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The Argentine Constitutional Reform of 1994 and its Mandate to Legislate the duty to Consult Indigenous Peoples: A Pending Debt[****]

La Reforma Constitucional Argentina de 1994 y su Obligación de Legislar el Derecho a la Consulta de los Pueblos Indígenas: Una Deuda Pendiente

ABSTRACT

One of the mandates granted to the Argentine National Congress in the 1994 Constitutional Reform was to ensure the participation of indigenous peoples consultations surrounding the in interests that affect them. However, nearly thirty years after the reform, the National Congress has yet to enact a law regulating the right to consultation of indigenous peoples. This article examines the main obstacles that have prevented such regulation, with particular

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attention to the complexities inherent in the Argentine federal system, which introduces tensions in the distribution of powers between the Nation and the provinces, as well as the challenges involved in ensuring genuine deliberative participation of indigenous communities. It also identifies the minimum content that a national law on indigenous consultation should include, along with the institutional features necessary to guarantee both effective participation in the legislative process and respect for the identity and worldview of indigenous peoples, in accordance with Argentine federalism. The analysis is framed within a constitutional theory based on deliberative democracy and is supported by international standards, current national and provincial regulations, and relevant national and international case law.

KEY WORDS

Argentine Constitutional Law, Right to Consultation of Indigenous Peoples, International Human Rights Law, Federalism, Deliberative Democracy.

RESUMEN

Uno de los mandatos otorgados al Congreso Nacional Argentino en la Reforma Constitucional de 1994 fue el de asegurar la participación de los pueblos indígenas en los intereses que los afecten. No obstante, a casi treinta años de la reforma, el Congreso Nacional aún no ha sancionado una ley que regule el derecho a la consulta de los pueblos indígenas. Este artículo examina los principales obstáculos que han impedido dicha regulación, con especial atención a las complejidades propias del sistema federal argentino, que introduce tensiones en la distribución de competencias entre la Nación y las provincias, así como a los desafíos para garantizar una participación deliberativa genuina de las comunidades indígenas. Asimismo, identifica los contenidos mínimos que debería incluir una ley nacional de consulta indígena y las características institucionales necesarias para asegurar tanto la participación efectiva en el proceso legislativo como el respeto a la identidad y cosmovisión de los pueblos originarios, en consonancia con el federalismo argentino. El análisis se enmarca en una teoría constitucional basada en la democracia deliberativa y se apoya en estándares internacionales, así como en la normativa vigente a nivel nacional y provincial, y en jurisprudencia relevante tanto nacional como internacional.

PALABRAS CLAVE

Derecho Constitucional Argentino, Derecho a la Consulta de los Pueblos Indígenas, Derecho Internacional de los Derechos Humanos, Federalismo, Democracia Deliberativa

I. INTRODUCTION

The Argentine constitutional reform of 1994 marked a historical milestone in the recognition of the rights of indigenous peoples. Previously, indigenous issues were regulated in section 67 subsection 15 of the 1853 Constitution, which established the responsibility of the National Congress to "[provide] for the security of the borders; preserve peaceful dealings with the Indians and promote their conversion to Catholicism".

This changed in 1994, when the reforming body unanimously decided to reformulate this section establishing in section 75 subsection 17 the Congress' responsibility to "[recognize] the ethnic and cultural pre-existence of the Argentine indigenous peoples. To guarantee respect for their identity and the right to a bilingual and intercultural education; to recognize the legal status of their communities, and the community's possession and ownership of the lands they traditionally occupy; and to regulate the delivery of other lands, suitable and sufficient for human development; none of these guarantees will be alienable, transferable or subject to encumbrances or embargoes. To ensure their participation in the management of their natural resources and other interests that affect them. The provinces can concurrently exercise these powers."

As mentioned above, one of the constitutional mandates given to Congress is to ensure the participation of indigenous peoples in the interests that affect them. More than 28 years after the constitutional reform, the National Congress has yet to enact a national law that guarantees the right of consultation for Indigenous peoples, nor have the provinces done so. Although this right is considered an operative one—meaning it should be directly and immediately applicable without the need for further regulation—its implementation has been inconsistent. While some consultation processes have taken place, many others have either been entirely omitted or carried out in ways that do not comply with Argentina's international obligations under ratified treaties. This is largely due to the discretionary practices at both the federal and provincial levels, where authorities unilaterally determine which situations warrant consultation and how those processes should be conducted. As an example of these types of consultation processes, we can mention the cases of the Lhaka Honhat Community in the province of Salta, for carrying out public works, or the Catalán community in the province of Neuquén, for the creation of the Municipality of Villa Pehuenia without consultation.

To remedy these breaches of constitutional mandates, numerous judicial cases were initiated to guarantee this right. The judgments on several occasions recognized that the right to consultation was violated and that the State failed to comply with its legal obligations. However, jurisprudential advances have not been sufficient to ensure that this right is respected in practice nor

that the National Congress or the provincial legislatures comply with the obligation to legislate it.

However, one of the difficulties of regulating this right is the Argentine federal system itself. Since the first National Constitution of 1853-1860, the Argentine Republic adopted a federal form of state, in accordance with section 1 of the National Constitution, based on the division of State power into 23 autonomous geographic units called provinces and the Autonomous City of Buenos Aires. To regulate the relationship between the levels of power, the National Constitution established a distribution of powers between the Nation and the provinces. National authorities can only exercise powers that have been delegated to them by the provinces. In this delegation of powers and faculties, the provinces reserved the power to issue their own procedural laws. Regarding the right of consultation, the substantive regulation is delegated mainly to Congress and concurrently to the provinces. However, this right also encompasses numerous procedural issues. Thus, there is a challenge of powers and limits surrounding regulation.

In Argentina there are 1,760 identified indigenous communities[1] and their claims increased by 74% in the period 2015-2020. Approximately 60% of these claims are aimed at land recognition, resulting in a total of almost 5 million hectares of surface affected by conflicts, and 13% represent environmental protests.[2] Indigenous communities are a collective[3] that historically and structurally suffered and suffers the violation of their rights, it becomes necessary to reverse this situation.

The primary objective of this article is to analyze the challenges involved in legislating the right to consultation at both the national and local levels, with the aim of identifying the minimum standards such legislation should uphold. Specifically, it seeks to define the essential features that these laws must include to ensure two key goals: first, the effective participation of Indigenous communities in the deliberative and legislative processes in a way that respects their unique identities; and second, consistency with the distribution of powers within Argentina's federal system.

For this, firstly, we will briefly present the constitutional theory in which we consider this right is framed. Second, we will explain the regulation at the

1 Decree No. 805/2021, (National Executive Branch, 2021-11-18) <https://www.argentina.gob.ar/normativa/nacional/decreto-805-2021-356886/texto> accessed 10 February 2023.

2 I Ruiz and S Crucianelli, 'Los conflictos indígenas crecieron un 74% en los últimos años y ya son más de 300 en todo el país' (Infobae, 2022) <https://www.infobae.com/politica/2022/10/09/los-conflictos-indigenas-crecieron-un-74-en-los-ultimos-anos-y-ya-son-mas-de-300-en-todo-el-pais/> accessed 10 February 2023.

3 National Ministry of Environment and Sustainable Development, *Manual técnico para la consulta a pueblos originarios en la gestión de bosques y cambio climático: lineamientos sobre el proceso de consulta previa, libre e informada a pueblos originarios* (1a ed., Ciudad Autónoma de Buenos Aires, 2021) 9 <https://www.argentina.gob.ar/sites/default/files/mayds_2021_-_salvaguardas_redd_pueblos_originarios_web_0.pdf> accessed 10 February 2023.

constitutional level, as well as the division of powers between the national and provincial levels. Thirdly, we will review the international standards on the right to consultation of indigenous peoples and international jurisprudence on the matter, as well as the national laws that regulate some aspect of participation and consultation on indigenous peoples. Fourthly, we will study the provincial constitutions and provincial regulations, as well as certain jurisprudence of the Argentine Supreme Court. Next, we will cover the bills that have been presented in the National Congress and the initiative of the indigenous communities of the Salinas Grandes Basin and Laguna de Guayatayoc to create their own consultation and consent procedure. Based on all of the above, we shall analyze the existing challenges when legislating this right; particularly, we will examine if a national law could contemplate the characteristics of each of the indigenous communities that inhabit the country, the distribution of powers, and the tensions between jurisdictions in relation to recognizing the rights of indigenous communities and the challenges that arise to ensure the deliberative participation of communities. Finally, we will reflect on the importance of generating instances of dialogue and debate among all the actors involved.

II.THE INCORPORATION OF THE RIGHT TO CONSULTATION IN THE CONSTITUTION FROM A PERSPECTIVE OF DELIBERATIVE DEMOCRACY

Our subject matter calls for a brief reflection on the arguments of constitutional theory behind the incorporation of the right to consultation in the constitutional reform of 1994. Likewise, we will attempt to frame these changes within the regional and national context.

During the nineteen eighties, different countries of the region went through the transition from dictatorial and authoritarian regimes to democratic systems. This transition led to regulatory changes that were reflected in constitutional amendments and reforms that incorporated a catalog of new rights and collective rights, including economic and social rights, environmental protection, the right to health, and rights related to vulnerable groups such as women, children, and indigenous peoples. In addition, some countries granted certain international human rights instruments a privileged legal status equivalent or even superior to that of their national laws.[4] Thus, a trend toward constitutional recognition of social rights, along with freedom and participation rights, can be observed not only in these constitutional texts but also in the jurisprudence and in scholarly works in Latin American countries.[5]

4 M G Andía, *Disadvantaged Groups, The Use of Courts and their Impact: a Case Study of Legal Mobilization in Argentina* (PhD thesis, Northeastern University 2011) 24-27.

5 R Arango, 'Constitucionalismo Social Latinoamericano' (Instituto de Investigaciones Jurídicas, UNAM 2010) <https://archivos.juridicas.unam.mx/www/bjv/libros/6/2894/6.pdf.> accessed 13 March 2023.

Particularly with respect to Argentina, the Constitution prior to the 1994 reform left aside the so-called economic, social, and cultural rights, and the specific rights of indigenous peoples. In relation to this group, the dominant conception was to "civilize" them, that is, to convert them to Catholicism and Western values. Only in the failed reform of 1949 were some of the economic, social, and cultural rights introduced. Then, the 1957 reform imposed by a military government preserved only section 14 bis of the 1949 Constitution[6]. The 1994 reform was comprehensive in this sense. It included this type of rights as well as the tools to make them effective, in addition to incorporating the constitutional hierarchy of certain international human rights instruments. Specifically, it incorporated into its text that it is up to Congress to recognize the ethnic and cultural pre-existence of the Argentine indigenous peoples and guarantee respect for their identity and the right to bilingual and intercultural education; recognize the legal status of their communities, and the community's possession and ownership of the lands they traditionally occupy; and regulate the delivery of other lands suitable and sufficient for human development; none of them will be alienable, transferable or subject to encumbrances or embargoes. In addition, Congress would ensure their participation in the management of their natural resources and other interests that affect them. The provinces could concurrently exercise these powers.

This raises the question: What constitutional theory might serve as the framework for incorporating the right to consultation and participation of indigenous communities in matters that affect them into the constitutional text?

Gargarella argues that the "people" lost decision-making power and control over the Constitution in the founding years of Latin American constitutionalism, in which the basic structure of the constitutional organization of power was defined (what he calls the Constitution's "engine room"), because of a liberal-conservative pact. The ensuing attempts to recover the constitutional place of the "people" at the regional level, starting with the Mexican Constitution of 1917, featured the incorporation of clauses that covered social and political rights yet resulted in an expansion of rights that left the organization of power intact. Finally, more recently, the author points out that there were attempts to "reincorporate the people" that had a more direct impact on the "engine room". Particularly among these latest initiatives, Gargarella identifies the right to consultation as an invitation to certain disadvantaged groups, including indigenous peoples, to participate in the decision-making process that directly concerns them. The author points

6 This section constituted the only precedent that recognized labor rights (dignified and equitable working conditions, limited hours, paid rests and vacations, minimum wage, among others) and social security rights (mandatory social insurance and pensions), the comprehensive protection of the family, the defense of family assets, family economic compensation, and access to decent housing.

out that unfortunately this initiative was resisted from the beginning by the powers that be and therefore its power was diluted. The author considers it an interesting and promising path, though still very limited, through which the power and agency of the people in the Constitution could be expanded. He stresses that it is not about the possibility of the institutional tool not working properly, but rather that the problem is more structural and lies in the differences in power and capabilities between established governments and disadvantaged groups.[7]

Along with Gargarella, we understand that the incorporation of the right to consultation in the terms in which it was embodied in the Argentine constitutional reform of 1994 derived from a vision that values participation and deliberation in democracy and was heavily influenced by a normative and institutional commitment to human rights. This must be understood considering the social and historical context that the country was experiencing at that time: the recent return of democracy in 1983 after the horrors of the military dictatorship. In this sense, the reform conferred constitutional hierarchy to certain international human rights instruments (section 75 subsection 22) and included dialogic tools such as the popular initiative to propose bills (section 39), popular consultation (section 40) and the right to consultation (section 75 subsection 17). However, the reform did not result in significant changes in the constitutional organization of power. For this reason, we believe that the reform was driven by a deliberative and participatory idea of democracy. We can identify this approach in the works of authors such as Jürgen Habermas and Carlos Nino. Habermas's theory affirms that the legitimacy of a political system is based on consensus that is built through active dialogue and debate in the public forum. He posits that broad, permanent, and institutionalized social and political participation can fundamentally contribute to the modern normative values of autonomy, self-realization and self-government. He affirms that participation is not impossible but must be procedural, that is, we must not understand it in terms of the classical theory of Aristotelian democracy but in a contemporary way through the democratization of public decision-making processes.[8]

For his part, the Argentine philosopher and legal scholar Carlos Nino exposed his theory of deliberative democracy in his work "The constitution of deliberative democracy". There, he analyzed the dimensions of constitutionalism as they relate to the historical constitution, rights, and democracy.

7 R Gargarella, 'Recuperar el lugar del ´pueblo´en la Constitución' (Instituto de Investigaciones Jurídicas, UNAM 2016) 49-55 <https://archivos.juridicas.unam.mx/www/bjv/libros/9/4257/4.pdf> accessed 13 March 2023.

8 J Vergara Estevez 'La Concepción de la Democracia Deliberativa de Habermas' (Quorum Académico, vol.2 n° 2 2005) 82-86 <https://www.redalyc.org/pdf/1990/199016762004.pdf> accessed 13 March 2023.

Particularly with respect to the latter, the author defends a dialogic approach, the value of which resides in its epistemic nature with respect to social morality since, with certain reservations, it could be stated that democracy is the most reliable procedure to access knowledge of the moral principles.[9] Thus, the notion of deliberative democracy would resolve the tension between the recognition of rights and the functioning of the democratic process, as the value of the latter lies in its ability to decide moral issues, including the scope, content and hierarchy of rights.[10]

Nino states that these three elements of constitutionalism (the historical constitution, an ideal constitution of rights and an ideal constitution of power) should not necessarily live in conflict but can support each other if they are balanced. In his words, "The democratic process acts as the most reliable method to recognize fundamental individual rights. In turn, respect for these rights promotes the epistemic value of the democratic process of discussion and decision-making. The continuity of the constitutional practice guarantees the effectiveness of decisions made through the democratic method, shedding light on the rights recognized through this method. Additionally, the voice of public deliberation -the essential component of democracy- and respect for individual rights generate a deep consensus that promotes the continuity of constitutional practice."[11]

Hence, after connecting the incorporation of the right of consultation in the constitutional reform of 1994 with a particular vision of participatory democracy, we can understand the epistemic value that resides in this right. As Guerra Schleef and Sánchez Sandoval point out, indigenous peoples' right to consultation fulfills a double epistemic function by design, which is essential in decision-making procedures: on the one hand, enabling the collective participation of indigenous communities as agents of their own, valid knowledge, and on the other, acting as a mechanism to increase visibility of impacts in order to protect indigenous rights in contexts of cultural diversity.[12] In the remainder of this article we will notice examples of this epistemic quality and we will mark its importance in the decision-making processes in specific cases.

9 C S Nino, *La Constitución de la Democracia Deliberativa* (Gedisa, 1997) 154.

10 Ibid, 190.

11 Ibid, 302.

12 F A Guerra Schleef and G A R Sánchez Sandoval, 'La función epistémica del derecho de los pueblos indígenas a la consulta previa en Chile' (*Ius et Praxis*, vol.27 n.3, 2021) 25 <https://www.scielo.cl/scielo.php?pid=S0718-00122021000300024&script=sci_arttext&tlng=es#:~:text=De%20esta%20manera%2C%20la%20consulta,adopte%20se%20acomode%20a%20las> accessed 13 March 2023.

III.FIRST APPROACH TO THE RIGHT TO CONSULTATION: REGULATION AT THE CONSTITUTIONAL AND INTERNATIONAL LEVEL

As stated previously, the right to consult indigenous peoples is enshrined both nationally and internationally. This section will analyze the way in which the right to consultation is regulated in the National Constitution and in international instruments applicable to Argentina, as well as the distribution of powers between the nation and the provinces, focusing on the regulation of the right to consultation of indigenous peoples.

III.A Constitutional level regulation

First, we will examine the regulation on the right to consultation of indigenous peoples in the National Constitution. This right was incorporated into the 1994 constitutional reform in section 75 subsection 17, establishing that Congress must ensure the participation of indigenous peoples not only in the management of their natural resources but also in other interests that affect them.

This section's wording, proposed by the Drafting Commission, was unanimously approved by the members of the Convention. Numerous convention members made express mention of the importance of this topic. For example, the convention member for the Capital indicated that the section relates to the claim of rights that have been greatly neglected in our country. Likewise, the convention member for the province of Salta mentioned the aspiration of her block to vindicate the rights of these peoples who, for a long time, were neglected and who, finally, have the possibility of being recognized in their ethnic and cultural integrity. Furthermore, the convention member for the province of San Juan highlighted that the approval of this text would correct a historical debt regarding aboriginal communities, which constitute one of the country's roots that we must not forget.[13] Although numerous Indigenous peoples attended the session during which this provision was debated, they were not granted voting rights in the Drafting Commission.[14]

By way of comparison, Colombia's 1990 National Constituent Assembly—convened to draft a new Political Constitution—included, for the first time, two Indigenous representatives among its fifty members. This milestone is widely regarded as the most significant development in the trajectory of

13 Convención Nacional Constituyente de 1994, *Diario de Sesiones de la Convención Nacional Constituyente*, 'Art. 75 inc. 17 de la Constitución Nacional' (Debate del dictamen de la Comisión de Redacción en los despachos en mayoría y en minoría originados en la Comisión de Nuevos Derechos y Garantías, Orden del Día nº 10, Sesión 3°, Reunión 29°, Fecha: 11/8/1994) 4062-4068 <https://www4.hcdn.gob.ar/dependencias/dip/Debate-constituyente.htm#Art.%2075%20inc.%2017> accessed 10 February 2023.

14 The indigenous groups who attended can be found at Convención Nacional Constituyente de 1994, *Ibid.*

the Colombian Indigenous Movement during the 20th century. It enabled Indigenous candidates to gain visibility in national media and encouraged Indigenous political parties to form alliances with other regional political sectors. As Mauricio Alejandro Díaz Uribe observes, from that point onward, Indigenous organizations came to be recognized as influential actors in national political reforms and in the evolving processes of decentralization and state governance. This transformation contributed to a shift in both the representation and public perception of Indigenous peoples within Colombian society, fostering a greater degree of respect from intellectual and political sectors for an ethnic identity increasingly viewed as positive, dynamic, and politically engaged.[15]

Back to the Argentine case, section 75 subsection 22 of the National Constitution establishes that international treaties have a higher hierarchy than national laws. Moreover, the constituent decided to grant constitutional status to certain international human rights treaties to which Argentina was a party. This means that in the Argentine legal system, the highest level of the legal hierarchy consists of the National Constitution and the international human rights treaties incorporated into section 75, subsection 22, followed by the remaining international treaties to which Argentina is a party and then by the body of national laws.

On the other hand, the distribution of powers between the Nation and the provinces was regulated in the first Constitution of 1853 and is currently regulated mainly in section 121, which establishes that "[the] provinces retain all power that is not delegated by this Constitution to the Federal Government, and that which has been expressly reserved by special agreements at the time of their incorporation". This provision results in the following distribution of competencies: exclusive powers of the federal state, which include issuing substantive law codes applicable to all jurisdictions, or federal or special laws; exclusive powers of the provinces, which include issuing their provincial constitutions or issuing their procedural laws; concurrent powers, that is, jointly held by the federal state and the provinces; exceptional powers of the federal state, that is, those that in principle and usually are provincial, but sometimes and with certain precautions they enter the federal orbit; the exceptional powers of the provinces, such as issuing substantive law codes until the Congress dictates them; and competencies shared by the federal state and the provinces, which require for their exercise a double integrating deci-

15 M. Díaz Uribe, 'Performatividad política y cultural: El movimiento indígena colombiano y su participación en la Asamblea Nacional Constituyente de 1990,' Revista Jangwa Pana, vol. 20, núm. 3, pp. 398-417, 2021, Universidad del Magdalena <https://www.redalyc.org/journal/5880/588072488002/movil/> accessed May 28 2025.

sion, one from the federal state and another for each participating province, as required for establishing the federal capital or creating new provinces.[16]

Regarding the regulation of natural resources existing in the territory, a subject of special interest when consulting indigenous peoples, the National Constitution establishes in its section 124 that "[the] original domain of the natural resources existing in its territory corresponds to the provinces." This provision does not imply that the provinces have absolute power to legislate on their natural resources, since in environmental matters the Constitution determined in section 41 that it corresponds to the Nation to dictate the norms that contain the minimum provisions for the protection of the right to a healthy environment, whereas it falls to the provinces to dictate the regulations necessary to complement the National legislation.

In this way, the National Congress has the power to dictate these basic assumption rules that are intended to ensure uniform or common environmental protection for the entire national territory, which the provinces must respect. For their part, the latter retain their regulatory power and can dictate rules that establish additional requirements or are stricter than the basic rules, but they can never be more permissive, they cannot go below the established threshold.

In a later section of this article, we will discuss why a national law for consultation with indigenous communities should respect the distribution of powers concurrently between the Nation and the provinces. We will also analyze how this distribution affects matters where the competence corresponding to each power is not so clear, for example, when regulating issues related to natural resources. Likewise, we will consider the need for not only a national law on the matter, but also for the provinces to sanction laws for consultation with indigenous communities, exercising their own powers.

Having defined the constitutional scaffolding regarding the distribution of powers between the Nation and the provinces, we will now examine the international regulation on the right to consultation of indigenous peoples and will return to federalism when analyzing how this right can be regulated in Argentina.

III.B. International level regulations

According to Silvina Ramírez, the opening of the State to indigenous rights was forged within the framework of a global discussion that produced, as a normative milestone, the modification of ILO Convention 107 by the current Convention 169. Based on the indigenous communities' demands for the rights to participation expressed in the right to consultation and prior, free and informed consent, a "pluralist paradigm" of relations between the State

16 G J Bidart Campos, *Manual de la Constitución Reformada* (Tomo I, Ed. Ediar, Buenos Aires).

and indigenous peoples has originated.[17] This paradigm has underlined the need to redesign the State, deserving a reasoned debate on the subject that links doctrinal debates, jurisprudential advances, existing regulations and the factual situation of indigenous peoples. For the author, this debate must take international legal instruments as its starting point, since they place the principle of self-determination and autonomy at the center of the scene. From these initial concepts, a new relationship between the State and indigenous peoples should be outlined.[18]

At the international level, there are numerous international instruments approved by Argentina that recognize the right to consultation of indigenous peoples, in addition to doctrinal advances by international organizations. Likewise, jurisprudence at the regional level has been outlining how the rights of indigenous communities should be applied. In this way, we can universally identify the aforementioned Convention 169 on Indigenous and Tribal Peoples of the International Labor Organization (ILO) and the United Nations Declaration on the Rights of Indigenous Peoples. At the regional level, we have the Inter-American Human Rights System (IAHRS), composed of the American Convention on Human Rights (ACHR), the American Declaration on the Rights of Indigenous Peoples, the decisions of the Inter-American Court of Human Rights and the reports of the Inter-American Commission on Human Rights (IACHR). Also, a new treaty recently became effective in the region: the Escazú Agreement. Each of these instruments will be discussed below.

III.B.1. ILO Convention 169

The ILO Convention 169 was adopted in 1989 in cooperation with the United Nations system. Three years later, in 1992, Argentina approved the Convention through Law No. 24.071 and deposited the instrument of ratification on July 3, 2000, the date on which it entered into force for the country and, consequently, acquired a superior hierarchy than the national laws.

This Convention establishes numerous provisions referring to the right to consultation. In particular, it indicates that when applying the provisions of the Convention, governments must consult the peoples concerned whenever legislative or administrative measures that may affect them directly are envisaged, clarifying that this must be done through appropriate procedures, through their representative institutions, in good faith, in a manner appropriate to the circumstances and for the purpose of reaching agreement or consent to the proposed measures (section 6).

17 S. Ramírez, 'Los derechos políticos de los pueblos indígenas. Comentario al fallo 'Comunidad Mapuche Catalán y Confederación Indígena Neuquina c/ Provincia del Neuquén s/ acción de inconstitucionalidad'' (2021, vol 2 n. 1) Revista Argentina de Teoría Jurídica, 51 <https://revistajuridica.utdt.edu/ojs/index.php/ratj/article/view/419/338> accessed 13 March 2023.

18 Ibid.

Furthermore, the Convention determines cases where communities have the right to decide and participate (section 7) and lists situations where consultation is mandatory. For example, consultation must be made before undertaking or authorizing any prospecting or exploitation program for existing resources on your lands (section 15) or when considering your ability to alienate your lands or otherwise transfer your rights to these lands outside of your community (section 17).

Likewise, in the case of establishing special professional training programs, they must be consulted about their organization and operation (section. 22 sub. 3). The creation of their own institutions and means of education must also be carried out in consultation with the peoples (section 27 sub. 3). In addition, the competent authorities must hold consultations with the peoples concerned, in order to adopt measures that make it possible to teach children to read and write in their own indigenous language or in the language most spoken by the group to which they belong (section 28).

According to the ILO, the consultation procedure is not limited to a yes-or-no decision, but is rather "a key form of dialogue that serves to harmonize conflicting interests and avoid conflicts, as well as resolve them."[19] Likewise, the ILO Committee of Experts on the Application of Conventions and Recommendations pointed out that the consultations do not impose the search for an agreement and the result of the consultations should not be considered mandatory.[20]

On the other hand, the Convention provides for a case in which the free and full consent of indigenous peoples must be obtained. Such is the case where the transfer and relocation of the peoples' settlements is considered necessary. However, it adds that if consent cannot be obtained, transfer and relocation should only take place after appropriate procedures established by national law, including public inquiries, where appropriate, in which the peoples concerned have the opportunity to be effectively represented (section 16).

III.B.2. United Nations Declaration on the Rights of Indigenous Peoples

Approved by the UN General Assembly in 2007, a characteristic of this instrument is that it indicates that, in addition to the obligation to carry out the consultation, in some cases it requires the free, prior and informed consent of indigenous peoples. These cases are to store and dispose of hazardous

19 ILO, *Los Derechos de los Pueblos Indígenas y Tribales en la Práctica. Una Guía sobre el Convenio No. 169 de la OIT* (2009) 60.

20 International Labor Conference, *Estudio general de las memorias relativas al Convenio sobre la consulta tripartita (normas internacionales del trabajo), 1976 (núm. 144) y relativas a la Recomendación sobre la consulta tripartita (actividades de la Organización Internacional del Trabajo), 1976 (núm. 152)* (Informe III Parte 1B, 88.a reunión, 2000) 18.

materials on indigenous people's lands or territories (section 29 sub 2), and to carry out military activities on indigenous peoples' lands or territories. In the latter case, it clarifies that they will not be carried out unless justified by a pertinent reason of public interest, or freely agreed with the indigenous peoples concerned, or requested by them (section 30).

The Declaration also provides for consultation and cooperation in numerous cases (section 15, sub. 2; section 17, sub. 2; section 32, sub. 2; section 36 and section 38) and indicates two specific cases in which the right to reparation is provided for in the absence of consent. These are: when indigenous peoples have been deprived of their cultural, intellectual, religious and spiritual assets (section 11, sub 2), and when their lands, territories or resources that they have traditionally owned, occupied or used have been confiscated, taken, occupied, used or damaged (section 28).

Although this declaration is not binding, it was approved by a large majority of countries in the UN General Assembly and was the result of a dialogue process between representatives of indigenous peoples and States, so it carries political weight and sufficient morality to endow it with legal force capable of transforming the political, legal and social structure in the countries that approved it.[21]

III.C. Inter-American Human Rights System

The States that make up the Inter-American System have general obligations to respect and guarantee the human rights of all persons under their jurisdiction, without discrimination of any kind, and specific obligations towards indigenous peoples, since they are original societies that pre-existed the colonization or establishment of the current state borders, and that have been subjected to conditions of marginalization and discrimination, whose foundation rests mainly on the respect and protection of their ethnic and cultural diversity.[22] Next, we will review how the IAHRS regulates and interprets the right to consultation of indigenous peoples.

III.C.1. American Declaration on the Rights of Indigenous Peoples

Approved by the OAS General Assembly in 2016, nine years after the United Nations Declaration, this instrument also lacks binding legal force. Similarly to the Declaration, it establishes when consultations must be held (sections

21 Consejo Nacional para Prevenir la Discriminación, *Derecho a la Consulta de los Pueblos Indígenas y Comunidades Indígenas y Afromexicanas en torno a Proyectos de Desarrollo y Explotación de Recursos Naturales* (Colección Legislar sin Discriminación, México, 2016) 92.

22 IACHR, *Pueblos Indígenas, Comunidades Afrodescendientes y Recursos Naturales: Protección de Derechos Humanos en el Contexto de Actividades de Extracción, Explotación y Desarrollo* (OEA/Ser.L/V/II. Doc. 47/15 2015) 20.

18, 20, 23 sub. 2, and section 29) and when the participation of indigenous peoples must be guaranteed (sections 14, 26, 31, 33, and 34).

A novelty of this Declaration is that it establishes the consultation with the purpose of obtaining the consent in the adoption of necessary measures so that the national or international agreements and regimes provide the recognition and the adequate protection of the cultural heritage and the intellectual property associated with said heritage of indigenous peoples (section 28).

III.C.2. Jurisprudence of the Inter-American Court of Human Rights

The Inter-American Court has ruled on the right to consultation of indigenous communities in a series of cases. In particular, we will mention the cases of the Saramaka People vs. Surinam; the Kichwa Indigenous people of Sarayaku vs. Ecuador; and the Indigenous Communities Members of the Lhaka Honhat Association (Our Land) vs. Argentina.

In 2007, the Inter-American Court intervened in the Case of the Saramaka People vs. Surinam. The facts are that the State began granting concessions to third parties to develop logging and mining activities in the territory of the Saramaka People, which caused damage to the environment.

The Court considered that the State, in order not to affect the subsistence of the Community, must comply with certain guarantees when granting logging and mining concessions for the exploration and extraction of certain natural resources in the Saramaka territory. These are: to ensure the effective participation of the members of the Saramaka people, in accordance with their customs and traditions, in relation to any development, investment, exploration or extraction plan carried out in their territory; and to guarantee that they will reasonably benefit from the plan being implemented; and that no concession will be issued within the territory unless and until independent and technically capable entities, under the supervision of the State, undertake a prior social and environmental impact study.

The first of these guarantees affirms the right to consultation and the obligation to obtain the Saramaka People's consent in development or investment plans within their territory. Thus, the State must actively consult with the said community according to their customs and traditions. This obligation also requires the State to accept and provide information as well as to ensure ongoing communication between the parties. In addition to this, the consultations must be carried out in good faith, through culturally appropriate procedures, in accordance with the traditions of the people, and must be aimed at reaching an agreement. It adds that these consultations must be carried out from the early stages of the development or investment plan and not only when the need to obtain community approval arises. It clarifies that early notice is important as it provides time for internal discussion within the communities and allows for an adequate response to the State. In

addition, the State must ensure that the Saramaka people are aware of the possible risks, including environmental and health risks, for them to accept the proposed development or investment plan knowingly and voluntarily. The consultation must also take into account the traditional methods of the Saramaka people for decision-making.

As an additional requirement, the Court affirms that in the face of large-scale development or investment plans with a greater impact within the Saramaka territory, Suriname has the obligation not only to consult the Saramakas but also to obtain their prior, free and informed consent according to their customs and traditions, which implies analyzing the difference between "consultation" and "consent".[23] Thus, according to the Court, Section 21 of the Convention does not prohibit *per se* the issuance of concessions for the exploration or exploitation of natural resources in indigenous or tribal territories. It adds that if the State wanted to legitimately restrict the rights to communal property, it must comply with the aforementioned guarantees.

Subsequently, the Court ruled on the right to consultation in the Case of the Kichwa indigenous people of Sarayaku v. Ecuador in 2012. The conflict arose around the exploration and exploitation of hydrocarbons in the territory where this community lives, due to a contract entered into between the State Petroleum Company of Ecuador (Petro-Ecuador) and the consortium made up of Compañía General de Combustibles S.A. (CGC) and Petrolera Argentina San Jorge S.A.

When analyzing the case, the Court reiterated the criteria used in the Case of the Saramaka People v. Suriname regarding the guidelines that States must respect to impose limitations or restrictions on the exercise of the right of indigenous peoples to property over their lands, territories and natural resources.[24] Likewise, the Court reaffirmed that the obligation to consult, in

23 The Court quoted: "[w]herever [large-scale projects] occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them. […] The principal human rights effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for their physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence" from the U.N., *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people* (2003) 2. See Interamerican Court of Human Rights, *Case of the Saramaka People vs Suriname* (2007) pa. 135.

24 The Court stated that "the close relationship between the indigenous communities and their land has an essential component, which is their cultural identity based on their specific worldviews, which, as distinct social and political actors in multicultural societies, must receive particular recognition and respect in a democratic society. Respect for the right to consultation of indigenous and tribal communities and peoples means precisely the recognition of their rights to their own culture or cultural identity (…), which must be assured, in particular, in a pluralistic, multicultural and democratic society." See par. 159. In addition, the Court considered "that the

addition to constituting a conventional norm, is also a general principle of International Law (par. 165).

The Court also established that, in the obligation to carry out special and differentiated consultation processes when the interests of indigenous communities are going to be affected, the particular consultation system of each town or community must be respected, so that it can be understood as an adequate and effective relationship with other state authorities, social or political actors and interested third parties.

For this reason, States must incorporate international standards into prior consultation processes, to generate sustained, effective, and reliable dialogue channels with indigenous peoples in consultation and participation procedures through their representative institutions (par. 166). This obligation must be guaranteed from the early planning stages of a project and in all its development phases, so that indigenous peoples can truly participate and influence the decision-making process. Thus, the State must ensure that the rights of indigenous peoples are not neglected in any other activity or agreement made with private third parties or in the framework of decisions of public power. In this sense, it is also the responsibility of the State to carry out supervision and control tasks in its application and to deploy, when appropriate, mechanisms for the effective protection of this right through the corresponding judicial bodies (par. 167).

Lastly and most recently, in 2020, the Court has handed down a judgment in the case of Indigenous Communities Members of the Lhaka Honhat Association (Our Land) vs. Argentina. This case arose from the claims of indigenous communities regarding the assignment and adjudication of the property of tax lots 14 and 55 in the Province of Salta and, among other things, regarding the construction of an international bridge without a consultation process, which started in 1995 and concluded in 1996.

Once again, the Court stressed the link that exists between the right to communal property and the right to consultation and participation of indigenous communities. In this sense, the Court considered that Argentina does not have adequate regulations or procedures to sufficiently guarantee the right to community-owned property.

Particularly with respect to the international bridge built, the Court indicated that there were no previous adequate consultation processes, which implied a violation of the property and participation rights of the communities (sections 21 and 23 of the Convention in relation to section 1.1 of that treaty). Thus, it established that in the event that the State carries out acts,

failure to consult the Sarayaku People affected their cultural identity, since there is no doubt that the intervention in and destruction of their cultural heritage entailed a significant lack of respect for their social and cultural identity, their customs, traditions, worldview and way of life, which naturally caused great concern, sadness and suffering among them." See par. 220.

works or undertakings on the indigenous territory that may affect its existence, value, use or enjoyment by the victim communities, or order, require, authorize, tolerate or consent that third parties do so, the State must necessarily provide information to the communities and carry out adequate, free and informed prior consultations, in accordance with the "three guarantees" established in the jurisprudence on the right to consultation constructed by the Court. In addition, the Court ordered the State to adopt legislative and/or other measures that may be necessary to provide legal certainty to the human right to indigenous community-owned property, within a reasonable, establishing specific procedures suitable for this purpose, which include the aforementioned guidelines regarding the right to consultation.

III.C.3. Consultation procedure requirements according to IACHR standards

The IACHR continuously determines the scope of the rights recognized by the IAHRS. Regarding the duty of the State to respect and guarantee, without discrimination, the consultation and consent exercised by indigenous and tribal peoples, it established certain standards that must be met. These are: consultation procedures must be carried out by the State; they must aim to reach an agreement or obtain consent; and they must be carried out in a prior, informed, good faith, free and culturally appropriate manner. Many of these requirements were seen in the judgments of the Inter-American Court; hence, only a few of them will be mentioned in this section.

In the first place, the IACHR stated that the subject obligated to comply with the obligation to consult is the State, at all levels. Therefore, the planning and carrying out of the consultation process cannot be delegated to a private company or to third parties, and less so to the same company interested in, for example, exploiting resources in the consulted community's territory.[25] In this sense, Rodriguez Garavito believes that experience shows that consultation processes tend to be privatized operations as long as they are managed, financed and controlled by the company interested in operating in indigenous territory, which reinforces relations of domination between companies, the State and indigenous peoples.[26]

Another requirement mentioned by the IACHR is that the consultation procedure must aim to reach an agreement or obtain consent. This is to ensure

25 IACHR, *Pueblos Indígenas, Comunidades Afrodescendientes y Recursos Naturales: Protección de Derechos Humanos en el Contexto de Actividades de Extracción, Explotación y Desarrollo* (OEA/Ser.L/V/II. Doc. 47/15 2015) 95.

26 C. Rodríguez Garavito, *Etnicidad.gov: Los recursos naturales, los pueblos indígenas y el derecho a la consulta previa en los campos sociales minados* (Bogotá, Dejusticia, 2012) 66-67.

that the peoples are capable of significantly influencing the process and the decisions made by expressing their opinions, concerns, and contributions, and that there is evidence of the modifications of the plans or projects, thus they can certify that the consultation really is a means that guarantees the rights that may be affected.[27]

With respect to extraction or exploitation plans or projects, the IACHR speaks of the "duty of accommodation", which requires flexibility on the part of all parties involved to accommodate the different rights and interests at stake, given that there is a substantial impact on the indigenous property rights and other related rights. Added to this, when the accommodation is not possible for objective, reasonable grounds proportional to a legitimate interest in a democratic society, the administrative decision that approves the extraction or exploitation plan must argue, in a reasoned manner, what those grounds are. Likewise, the decision and the reasons that justify the non-incorporation of the results of the consultation in the final plan must be formally communicated to the respective indigenous people. If these steps are not followed, the decision could be considered contrary to the guarantees of due process established by the standards of the IAHRS.[28]

One of the requirements is that the consultation must be carried out in good faith, which requires the absence of any type of coercion on the part of the State or agents or third parties acting with its authorization or acquiescence, and of attempts to disintegrate the social cohesion of the affected communities. Moreover, the IACHR considers that it is not in good faith not to give due consideration to the results of the consultation in the final design of the plans or projects. Along these lines, neither should the State have a predetermined decision before the consultation process, since the decision should depend on the result of that process.[29]

It is also worth mentioning that the consultation process must be culturally appropriate and take into account both the traditional methods of the corresponding people for decision-making and their own forms of representation.[30] When explaining this requirement, the IACHR makes special mention of the participation of indigenous women, indicating that, as members of indigenous peoples, States must ensure the participation of women in their internal decision-making processes. It adds that one way to achieve this is to coordinate with indigenous peoples through respectful means to guarantee the participation of indigenous women in their decision-making systems.[31]

27 IACHR, *Pueblos Indígenas, Comunidades Afrodescendientes y Recursos Naturales: Protección de Derechos Humanos en el Contexto de Actividades de Extracción, Explotación y Desarrollo* (OEA/Ser.L/V/II. Doc. 47/15 2015) 97.

28 Ibid, 97-98.

29 Ibid, 107-108.

30 Ibid, 109-110.

31 Ibid, 111.

III.C.4. The obligation to obtain consent according to the IACHR

Obtaining free, prior and informed consent from indigenous communities may be mandatory in some cases. According to the IACHR, the cases in which it is mandatory to obtain consent in accordance with International Human Rights Law are: in the event of a forced transfer of indigenous peoples from their lands and territories; in cases of storage and disposal of hazardous waste in the community's territory; and for carrying out military activities in those territories. Also, the Committee for the Elimination of Racial Discrimination recommended that the States parties ensure that legislation is not approved or any decision is taken that directly affects the rights and interests of indigenous and tribal peoples without their free, prior and informed consent.[32]

For their part, in the IAHRS, the IACHR and the Inter-American Court consider that it is mandatory to obtain consent to develop and implement large-scale projects in the communities' territory. To determine whether a plan or project can be considered "large-scale," the IACHR considers that two points must be analyzed: the characteristics of the project that determine its magnitude or dimension; and the human and social impact of the activity taking into account the specific circumstances of the affected indigenous or tribal people. Another important point is to analyze the cumulative impacts of the plans or projects. This is because if the plans or projects are analyzed independently, they may not have significant impacts on the territories of the communities, but if they are analyzed jointly, they may have a large-scale impact on the territory, therefore consent must be obtained.[33]

III.D. The Escazú Agreement

In 2018, the Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean (commonly called the Escazú Agreement) was adopted, the first binding regional instrument on environmental law. and the first in the world to address the protection of human rights defenders in environmental matters. As its name indicates, one of the rights enshrined in this treaty is that of public participation in environmental decision-making processes, specifically regulated in section 7. It establishes certain conditions and minimum requirements to carry out these consultation processes.

By way of summary, it establishes, among many other provisions, that participation must be ensured from the initial stages of the decision-making process; the necessary information must be provided to the public in a clear, timely and understandable manner; the process must contemplate reasonable

32 Ibid, 85-87.
33 Ibid, 99-101.

terms to inform the public and to allow effective participation; the public must have the opportunity to comment; and once the decision has been adopted, the public must be duly informed of it, together with the reasons and grounds that support it.

On the other hand, the treaty pays special attention to people and groups in vulnerable situations, seeking to make them the main beneficiaries of these processes. In this sense, it refers specifically to indigenous peoples, indicating in subsection 15 that "[in] the implementation of this Agreement, each Party shall guarantee respect for their national legislation and their international obligations regarding the rights of indigenous peoples and local communities."

In this way, the Agreement incorporated new international obligations for Argentina[34] that are directly applicable to the consultation procedures with indigenous peoples. Henceforth, any measure that seeks to regulate this right must respect the standards provided by this international treaty.

IV. LOCAL LEGISLATION

In this section we will analyze the internal regulations relating to indigenous peoples, at both the national and provincial levels, to detect whether there are provisions regarding the right of consultation. Only the laws that establish provisions referring to the consultation and participation of indigenous communities will be mentioned, since it is beyond the scope of this article to analyze all the regulations applicable to indigenous peoples.

IV.A. National laws

Argentina does not have a national law that regulates the right to consultation of indigenous peoples, but there are national laws that provide for instances of participation. Among these, we can identify Law No. 23.302 on Indigenous Policy and Support for Aboriginal Communities (1985), which declares national interest in the care and support for indigenous peoples and existing indigenous communities in the country and their defense and development for their full participation in the socioeconomic and cultural process of the Nation, respecting their own values and modalities. The law creates the National Institute of Indigenous Affairs (hereinafter, INAI) as a decentralized entity with indigenous participation, which implements social policies aimed at indigenous peoples. The INAI, with a representative from each of the indigenous communities, intervenes in matters of land adjudication, education plans, and healthcare plans.

34 Argentina ratified this treaty in 2020 through Law No. 27.566 and in April 2021, the treaty entered into force.

Added to this, Law No. 25.517[35] (2001) provides that in order to carry out any scientific undertaking that has as its object the aboriginal communities, including their historical and cultural heritage, the express consent of the interested communities must be obtained. Likewise, Law No. 26.160 (2006) promotes the participation of indigenous organizations and provincial indigenous councils in the survey of the lands occupied by the communities. Although these three laws mention instances of participation, they do not establish specific procedures to ensure them.

On the other hand, the National Education Law (2006) contains a chapter on bilingual intercultural education and contemplates the creation of permanent participation mechanisms for representatives of indigenous peoples. For its part, Law No. 26.331 on minimum provisions for the environmental protection of native forests (2007) establishes the hearing and public consultation in land clearing projects and guarantees access to information to indigenous peoples on clearing authorizations.

Law No. 27.118 (2015) has among its objectives to develop and strengthen participatory institutional structures; to plan, monitor and evaluate policies, programs and actions for the development of local Family, Peasant and Indigenous Agriculture. This law does not offer further specifications on these participatory institutional structures. Finally, Law No. 25.607 (2002) provides for the participation of communities in the campaign to disseminate the rights of indigenous peoples.

Furthermore, there are certain decrees and resolutions that provide for the participation of indigenous peoples. Among them we can mention Decree No. 700/2010, which created the Commission for Analysis and Instrumentation of Indigenous Community Property, Decree No. 702/10, which created the Directorate for the Affirmation of Indigenous Rights, and INAI Resolution No. 152/04, that creates the Council of Indigenous Participation. It is important to note that, in 2024, the National Government, through Resolution No. 53/2024, repealed Resolution No. 4811/96, which had established the National Registry of Indigenous Communities. The purpose of this registry was to maintain an up-to-date and comprehensive record of both registered and unregistered Indigenous communities throughout the country.

The wording of the first decree highlights the need for the active participation of the provinces, considering the attribution of concurrent powers enshrined in section 75 subsection 17 of the National Constitution and the close relationship between indigenous peoples and the territories of national and provincial jurisdiction they occupy.

35 Law No. 25.517 establishes that the mortal remains of indigenous peoples which are part of museums and/or public or private collections, must be made available to indigenous peoples and/or communities that claim them.

IV. B. Provincial Constitutions

In addition to what is established in the National Constitution and national laws, it should be noted that the constitutions of some provinces have enshrined the recognition of the right of indigenous peoples to consultation, or of participation or consent mechanisms in matters that affect their interests.

The province of Chaco recognizes the participation of indigenous peoples in relation to the protection, preservation, recovery of natural resources and other interests that affect them and in sustainable development (section 37), and in conducting a technical study, censuses and an operational plan in order to proceed with the immediate transfer of suitable and necessary lands for the development of indigenous peoples (fifth transitory clause).

The province of Salta establishes participation in the management of natural resources found within the lands they occupy and of other interests that affect them. It recognizes their intellectual property and the economic product of the theoretical and practical knowledge derived from their traditions when they are used for profit, which relates to economic participation (section 34). In addition, the Constitution of Salta rules that the Provincial Government generate mechanisms that allow both indigenous and non-indigenous residents, with their effective participation, to agree on solutions related to public land, respecting the rights of third parties.

The province of Formosa declares in its Constitution that indigenous peoples are assured effective leadership in decision-making that is linked to their reality in provincial and national life and that the rational use of existing forests in aboriginal communities will require their consent for exploitation by third parties and may be used according to their uses and customs, in accordance with current laws (section 79).

Finally, the constitutions of the provinces of Neuquén (section 53) and Tucumán (section 149) guarantee indigenous peoples' participation in the management of their natural resources and other interests that affect them. The same is stated in the Constitution of Entre Ríos regarding the participation of indigenous peoples in the protection, preservation and recovery of natural resources linked to their environment and subsistence (section 33).

Bearing in mind that the provincial authorities are closer to the existing indigenous communities in their territories and that it is also their responsibility to regulate this right, the level of recognition in the provincial constitutions is quite low. Only six of the twenty-three provinces expressly recognize it. The following section will analyze the provincial laws that have recognized the participation of communities in various issues.

IV.C. Provincial laws

When exploring provincial regulations on the rights of indigenous peoples, we note that there is no provincial law that regulates the right to consultation

in a general way. However, there are regulations that provide consultation and participation mechanisms on certain topics, for example education or tourism, but many times without going into greater precision or specifications. Other laws create provincial advisory councils made up of members of the communities to participate in matters that affect them. Next, we will delve into some of these regulatory proposals.

Regarding the creation of advisory provincial councils or institutes comprising representatives of the indigenous communities, the following laws can be identified: Law No. 7121 on the development of the indigenous peoples of Salta, which creates the Institute of Indigenous Peoples and also the Community Assembly; Law No. 2727 of the province of Misiones, that provides for the formation of an Advisory Board; Law No. 3528 of Chaco that creates the Institute of the Chaco Aboriginal, and Law No. 6604 that creates the Provincial Advisory Council of Indigenous Languages, a technical-political and coordination body; and Law No. 1228 of La Pampa, which creates the Provincial Council of the Aboriginal.

In addition, various provinces have laws that guarantee intercultural bilingual education and contemplate mechanisms for the participation of indigenous communities for their formulation and implementation. These are: Law No. 6991 of Chaco; Law No. 2511 of the province of La Pampa; and Law No. 11.078 of Santa Fe.

Another point on which some provincial legislation contemplates participation mechanisms for indigenous peoples is the adjudication of land. In this sense we find: Law No. 2727 of Misiones; Salta's Law No. 7121, which also determines that the adjudication of definitive ownership of the lands, either in their current settlement or in cases that require a transfer, must be done with the free and express consent of the indigenous population involved, and that the Provincial Institute of Indigenous Peoples of Salta must implement the appropriate consultation mechanism, in common agreement with the Community Assembly; and Law No. V-0600-2007 of San Luis.

Beyond the aforementioned provincial laws, there are also other provincial regulations that contemplate participation mechanisms on specific topics. For example, concerning work programs in Law No. 426 of Formosa, on the use of native forests in Tucumán through Law No. 8304, and regarding the planning of housing construction through Law No. 2727 of Misiones and Law No. 7121 of Salta.

Though not a law, the province of Neuquén recently issued Decree No. 108/2023 with the purpose of establishing a legal framework that guarantees indigenous communities the right to prior, free and informed consultation regarding those administrative measures that could affect them directly and providing a procedure to carry out this type of consultation. The wording

of said decree was agreed between the officials of the province's Executive branch and the representatives of the Mapuche communities.[36]

Regarding the decree and the procedure stipulated therein, it is worth highlighting the following points: first, that the consultation procedure currently in the province is only applicable to administrative measures and not to laws, due to the separation of powers -since it was created through decree and not by law. Thus, we believe that section 4's enumeration of the cases in which the consultation must be implemented should be taken as merely illustrative and not exhaustive. On the one hand, the decree provides a broad definition of administrative measures; on the other, it would be an unreasonable restriction on the right to consultation of indigenous peoples if the procedure were not applied to, for example, administrative measures related to healthcare programs or housing construction. In addition, the fact that these cases are listed and not others could make it difficult in practice to conduct consultations regarding administrative measures outside of them.

In the dialogues prior to the issuance of the decree, representatives of the Indigenous Communities of the Province of Neuquén stated that it was necessary to evaluate the current regime regarding the recognition of Legal Entity. For that reason, the decree establishes a ninety-day term to create the Special Register of Indigenous Communities of the Province. Some community representatives stated that the provincial government makes it difficult for certain communities to register, which is why they would be hindered from participating in consultation procedures.[37]

By way of comparison, Mexico—a federal state like Argentina—also lacks a specific law regulating the right of Indigenous peoples to consultation. Although numerous legislative initiatives have been proposed, none have been successfully enacted. At the national level, the Mexican Constitution obligates the State to consult Indigenous peoples in the formulation of federal, state, and municipal development plans, and, where appropriate, to incorporate their recommendations. It further mandates that the recognition of Indigenous peoples must be reflected in the constitutions and laws of the federative entities. Nevertheless, as of 2018, only eighteen of the thirty-two states had incorporated any provision concerning the right to consultation into their constitutions.

At the federal level, the obligation to conduct consultations typically arises from administrative law regulations governing infrastructure projects and

36 Río Negro Newspaper, 'Gutiérrez firma esta semana el protocolo de consulta previa para comunidades mapuche'(2023) <https://www.rionegro.com.ar/politica/gutierrez-firma-esta-semana-el-protocolo-de-consulta-previa-para-comunidades-mapuche-2689158/> accessed 10 February 2023.

37 The sector of the Mapuche Confederation that answers to Jorge Nahuel criticized the requirement of legal status as a condition for being consulted, arguing that some communities' lack legal status due to the government's own delays. Ibid.

development initiatives. However, references to consultation within these legal instruments are generally fragmented, limited in scope, and often repetitive. The Mexican case thus illustrates the broader challenges faced by federal systems in establishing an effective and coherent regulatory framework for the right to consultation at both national and subnational levels.

IV.D. National jurisprudence

In this section, we will analyze some of the judicial rulings issued by the highest court in the country, the Supreme Court of Justice of the Nation ("Corte Suprema de Justicia de la Nación", "CSJN" in short), which positively refer to the right of consultation of indigenous peoples to exemplify the state of affairs on the subject matter at the jurisprudential level.

Perhaps one of the most emblematic cases resolved by the CSJN on the rights of indigenous peoples is the decision "Catalan Mapuche Community and Neuquén Indigenous Confederation v/ Province of Neuquén s/ action of unconstitutionality". In this relatively recent case (2021), the Court ruled by majority regarding the duty to ensure the participation of the Mapuche communities that inhabit the territory in which the municipality of Villa Pehuenia was delimited.

The conflict around which the ruling revolves dates to 2003, when the Neuquén provincial legislature sanctioned Law No. 2.249 by means of which the Municipality of Villa Pehuenia was created in a territory where the Mapuche Catalan, Puel and Placido Puel lived. They, together with the Neuquén Indigenous Confederation, filed an action to declare the unconstitutionality of the aforementioned law and of Decree No. 2/2004 of the Neuquén executive branch that called for elections to form the municipal commission. They alleged that these measures affected them directly and that their right to consultation and participation had not been safeguarded, nor had their ethnic and cultural heritage been recognized. This action was rejected by the Neuquén courts but finally had a positive result in the Supreme Court. The highest Court established certain points that deserve to be highlighted in the development of this work.

Firstly, it remarked that both section 75, subsection 17, of the National Constitution and section 53 of the Constitution of the Province of Neuquén guarantee indigenous peoples a set of specific rights based on the duty to ensure "respect for their cultural identity", including the right to participate in the management of natural resources and other interests that affect them. According to the Court, "*...This prerogative means 'hearing the voice of the indigenous peoples' in order to take into account their interests, opinions and points of view in certain matters and prevent possible damage to their cultural identity when adopting measures that may affect their way of life or their traditional customs. This participation must allow indigenous peoples to*

express their concerns, proposals and appreciations at a timely stage through appropriate procedures to protect their rights and interests…".

Thus, in light of what was established by the Court, the creation of the municipality of Villa Pehuenia called for the province of Neuquén to require the participation of the indigenous community. This implies that the provincial State has not respected the constitutional right to participation in this case. This in so far as not only did the province of Neuquén avoid consulting the communities, but it also did not contemplate measures to generate appropriate and adequate mechanisms for permanent participation in the government diagram of the new municipality. Accordingly, "the situation of vulnerability in which indigenous peoples find themselves - due to their idiosyncrasy that differentiates them from the majority of the population - demands that the State design, promote and encourage various forms of participation that allow said sectors of society to partake in public affairs that involve their interests".

Faced with the particularities of this case, the Court proposed a solution to rearrange the institutional situation regarding the protection of the indigenous peoples involved. Hence, it ordered the Province of Neuquén, within a period of 60 days, to convene and establish a dialogue table with the Mapuche Catalan Community and the Neuquén Indigenous Confederation to design, together with the Municipality of Villa Pehuenia, permanent mechanisms of institutional participation and communication, in such a way that communities can intervene in the determination of municipal policies and decisions that involve them and thus optimize coexistence among the inhabitants of the municipality, and if necessary, adapt the legislation on the matter. The fulfillment of the execution of this duty rests on the Superior Court of Justice of Neuquén, which will follow up on the progress achieved through the dialogue table.

Silvina Ramírez stated that it is pertinent to the analysis of this ruling to consider the paradigm of the pluralist state when reflecting on the scope of a conception that visualizes indigenous peoples not as mere "different groups" within the State but as collective and political subjects, which gives meaning to interculturality. The author affirms that there is an imperative for contemporary democratic States to create new forms of participation, to overcome a traumatic relationship with States in order to recreate spaces for dialogue that can also create spaces for meetings.

Aside from this important precedent in the matter, we must also refer to certain points in other judgments, prior to the case of the Catalan Mapuche Community, in which the Supreme Court ruled on the right to consultation of indigenous peoples.

In the brief ruling "Pilquiman, Crecencio c/ Instituto Autárquico de Colonización y Fomento Rural s/acción de amparo" of 2014, the CSJN granted Pilquiman's request, as a member of the Lagunita Salada, Gorro Frigio and Cerro Bayo Aboriginal Community, so that their rights of consultation

and participation are respected in the event of the adjudication for sale by the Instituto Autárquico de Colonización de Chubut to an individual of an extension of hectares where a cemetery belonging to the indigenous community is located. In addition, it annulled a judgment of the Superior Court of Justice of the province of Chubut that ignored the claim for annulment of said adjudication. The CSJN reaffirmed its respect for the federal principle and its role as final interpreter of the National Constitution and annulled the questioned sentence and ordered the Superior Court of Chubut to issue a new ruling due to the unjustified formal rigor and the omission to contemplate the right to consultation and participation of indigenous peoples, understanding that these rights were being violated. Silvina Ramírez highlights this brief sentence as relevant for the protection of indigenous rights. Through this ruling, the Court recognizes that the right to consultation and participation must be respected and deserves a response that the Provincial Court set aside, invoking formal considerations. This indicates that the State, through its highest judicial instance, is materializing its constitutional and international commitments.[38]

It is also worth noting the public hearing held in the case "Aboriginal Community of Santuario Tres Pozos y otros c/ Jujuy, Provincia de y otro s/ amparo", in which said community filed a protective action to enforce its rights of participation and consultation on the permits granted by the provincial government for exploration and exploitation of lithium and borate in the area of the Laguna de Guayatayoc-Salinas Grandes sub-basin. In this sense, the CJSN convened a public hearing and ordered the province to arbitrate the necessary measures to make effective the rights of participation and consultation of the community so that, consequently, they can express free, prior and informed consent on the prospecting or exploitation programs for existing natural resources in their territories.

We observe in these cases how the CSJN, in its role as the last interpreter of the Constitution, ruled to safeguard the rights of consultation and participation of indigenous peoples in the face of legislative and administrative measures that affected them. In our view, while it is undoubtedly positive that the rights of Indigenous communities are safeguarded against being overridden by majoritarian political institutions such as the executive or legislative branches—and that recourse to the judiciary has proven an effective strategy for asserting the right to consultation when legislative bodies fail to address Indigenous claims—it is nonetheless problematic that such protection depends exclusively on judicial decisions issued in individual cases.

38 S, Ramírez, 'La Corte Suprema y el Derecho a la Consulta de los Pueblos indígenas'(Infojus Noticias, 2014) <http://infojusnoticias.gov.ar/opinion/la-corte-suprema-y-el-derecho-a-la-consulta-de-los-pueblos-indigenas-144.html> accessed 10 February 2023.

Although the right to consultation is recognized as operative, we contend that it would be significantly more desirable for this right to be formally regulated by legislation. From a democratic perspective, statutory regulation provides greater legitimacy than case-by-case judicial rulings and offers a more stable, coherent, and predictable framework for implementation. Importantly, any such legislative initiative should be developed through the active participation of Indigenous communities themselves—a principle we will examine in further detail below.

Notwithstanding the desirability of the enactment of a law, it should not be underestimated that sometimes the resolution of cases by the courts can be driven by social mobilization and that some judicial decisions bring certain issues into discussion in the public forum. Starting from the landmark case "Brown v. Board of Education" by the Supreme Court of the United States, the expectations about courts, previously thought solely as an instrument of the elite in power, began to be reformulated and a new perspective emerged on the role of courts and their functions in the political system. In this way, litigation became a resource used by groups in vulnerable situations for political purposes. Thus, these groups use courts as one of their possible strategies, in addition to lobbying and political participation, to have an impact on the public agenda and discussion.[39] These debates in society can then encourage the enactment of a law.

Consider the role of the courts from the perspective of deliberative democracy. According to Carlos Nino, the epistemic theory of democracy questions the control of judicial constitutionality but for three exceptions: the control of the democratic process, the disqualification of laws based on perfectionist grounds and the analysis of whether the law in question negatively affects the preservation of a morally acceptable legal practice.[40] The first two exceptions revolve around the conditions that contribute to making democratic decisions epistemically trustworthy, while the third is based on those conditions also being effective.[41]

In particular, the first exception refers to the control of the democratic procedure, that is, the rules of the democratic procedure designed in order to maximize the epistemic value of said process. Nino identifies as rules the breadth of participation of those who are potentially affected by the decision to adopt, the freedom of the participants to be able to express themselves,

39 M G Andía, *Disadvantaged Groups, The Use of Courts and their Impact: a Case Study of Legal Mobilization in Argentina* (PhD thesis, Northeastern University 2011) 18.

40 C S Nino, *La Constitución de la Democracia Deliberativa* (Gedisa, 1997) 260 - 292.

41 Ibid. The second exception is related to the preservation of personal autonomy against perfectionist laws that seek to impose an ideal of personal excellence. The third exception is related to judicial control to preserve the social practice in which the decision at hand operates (the historical constitution), which guarantees the effectiveness of democratic decisions themselves.

the equality of conditions in participation, among other rules[42]. However, as to ensure that the rules of the democratic procedure are adequately complied with, this responsibility cannot be delegated to the democratic process itself, as the monitoring process would be influenced by non-compliance with the rules and conditions on which the epistemic value is based. In this sense, the role of judges is to ensure that the procedural rules and the conditions of democratic discussion and decision are fulfilled and their intervention must always be aimed at expanding the democratic procedure. Here, the notion of what Nino calls "*a priori* rights" becomes relevant: those rights that constitute conditions of validity of the democratic process and whose value is not determined by that process but rather is presupposed by it. Examples of these are political rights and freedom of expression. Thus, the mission of judges, according to this author, is to guarantee respect for *a priori* rights as prerequisites for the validity of the democratic process.[43]

In this way, following Nino's thesis and from the cases presented in this section, we can think about the role of the judiciary in terms of control of the rules of democratic procedure in those conflicts in which the right to consultation is at stake: precisely, in order to ensure broad participation of indigenous peoples in decisions that potentially affect them and to ensure the equality of said participation in the face of the marked asymmetry of power that they face.

V. EXPERIENCES IN THE REGULATION OF THE RIGHT TO CONSULTATION

In this section, the bills that were presented to the National Congress to regulate the right to consultation of indigenous peoples will be analyzed. Subsequently, the Kachi Yupi self-consultation and consent protocol will be shown, created by the Indigenous Communities of the Salinas Grandes Basin and Guayatayoc Lagoon in the provinces of Jujuy and Salta.

V.A. Bills of Law

To date, five bills have been submitted to the Argentine National Congress aimed at enacting a law to consult indigenous peoples, but none have managed to become law. They were presented in the years 2013[44], 2014[45] , 2015[46],

42 Ibid, 272-273.

43 Ibid, 275.

44 Cámara de Diputados Argentina, *Proyecto 1995-D-2013,* <https://www.hcdn.gob.ar/proyectos/textoCompleto.jsp?exp=1995-D-2013&tipo=LEY> accessed 10 February 2023.

45 Cámara de Senadores Argentina, *Número de Expediente S-2041/14* <https://www.senado.gob.ar/parlamentario/comisiones/verExp/2041.14/S/PL> accessed 10 February 2023.

46 Cámara de Diputados Argentina, *Proyecto 0902-D-2015* <https://www.hcdn.gob.ar/proyectos/textoCompleto.jsp?exp=0902-D-2015&tipo=LEY> accessed 10 February 2023.

2016[47], 2018[48]. Senator María Magdalena Odarda[49] presented her project in 2014 and later presented it again in the years 2016[50], 2018[51] and 2019[52]. Likewise, the project presented in 2018 was also presented in the year 2020[53]. In total, there were nine instances where there was an opportunity to approve one of the projects presented.

Of these bills, three only referred to the direct impact of the legislative or administrative measures on the communities, while two also provided for indirect impact (that of Senator Odarda and the bill presented in 2016). Added to this, the majority only provided for the obligation to carry out the consultation, not the obligation to obtain consent. Only Senator Odarda's project listed some cases where, in addition to the consultation, it was also mandatory to obtain consent. Regarding the type of law, there was no uniformity in the type chosen, since they mentioned being: framework law; public order law; general and public order law; and another project indicated that the provisions of the law were similar to the norms of minimum provisions.

V. B. Self-consultation protocols and autonomous community consultation and consent protocols: the case of Kachi Yupi

In the absence of mechanisms to assert the right to consultation, different indigenous communities have given new meaning to consultation and consent, in an exercise of their self-determination to define how they want to exercise ownership of their rights, and thus have created their consultation processes based on life plans, self-consultation protocols, mandates, their knowledge systems, among others[54]. These generally consist of documents prepared by the indigenous peoples themselves, where norms and procedures related to the implementation of prior consultation are detailed and specified. They contemplate a diversity of collective identities, since they are aimed at explaining the internal government of each people and establishing its

47 Cámara de Diputados Argentina, *Proyecto 2531-D-2016* <https://www.hcdn.gob.ar/proyectos/textoCompleto.jsp?exp=2531-D-2016&tipo=LEY> accessed 10 February 2023.

48 Cámara de Diputados Argentina, *Proyecto 4686-D-2018* <https://www.hcdn.gob.ar/proyectos/textoCompleto.jsp?exp=4686-D-2018&tipo=LEY> accessed 10 February 2023.

49 María Magdalena Odarda was Head of the INAI from 2020 to 2022.

50 Cámara de Senadores Argentina, *Número de Expediente 1396/16* <https://www.senado.gob.ar/parlamentario/comisiones/verExp/1396.16/S/PL> accessed 10 February 2023.

51 Cámara de Senadores Argentina, *Número de Expediente* 172/18 <https://www.senado.gob.ar/parlamentario/comisiones/verExp/172.18/S/PL> accessed 10 February 2023.

52 Cámara de Senadores Argentina, *Número de Expediente 3394/19* <https://www.senado.gob.ar/parlamentario/comisiones/verExp/3394.19/S/PL> accessed 10 February 2023.

53 Cámara de Diputados Argentina, *Proyecto 0793-D-2020* <https://www.diputados.gov.ar/proyectos/proyecto.jsp?exp=0793-D-2020#:~:text=Derecho%20a%20la%20consulta.,calidad%20de%20vida%20o%20desarrollo> accessed 10 February 2023.

54 CIDH, *Derecho a la libre determinación de los Pueblos Indígenas y Tribales* (OEA/Ser.L/V/II, Doc.413/21 2021) 82.

rules for decision-making and its political representation. Their purpose is to inform the States on the way in which they should dialogue with them in relation to those decisions that affect their rights.[55]

In Argentina, an experience of these characteristics is the Kachi Yupi-Huellas de la Sal protocol, where the Prior Consultation and Prior, Free and Informed Consent Procedure, agreed upon by the Communities of the Atacama and Kolla Peoples of the territory of the Cuenca de the Salinas Grandes and Laguna de Guayatayoc was presented. It was elaborated, in a community way, and shared and agreed between all the communities' actors. This document outlines the development of standards and mechanisms that involve the participation, consultation, and prior, free and informed consent for the protection of these peoples facing administrative or legislative measures that may affect them, with special emphasis on mining projects, as they affect the territory of the salt flats most intensely.[56]

VI. CHALLENGES FOR THE ENACTMENT OF A LAW FOR THE CONSULTATION OF INDIGENOUS PEOPLES

As previously noted, there exists a constitutional mandate to enact a national law governing the consultation of Indigenous peoples—a mandate that remains unfulfilled to this day. Although provinces have the authority to regulate this right, an analysis of provincial legislation reveals a notable absence of regulatory frameworks that comply with international standards.

Although this right has not yet been properly legislated, its operative nature means that authorities remain obligated to guarantee its exercise, and Indigenous communities are entitled to demand its enforcement. However, the discretionary manner in which authorities determine when and how consultations are conducted has frequently resulted in conflicts, often compelling communities to seek judicial intervention for resolution. As previously discussed, relying solely on court rulings to ensure the enforceability and implementation of this right is deeply problematic. This situation underscores the urgent need for comprehensive national legislation. Nevertheless, enacting a law of this nature entails a range of complex challenges.

One of them is that there is no single way to conduct a consultation that fits every indigenous community in the country. Each consultation process must adapt to the realities and conditions of each community, as well as to the specificities of each jurisdiction where the consultations are carried out.

55 Ibid.

56 Kachi Yupi, *Huellas de la Sal: Procedimiento de Consulta y Consentimiento Previo, Libre e Informado para las Comunidades Indígenas de la Cuenca de Salinas Grandes y Laguna de Guayatayoc* (2015) 5 <https://naturaljustice.org/wp-content/uploads/2015/12/Kachi-Yupi-Huellas.pdf> accessed 10 February 2023.

The question arises if it would be better for each province to regulate their own consultation processes, since they are in a better position to know the specificities of the communities that inhabit their jurisdictions, or instead if National Congress should pass a law wide enough that it can be applied according to the circumstances of each specific case, respecting provincial autonomy in the matter.

An interesting point to discuss when determining how to regulate the right to consult the indigenous peoples is that the IACHR warns that it should not be aspired to generate standardized processes, either based on legislative measures or not, since they tend to standardize all peoples on a pattern. This is because, in some contexts, the recognition of the right to consultation in national laws has had counterproductive effects for the self-determination of indigenous and tribal peoples.[57]

Because of this, the IACHR considers that to fully guarantee the communities' exercise of self-determination, the necessary measures must be taken to guarantee the right to consultation with broad participation, whether through a law addressing this matter or otherwise. According to the IACHR, there should be a constant intercultural dialogue between normative and indigenous and tribal law, National Law, and International Human Rights Law.[58]

Another important challenge emanates from the distribution of powers between the nation and the provinces, the result of the Argentine federal system. As could be seen from analyzing the right to consultation, its regulation is mainly procedural, and the power to regulate procedural issues originally belongs to the provinces, since they have not delegated that power to the national authorities. Moreover, since consultations with Indigenous peoples typically arise in the context of exploration or exploitation of natural resources located within their territories, regulatory authority in these matters falls exclusively to the provinces, as they hold original domain rights over the natural resources within their jurisdictions.

The difficulty of determining who is competent to consult the population is evidenced in practice. For example, in "Asociación Argentina de Abogados Ambientalistas de la Patagonia c/ Santa Cruz, provincia de y otro s/ amparo ambiental"[59], 2016, the CSJN referred to the lack of environmental impact studies and public hearings prior to the construction of hydroelectric plants in the Santa Cruz river, in the province of Santa Cruz. The project of hydroelectric plants refers to the construction of two dams on the Santa Cruz river,

57 CIDH, *Derecho a la libre determinación de los Pueblos Indígenas y Tribales* (OEA/Ser.L/V/II, Doc.413/21 2021) 82-83.

58 Ibid.

59 CSJN, *Asociación Argentina de Abogados Ambientalistas de la Patagonia e/ Santa Cruz, Provincia de y otro s/ amparo ambiental* (5258/2014) 2016.

a river that is exclusively provincial for it does not limit with the jurisdiction of any other province.

The project was incorporated into the National Hydroelectric Works Program, so it is the Ministry of Energy of the Nation who commissioned it. However, the National State and the Province of Santa Cruz signed an agreement by which the responsibility for processing technical, hydraulic and environmental evaluations was assigned to the province, as the project was located entirely within this province.

In this context, the claimant began a protective action against the National State and the province of Santa Cruz, and alleged that the cause had an inter-jurisdictional incidence potential while the dam project could affect not only the province, but also the Los Glaciares National Park -of national jurisdiction -, while the National State is responsible for executing the project and has the respective funds. The claimant also asked for a precautionary measure to be ordered so that the works are suspended until the required studies and hearings are carried out.

The CSJN determined that the province could not be considered an adverse party because the object of the litigation demonstrated that the national state is the legitimized person that integrates the substantial legal relationship, as long as the execution of the project is subject to its jurisdiction. The Court adds that National Law No. 15.336 of Electric Power establishes in section 12 that the works and facilities for generation, transformation, and transmission of the electricity of national jurisdiction cannot be subject to local legislation measures that restrict or hinder their free production and circulation.

Therefore, the Court determined that the National State was the only one that had an obligation as well as the possibility of complying with the restorative mandate of violated rights. The Court finally resolved that the National State did not comply with any environmental impact evaluations and hearing procedures, so it allowed a precautionary measure and ordered the suspension of the works until the environmental impact evaluation process and the hearing are implemented, or until a final ruling is passed, whichever happens first.

Subsequently, in 2017, the Mapuche Tehuelche Lof Fem Mapu community promoted a protective action against the National State, the province of Santa Cruz and UTE Represas Patagónicas to the Patagonian dams so that, among other things, the free, prior and informed consultation procedure is guaranteed and implemented in order to participate in decision-making instances and in the protection of cultural heritage and of the indigenous mortal remains that

were found in the execution of the dams.[60] This action was later accompanied by 14 other indigenous communities in the province.[61]

The judge decided to request the INAI to set a dialogue table for consultation with the existing communities in the area surrounding the dam work and translated the sentence to the Mapuche language, a novelty in this country. At the dialogue table, the parties reached agreements to start a prior, free, and informed consultation process, but the process was paralyzed until 2021, when the judge activated the execution process.[62]

Currently, news on the INAI shows that it is actively participating in the intercultural consultation process with the fifteen indigenous communities on the construction of the dams on the Santa Cruz River, together with the Secretary of Energy, the National Ministry of Environment, and provincial agencies dealing in Culture and Environment.[63]

On the other hand, there are tensions between the national, provincial, and municipal authorities regarding the recognition by the INAI of the occupation of lands in favor of indigenous communities and the subsequent rejection of these measures by the government.[64] This is another example of the difficulties that our federal system and the distribution of powers generate in indigenous communities, which are at the center of the dispute between those levels of power.

However, given these challenges, certain factors can be defined so that it can be determined whether the nation or the provinces are competent to carry out the consultation. In short, it depends on who is the authority that is going to sanction or modify a law or administrative act that directly affects

60 F, Kosovsky *Pueblos Indígenas. Derecho a la consulta y participación CSJN. 'Comunidad Mapuche Catalán y Confederación Indígena Neuquina c/ Provincia del Neuquén s/ acción de inconstitucionalidad', 8 de abril de 2021* Debates Sobre Derechos Humanos (N° 5 - 2021).

61 S. Delgado 'Un juez dictó el primer fallo en lengua mapuche a favor de pueblos originarios' (Cosecha Roja, 2021) <https://www.cosecharoja.org/un-juez-dicto-el-primer-fallo-en-lengua-mapuche-a-favor-de-pueblos-originarios/> accessed on 10 February 2023.

62 Ibid.

63 INAI, 'Histórico proceso de Consulta Libre, Previa e Informada a las comunidades indígenas de la provincia Santa Cruz' (2022) <https://www.argentina.gob.ar/noticias/historico-proceso-de-consulta-libre-previa-e-informada-las-comunidades-indigenas-de-la> accessed 10 February 2023; INAI 'Continúa el Diálogo Intercultural con las Comunidades Indígenas de la provincia de Santa Cruz' (2022) <https://www.argentina.gob.ar/noticias/continua-el-dialogo-intercultural-con-las-comunidades-indigenas-de-la-provincia-de-santa > accessed 10 February 2023

64 For example: Infobae 'Fuerte rechazo de Mendoza a la decisión del gobierno nacional de entregarle más tierras a una comunidad mapuche' (2023) <https://www.infobae.com/politica/2023/02/03/fuerte-rechazo-de-mendoza-a-la-decision-del-gobierno-nacional-de-entregarle-mas-tierras-a-una-comunidad-mapuche/> accessed 10 February 2023; S Velasquez 'Privilegios. El intendente de Bariloche rechaza reconocimiento del INAI a comunidad mapuche' (2021) <https://www.laizquierdadiario.com/El-intendente-de-Bariloche-rechaza-reconocimiento-del-INAI-a-comunidad-mapuche> accessed 10 February 2023.

the communities, or that adopts a public policy that directly affects them, or that approves a plan or project on their lands or territories.

Yet it becomes problematic when the different levels of power are intertwined, as observed in the case of the construction of the dam in Santa Cruz or, for example, in interjurisdictional environments. For this reason, when enacting a national indigenous consultation law, these cases must be taken into account to establish parameters on who will be the authority in charge of carrying out the consultation procedures with indigenous communities.

In our opinion, if a national consultation law is to be enacted, it is essential that it respects the constitutional distribution of powers between the national government and the provinces. Section 75, subsection 17 of the National Constitution, after outlining the powers of the National Congress concerning indigenous peoples, explicitly states that "the provinces can concurrently exercise these powers." This means that these powers belong jointly to the federal state and the provinces.

Bidart Campos considers that the powers to regulate this provision of the National Constitution are concurrent between the federal state and the provinces, which facilitates different regulations that are adaptable to the special idiosyncrasies of indigenous communities depending on the place where they are settled.[65] In this sense, the provinces can concur in the legal development of the rights of indigenous peoples but they cannot ignore the federal constitutional framework, which is the minimum level of rights that must be recognized.[66]

Another issue that constitutes a challenge in the regulation of the right to consultation is the tendency to focus on its procedural aspects and not the substantive ones. According to Guerra Schleef and Sánchez Sandoval, the emphasis placed on conflict resolution has accentuated the functionality of indigenous participation rights in harmonizing conflicting interests. This has resulted in focusing attention exclusively on compliance with the procedural guarantees that govern these dialogue mechanisms, thus avoiding substantive discussions regarding the impacts that a certain measure may have for a people or community, or if the decision made respects the other rights guaranteed by Convention 169.[67] Rodríguez Garavito believes this replacement of substantive discussions by procedural debates is only partial and temporary, since substantive conflicts reappear in consultation proceedings,

65 G J Bidart Campos, *Manual de la Constitución Reformada* (Tomo III, Ed. Ediar, Buenos Aires).

66 Ministerio de Justicia y Derechos Humanos de la Nación, *Derecho de los Pueblos Indígenas en Argentina: una Compilación* (2015 Ciudad Autónoma de Buenos Aires) 15 <http://www.jus.gob.ar/media/3114381/derechos-de-los-pueblos-indigenas-121115.pdf> accessed 10 February 2023.

67 C A Rodriguez Garativo, *Etnicidad.gov: Los recursos naturales, los pueblos indígenas y el derecho a la consulta previa en los campos sociales minados* (Bogotá, Dejusticia, 2012) 23.

sometimes under the appearance of procedural issues. This mixture between substance and form generates constant mistakes and misunderstandings in the negotiations between companies, the State and indigenous peoples. Thus, according to this author, the communication facilitated by the procedural rules gives rise to frequent misunderstandings and even extended periods of isolation between the parties. However, Rodríguez Garavito adds that the procedural requirements of the consultation are, many times, the only effective mechanisms to slow down the unbridled pace of extractive economic projects and to question the state decisions that support them.[68] He even points out that procedural rules generate valuable spaces and tools for founding or re-founding processes of collective mobilization.[69]

We believe that for future legislation to be consistent with a conception of deliberative democracy, it is essential to consider in its formulation that the right to consultation is not the same as the right to participation, since the right to consultation is a "qualified participation", whose purpose is to open a stage of intercultural dialogue to build agreements.[70]

At this time, we can analyze the characteristics of this dialogue from the perspective proposed by Rodríguez Garavito, who contemplates the rise and incidence of prior, free and informed consultation in conflicts over indigenous rights as a new approach to ethnic rights and multiculturalism that contains a distinctive language and rules.[71] For the author, the global diffusion of prior consultation and its appeal to such different actors lies in the fact that the aforementioned emphasis on procedural issues offers a lingua franca that connects radically different visions of economic development and the good life, which allows at least a provisional conversation between said positions. The question of provisionality should not be overlooked, for although the procedural aspect mitigates the substantive differences between the parties, it does not eliminate them.[72]

Regarding deliberation, it is also important to consider the epistemic function of the right to consultation that Guerra Schleef and Sánchez Sandoval maintain. These authors posit that the indigenous consultation is constituted as a procedural device whose purpose is to remedy (up to a certain point) a particular type of "epistemic injustice" that occurs when certain subjects

68 Ibid, 24.

69 Ibid, 72.

70 S Ramírez, 'Los derechos políticos de los pueblos indígenas. Comentario al fallo 'Comunidad Mapuche Catalán y Confederación Indígena Neuquina c/ Provincia del Neuquén s/ acción de inconstitucionalidad'' (2021, vol 2 n. 1) Revista Argentina de Teoría Jurídica, 51 <https://revistajuridica.utdt.edu/ojs/index.php/ratj/article/view/419/338> accessed 13 March 2023.

71 C A Rodriguez Garavito, *Etnicidad.gov: Los recursos naturales, los pueblos indígenas y el derecho a la consulta previa en los campos sociales minados* (Bogotá, Dejusticia, 2012) 15.

72 Ibid, 22.

or groups are excluded from participating as potential agents of knowledge in the practices of epistemic inquiry due to belonging to one or more marginalized social identities ("hermeneutic marginalization")[73]. They affirm that prior consultation, in addition to being an instrument for the prevention and resolution of conflicts, seeks to enable the collective participation of indigenous peoples from their specificity, as a tool for the protection of their collective rights in contexts of cultural diversity, which require special spaces for dialogue to make visible impacts that might not be transparent to the dominant culture.[74]

Silvina Ramírez emphasizes interculturality as a quality of dialogue and affirms that permanent mechanisms for "intercultural dialogue" must be generated to prevent the definition of what is valuable for indigenous peoples from being left to third parties. Otherwise, a "revised" paternalism is configured that leads to new forms of subordination and undermines the purposes of the right to consultation and prior, free and informed consent.[75] Likewise, the author highlights the importance of building intercultural institutions for the effective participation of indigenous peoples in government management decisions, through the enabling of adequate channels and spaces that create the conditions for intercultural dialogue.[76]

Finally, it should be noted in the field of deliberation that, among the premises suggested by Almut Schilling-Vacaflor and Riccarda Flemmer for conflict resolution based on the study of the Peruvian case, we can identify the creation of impartial state institutions, the implementation of measures to counter power asymmetries and joint decision-making processes.[77] Perhaps these parameters can be taken so that dialogues can develop in greater conditions of equality.

In summary, we contend that the national law should be grounded in and respect the principle of concurrent powers. It ought to regulate the minimum essential aspects of the consultation process necessary to uphold the right,

73 F A Guerra Schleef and G A R Sánchez Sandoval, "La función epistémica del derecho de los pueblos indígenas a la consulta previa en Chile" (*Ius et Praxis*, vol.27 n.3, 2021) 28 <https://www.scielo.cl/scielo.php?pid=S0718-00122021000300024&script=sci_arttext&tlng=es#:~:text=De%20esta%20manera%2C%20la%20consulta,adopte%20se%20acomode%20a%20las> accessed 13 March 2023. These authors mention that the concept of epistemic injustice was first articulated by Miranda Fricker.

74 Ibid. 28.

75 S Ramírez, 'Los derechos políticos de los pueblos indígenas. Comentario al fallo 'Comunidad Mapuche Catalán y Confederación Indígena Neuquina c/ Provincia del Neuquén s/ acción de inconstitucionalidad'' (2021, vol 2 n. 1) Revista Argentina de Teoría Jurídica, 51 <https://revistajuridica.utdt.edu/ojs/index.php/ratj/article/view/419/338> accessed 13 March 2023.

76 Ibid.

77 A Schilling-Vacaflor and R Flemmer, 'Why is Prior Consultation Not Yet an Effective Tool for Conflict Resolution?: The Case of Peru', (German Institute for Global and Area Studies, 2013), 25 <http://www.jstor.com/stable/resrep07631> accessed 13 March 2023.

without prescribing exhaustive procedural details for its implementation. As previously discussed, given the impossibility of anticipating every particular situation for each Indigenous community across the country, the law must allow sufficient flexibility to accommodate these specificities on a case-by-case basis. Fundamentally, the legislation must comply with the international standards to which the country is bound, as well as reflect both national and international jurisprudential developments on the matter. Furthermore, it is imperative that the draft law be subjected to consultation with Indigenous communities nationwide prior to its enactment, thereby ensuring their meaningful participation in its negotiation and drafting, thus addressing the longstanding constitutional obligation owed to them.

Yet national law alone will not suffice; it is also necessary that the provinces, in accordance with their concurrent powers in the matter, enact laws that regulate this right. An advantage of this local regulation is that it would allow, by virtue of proximity, for the particularities of each of the existing indigenous communities in their territories to be considered. However, in line with the challenges raised above, there is a risk that provincial legislation turns out to be more restrictive than the existing international standards. In this sense, it would be interesting to reflect on the need for national regulation that establishes a minimum floor that the provinces cannot undermine.

VII. CONCLUSIONS

Not only are there numerous challenges in enacting legislation on the consultation of Indigenous peoples, but regional experience reveals that Indigenous communities often express reservations about regulating this right for three primary reasons: first, because regulations are frequently enacted without their meaningful participation in the drafting process; second, because such regulations tend to fall below established international standards; and third, because they impose requirements that are ill-suited to the diverse realities of each Indigenous community.

The National Constitution assigns the National Congress the responsibility to ensure the participation of Indigenous peoples in the management of their natural resources and other interests that affect them. However, despite various legislative initiatives, Congress has yet to fulfill this constitutional mandate. Nearly thirty years after the constitutional reform and twenty-three years following the ratification of ILO Convention 169—which established initial parameters for consultation procedures—and despite subsequent advances in international instruments and judicial rulings, the State at all levels has had numerous opportunities to implement existing international standards when adopting measures impacting Indigenous peoples, yet many of these efforts have been unsatisfactory.

In Argentina, the absence of comprehensive regulation, at both the national and provincial levels, underscores the contentious nature of reaching consensus on this issue, despite the multitude of legislative proposals aimed at regulating this right. This context reveals an urgent need for a broad, inclusive national debate involving all relevant stakeholders—most importantly, the Indigenous communities themselves—to establish an effective regulatory framework for the right to consultation.

In this debate, the balance between the dialoguing parties must be guaranteed in order to overcome the material inequalities in decision-making power, which, according to James Anaya, refer to the great differences in technical and financial capacity, access to information and political influence.[78] This dialogue must recognize indigenous peoples as agents of their own, valid knowledge, as Guerra Schleef and Sánchez Sándoval well point out[79]. Only through this approach can regulations be crafted that facilitate the planning, execution, and development of extractive activities in a manner that benefits all parties involved while respecting Indigenous rights and participation standards enshrined at both the international and constitutional levels.

It is essential to have a national regulatory-institutional framework that regulates the right to consultation of indigenous peoples before all legislative and administrative measures that directly affect them in order not only to comply with constitutional and international precepts, but also to improve the political, economic, and productive model that allows the participation of the affected communities and where consensus is reached between conflicting interests.

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