6 Prior consultation to halt the resource curse?

Potentials and pitfalls of a participatory innovation in Peru and its implications for the Andean countries

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Introduction

The recent cycle of the commodity boom as well as the reliance of national economies on resource revenues has driven Latin American governments to expand the extractive frontier further into the Amazon and the Andes (Bebbington & Bury, 2013; Svampa, 2015). Indigenous peoples inhabiting these areas are the main affected parties and projects have significantly increased contestation between them, states, and companies (Engels & Dietz, 2017). These socio-environmental conflicts have also turned violent because states and companies did not respect indigenous ways of life or their physical wellbeing.

Participatory processes have been used as indicators of a *Latin American exceptionalism* to the political resource curse (Ahmadov, 2014), with consultation mechanisms being promoted by international organizations, policymakers and academia as a central democratic means to improve resource governance and transform conflicts (GIZ, 2015; Laplante & Spears, 2008; United Nations, 2011; World Bank, 2016). Scaling-up in-depth insights into the implementation of prior consultation in Peru—the only country in Latin America with a national framework legislation—this chapter explores and compares reasons for the implementation of prior consultations as well as the potential and pitfalls of consultations to reform resource governance in the Andean countries.

Prior consultation and the principle of Free, Prior and Informed Consent (FPIC) have become the most important participatory mechanisms for indigenous peoples vis-à-vis extractive industries. In international law, indigenous prior consultation was first introduced in 1989 by International Labour Organisation Convention 169 (ILO C169). Later, consultation rights and FPIC were recognized in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as well as in the regional American Declaration on the Rights of Indigenous Peoples (ADRIP) from 2016. Only recently, since the late 2000s and early 2010s, consultation has been further institutionalized in the Andean countries—with Colombia being the only exception, conducting the first consultation process in 1994 (Rodríguez, 2011, p. 65). Therefore, Special Rapporteur on

the Rights of Indigenous Peoples Rodolfo Stavenhagen first diagnosed an *implementation gap* in 2006 (see Wright & Tomaselli, 2019, p. 279).

Consultation regulations and implementation progress have provoked a surprising and almost complete reversal in the political positions of actors. From being a central claim of indigenous movements and an unwanted obligation for governments and companies, the initial resistance of state and corporate actors changed to approval and—at the same time—the claims of indigenous peoples have turned into contestation and opposition by these previous advocates. However, international organizations and development agencies still celebrate consultations as a guarantee for indigenous peoples' rights per se and as a central means to tackle the high number of socio-environmental conflicts in the Andean countries. This chapter argues that prior consultation is highly contested and the shift in advocacy is due to the limitations of the processes implemented. In principle, consultation legal frameworks should permit affected indigenous populations to have a meaningful voice in state decision-making. However, the scope of domestic *consultation regimes* (Szablowski, 2010) varies substantially in legal texts and in practice.

The main argument of this chapter is that the reversal in the direction of advocacy has resulted from prior consultation being a promising institutional innovation established in constitutions and laws but was subsequently downsized by formal regulations of governments and state administration as well as by informal practices following corporate interests in the industry of resource extraction. Conceptually, the chapter takes an agency-focused perspective on the institutionalization of prior consultation combining critical approaches to law, participation and the transformation of resource conflicts used in the fields of international relations, postcolonial studies and anthropology. The empirical material stems from an in-depth study of indigenous mobilization and contestation leading to and accompanying the implementation of prior consultation in Peru. The data comprises transcripts of interviews and participant observations, primary sources, and legal documents during the law-making process in 2011 as well as during the implementation of prior consultations, especially in the hydrocarbon sector between 2012 and 2016. The empirical material is embedded into an extensive review of secondary literature on prior consultation in international law and domestic contexts.

The first section of the chapter introduces prior consultation as discussed in international law and distinguishes it from other mechanisms of citizen participation. The second section gives an overview on the reasons for and the progress of introducing prior consultation focusing on the Andean countries. The third section critically analyses the complexities of implementing prior consultation in the case of Peru. Based on these in-depth insights, the fourth section discusses the potential and pitfalls of prior consultation for reforming resource governance in the Andean region. Finally, the concluding section reflects on the broader implications of prior consultation as an institutional innovation to break the resource curse and to contribute to sustainable development.

Prior consultation and FPIC as institutional innovations

Prior consultation is often presented as the most important institutional innovation in Latin American resource governance. Legal scholars have also termed prior consultation as a globally prevalent “new approach to ethnic rights and multiculturalism, with its own language and rules” (Rodríguez-Garavito, 2011, p. 268). Prior consultation can be understood as a participatory institution. In line with Falleti and Riofrancos (2018, p. 87) participatory institutions can be defined “as formal, state-sanctioned institutions explicitly created to augment citizen involvement in decision making over public goods or social services.”

From the perspective of formal institutions, consultation processes are based on the international indigenous right to prior consultation and the principle of FPIC. The main international legal instrument in this regard is the ILO C169 and the UNDRIP. The ILO was the first international body to draft international frameworks for indigenous peoples’ rights. Responsible for formulating international labor standards, the ILO started its concern for indigenous peoples out of preoccupation for their conditions as exploited workers and forced labor (ILO, 2009, p. 153). In the revision process of an earlier standard, prior consultation was first defined by the ILO C169 and later interpreted as a “cornerstone” of the Convention (ILO, 2009). The ILO C169 is the only legally binding instrument for indigenous peoples’ rights on an international scale. The principle of FPIC was established by the UNDRIP, which is an important instrument of *soft law* (for a detailed account, see e.g. Barelli, 2012). Additionally, the ILO supervisory system and the UN Special Rapporteurs on indigenous peoples’ rights articulate recommendations. In the Latin American context, the ADRIP, jurisprudence of the Inter-American Court on Human Rights (IACtHR), constitutional courts, and national constitutional frameworks and laws have influenced the implementation process. Recommendations of the Expert Commission on ILO C169 as well as jurisprudence of the IACtHR have influenced the implementation process (Baluarte, 2004).

Without going into detailed legal analysis, prior consultation and FPIC need to be distinguished from public participation, from corporate social responsibility programs (CSR) and from each other. First, indigenous peoples’ participation has a different legal and normative basis than public participation. While public participation aims at involving citizens in democratic state decision-making, setting emphasis on equal rights for everyone, prior consultation and FPIC are derived from indigenous peoples’ right to self-determination and their special connection to their lands. Therefore, standards for prior consultation specifically include cultural adequacy. Second, prior consultation and FPIC primarily are *historical debts* of postcolonial states and not company obligations. Third, consultation and FPIC both define indigenous peoples’ rights but are two different legal concepts. A fundamental difference between these two concepts is that prior consultation should give indigenous peoples the opportunity to participate in decision-making but does not necessarily attribute decision-making power to them. In contrast, FPIC requires governments

(and companies) to reach the consent of indigenous peoples before a project starts. Vice versa, indigenous peoples can withhold their consent and say no to external interventions.

The emergence of FPIC can be traced as a central controversial issue in the elaboration of formal international, regional and national legal texts as well as in regional and national court decisions (for detailed accounts, see e.g. Doyle, 2015). However, the concepts of consultation and FPIC are not clear cut (see e.g. Rodríguez-Garavito, 2011). Therefore, depending on weaker and stronger interpretations, prior consultation may or may not include FPIC.

Reasons for implementing prior consultation in the Andean countries

Legal texts and rulings on prior consultation and FPIC are the result of indigenous protests and are the subject of on-going controversies (see e.g. Falletti & Riofrancos, 2018; Tomaselli & Wright, 2019). Globally, Latin America is the region most advanced in the institutionalization of indigenous peoples' prior consultation and FPIC. The ILO C169, which is the only international treaty open for ratification exclusively referring to indigenous peoples, is almost a *regional convention*. The majority of 15 of a total of 23 ratifying states of ILO C169 are located in Latin America.

Although countries signed the ILO C169 early in the 1990s, many governments were reluctant to implement consultation rights. Briefly reviewing variation between the Andean countries in terms of legal frameworks and regulations, the ILO C169 has played a role in several constitutions of the 1990s and 2000s but has not resulted in coherent legal frameworks or the systematic implementation of consultation processes. In terms of legal frameworks, Bolivia ratified ILO C169 June 1991, consultation was then incorporated into a new law of hydrocarbons in May 2005, but prior consultation was not implemented "because it was not regulated" (Urteaga-Crovetto, 2018, pp. 10–11). Under the government of Evo Morales, prior consultation was regulated for the hydrocarbon sector, the UNDRIP became part of national law, and the new Bolivian Constitution of 2009 granted ILO C169 constitutional status (Urteaga-Crovetto, 2018, p. 11). However, irreconcilable claims between the government and indigenous organizations hindered the adoption of a conjoint national legal framework on consultations (Schilling-Vacaflor, 2014). In the hydrocarbon sector, consultations are implemented starting in 2007 and in the mining sector in 2015 (Zaremborg & Torres Wong, 2018, pp. 50–56). In Colombia, ILO C169 was ratified in 1991 and has constitutional status, and prior consultation was incorporated into the 1991 Constitution. Since then, the Colombian Constitutional Court has developed an ample jurisprudence to further define consultation procedure and substance (Urteaga-Crovetto, 2018, pp. 12–14). Prior consultations have been conducted in the extractive industries since 1994 (Calle Alzate, 2019, p. 92). Ecuador ratified ILO C169, and the right to prior consultation

was incorporated into the 1998 Constitution (Urteaga-Crovetto, 2018, pp. 14–16). In 2012, Executive Decree 1247 was adopted to regulate prior consultation, and the Secretary of Hydrocarbons (SHE) has been implementing consultations since 2013 (Burgos, 2015, p. 54). In Chile, different legal texts were adopted without indigenous participation, and a first regulatory norm under the Bachelet government had to be replaced by the new regulation DTO-66 of March 2014, which is also vigorously opposed by indigenous peoples (Blanco, 2016, p. 14; Tomaselli, 2019).

Recent literature has identified four reasons for states to legally implement prior consultation in the Andean countries that can be traced historically in the waves and counter-waves of the recognition of indigenous peoples' rights. First, indigenous mobilizations of the 1990s reached a formal recognition of indigenous peoples' rights. The *multiculturalist turn* in Latin America refers to the success of indigenous movements in Latin America in establishing domestic political parties and forming at least part of the state governments, especially in Ecuador and Bolivia (see e.g. Van Cott, 2005; Yashar, 2005).

Second, indigenous peoples' rights recognized in the multicultural reforms remained only on paper. This limited impact resulted in frustration, which is most prominently reflected on by Charles Hale's criticism of the limitations of *Neoliberal Multiculturalism* (Hale, 2004). In this context, indigenous peoples' rights, including participation and prior consultation, had been formally recognized but were not put into practice. Therefore, scholars have frequently criticized an *implementation gap* of rights (Helmke & Levitsky, 2006; Schilling-Vacaflor & Flemmer, 2015; Sieder, 2011).

Third, a new wave of resource extraction moving into indigenous peoples' territories has caused high numbers of conflicts, which sparked protests in many communities, often in alliances with national as well as international human rights, environmental and indigenous organizations, leading to political pressure on governments (and companies) to implement consultation rights (Brysk, 2000; Wright, 2014). These protests also led to rulings of the Inter-American Court on Human Rights, with the Saramaka people versus Suriname (2007) and the Sarayaku people versus Ecuador (IACtHR, 2012) cases in favor of the right to FPIC being the most emblematic ones (Doyle, 2015).

Fourth, consultation processes were implemented and further regulated. Comments of the ILO have an influence on the international level and "[d]emonstrating compliance was also significant, as Convention 169 became a marker of internationally approved good behavior. Reactions to the request were soon to follow" (Larsen, 2016, p. 12). Although the legal implementation of prior consultation and FPIC are no longer rejected by governments in Latin America, their scope is highly contested. Against this background, the contested interpretation of regulations has become the new field of struggles over recognition in domestic contexts (Larsen, 2016, p. 11; Rodríguez-Garavito, 2011).

Implementation of prior consultation in Peru: unwanted change

The Peruvian consultation law is internationally celebrated as a forerunner because it provides a national framework for prior consultations, which has served as a leading example for its neighboring countries, such as Bolivia, Brazil, Chile and Colombia; they are elaborating similar legislation. However, Peru's pioneering role came as a surprise for observers. The country has long been discussed as an outlier case in the *multiculturalist turn* of the region because of the absence of indigenous political parties at the national level despite having one of the largest indigenous populations in South America (e.g. Merino, 2019).

Peru had ratified ILO C169 under the authoritarian government of President Alberto Fujimori in 1994, a time still marked by the internal armed conflict (1980s to 1990s) with leftist guerrillas. However, the ratification was mainly to show donors compliance with international standards (Orihuela, 2014). For over a decade, the implementation of ILO C169 was not advanced in a comprehensive way. In response, indigenous and peasant communities staged protests against various projects and started conducting their own consultation processes to avoid imposed mining projects with the Tambogrande consultation being the most famous case (Fulmer, 2014; Walter & Urkidi, 2017). In June 2009, the violence of the *Baguazo* conflict opened a window of opportunity for indigenous organizations to push for the implementation of prior consultation despite the strong opposition of the government of Alan García (2006–2011; Hughes, 2010).

In 2011, the newly elected left-wing President Ollanta Humala adopted the Peruvian Consultation Law (Law of the Right to Prior Consultation of Indigenous and Tribal Peoples, recognized in the Convention 169 of the International Labor Organisation (ILO), Law No. 29785: Republic of Peru, 2011; in the following: LPC) as part of his election promises in 2011. Peruvian indigenous organizations were then involved by the Humala administration in the participatory elaboration of a national regulatory norm. Indigenous organization had hoped for the regulation to fill flaws in the restricted version of the initially negotiated consultation law but were disappointed by the government's reluctance. Nevertheless, the Regulating Decree (Regulating Decree of Law 29785, Law of the Right to Prior Consultation of Indigenous and Tribal Peoples, recognized in the Convention 169 of the International Labor Organization (ILO), No. 001–2012-MC; Republic of Peru, 2012) was adopted without the approval of the main indigenous organizations in 2012 (Flemmer, 2019; Schilling-Vacaflo & Flemmer, 2015).

From a legal perspective, the Peruvian consultation law even stays behind the minimal standards defined in international law. Despite being celebrated internationally, the legal framework and the further institutionalization of prior consultation in Peru are criticized by indigenous and civil society organizations for four main shortcomings: First, the legislation defines *whom to consult* in a narrow way. The consultation legislation establishes that the state has the

authority to decide on the status of being *indigenous*. Further, the legal framework defines that only people *directly descended* from precolonial populations are to be considered *indigenous peoples*—which is more limited than the ILO C169 definition—and stipulates that the representative organizations that participate in the consultations have to be from the geographic area of the planned measure. Accordingly, higher-level indigenous organizations with more experienced leaders remain outside of the processes. Second, the legislation leaves all decisions about *how to consult* to the state. In this regard, the Peruvian government ignored indigenous demands for an obligatory phase of joint planning. Instead, the framework puts the consulting state entity in charge to prepare a consultation schedule and then present it to the peoples to be consulted. Third, the Peruvian consultation legislation insists that all measures, including extractive projects, adopted without consultation before the national legal framework went into practice, remained in force. From a legal perspective, this is ambiguous because the Peruvian government had already ratified ILO C169 in 1994, and therefore was formally obliged to implement consultations since 1995. Fourth, the LCP does not establish a consent obligation and the regulatory decree stipulated that reaching a consensus is mandatory only when relocation of indigenous populations or the disposal of hazardous waste is planned. The final decision about projects remains with the consulting state entity. The legal framework stipulates that only agreements are binding, which means that in the case of disagreement—if communities oppose a measure—the state can still implement the projects, but the communities do not have a legal possibility to veto them.

Under the subsequent Humala administration (2011–2016), a total of 24 consultation processes on extractive projects involving communities from 23 different indigenous peoples were concluded, 11 of which concerned hydrocarbon concessions in the Amazon, and four of which dealt with mining projects in the Andes (Ministerio de Cultura, 2016). For oil, gas and mining projects, the consulting state entities are sub-divisions of the powerful Ministry of Energy and Mines (MEM). As in the other Andean states, Peru's economy depends highly on the extraction of natural resources. Legally, the state owns all sub-soil resources. The national government via the MEM is the central entity that defines areas for mining and hydrocarbon (oil and gas) concessions, organizes international auctions and signs contracts with the highest-bidding company. These formal concessions are leased for 30 to 40 years and managed by foreign companies, whilst only sub-contractors—for infrastructure etc.—are Peruvian (Orihuela, 2012).

For the hydrocarbon and mining sectors, the MEM decided that consultations are to be implemented only once in the licensing process of the projects. For hydrocarbon projects, this is at a very early stage when only a broad area for a future license is defined but there are no details on the projects and activities planned (Flemmer & Schilling-Vacaflor, 2016). For mining, the consultation takes place very late, right before the company begins to work, when the project has already been designed (Merino, 2018)—which means either projects are

not defined yet and impacts remain unclear, or that the project is already fully designed and difficult to change.

In the hydrocarbon sector, from the 26 hydrocarbon processes initially announced (El Comercio, 2013), only 11 were concluded by the end of the Humala government in 2016. Nine of these processes were concluded “as planned”, one was partly opposed (Block 191), and one is still the subject of a contentious renegotiation for a new consultation (Block 192/Ex-1AB). Additionally, other consultation processes began but were cancelled due to local opposition (Block 157) (see Flemmer, 2019).

In general, the concluded consultation processes in Peru can be characterized by three shortcomings: First, the ownership of indigenous peoples is very limited. States usually design the proceeding, control the access to consultation arenas, and establish general *rules of the game*. Therefore, prior consultation has turned from an indigenous peoples’ claim into a state-controlled space and a stage for state monologues. Second, the substantial participation of indigenous peoples during consultation is limited. Third, the influence of indigenous peoples on the results of consultations and ultimately on the projects’ implementation is limited (for a detailed account, see Flemmer & Schilling-Vacaflor, 2016). This is in line with a more general critique of the public participatory mechanisms implemented by the Peruvian government in resource governance since the 1990s. Formally, the country’s legal framework for participation and environmental licensing has been celebrated for being one of the most advanced in the region (Orihuela, 2014). However, in practice, these mechanisms have proven to be ineffective for protecting the environment or for giving local populations a meaningful say, because they are partial to company interests focusing on attracting large-scale projects, rather than on state control (Dargent et al., 2017).

In mining, the implementation process started only after repeated claims from the Peruvian Human Rights Ombudsman, the Ministry of the Environment, indigenous and other non-governmental organizations at the end of 2015 (Irigoyen, 2016). The minister and high-ranking officials of the MEM qualified prior consultation polemically as an *investment obstacle* (La Primera, 2013) and repeatedly articulated opposition against the implementation of consultations together with mining companies (Gálvez & Sosa Villagarcía, 2013). Until the end of Humala’s term in 2016, four consultations were conducted. These were criticized for being rushed, i.e. taking between 34 to 43 days (Defensoría del Pueblo del Perú, 2015; Irigoyen, 2016). Critique was also articulated by the Peruvian human rights ombudsman about the interference of companies in the consultation processes and that the agreements would only repeat already established obligations of the MEM to supervise the projects (Defensoría del Pueblo del Perú, 2016). Nevertheless, these mining consultations were not contested, which was mainly because companies were already working in the areas and had previously established working agreements with the communities (Ocampo & Urrutia, 2016).

However, indigenous organizations and communities have opposed the top-down implementation of consultations. In the same vein as indigenous people,

communities have opposed extractive projects and criticized the flawed public participation processes before prior consultations were conducted (Schilling-Vacaflor et al., 2018). Two hydrocarbon-related cases of contested consultations are particularly interesting: First, in the long conflictive history of the oldest Amazonian oil-producing region in Peru, Block 192 in the Northern Amazon region of Loreto, the state-led consultation has served indigenous organizations and communities as a platform to gain attention for long-standing claims for environmental remediation, compensation payments and an increase of communities' influence in the project design by UN entities and opened negotiations with the Peruvian Congress as well as with the Executive (Lévano, 2017). Second, in the southern Peruvian Amazon region of Madre de Dios, communities rejected participation in consultations convened by the state. In reaction to the communities' opposition, the state reduced the area of the future concession in order to not overlap with indigenous territories. This means that communities were able to use the state's formal obligation to conduct prior consultations to avoid a new hydrocarbon project on their territories by rejecting any consultation at all (Flemmer, 2019).

Implications for the Andean countries: potentials and pitfalls

The absence of national legal frameworks has long been an excuse for governments to not implement prior consultations. Peru is still the only country in the region that has adopted a general national framework law. However, other Andean states have incorporated prior consultation into legal regulations, and the implementation of consultation processes has made progress. The potential of prior consultation as an institutional innovation is commonly advertised as providing spaces to facilitate participation, mediate negative impacts on affected populations and ensure benefits for communities affected by resource extraction. Further, consultation processes are supposed to transform conflicts before they can turn violent and provide platforms to discuss and reconcile different visions of development (McNeish et al., 2015).

In the dimension of formal institutionalization, prior consultation is ambiguously interpreted and highly contested. Although Peru has set an important sign with the consultation legislation of 2011 and 2012—compared to Bolivia, Colombia and Ecuador—the law stays behind in the formal recognition of indigenous peoples and their rights (Schilling-Vacaflor & Flemmer, 2015). However, even in countries more progressive in recognizing indigenous peoples' rights, such as Ecuador (Constitution of 2008) and Bolivia (Constitution of 2009), *hybrid regimes* between prior consultation and FPIC were established (Szabłowski, 2010). In practice, the resource-based economies impose narrow interpretations of prior consultation (Schilling-Vacaflor, 2017 on Bolivia; Burgos, 2015 and Vallejon, 2014 on Ecuador). Falleti and Riofrancos (2014) speak of *poison pills*, which are formal rules, e.g. in the form of regulatory presidential decrees in Ecuador, that undermine the scope of participation. This means

that whilst constitutions and national laws may establish consultation as part of indigenous rights, those rights become downsized by further regulations in the extractive industries sector or are limited by other political decisions. Larsen (2016) finds in a comparative study on Chile, Bolivia, Ecuador and Peru a trend of domesticating and compartmentalizing indigenous peoples' rights and limiting them by *national interests* in resource extraction. Also in Colombia, the government and private industries intended and partially annulled progressive rulings of the Constitutional Court recognizing FPIC (Doyle, 2015, p. 200).

Regarding effective participation, the literature has found that consultation processes are merely procedural. In Peru, the limitations on consultations included even the fact that the ideas, interests and identities of the weaker party—indigenous communities—are often not respected, and may not even enter into the process at all (Flemmer & Schilling-Vacaflor, 2016; Schilling-Vacaflor & Flemmer, 2015). Similar observations can be made in other Andean countries. Bolivia, for example, implements prior consultation processes in the hydrocarbon sector based on sectoral norms since 2007 with a narrow process. The state generally acts as an accomplice to the companies, using participatory arenas to silence dissent (Fontana & Grugel, 2016; Schilling-Vacaflor, 2017; Schilling-Vacaflor & Eichler, 2017). In the same vein, Colombia ultimately has the amplest experience in conducting prior consultations. However, these processes are considered to be merely procedural and are said not to give communities a meaningful say (Rodríguez-Garavito et al., 2010). In Chile, the recognition of indigenous peoples' rights is still absent in the constitution, but the legal implementation of prior consultation has advanced (Tomaselli, 2019). However, the government seems to consider “consultation as a tick in the box” (Ibid., p. 129). Recent protests against President Sebastián Piñera and the results of a referendum in 2020 call for revising the current constitution and holding discussions on further recognition and realization of indigenous rights in practice (Montes, 2020). Lastly, Ecuador has recently begun to put consultations into practice in the hydrocarbon sector in 2013. Yet, scholars find that the Ecuadorian processes were solely classified as *prior consultation* and much closer to a procedure collecting complaints than to a participatory process (Burgos, 2015; Leifsen et al., 2017; Vallejo, 2014).

Finally, prior consultations and legal frameworks for indigenous peoples' rights have been criticized as providing merely symbolic solutions to material problems (Fontana & Grugel, 2016; Goodale, 2016). Power relations underlying resource extraction are highly asymmetric. Like the Political Ecology literature emphasizes, the structures distributing negative impacts and benefits of these projects are fundamentally asymmetric and unjust (Bebbington & Bury, 2013). Consequently, prior consultations are implemented in this context of power asymmetry. While international standards, such as the ILO C169 and the UNDRIP, urge governments to share benefits with the affected communities, most negotiations only include compensation payments and social programs (Flemmer & Schilling-Vacaflor, 2016; Schilling-Vacaflor, 2014, 2017). Also, the ECLAC report (2014, p. 23) on indigenous peoples' rights in Latin America

concludes that the region has incorporated important participatory rights, but “too often there is greater emphasis on the consultation procedure than on reaching agreements for the full exercise of indigenous peoples’ rights.” As Torres Wong (2018, p. 144) writes,

in a context of persistent and deep economic inequality and generalized violence, it should come as no surprise that the implementation of the right to prior consultation has failed to protect Indigenous territories in the ways envisioned by its most forthright advocates.

Additionally, power asymmetries also exist within and between communities. In this regard, consultations have been characterized as favoring local elites, disadvantaging women (Eichler, 2019), and leading to fragmentation and conflict (Arellano-Yanguas, 2011).

Reasons for the limitations of prior consultation to reform resource governance are generally attributed to the poor institutional embeddedness and governments’ lack of political will to meaningfully implement participatory reforms. In terms of institutional embedding, the preconditions for participatory governance are not in place in most countries. These preconditions include: On the state’s side, the imposition of consultation procedures, a lack of intercultural capacities of the state personnel and the absence of follow-up mechanisms. On the communities’ side, these include weak structures of local organizations as well as a lack of capacity to understand and evaluate the information presented by the consulting entity. In this regard, Schilling-Vacaflor and Flemmer (2015, p. 811) summarize: “Establishing these preconditions would result in state institutions capable of justly balancing the diverse interests at stake; measures that reduce power asymmetries within consultations; and joint decision-making processes with binding agreements.” However, consultations with indigenous communities in remote areas suffer from an *overload* of demands for basic state services, when they are almost the sole contact between communities and the state (Ibid.). Another crucial issue is that the regulations were elaborated unilaterally by the state administration and the social movement actors were not included—or as in Peru, left the processes. Based on a comparison of the institutionalization of consultation processes in Bolivia and Ecuador, Falleti and Riofrancos (2018, p. 88) argue that

for the newly created institution to strengthen there must be a process of political incorporation of the mobilized social actors during the early stages of regulation and implementation. We show that while social mobilization is a necessary condition of institutional strength, it is not sufficient.

They conceptualize (Ibid., p. 91) institutional strength as institutions being “legitimate, efficacious, and enforced” and conclude (Ibid., p. 91), “[e]nforcement is not solely a function of the state’s institutional capacities, but also of its willingness to apply the law and enact the institution.”

However, communities and their allies also have strategies to use prior consultation in informal ways. While for communities there is no formal legal way to veto projects through prior consultation processes, communities can still use formal consultations to (1) mobilize for more meaningful negotiations over project terms and agreements; (2) block processes and articulate broader grievances; (3) deny consultations and block projects (Schilling-Vacaflor & Flemmer, 2020; also Jaskoski, 2020). Further, indigenous peoples started to refrain from engaging in dialogue with the state out of frustration that these processes do not respect their own development visions and because projects were implemented without their concerns being taken seriously (Leifsen et al., 2017). Indigenous organizations and communities have also claimed prior consultation and FPIC to be part of their own institutions and conduct self-led community consultation to decide about projects (Fulmer, 2014; Walter & Urkidi, 2017).

Conclusion

This chapter explored why in the case of prior consultation the initial resistance of state and corporate actors has shifted to approval and—at the same time—the previous advocacy of indigenous peoples turned into contestation and opposition. The main argument is that this shifts in advocacy has resulted from prior consultation being a promising institutional innovation established in constitutions and laws but then has become downsized by formal regulations of governments and state administration as well as by informal practices following corporate interests of the extractive industries.

At the same time, despite the efforts of states and companies to limit it, prior consultation has nevertheless become more institutionalized throughout Latin America. After being formally established in the 1990s and 2000s, in the 2010s a wave of consultation regulations and participatory processes were implemented in the Andean countries. Reasons for the final push for institutionalizing prior consultation vary among the different countries. However, in almost all cases indigenous peoples' mobilizations and international pressure played a key role. For the Andean states, this means that institutional change was imposed by civil society actors, international organizations and donor agencies.

Rather than adapting the extractive sector to indigenous peoples' rights, prior consultation has been adapted to the logic of the extractive industries. For the Andean countries, scholars distinguish broadly between “classical”, neoliberal forms of extractivism and more recent *heterodox* models of extractivism (Larsen, 2016) in Bolivia and Ecuador. Prior consultation has been institutionalized in both contexts but with similar results. In general, the processes implemented in the hydrocarbon and mining sectors have been criticized due to the state-controlled access to consultation, the limited influence of indigenous peoples during the processes and the narrow agreements. Thereby, particularly alarming is that the regulation of prior consultation has “contributed to disempower indigenous peoples and communities” (Urteaga-Crovetto, 2018, p. 8).

Beyond shortcomings in the implementation of consultation processes, a fundamental problem is that prior consultation and FPIC are implemented as isolated mechanisms without changing the general logic of the extractive industries sector. Two factors are responsible for this: On the one hand, this is an issue of strategic framing that narrows discussions over indigenous peoples' rights to procedural questions and single participatory instrument (Rodríguez-Garavito, 2011; Merino, 2018). On the other hand, prior consultation and FPIC on a more profound level have problematic conceptual underpinnings. First, consultations are conducted only once during the life-cycle of a project. Timing is important, and consultation starts rather too early before projects are designed, or too late when changes are no longer possible. Either way, projects and conditions may change, and therefore participation needs to be continuous. Second, the role of indigenous peoples becomes merely reactive as they are confronted with outsiders' proposals to either reject or approve, but lack any further say in the actual construction and negotiation of the proposals themselves (Masaki, 2009).

In conclusion, the potential of prior consultation to reform resource governance is at present rather limited. Prior consultations in the Andean countries range on a spectrum between two points: The *minimal* state-led interpretation converts prior consultations into stages for project advertisement and state monologues. Thereby, consultation turns into an instrument that serves to legitimize extractive projects which have been already approved. In their more meaningful version, consultations can at least serve to (re)configure project designs to lower their impact on local populations and ecosystems and to (re)negotiate compensation payments and/or the funding of social projects. However, in comparison to consultations in Canada and Indonesia, negotiations over benefit sharing agreements are not even discussed in the Andean countries. Neither is the possibility of calling into question of the implementation of the project itself. FPIC and the possibility for communities to deny a project is not on the table. However, communities can still use consultations to mobilize and block projects by refusing to participate in them. Consequently, from an emancipatory perspective of indigenous peoples' rights there is a need to shift from a *top-down* to a *bottom-up* approach for realizing the true potentials of prior consultation and FPIC in Latin America.

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