Indigenous Peoples, Identity, and Free, Prior, and Informed Consultation in Latin America

Armando Guevara Gil

Law and Anthropology
Edited by Marie-Claire Foblets, Mark Goodale, Maria Sapignoli, and Olaf Zenker

Subject: Law, Law and Society Online Publication Date: Sep 2021
DOI: 10.1093/oxfordhb/9780198840534.013.7

Abstract and Keywords

This chapter documents the social life of the right to free, prior, and informed consultation in Latin America. Challenging the original intent of the signatories of International Labour Organization (ILO) Convention 169 on Indigenous and Tribal Peoples (1989), Indigenous peoples, subaltern communities, and their advocates—a tacit coalition of activists, scholars, judges, legislators, and diplomats—work at the intersection of law and anthropology to redefine and substantiate the right to consultation. Two movements characterize this endeavour. First, the right is being *broadened*, significantly expanding the legal subjects able to claim its enforcement. Second, consultation is being upgraded from a soft to a solid right, *deepening* it, so to speak, as a way of overcoming the procedural trap that reduces consultations to rituals of domination. Interestingly, corporations and multilateral banks are acknowledging this decolonizing reinterpretation of the right to free, prior, and informed consultation. While its full-blown implementation as an expression of the right of Indigenous self-determination is still utopian, both *broadening* and *deepening* the right to consultation empower Indigenous and subaltern communities in their daily struggles against extractivism and developmentalism.

Keywords: free, prior, and informed consultation, free, prior, and informed consent, ILO 169, Latin America, Indigenous peoples, Indigenous rights, Latin American legal anthropology

In this chapter, I explore the close relationship between law and anthropology in Latin America. Within the field of Indigenous peoples' rights, I focus on the social life of the right to free, prior, and informed consultation on state measures that might directly affect Indigenous peoples, as granted by the 1989 International Labour Organization Convention 169 on Indigenous and Tribal Peoples (ILO 169).[1] As Rachel Sieder (2016: 419) has noted, the 'promise of "prior consultation" became a lightning rod for indigenous mobilizations' against extractivism and developmentalism. It is also a 'key tool for protecting [Indigenous peoples'] rights' (Sierra 2014: 22[2]). I show how Indigenous peoples, subaltern communities, and their advocates work at the intersection of law and anthropology both to *broaden* the right to prior consultation and to '*deepen*' it so that it can be realized in a substantive way. These two movements characterize the regional evolu-

tion of the right to consultation and, in general, 'the emergence of new legal categories' (Goodale 2015: 13).

The first movement, broadening, refers to redefining the legal subjects eligible to claim enforcement of the right. The second movement, which I am calling 'deepening', means that a consultation process can only be considered substantive when the social groups involved give their consent to the measure or exert their *veto power* as expressions of their right to self-determination (Clavero 2015: 647; Herrera 2019: 211, 221). Thus, a tacit coalition of Indigenous and grassroots leaders, lawyers, anthropologists, judges, legislators, and diplomats is expanding the right to consultation beyond the original intent of the signatories of ILO 169 as a way to seek redress for the injustices Indigenous peoples and subaltern communities experience across Latin America.

Before dealing with each movement, in the next section I refer briefly to legal indigenism as an example of the intersection of law and anthropology in Latin America and to the importance of the anthropological gaze for analysing legal categories in their political and cultural context.

Legal indigenism and ILO 169

In Latin America, lawyers and anthropologists play a key role in debates over the *Indian question*. During the early years of the twentieth century, a continental cadre of *indigenistas* oscillated between the celebration of racial and cultural distinctiveness and calls for assimilationist policies. They were white and *mestizo* artists, intellectuals, lawyers, and anthropologists who spoke on behalf of Indigenous people (Giraudo and Lewis 2012: 3–4) and were usually hired by governments as experts on Indigenous affairs. Legal indigenism, essentially paternalistic, was developed as a particular field to promote Indigenous rights and inclusive administrative reforms (Ramos 2006: 207).

By the final third of the century, indigenism had become outdated. Indigenous peoples' empowerment as (trans)national political actors and the call to decolonize Latin American anthropology and state policies had changed domestic and international ethnopolitical landscapes completely.[3] Integration and assimilationist policies were rejected, and the right to self-determination became the cornerstone of Indigenous demands against nation-states.

Along the way, legal anthropological knowledge acquired ever greater importance. Indigenous political demands were framed as rights, and Indigenous peoples' struggles were ever more frequently included on the agenda of the international human rights movement because they could not find redress at the national level within the modern states in which they resided (Niezen 2003: 37; Sieder et al. 2019: 8). As law and culture are 'inextricably linked' and the term *Indigenous* is in itself a legal-anthropological construct, the question of Indigenous rights is 'not an issue for cultural experts only; it is a

Likewise, the powerful International Council on Metals and Mining (ICMM) adopts the language of consultation and consent. Beyond official permits, ICMM acknowledges 'that successful mining and metals projects require the support of a range of interested and affected parties'. Indigenous peoples should be 'fully informed about the project and its potential impacts and benefits' before providing their consent 'without coercion, intimidation or manipulation' (ICMM 2015: 28). However, consultations 'should neither confer veto rights to individuals or subgroups nor require unanimous support'. If extractivist projects face opposition and governments decide to go ahead, 'ICMM members will determine whether they ought to remain involved' (Herrera 2019: 214; ICMM 2015: 11, 29).

Thus, the requirement to seek a 'social license to operate' remains part and parcel of the neoliberal governance milieu (Rodriguez 2011). Nevertheless, it still improves the chances for meaningful negotiation, and even for oppositional movements to prevail. Ideally, it aims at reconciling Indigenous rights and interests with those of business and industry. In conflictive social settings, 'consent is a prerequisite and companies should expect to face indigenous community opposition when attempting to proceed' without their permission. Protests, shutdowns, and international campaigns negatively affect the value of the investment. Therefore, 'to have any meaning, social license requires consent' of all the 'vulnerable communities' impacted by development or extractivist projects (Morrison 2014: 77, 79; see Cantú 2019: 37–8). Since some corporations are economically larger than their host countries (Herrera 2019: 195), the social license to operate can also serve as a step towards balancing an asymmetrical relationship.

Final remarks

While all the efforts of Indigenous leaders, legal and political advocates, activist anthropologists, state officials, international human rights bodies, multilateral banks, and corporations are commendable, we have to remember, first, that Latin American is the most violent continent in the world, particularly dangerous for Indigenous, peasant, and environmental leaders and activists (Doran 2017: 198). Between 2014 and 2018, 536 such activists were murdered (Alcázar 2020: 27, table 1).[29] I am not claiming that the corporations are involved in these murders, but clearly Indigenous and subaltern leaders and communities are operating in dangerous 'minefields' (Rodriguez 2011: 264–5; Sieder 2016: 420), and are taking their lives in their hands when they try to defend their rights.

Moreover, globally 'nearly 64 percent of the world's extractive conflicts take place in the Latin American region'. This is part of a global trend whereby '50–80 percent of mineral expansion worldwide is planned on indigenous land' (Torres 2019: 4, 5). Second, guerrillas, paramilitaries, drug cartels, and illegal logging and mining organizations also operate on Indigenous territories or their surroundings, hindering the governance of natural resource extraction and endangering Indigenous peoples' livelihoods (Bustamante 2015: 189; Sieder 2013: 231–4). Third, most Latin American states have passed harsh laws to criminalize social protest and pressurize local communities into yielding to extractivist and developmental projects (Doran 2017; Sieder 2013; Sieder and Barrera 2017).

As a response to this dire context, Indigenous and subaltern communities challenge the hegemonic roots of ILO 169 and reinterpret it from a decolonizing point of view. Broadening the right to consultation and trying to deepen it by making it more substantial and efficacious are creative steps Indigenous and subaltern communities take towards seizing control over their livelihoods and futures. In this endeavour, they 'employ an anthropological [approach to law] as part of broader legal and political movements' (Goodale 2008: 215) that involves *comprometidos* (committed) legal scholars and social scientists. It might not be enough to question structural inequalities, but it surely empowers Indigenous and subaltern peoples in their daily local struggles.

Acknowledgements

This chapter is dedicated to André Hoekema (1940–2020), *un hombre bueno y sabio*, whose knowledge of and solidarity with Latin American Indigenous people was remarkable and inspiring. I wish to thank Marie-Claire Foblets for her unfailing support and sharp criticism, Brian Donahoe for his masterful and patient editorial work, and Aníbal Gálvez Rivas for his assistance in compiling the bibliography.

References

Albó, X. 2012. 'Justicia Indígena en la Bolivia Plurinacional'. In B. Santos and J. Exeni, eds. *Justicia Indígena, Plurinacionalidad e Interculturalidad en Bolivia*, 201–48. La Paz: Ediciones Abya-Yala, Fundación Rosa Luxemburg.

Alcazar, A. 2020. 'La Criminalización de la Protesta Social: un Estado de la Cuestión'. *Revista Rupturas* 10(1): 25–43.

Anderson, M. 2007. 'When Afro Becomes (Like) Indigenous: Garifuna and Afro-Indigenous Politics in Honduras'. *Journal of Latin American and Caribbean Anthropology* 12(2): 384–413.

Aparicio, M. 2015. 'Derechos y Pueblos Indígenas: Avances Objetivos, Debilidades Subjetivas'. *Revista De Antropología Social* 24: 127–47.

Arboleda, S. 2015. 'Muerte, Destierro y Simulacro Estatal: la Consulta Previa entre los Afro Colombianos'. In D. Duprat, ed. *Convenção n. 169 da OIT e os Estados Nacionais*, 325–44. Brasilia: ESMPU.

Ariza, L. 2018. 'Legal Indigeneity: Knowledge, Legal Discourse and the Construction of Indigenous Identity in Colombia'. *Identities: Global Studies in Culture and Power*, available at ˂**https://doi.org/10.1080/1070289X.2018.1543484**˃.

Ariza, R. 2017. 'Descolonización de prácticas judiciales constitucionales en Bolivia–Colombia'. *Revista Direitto & Praxis* 8(4): 3004–36.