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Re-politicizing participation or reframing environmental governance? Beyond indigenous' prior consultation and citizen participation

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ABSTRACT

Recent studies explore how participatory mechanisms such as prior consultation/consent processes and participation in Environmental Impact Assessments (EIAs) might reinforce the mediating role of the state between social groups and companies at the same time that creates political opportunities for promoting social demands. This article problematizes these ideas by deepening the understanding of participatory mechanisms within broader environmental governance structures. The focus of the article is Peru, the first Latin American country that has passed a General Law of prior consultation for indigenous peoples, and currently is struggling to articulate this mechanism to participatory stages in EIAs. From an engagement with the literature on political ecology and development studies, this article explores the limitations of indigenous participation within an environmental governance that prioritize the promotion of investments in extractive industries. In particular, by exploring the challenges and limitations of indigenous decision-making power in new institutions for consultation and EIA participation, the article holds that participatory mechanisms themselves are unable to provide more power of decision to indigenous peoples if policy-makers translate claims for institutional transformation (related to indigenous self-determination and ecological zoning) into merely participatory provisions of specific projects. The result is a paradoxical multiplication of weak participatory channels, making the voices of local communities and indigenous peoples auditable, however, without a real compromise to translate these concerns into public policies beyond participatory processes. This study is a qualitative investigation whose data collection methods included semi-structured interviews, observation and documentary analysis. The author undertook 38 semi-structured interviews in 2016–2017 with key relevant actors (from state offices, indigenous organizations, and civil society organizations) involved in consultation processes and participation in EIAs, and documentary analysis of EIAs, reports, legal regulations and policy instruments.

1. Introduction

Recent studies (Leifsen, Gustafsson, Guzmán-Gallegos, & Schilling-Vacaflor, 2017a; Schilling-Vacaflor, 2017; Weitzner, 2017; Machado, López Matta, Mercedes Campo, Escobar, & Weitzner, 2017) explain how participatory mechanisms, such as free, prior and informed consent processes and participation in environmental impact assessments (EIAs), create political opportunities for the inclusion and deepening of social demands. These authors criticize the argument that formal participatory tools often become empty bureaucratic procedures aimed at depoliticizing extractive activities and argue that new, unintended uses of formal participatory instruments result in their re-politicization (Leifsen, Sánchez-Vázquez, & Reyes, 2017b). These contributions admit the limitations of participatory mechanisms, and some argue that other rights must be simultaneously enhanced with participation (such as the right to territory and the autonomy of Indigenous peoples), highlighting the relevance of the broader institutional context (Flemmer & Schilling-Vacaflor, 2016; Gustafsson, 2017).

This article seeks to contribute to this literature by deepening the understanding of the participation of Indigenous peoples in the broader environmental governance structures in Peru by both analyzing the limitations of participatory provisions as well as the power dynamics in the implementation of new institutions for free, prior and informed consent and environmental evaluation. It is argued that these new institutions could weaken instead of fortify Indigenous rights if authorities do not introduce structural changes in environmental governance. As Indigenous concerns for self-determination, territorial protection and social and

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economic rights extend beyond current legal and institutional arrangements for participation, the governmental focus to address Indigenous demands should change from multiplying procedural rights to truly attending to substantial rights through institutional transformations.

This article considers 'prior consultation' to be a weak version of the international standard of free, prior and informed consent (FPIC), whose precursor can be found in the ILO Convention 169 of 1989 (Hanna and Vanclay, 2013) as a right of Indigenous peoples to be consulted before the approval of any measure that could affect their collective rights. Whereas the Convention only requests that governments consult without obtaining actual consent (with the exception of displacements), the United Nations Declaration of the Rights of Indigenous Peoples of 2007 (UNDRIP), which is a non-binding instrument according to international law, went further by emphasizing that consultation processes should attempt to obtain 'consent' and expressly requires consent in cases of displacement, storage or disposal of hazardous materials in Indigenous territory as well as the use or occupation of Indigenous material and immaterial property. International human rights jurisprudence has also contributed to forging this right. In the most important decision on the FPIC (Saramaka v Suriname), the Inter-American Court of Human Rights asserted that consent from Indigenous peoples is also necessary in cases of 'large-scale development or investment projects' that would have a 'major impact' on 'a large part of their territory'.

Whereas these developments in international law show different interpretations of the standard regarding the decision power of Indigenous peoples, multilateral organizations such as the World Bank, the International Finance Corporation – IFC (2012), the Inter-American Development Bank – IDB (2006), or private global organizations such as the International Council on Mining and Metals – ICMM (2013) have approved guidelines on consultation that consider it a kind of participatory right instead of an expression of Indigenous self-determination (Hanna and Vanclay, 2013; MacKay, 2005). Therefore, it is important to distinguish between the *consent standard* (FPIC), which includes the obligation to obtain consent in those cases recognized by the UNDRIP and international jurisprudence, the *consultation standard* as a limited right of participation recognized in the binding ILO Convention 169 and most guidelines of multilateral organizations (where actual consent is an exception), and *consent as an expression of self-determination* as a total power of decision of Indigenous peoples (where actual consent should be the rule) that is not fully recognized by national and international standards (Merino, 2017).

Although most Latin American countries have ratified ILO Convention 169[1] and are signatories of the UNDRIP, they have implemented a weak standard of consultation. This is the case for those countries that have included it in their constitutions, such as Ecuador (2008) and Bolivia (2009), and for others where FPIC has been fostered by judicial decisions, such as Colombia (Hernández, 2014). In all these cases, consultation implementation has been developed by specialized regulations, especially in the hydrocarbon sector (Fontana and Grugel, 2016; Schilling-Vacaflor, 2017), and has raised similar concerns including the limited provision of information, lack of local capacity to understand information, short time for deliberation, tensions between local visions of development and the objectives of state development, and the transformation of consultation into a simple label of social responsibility (Fontana and Grugel, 2016; Leifsen, 2017; Schilling-Vacaflor and Flemmer, 2015; Schilling-Vacaflor, 2014; Rodríguez-Garavito, 2011; Szablowski, 2010).

Peru is the first country in Latin America that has approved a general law (to be applied to all economic and social sectors). The importance of the Peruvian experience resides in the fact that most countries are currently discussing the approval of a general law of prior consultation, and Peru is the only legal model to consider (DPLF, 2015; IWGIA, 2017). However, the Peruvian consultation law also regulates a lower FPIC standard, so public officials are struggling to implement this right in relation to participatory stages in EIAs, particularly when extractive industries and infrastructure projects are at stake. On the one hand, companies and state officials agree on simplifying and accelerating administrative processes to allow the development of these projects; on the other hand, Indigenous peoples and local communities request deeper participation in these processes, often triggering social conflicts. As a result, according to some estimations (Peruvian Institute of Economy, 2015), social conflicts and bureaucratic procedures deeply affect the economic performance of Peru (both problems are estimated to have delayed mining investments in the amount US$ 21.5 billion since 2011).

In the last decade, there has been a significant increase in social conflicts associated with extractive industries (from 37 per month in 2007 to 139 in 2017 [Ombudsman, 2017]). Whereas most Peruvian theorists propose to solve these conflicts with specific institutional adjustments (improving transparency, redistribution, etc.), some conflicts have a more structural scope (see discussions in Merino, 2015) that include demands for structural changes at the state level that require proper translation into public policies. An example is the *Baguazo*, a conflict that occurred in the northern Amazon in 2009 when Indigenous peoples opposed a legislative package directed to facilitate the exploitation of natural resources within their territories. They used the conflict to promote a public discussion on the necessity of intercultural policies and the recognition of Indigenous territorial rights, among other issues. Of multiple claims, the most successful was the right to prior consultation. The struggle for the recognition of this right fostered the development of a legal and institutional framework for this issue.

Another structural conflict is the opposition of communities to the most important mining project in the country, the Conga Mine in Cajamarca. This conflict emerged because the EIA approved by the Ministry of Energy and Mines (MINEM) authorized the transformation of lagoons into artificial reservoirs; the affected communities disagreed and demanded the project be stopped. The project remains paralyzed today, but it initiated a discussion about how the EIA must be approved and by whom, specifically whether those sectors in charge of promoting extractive activities must also be responsible for evaluating the environmental viability of a project. For this reason, the government created the National Service for Environmental Certification of Sustainable Investments (SENACE) in 2012 as a technical and independent office in charge of evaluating EIAs.

Prior consultation and the evaluation of EIAs under SENACE are two examples of how social conflicts might be transformed into public policies. However, political and economic pressures and structures have determined the weakness of these new institutions, for example, limiting the extent of the right to consent in the Prior Consultation Law or limiting the autonomy and power of SENACE. In this context, profound Indigenous demands that would require broader transformations in environmental governance are translated into weak institutions for EIA evaluation and consultation. Thus, policymakers translate claims for deep environmental protection of fragile ecological systems into a technical architecture for environmental evaluations with weak participatory provisions; Indigenous concerns for self-determination and

[1] This Convention was ratified in Latin America by Mexico (1990), Bolivia (1991), Colombia (1991), Paraguay (1993), Costa Rica (1993), Peru (1994), Honduras (1995), Guatemala (1996), Ecuador (1998), Argentina (2000), Dominica (2002), Venezuela (2002), Brazil (2002), Chile (2008), and Nicaragua (2010) (ILO, 2018).