The Prior Consultation of Indigenous Peoples in Latin America

Inside the Implementation Gap

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Chapter 8

Processes and failures of prior consultations with Indigenous Peoples in Chile

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8 Processes and failures of prior consultations with Indigenous Peoples in Chile

Alexandra Tomaselli

Introduction

In 2008, the first mandate of President Michelle Bachelet and the (much delayed) ratification by Chile of the ILO Convention No.169 Concerning Indigenous and Tribal Peoples in Independent Countries of 1989 (ILO 169) relaunched the debate on Indigenous rights throughout the country. In particular, it focused on their right to consultation. In the intervening years, Chile began to hold a number of consultations with Indigenous Peoples, some of which were carried out even before the treaty entered into force. However, it is important to note that some of these consultations repeatedly addressed the same issues over the course of eight years, involving *de facto* overlapping consultation processes, nullifying and undermining the credibility of the previous processes. This is the case of the consultations on the constitutional recognition of Indigenous Peoples and the creation of a Ministry of Indigenous Peoples, a National Council of Indigenous Peoples, and (other) Councils of Indigenous Peoples. The nine Indigenous Peoples of Chile were consulted five times on some or all of these issues: twice in 2009, once in 2011, again in late 2014–early 2015, and once again in 2017.

Furthermore, the legislation over the regulation of the right to be consulted has changed considerably over the years, creating further confusion and overlaps. Eventually, it was codified by Supreme Decree No. 66 of 15 November 2013 (Ministerio de Desarrollo Social, 2013), which entered into force on 4 March 2014 (hereinafter, Decree 66). This decree decentralises the possibility to carry out consultations with Indigenous Peoples to a number of public authorities, and it also stipulates that even those consultations that do not obtain the consent of the concerned peoples should be considered as having fulfilled their objective (see further below). This casts a shadow over the possibilities for fair implementation of this internationally-recognised and fundamental right of Indigenous Peoples.

Against this background, this chapter analyses the process and results of selected cases of consultations with Indigenous Peoples in Chile, and explores the reasons for their failures. First, it offers a short overview of Indigenous Peoples in Chile and the legislative framework vis-á-vis the (weak) protection

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of their rights. Second, it focuses on how Chile has regulated their right to consultation. Third, it addresses the five processes of consultations over those potential institutional reforms that would have directly affected the entire discourse and protection system of Indigenous Peoples in Chile – and thus called here "institutional" consultations. Finally, it provides some concluding remarks on the reasons for the failures of these consultation processes.

A short overview of Indigenous Peoples in Chile and their rights

The 2012 census in Chile registered that 11.07% of the Chilean population (i.e., 1,842,607 people) self-identify as Indigenous. According to this official data, the most numerous Indigenous People in Chile are the Mapuche (almost 82%), followed, in order, by the Aymara, Diaguita, Quechua, Colla, Rapa Nui, LikanAntai (also called Atacameños), Yagán o Yámana, and Kawésqar (Instituto Nacional de Estadísticas Chile, 2012, p. 172). These are the nine Indigenous Peoples recognised by the so-called *Ley Indígena* (Indigenous Law) (Ministerio de Planificación y Cooperación, 1993, article 1, para. 2), although the Diaguita were included only in 2006 by modifying article 2 (para. 1) of the Indigenous Law (Ministerio de Planificación y Cooperación, 2006).

Approximately 31% of the population of Indigenous Peoples in Chile are affected by multidimensional poverty, which includes housing, income, health, and education (Observatorio Ciudadano de Chile, 2017). They have long suffered, and continue to suffer, from land dispossession (Aylwin, 1995; Bengoa 2000; Carruthers & Rodriguez, 2009; Rosti, 2008; Toledo Llancaqueo, 2006a). Furthermore, they are often prosecuted in military tribunals under the Antiterrorist Law (Ministerio del Interior, 1984). This law was adopted under Pinochet's dictatorship and involves severe penalties and the use of arbitrary means of evidence, such as declarations by unidentified witnesses (Ministerio del Interior, 1984, articles 15–18), who are known as the *sin rostro* (faceless) (Tomaselli, 2016).

The Indigenous Law is the main domestic legal source of recognition of Indigenous rights in Chile. Despite several attempts after the restoration of democracy (Toledo Llancaqueo 2006b; Tomaselli, 2016), Indigenous Peoples still lack constitutional recognition, which was the object of three of the recent consultation processes (see below).

In short, the Indigenous Law recognises the existence of the aforementioned Indigenous Peoples, although it defines them as ethnicities (*etnías*); establishes a definition of an Indigenous community and how this can be created; recognises land rights and titles in accordance with nineteenth-century documents; constitutes a fund for land and water (re)distribution; recognises a number of cultural rights, including intercultural and bilingual education; states some participatory rights; and creates the National Corporation of Indigenous Development (CONADI), which is the public agency in charge, *inter alia*, of the promotion of Indigenous policy at State level and the implementation of the Indigenous Law (Ministerio de Planificación y Cooperación, 1993, articles 1, 9–10, 12–19, 20–22,

28–31, 32–33, 34–35 and 38 and ff.).[1] However, this law does not recognise Indigenous Peoples as such, and remains essentially unimplemented (Instituto de Estudios Indígenas, 2003; Instituto Nacional de Derechos Humanos, 2013; Vergara, Gundermann & Foerster, 2006), particularly with regard to bilingual education (Webb & Radcliff, 2013).

Another relevant law is the so-called *Ley Lafkenche* that refers to the Mapuche peoples of the coast (Ministerio del Trabajo y Previsión Social, 2008; Ministerio de Planificación y Cooperación, 2008). This (long-awaited) law establishes coastal marine space(s) for those Indigenous Peoples that have preserved a customary use of them (art. 3). Nevertheless, it is also poorly implemented (Aylwin & Silva, 2014; Kaempfe & Ready, 2011).

Chile is also bound to those international obligations descending from the human rights treaties it has signed and ratified, including the core nine treaties (United Nations Human Rights Office of the High Commissioner, n.d.), in accordance with article 5 of its Constitution (Meza-Lopehandía, 2010). Among these treaties, ILO 169 was ratified by Chile in late 2008, and it entered into force on 15 September 2009 (Ministerio de Relaciones Exteriores, 2008). Chile also voted in favour of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (United Nations Press Release, 2007).

Since the analysis of the complex Chilean context with regard to Indigenous Peoples goes beyond the scope of this paper – and due to space constraints – it suffices to highlight here the two most relevant developments in the Chilean Indigenous agenda. The first is the apology to Indigenous Peoples by (former) President Bachelet in June 2017 for the past atrocities and errors committed by the Chilean State, an act that was long overdue and which had a political resonance, but nevertheless resulted in little concrete action (Milesi, 2017). The second is the recent, worrying declaration by newly re-elected President Piñera of his intent to withdraw Chile from ILO 169 (Bertin, 2018), which – as of December 2018 – had not been followed up by any official action to this effect.

The Chilean legislative framework on the right to prior consultation of Indigenous Peoples

Beyond ILO 169 and UNDRIP, the right to prior consultation of Indigenous Peoples, but not their Free, Prior and Informed Consent (FPIC), is regulated in Chile by the abovementioned Decree 66 (Ministerio de Desarrollo Social, 2013).[2] This executive order takes inspiration from some of the international standards but ultimately fails to meet some key requirements contained in both ILO 169 and the UNDRIP.[3] It establishes a detailed procedure, which includes five specific steps: (1) a common elaboration of the consultation plan; (2) the dissemination of information about the consultation process; (3) Indigenous Peoples' own internal deliberation process; (4) a "dialogue" between Indigenous Peoples and State representatives; and (5) classification and communication of the results, which concludes the consultation process

(Ministerio de Desarrollo Social, 2013, article 16). Nevertheless, it considers "all the possible efforts" made by the authorities involved to reach an agreement with Indigenous Peoples or obtain their consent – rather than their actual agreement or consent – as fulfilling the duty of the consultation (Ministerio de Desarrollo Social, 2013, article 3); it enumerates the public bodies which have a duty to consult Indigenous Peoples, but it leaves out other relevant State actors that adopt measures likely to directly affect Indigenous Peoples, such as the Armed Forces, public companies, and other local administrative bodies (e.g., the municipal governments) (Ministerio de Desarrollo Social, 2013, article 4); and it requires consultation only for those administrative and legislative measures likely to cause a "significant and specific impact" on Indigenous Peoples, without providing further criteria (Ministerio de Desarrollo Social, 2013, article 7).

In addition to Decree 66, Decree 40 of 2013 regulates the Environmental Impact Assessment System that is required for all investment projects in Chile (Ministerio del Medio Ambiente, 2013). Therefore, it governs all the consultation processes with Indigenous Peoples in the case of extractive or infrastructural projects that are to be built within or close to their territories (e.g., a new mine or a hydroelectric plant). An examination of this executive order reveals that – while it enshrines some international standards, such as the duty to consult in good faith and observe appropriate socio-cultural mechanisms (see Ministerio del Medio Ambiente, 2013, article 85) – other articles contain some worrying stipulations. This is the case of article 83, in relation to art. 7 of ILO 169, which limits the duty to consult Indigenous Peoples only to those projects which have a "high impact" on them, i.e., when relocation is required or their lifestyle and customs are likely to suffer a "significant alteration" (Ministerio del Medio Ambiente, 2013, article 83). This means that, for all those projects that are considered to have an unspecified "low impact" on Indigenous Peoples, a few "informative meetings" would suffice (Ministerio del Medio Ambiente, 2013, article 86). This leaves room for arbitrary interpretation, e.g., when it comes to defining what a "significant alteration" may be or imply.

The institutional consultations in Chile (2009–2017)

Since early 2009, a number of consultations with Indigenous Peoples have been carried out by the regional offices of CONADI. This means that some of them were realised prior to the entry into force of ILO 169.

For the purposes of this chapter, five processes of consultation are analysed. These consultations essentially addressed very similar, and, in some cases, exactly the same issues. These were: (1) the participation of Indigenous Peoples in the Chilean Congress, including the establishment of a Secretariat of Indigenous Affairs, a Ministerial Council of Indigenous Affairs, a regional Unit for Indigenous Affairs in each Governor's office, and a Council of Indigenous Peoples (2009); (2) the constitutional recognition of Indigenous Peoples and their rights (2009); (3) (again) the constitutional reform regarding Indigenous Peoples and their rights, the creation of a Council of Indigenous

Peoples and of an Indigenous Development Agency, the procedure for consultation, and the Environmental Impact Assessment System (2011); (4) the establishment of a Ministry of Indigenous Affairs, and (again) an Indigenous Development Agency, a (National) Council of Indigenous Peoples and other nine Councils, one for each Indigenous People that is recognised in Chile (2014–2015); and (5) (again) the constitutional reform (2017). Out of these consultation processes, four were carried out during the first and second mandates of (former) President Bachelet (2006–2010, and 2014–2018, respectively), and one under the first term of the current President Sebastián Piñera (2010–2014; his new term runs from 2018 to 2022).

The first consultation under scrutiny here referred to a number of proposals to favour Indigenous participation within the Congress, which included the establishment of a Secretariat of Indigenous Affairs, a Ministerial Council of Indigenous Affairs, a regional Unit for Indigenous Affairs in each Governor's office, and a Council of Indigenous Peoples (CONADI, 2009a). The process of this consultation consisted of sending letters to those Indigenous organisations that were registered by CONADI in accordance with the Indigenous Law (Ministerio de Planificación y Cooperación, 1993, article 12), inviting them to be part of "participatory dialogues" (CONADI, 2009a, p. 12). In early 2009, 4,599 letters were sent (CONADI, 2009a, p. 10), and these dialogues were held between 12 and 27 March 2009, which brought together 789 Indigenous representatives (CONADI, 2009a, p. 12). The offices of CONADI received only 410 replies to the letters they dispatched, i.e., less than 10% of those that were sent. As for the dialogues, although (almost) 800 representatives is a high number *per se*, it barely represented 0.04% of the Chilean population that self-identified as Indigenous in the 2012 census (Instituto Nacional de Estadísticas Chile, 2012). Although they officially disseminated information about the consultation in both national and local media, on the CONADI website, and at the offices of CONADI by putting up a number of posters (CONADI, 2009a, p. 6) – which may be a sign of the potential good faith and efforts on the part of CONADI – the timeframe for this fundamental and complex consultation was extremely short. Moreover, it occurred during the southern hemisphere's summer months, during which many Indigenous individuals travel away from their community for seasonal work. Finally, CONADI and the ministerial staff in charge of this consultation process did not take into consideration that many Indigenous communities are isolated or located in remote rural places, and Indigenous individuals may not travel frequently to the urban areas where the CONADI offices are situated.

Subsequent actions included submitting two draft laws, one regarding the Ministry of Indigenous Affairs and the Agency for Indigenous Development, and one the Council of Indigenous Peoples. Both have remained pending since 20 January 2010, i.e., after the presidential election. In July 2010, the newly established government of President Piñera created a Ministerial Council for Indigenous Affairs. However, all it did was recreate a body that

had already been founded by President Bachelet (Tomaselli, 2012). Hence, Indigenous Peoples were called on to express their consent on the creation of a body that already existed.

The second consultation analysed here relates to the first time Indigenous Peoples were consulted about the constitutional reform that would have mentioned their existence and included their rights. The process of this consultation foresaw the following phases: dispatching the instructions and the guidelines for the consultation via letters or emails to Indigenous communities, organisations, and associations, and through the media between 13 April and 1 June; a one-day training workshop for civil servants working closely with Indigenous Peoples (scheduled on 21 April); an unspecified number of workshops on the consultation process to be held at provincial or local level between 24 and 30 April; and potential talks to be organised with the local CONADI offices between 22 April and 5 June (CONADI, 2009b, p. 2). CONADI and the ministerial staff in charge of this consultation process never published the official results, but they mentioned them in a document prepared by CONADI and the government for the Committee of Experts on the Application of Conventions and Recommendations of the ILO after the first year following the ratification of ILO 169. In particular, they declared that they had received 428 replies, which were submitted to the Chilean Congress (CONADI, 2010, p. 38). Hence, also, in this case, the responses from Indigenous Peoples were extremely sparse, which may be a sign of the lack of appropriateness of the methodology and timeframe of this consultation. Indeed, they scheduled the workshops during only one week, and allowed only one and a half months for sending the letters and receiving potential replies.

The third consultation addressed here occurred under the first mandate of President Piñera, the so-called "Broad Consultation" (*Gran Consulta*). It addressed a number of unresolved questions, including the constitutional reform concerning Indigenous Peoples and their rights; the creation of an Indigenous Development Agency (which should have replaced the CONADI), and a Council of Indigenous Peoples; the overall procedure of consultations with Indigenous Peoples; and the Environmental Impact Assessment System (Gobierno de Chile, 2011). This consultation ran online from April to September 2011. Indigenous individuals could vote via the internet or at the offices of CONADI. Apparently, CONADI and the ministerial staff in charge of this consultation process organised a few workshops between June and July 2011 (Gobierno de Chile, 2011), but no minutes or participants' lists have ever been made available, and whether they were actually carried out or not remains uncertain. Due to the intensification of the debate on the legislation over the right to consultation during the same months, the Government decided to suspend this Broad Consultation in September (Marimán Quemenado, 2012). As mentioned above, many Indigenous families live in remote places, and if they cannot access the internet from home, must travel to an urban centre in order to do so. Hence, there were

implications for the potential of these peoples not only to be adequately informed about the process but also, and most importantly, to participate in it. In sum, this consultation regarded those fundamental issues that had already been addressed by the 2009 consultation, and, likewise, it did not come to any conclusion. The constitutional reform was the object of another consultation in 2017 (see below).

The fourth consultation process under analysis here was launched by the (re-elected) government of Bachelet (again) on the establishment of the Ministry of Indigenous Affairs, a National Council of Indigenous Peoples and another nine Councils of Indigenous Peoples in June 2014 (Tomaselli, 2016, p. 460). This was the third consultation on the creation of these bodies, which, as was the case with the previous proposals, would reform CONADI. This consultation ran from September 2014 to January 2015, and was organised according to Decree 66. This implied the participation of those Indigenous communities enrolled in CONADI's register (Ministerio de Desarrollo Social, 2013, article 5; Ministerio de Planificación y Cooperación, 1993, article 12), and the use of the aforementioned five-step procedure. As a further guarantee of the transparency and good faith of this process, the Ministry signed agreements with international bodies and the Universidad Diego Portales, a well-respected university in the areas of law and human rights (Ministerio de Desarrollo Social, 2014a; Ministerio de Desarrollo Social, 2014b).

This consultation officially came to an end on 30 January 2015. The Ministry of Social Development proclaimed it a great success (Ministerio de Desarrollo Social, 2015a) due to the broad participation of Indigenous representatives, since the phases of the consultation were carried out in 122 places (Ojeda, 2015). This is also reported in the Final Report of the consultation, which registered the participation of 6,833 Indigenous representatives (Ministerio de Desarrollo Social, 2015b, p. 23). Nonetheless, Indigenous and other civil society organisations alleged a number of irregularities. They denounced a lack of transparency in the overall process; the manipulation of Indigenous individuals during the phases of the consultation; the lack of legitimacy of some of the Indigenous representatives involved, and – at the same time – the denial of the opportunity to designate proper representatives on the part of other communities. Aymara, Mapuche, and Quechua marched against the consultation in Santiago, while other Mapuche, and Kawésqar did the same in the South. Other Indigenous organisations filed writs of *Amparo* against local and national authorities alleging, *inter alia*, the omission of documents, false declarations, and a lack of proper information during the consultation process (Ojeda, 2015).

The results of this consultation were published in the first half of 2015 (Ministerio de Desarrollo Social, 2015b). They reported the choices of the Indigenous representatives who were consulted, which are summarised as follows:

- a favourable opinion on the establishment of the Ministry of Indigenous Affairs as well as the Council(s) of Indigenous Peoples, although the former shall not only supervise (*velar*) but duly protect (*resguardar*) the fair application of Indigenous rights;
- the request to create a stable body in charge of consultation processes within this Ministry of Indigenous Affairs;
- an agreement to keep a Register of Traditional Authorities by the Ministry of Indigenous Affairs, with the exception of the Rapa Nui people;
- conformity on the reform of CONADI and the transfer of its funds to the Ministry of Indigenous Affairs;
- the demand to increase the numbers of representatives in the Council(s) of Indigenous Peoples (Ministerio de Desarrollo Social, 2015b).

Two draft laws were thus submitted to create the National Council of Indigenous Peoples, and the other nine councils (Draft Law/*Boletín* No. 10526–06), and the Ministry of Indigenous Affairs (Draft Law/*Boletín* No. 10525–06) in January 2016. Nevertheless, as this chapter went to press (December 2018), the former was still under the scrutiny of the Chilean Senate, while the latter was withdrawn in May 2016, i.e., four months after its submission. This was supposedly due to a new legislative strategy (Cooperativa.cl, 2016), which has not yet been implemented, and which is unlikely to be promoted during the second mandate of President Piñera. Moreover, the Council of Atacameño Peoples denounced, *inter alia*, that the latest draft law on the Council(s) of Indigenous Peoples limits the deliberations of these bodies to recommendations and observations only, rather than resolutions with at least some binding effects (Mapuexpress, 2018).

The fifth and last process of consultation under analysis here dealt with (again) the constitutional recognition of Indigenous Peoples and a number of their rights. This process included a preparatory phase called the Indigenous Constituent Process (*Proceso Constituyente Indígena*), within the framework of the debates on the general constitutional reform. It consisted of pre-organised and self-arranged meetings to collect ideas and proposals concerning recognition at constitutional level as well as online contributions (Ministerio de Desarrollo Social, 2016, article 3, para. 5; Observatorio del Proceso Constituyente en Chile-Fundación RED, n. d.; Gobierno de Chile, 2017). This process took place between August 2016 and January 2017. The official data reported the participation of approximately 17,000 Indigenous representatives (Gobierno de Chile, 2017).

The proposals collected were reworked into a text that was put forward for consultation by Resolution No. 726 of 22 July 2017. This consultation followed the five-step procedure in accordance with Decree 66 (Ministerio de Desarrollo Social, 2013, article 16), and was held between August and November 2017. The overall process was organised with the collaboration of experts from the United Nations and the University of Chile, and representatives of the National Institute of Human Rights were invited as observers (Gobierno de Chile, 2017).

The official data report that meetings were held in 123 places in order to plan the consultation during August 2017 (steps 1 and 2). Apparently, Indigenous Peoples organised their own deliberation processes (step 3) in more than 300 places during September, and more than 10,000 Indigenous individuals took part in them (Gobierno de Chile, 2017).

The "dialogue" (step 4) was realised in a twofold way: first, in regional meetings from 30 September onwards; second, in a National Meeting convened between 16 and 21 October (Gobierno de Chile, 2017), which involved about 145 Indigenous delegates (Gobierno de Chile, 2017). This intense meeting resulted in a provisional agreement on a number of new features to be inserted into the Chilean Constitution, but it also reported partial agreement or dissent on other parts. Moreover, this agreement was signed without any Quechua, Yagán, or Kawésqar representatives (Gobierno de Chile, 2017).[4]

Consent was apparently reached on the constitutional recognition of the following aspects: the pre-existence of Indigenous Peoples, including their ancestral/pre-Colombian presence, the conservation of their culture, and the land as the fundamental source of their existence and culture; their right to preserve, strengthen, and develop the own history, identity, culture, languages, institutions, and traditions (including their ancestral authorities); the State duty to preserve the cultural and linguistic diversity of the Indigenous Peoples; the right of Indigenous Peoples to culture and (official use of their) languages, including their material and immaterial patrimony in accordance with their worldview, and the right to education in their own language; and a general affirmation of the right to equality of all Indigenous individuals and Peoples, as well as the prohibition of discrimination on the basis of (Indigenous) origins or identity (Gobierno de Chile, 2017).

The parties partially agreed on other points, as follows: the duty to interpret the (new) constitution in light of those international treaties that safeguard Indigenous rights and which have been ratified by Chile; the reservation for Indigenous representatives of up to 10% of the total seats in Congress; a right to health and to the best possible healthcare as well as to traditional Indigenous medicine and health practices; the constitutional consecration of their rights to consultation and self-determination, including their right to autonomy and to their political, legal, socio-cultural, and economic authorities (Gobierno de Chile, 2017).

Finally, there was clear dissent over the constitutional guarantee for the (later) establishment of Indigenous Territories (by ordinary law), and over the plurinational character of the Chilean State. The closing document of this intense meeting was signed by only 38 Indigenous representatives out of approximately 145 delegates (Gobierno de Chile, 2017).

On 3 November, the Ministry of Social Development summoned a negotiating table (*Mesa de diálogo*), which was turbulently left by 27 Indigenous delegates due to their persisting dissent on several of the abovementioned points. Some other 31 Indigenous representatives signed the closing document of 3 November, which included the aforementioned points of agreement, and

also reframed and included the interpretation of the Constitution in light of Chile's international obligations vis-à-vis Indigenous rights, and their right to self-determination, to be exercised within the new Constitution. Partial agreement was reiterated on the measures regarding the reserved Congress seats, as well as Indigenous rights to health and consultation. Indigenous land rights and the plurinational character of Chile were referred to as having reached a partial agreement (Gobierno de Chile, 2017). Nevertheless, all the topics that were classified as partially agreed remained excluded, *de facto*, from the text that was prepared for the constitutional reform.

Despite the efforts of both parties (Indigenous Peoples on the one hand, and the State bodies on the other hand), this consultation suffers from the abovementioned weaknesses that are intrinsic to all those consultation processes that have been organised within the framework of Decree 66. In particular, this consultation could easily fall under the scope of "all the possible efforts" (Ministerio de Desarrollo Social, 2013, article 3) and thus be archived, at least with regard to all those abovementioned aspects that remained pending or partially agreed upon.

Moreover, Indigenous leaders denounced a lack of mutual trust, as was evidenced by the schism between those Indigenous delegates who exited the 3 November negotiating table and those who remained. This was apparently due to threats made by some government representatives to terminate the consultation without reaching an agreement. Others complained about the technical difficulties of the documents under discussion during both the regional "dialogue" phase meetings and the National Meeting (Observatorio Ciudadano de Chile, 2018, p. 217). Indeed, the last phases of the consultation took place in less than two months. This suggests that the authorities appointed were under pressure to come to a conclusion before the Presidential and general elections of December 2017.

Concluding remarks

This chapter has discussed five consultation processes that addressed the constitutional recognition of Indigenous Peoples and their rights, and the creation of a number of public bodies related to Indigenous issues in Chile. They have been framed as "institutional" since they addressed a number of potential institutional reforms at national level that would have had a direct impact on the entire discourse and protection system of Indigenous Peoples in this country.

In the course of nine years (2009–2017), Indigenous Peoples were called to express their consent three times on different constitutional reforms that would have recognised them as Peoples with collective rights and led to the creation of a Council (and, later, more Councils) of Indigenous Peoples; twice on the transformation of CONADI into another Indigenous Development Agency; twice on the creation of a ministerial body that would run their affairs (first, a Ministerial Council of Indigenous Affairs that already existed, then a Ministry of Indigenous Affairs, the draft law of which was withdrawn a few months after its submission); once on the creation of a Secretariat of

Indigenous Affairs and of a regional Unit for Indigenous Affairs in each Governor's office; and once on the procedure for consultation itself, and the Environmental Impact Assessment System, which were both regulated by Decrees, the text of which was not subject to a consultation process.

The repetition of these consultations *per se* undermines the credibility of the Chilean government(s) in pursuing a fair implementation of the right to (prior) consultation of Indigenous Peoples. Moreover, all the attempts made to regulate the consultation process continue to present lacunae in comparison to the required international standards.

There seem to be three reasons for the failure of prior consultation in Chile: the overall lack of good faith on the part of the State representatives; the many irregularities, which Indigenous representatives and organisations complained about; and, the unwillingness or impossibility of pursuing any concrete action after the end of the consultation process (this remains to be seen with regard to the 2017 consultation, but it is unlikely that it will be taken forward). This continuing discontent and the apparent reluctance of the Chilean State to carefully observe its duty regarding the right to prior consultation of Indigenous Peoples have become even more concerning after the recent, abovementioned declaration of (newly re-elected) President Piñera to withdraw from ILO 169, which is the lynchpin of safeguards for Indigenous Peoples and their rights, in a country that still denies them constitutional recognition. It sadly seems that the Chilean government(s) and its bodies continue to envision Indigenous Peoples' right to consultation as a tick in the box: once it is "done" – in whatever form they do it – their duty is fulfilled, irrespective of the international obligation to pursue Indigenous Peoples' consent (or, at least, agreement). This limited understanding destabilises not only the whole protection system of Indigenous rights within this country but also the possibility of continuing the dialogue between the State and a sector of society that fairly claims its (long-awaited) recognition and acknowledgment. It also points to bad practice in terms of realising Indigenous rights, thereby undermining Chile's credibility in pursuing its (long overdue) human rights agenda.

Notes

1 Moreover, CONADI possesses legal status, holds regional offices, counts on an annual budget, and is steered by a National Council composed of 17 members, 8 of whom are elected by Indigenous communities (Ministerio de Planificación y Cooperación, 1993, articles 38 and ff.).

2 On the previous Decree No.124 of September 2009 and the following debate on the legislation on Indigenous Peoples see Tomaselli (2016). For an overview of how Chilean national courts have (extensively) recognised misapplications of art.6 of the ILO 169, see Contesse (2012) and Tomaselli (2016).

3 On the international requirements of the right to prior consultation, see the chapters by Cantú Rivera and Del Castillo in this volume, and, *inter alia*, Doyle (2015), and Instituto Interamericano de Derechos Humanos (2016).

4 The official document by the Gobierno de Chile (2017) includes the original closing signed acts of both the 16–21 October and the 3 November meetings.

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