama fulfilled most of the sentence obligations, such as the public act of acknowledgment of its international responsibility and paid the amounts established for pecuniary and non-pecuniary damage, but there have not been fully demarcations of some Embera territories, concretely Ipeti and Pirati, where still lives some intruders.

Results and conclusions

In connection with above, its necessary to indicate that the main challenges of the Panamanian Indigenous Peoples are similar to the demands of others peoples of the OAS, such as combat the results of the invasion and illegal extraction of the natural resources of their territories. A high level of organization of some Panamanian Indigenous Peoples showed that the Inter-American System is an

efficient mechanism, even though sometimes slowly, to the safeguard of its rights, while taking into account various possibilities, such as the instruments provided by the United Nations. In this sense, it's imperative to agree with the recommendations formulated on ILO [21], which stated the Panama necessity to create the indigenous region of Naso and Bribri and to ratify the ILO Convention 169. The comprehensive compliance with what is determined in the scope of the IAHRs and other Human Rights Mechanisms should be constant verified by the Indigenous Peoples and other Human Rights defenders of Panamanian Civil Society.

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