Americas QUARTERLY
PUBLISHED BY AMERICAS SOCIETY AND COUNCIL OF THE AMERICAS

AQ FEATURE

Contested Lands, Contested Laws

BY Carlos Andrés Baquero Díaz

The process of translating international conventions on consulta previa into laws has not been smooth.

Read more about proposals for regulation here.

The right to free, prior and informed consent (FPIC), or *consulta previa,* has expanded throughout South America. Nine states have ratified the International Labour Organization's Convention 169 (ILO169)—the principal treaty regarding *consulta previa*.* But regulations created by four of those states—Colombia, Chile, Peru, and Ecuador—contradict the commitments they accepted when they ratified the treaty, in effect violating the right of Indigenous people to be consulted on administrative and legislative measures that could directly affect them.[1]

ILO 169 clearly establishes that before a government decides to begin an oil extraction project, change a law about logging, build a dam, or create a bilingual education law, it must consult in advance with local communities and reach an agreement with them.

The right to *consulta previa* takes the form of a dialogue between the state and an Indigenous community. But since ILO 169 does not provide guidelines regarding how this dialogue should be structured and carried out, much of the debate in South America has focused on verifying what requirements are necessary for this dialogue to happen—such as who will participate and what the participants' functions will be. Since the pursuit of natural resources has turned the ancestral lands of ethnic peoples into zones of dispute, clear guidelines that govern the implementation and authority of ILO 169 are essential. Given the vagueness of the original convention, it has been up to individual countries to develop guidelines in the form of domestic regulations.

Such regulations can be a mixed blessing. Many national-level Indigenous and Afrodescendent organizations are opposed to domestic regulation, arguing that it will reduce the protection afforded to them by ILO 169. They claim it will be difficult—if not impossible—to create a universally acceptable procedure that takes into consideration both cultural differences and the differences in the types of projects being explored.

The validity of their concerns was demonstrated by the efforts of Colombia, Peru, Ecuador, and Chile to regulate *consulta previa*. Each country's measures varied in level of detail, but in all cases the mandated procedures actually reduced the level of protection afforded by international law and endangered the physical and cultural existence of Indigenous peoples.

Colombia

In Colombia, the right to *consulta previa* has been regulated primarily through two presidential decrees and the judgment of the Constitutional Court. While the two presidential decrees did not, however, lead to an increased protection of rights, the Court's rulings have resulted in enhanced protection.

Decree 1320, introduced in 1998, regulated the *consulta previa* process in natural resource extraction cases. It came under immediate criticism from national Indigenous and Afro-Colombian organizations, the ILOand the Colombian Constitutional Court. They claimed that the decree violated ILO 169 because there was no consultation with ethnic organizations. Specifically, the ethnic organizations argued that the decree established a fixed timeline for all consultation processes, which —according to ethnic groups—should be determined on a case-by-case basis. The ILO requested that the government modify the decree, guaranteeing the participation and protection of ethnic peoples.[3]

In 2013, the national government enacted another decree that sought to regulate the right to *consulta previa*, this time assigning different tasks to state entities to develop consultation processes.[4] This national measure was a repeat of 1998—enacted without the consultation of the Indigenous community and with content that violated the right to *consulta previa*. For example, the current decree protects only those communities that live in titled territories, ignoring those that live in ancestral territories.

In contrast to the lack of protection from the executive branch, Colombia's Constitutional Court has been a staunch supporter of strengthening *consulta previa* rights. For example, the Court has declared unconstitutional laws that were enacted without consultation with the communities—for example the General Forestry Law of 2006, which regulated logging. The Court has also incorporated the strongest protection standards—established by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which is another instrument of international law— within its jurisprudence.[5] When continued opposition from communities in the Chidima and Pescadito territories to the construction of a highway, an electricity project and a mine was ignored, the Court stepped in.[6] It declared that the community must give its consent if residents were going to be displaced, if toxic waste was likely to accumulate on their lands, or if the project was likely to cause a social, cultural or environmental impact that put the community's existence at risk. In this ruling, the Constitutional Court explicitly adopted the international standards developed by the UNDRIP.

Peru

In 2011—in response to the deadly Bagua conflict of 2009—the Ollanta Humala administration enacted Law 29785, which regulates the right to *consulta previa*.[7] Yet by establishing that the consultation processes must take place within reasonable time frames and that the state has the right to make the final decision on a project—even if the groups oppose the measure—the law actually violated ILO 169, which explicitly rules out any time frame for consultation. More broadly, the right to FPIC cannot be upheld if the government is able to override the decision of the Indigenous community.

There were further problems when trying to detail the procedure for *consulta previa*. For one, the law did not define the process of how consultation should take place. In response, the government enacted the Supreme Decree No. 001 of 2012[8] and the Methodological Guide to fill these gaps.[9] Yet because Indigenous communities were not consulted in their development, some Indigenous organizations have opposed these tools. Additionally, the Supreme Decree has similar problems as the law: it includes a closed list of administrative and legislative measures that must be consulted; establishes a universal timeframe (120 days) for the prior consultation processes; and ignores the rights of Afro-Peruvians to *consulta previa*.

ILO 169 does not define a specific list of issues or measures that must be subject to consultation. It also acknowledges that cultural differences may require differences in time frames for consultation, and refers to both Indigenous and tribal peoples, which could include Afro-Peruvians.

One of the most debated tools is the *Base de Datos de Pueblos Indígenas u Originarios* (Database of Indigenous or Native Peoples), which determines who is legally considered Indigenous and therefore has the right of consultation. In a class-action lawsuit presented to the Superior Court of Justice of Lima, the District Federation of Peasants of Chichaypujio questioned the database on the grounds that the additional criteria— of the use of an Indigenous language and property on communal land, which were required to qualify as Indigenous—excluded many communities from their right to *consulta previa*.

Although the national government has said the database serves only as a point of reference, the Indigenous organizations maintain that its implementation will impede the right to *consulta previa* for those communities that do not meet these additional requirements.

Ecuador

C*onsulta previa* regulation in Ecuador was issued amid great debate over oil exploration in the Amazon region. Nationally, the discussion was focused on the development of the 11th Oil-Licensing Round—a project seeking private investment to explore land located in the previously unexplored southeastern Amazon region—at which the state offered approximately 2.6 million hectares for oil exploration. Internationally, the Sarayaku people requested the IACHR to step in to protect their right to *consulta previa*, which they argued had been violated by the Ecuadorean government when, in 1996, it allowed an Argentine oil company, Compania General de Combustibles S.A., to explore their territory without consultation.**

Executive Decree No. 1247 was finally adopted in 2012, and it regulated *consulta previa* in cases of oil exploration.[10] Indigenous groups in Ecuador argued that the enactment of Executive Decree 1247 had violated their rights of consultation because they had not been consulted about the law itself.

The debate over the decree and the 11th Oil-Licensing Round highlights the conflicting government priorities. The administration of President Rafael Correa is determined to promote economic development through natural-resource extraction in Yasuní National Park. But the strategy to exploit the country's oil reserves will endanger several Indigenous communities that live in voluntary isolation, and put the environment at risk.[11]

Moreover, the Pachamama Foundation—a prominent foundation that had historically supported the Indigenous peoples of the Ecuadorian Amazon region and had questioned the tools used by the Ecuadorian government to implement the right to *consulta previa*—was closed after the oil exploration debate. According to the government, some of its members attacked foreign diplomats during protests against the 11th Oil-Licensing Round.

Chile

In Chile, the debate over the right to *consulta previa* triggered a more than two-year dialogue between Indigenous groups and the national government. The discussions began in March of 2011 and expanded between March and August of 2013, following the modification of the Supreme Decree 124.[12]

The government presented a final text that Indigenous groups opposed on the grounds that it excluded all legislative measures and a specific list of administrative measures from the obligation to consult, and therefore violated their right to consent to the measures. This led the government to modify the decree and to enact the Supreme Decree 66 of 2013, which incorporated some of the communities' objections, such as the obligation to consult legislative measures.[13]

In January of 2014, the *Sindicato No. 1 de Panificadores Mapuche de Santiago de Chile* (No. 1 Labor Union of Mapuche Bread Bakers of Santiago) presented a complaint before the ILO's Committee of Experts in which they argued that the Chilean government's enactment of the new Supreme Decree of 2013 violated ILO 169 because it reduced the protection of the right to *consulta previa* in two ways: in its definition of measures that could affect Indigenous peoples, and in its evaluation of the projects that enter the Environmental Assessment Service.[14] The ILO decision is still pending.

Endnotes

0 Comments Americas Quarterly Login

Sort by Best Share Favorite

Start the discussion…

Be the first to comment.

ALSO ON **AMERICAS QUARTERLY** WHAT'S THIS?

Arts Innovator: Francisca Valenzuela, Chile

1 comment • 3 months ago

Max — She's amazing, a crear example of chilena talent

Additional Reforms Needed in Colombian Mining Sector

13 comments • 2 months ago

Felicity Webber — Such a contrast to the the current situation in the UK with Shale Gas.

Child Migrants—Whose Problem?

1 comment • 15 days ago

Truth teller — Come up with the money, the nation is 17 trillion in debt.

Where Are the Voices?

1 comment • a month ago

jmcauliff — Chris Sabatini writes about Cuesta Morua being denied a visa by Cuba. I am not sure what …

Subscribe Add Disqus to your site

Connect with *AQ*

AQ's 2014 World Cup Coverage

Check in with *AQ* for updates on the 2014 World Cup in Brazil.

AQ and Efecto Naím: NTN24 Partnership

June 1: This *AQ*-Efecto Naím segment looks at sustainable cities in the hemisphere.

WEB EXCLUSIVES

- AQ Slideshow: Colombia Preserves San Andrés and Old Providence Archipelago's Seaflower Marine Protected Area

  June 13, 2014

  by Luis Carlos Villegas

  

  Learn about Colombia's role in preserving the Seaflower Biosphere Reserve and Marine Protected Area in the western Caribbean.

- AQ Slideshow: The Least Colombian Department in Colombia

  June 3, 2014

  by Ramón Campos Iriarte

On May 25, raizales—Afro-Caribbean people living on the Archipelago of San Andrés, Providencia and Santa Catalina—participated in the Colombian presidential elections.

MORE WEB EXCLUSIVES »

Read our new series of first-person articles.

Most Popular

MOST POPULAR ON *AQ* ONLINE

Most Viewed

Past: 1 day 1 week 1 month 1 year

Brazil's Long To-Do List (283 times)

The New Buzz About Montreal (91 times)

Brazil Crashes out of the World Cup (36 times)

Brazil Endorses International Decade for People of African Descent (24 times)

Monday Memo: Argentine debt – Putin in Latin America – Italy investigates Plan Cóndor – Earthquake – Trapped Honduran Miners (24 times)

AQ Course Packets: Now Available for Your Classroom!

Browse our catalogue.

NOW ON AS/COA ONLINE

Summary: Panel Discussion - Expectations for the Sixth BRICS Summit

by Shannon Hilsey - 6 hours ago

Panelists: Yukon Huang, Senior Associate, Carnegie Endowment and former World Bank Director for China Tanvi Madan, Fellow ...

Brazil Loses Big At World Cup - And Not Just On The Field

by Andrew O'Reilly - 6 hours ago

After the historic and heartbreaking 7-1 loss Germany handed host nation Brazil on Tuesday, the last thing Brazilians probably ...

Brazil-BRICS Trade: A Visual Breakdown

by Elizabeth Gonzalez - 7 hours ago

On July 15, several of the world's most powerful emerging market leaders will meet in Brazil. Heads of state from the ...

Americas Society
Council of the Americas

AQ MEDIA PARTNER

FINANCIAL TIMES

World

America Movil: play on

8 hours ago

The smartest thing would be for Carlos Slim to sell not what has the least value to him, but what has the most value to someone ...

Companies

Brazil poll contenders fear World Cup hangover

9 hours ago

The national mood has switched from elation to despair after the team's drubbing, threatening more strife and volatility ahead ...