



International
Labour
Organization

Consultations with indigenous peoples on constitutional recognition

The Chilean experience (2016–17)



Gender,
Equality
and Diversity
& ILOAIDS
Branch

Consultations with indigenous peoples on constitutional recognition:

The Chilean experience (2016-17)

Gender, Equality and Diversity Branch

International Labour Office - Geneva

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Preface

In November 2015, the Governing Body of the International Labour Office approved the strategy for ILO action concerning indigenous and tribal peoples. The strategy refers to improving the application of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), in the following terms:

“Promoting institutionalized dialogue between indigenous and tribal peoples and state institutions, as well as capacity building for ILO constituents and indigenous and tribal peoples’ organizations for establishing and strengthening procedures for consultation and participation regarding key public policy areas will be a strategic focus of ILO action. This would include mapping and assessing existing practices and challenges regarding such mechanisms and promoting dialogue, involving ILO constituents and indigenous and tribal peoples, in order to seek solutions for overcoming related difficulties, in line with ILO standards. Particular attention will be given to ensuring active involvement of indigenous women and youth in consultation and participation processes.”¹

For this purpose, the Office is endeavouring to document experience of consultation and participation for consideration by governments, employers’ and workers’ organizations and the organizations of the indigenous peoples concerned.

The present study describes the indigenous consultation process carried out by the Government in Chile between May 2016 and November 2017. The study was prepared by Antonia Rivas, with the assistance of Constanza Tizzoni, under the supervision of Martin Oelz, Senior Specialist in the Gender, Equality and Diversity Branch. Technical inputs were also provided by Hernan Coronado, Technical Officer (Indigenous Peoples) at the ILO Sub-regional Office for Central America.

For ease of reference, the second section of the 2013 publication, *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for ILO tripartite constituents*,² which contains guidance on the provisions of the Convention relating to consultation and participation, is reproduced in Annex 1.

Shauna Olney
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¹ GB.325/POL/2, 7 October 2015: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_412809.pdf

² http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_205225.pdf



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1. The indigenous constituent process: Background

The purpose of the present case study is to describe the process of indigenous consultation carried out by the Government of Chile between May 2016 and November 2017 on the measures to be included in the preliminary draft of a new Political Constitution of the Republic of Chile.¹ This process, carried out within the framework of the right to consultation as set out in the Indigenous and Tribal Peoples Convention, 1989 (No. 169), of the International Labour Organization (ILO), was a milestone in the country, as the indigenous peoples had never been consulted in a process of this type. In April 2016, the President of the Republic announced the start of the constituent process, which consisted of two stages: a process of participation and a consultation stage.

The first stage was designed as a participation process for all citizens, and included a special mechanism for the participation of indigenous peoples. Over 17,000 representatives of the nine indigenous peoples in Chile participated during this stage, when they discussed in various ways the subjects that they believed should be covered by the new Constitution. A total of 605 meetings were held between the months of August and December 2016.²

The second stage, known as the indigenous consultation, was held during the second half of 2017 with the objective of reaching agreement through a process referred to by the Government as “incremental dialogue” on the content relating to the rights of indigenous peoples to be included in the proposed text of the new Constitution. This process led up to a week-long National Meeting, which resulted in important agreements and certain areas of disagreement concerning the content relating to the constitutional recognition and the rights of indigenous peoples which should be included in the preliminary draft of the new Constitution of Chile. On 8 March 2018, a draft constitutional reform was submitted by the Government in Message No. 407-365.³

Various institutions participated in the process and fulfilled important roles in the consultation, as reported in the present study. They included: the Government of Chile, through an inter-ministerial committee established for that purpose; indigenous peoples; the National Council of the National Indigenous Development Corporation (CONADI); various universities, the National Human Rights Institute (INDH); and the United Nations system, through an advisory and follow-up council.

¹ <http://www.constituyenteindigena.cl/>

² *Sistematización del proceso participativo constituyente indígena* (“Organization of the indigenous participatory constituent process”), University of Chile, May 2017, Santiago de Chile.

³ Bulletin No. 11,617-07, Draft constitutional reform, initiated by the message of H.E. the President of the Republic, to amend the Political Constitution of the Republic. <http://www.senado.cl/appsenado/templates/tramitacion/index.php>

It should be emphasized in this introduction that the process of participation and consultation that was undertaken was based on the content of the two specific international instruments on indigenous matters, namely ILO Convention No. 169, a binding international legal instrument, and the United Nations Declaration on the Rights of Indigenous Peoples. Both the Government and the representatives of indigenous peoples modelled their proposals and negotiating positions taking these instruments as a basis.

It is important to note that the process of indigenous consultation was held within the framework of a more general process convened by the President of the Republic to draw up a new Constitution. The Political Constitution of the Republic of Chile, which has been in force since 1980, when it was imposed by the military dictatorship, continues to be the subject of much criticism by broad sectors of the population despite the numerous reforms that have been made, both on the grounds of its undemocratic origin and its content.



2. Purpose and methodology of the study

The main purpose of this case study is to inform readers who are not familiar with the Chilean context of this process of indigenous consultation. In this regard, reference is first made briefly to the indigenous peoples which have been living in Chile since time immemorial, their relations with the State and their main demands. The study then describes the demand for constitutional recognition of the rights of indigenous peoples and the main landmarks over recent decades. A description is then provided of the stages and methods used in the process of the indigenous constituent consultation. The following section reviews the roles played in the process by the different participants, both indigenous and institutional, their assessment, views and comments. The study concludes with a section summarizing the difficulties, challenges and achievements, as assessed by the participants in the process, and the lessons learnt which may be relevant for future indigenous consultation processes.

In preparing for this study, all the official documents issued during the process of indigenous constituent consultation were reviewed, and particularly the two reports on the organization of the participation and consultation processes prepared by a team from the Department of Social Sciences of the University of Chile. In addition, 33 interviews were conducted with indigenous representatives (18), institutional actors (6), members of the National Council of the CONADI (2), members of the United Nations organizations which participated in the process (4) and representatives of some of the universities (3) that played a role in the participation and consultation processes.



3. Indigenous peoples in Chile

Nine indigenous peoples have lived in the north and south of Chile since time immemorial: the Aymara, Atacameño, Quechua, Diaguita, Kolla, Rapa Nui, Mapuche, Kawéskar and Yagán. The latest data available are from the 2017 census,⁴ according to which 2,185,792 people consider that they belong to an indigenous or native people, or 12.8 per cent of the total population of Chile. The Mapuche people is the most numerous, accounting for 79.8 per cent of the total, followed by the Aymara people with 7.2 per cent, the Diaguita people with 4.1 per cent, the Atacameño or Likan Antai people with 1.4 per cent, the Quechua people with 1.6 per cent, the Kolla people with 0.9 per cent, the Rapa Nui people with 0.4 per cent, the Kawéskar people with 0.1 per cent and the Yagán people, also with 0.1 per cent.

It should be emphasized that there has been a progressive increase in recent years in the number of persons identifying themselves as indigenous. Although this increase may be due to a methodological change in the manner in which the population is measured,⁵ it may also be related to the public policies that have been implemented in the country since the 1990s, which would explain why more people are declaring that they are indigenous, thereby overcoming the fear of exclusion and discrimination.

Nevertheless, the Casen survey⁶ of 2015 on the national socio-economic characteristics of the population shows a situation of significant disadvantage in such important areas as income, employment, health and education in comparison with the non-indigenous population, which has been present for a long time.⁷ By way of illustration, in relation to the percentage of persons in a situation of “poverty”, measured as a function of income, although there is a general trend for this to decrease, poverty among indigenous persons is almost double that of non-indigenous persons. The Casen survey also showed that there has been a change in the geographical distribution of persons reporting that they belong to an indigenous people, with an increasing relocation to urban areas. Accordingly, 75.3 per cent of those belonging to native peoples live in urban areas, and nearly one-third of them (30 per cent) are in the Metropolitan Region, where the national capital is located.

⁴ According to the results of the 2017 census: <http://www.censo2017.cl/>

⁵ Schkolink, Susana, and del Popolo, Fabiana, 2005: *Los censos y los pueblos indígenas en América Latina: Una metodología regional*, Notas de Población No. 79, ECLAC; Figueroa, Verónica, 2012: “La realidad de los Pueblos Indígenas en Chile: Una aproximación sociodemográfica para contribuir al diseño de políticas públicas pertinentes”, in *Revista Anales*, 7th Series, No. 3, July 2012; Valdés, Marcos, 2016, *Tres décadas de cuantificación de la población indígena en Chile a través de los censos*, Notas de Población, ECLAC, pp. 207-225.

⁶ http://observatorio.ministeriodesarrollosocial.gob.cl/casen-multidimensional/casen/docs/CASEN_2015_Resultados_pueblos_indigenas.pdf

⁷ Agostini, Claudio, A., Brown, Philip, and Roman, Andrei, 2010: “Estimando indigencia y pobreza indígena regional con datos censales y encuestas de hogares”, in *Cuadernos de Economía (Latin American Journal of Economics)*, 47, pp. 125-150.



4. Historical relations of indigenous peoples with the State of Chile

Until 1990, the situation of indigenous peoples in Chile was very complex and they experienced a situation of exclusion and discrimination in relation to the rest of the population. This historical situation had its origins in the processes of expansion and territorial occupation undertaken by the State of Chile from the middle of the 19th century to the beginning of the 20th century, which stripped indigenous peoples of their lands and confined them to small areas.⁸ This provided the general framework for the relations between contemporary national society and indigenous peoples.⁹ In general terms, until 1990, these processes of reduction or reservation were the centrepiece of relations between indigenous peoples and the State. These processes, which varied in form depending on the indigenous people and geographical area, had similar results in terms of the loss of the lands of the indigenous peoples. In the north of the country, what was known as the “Chileanization of the North”¹⁰ deprived indigenous peoples of their lands and natural resources, which were taken over by State enterprises. In the centre and south of the country, the process that was known as the “Pacification of the Araucanía”¹¹ also implied a significant loss of the collective lands of the Mapuche people, which in this case passed into private hands.¹²

In this way, the indigenous peoples grew poorer and remained outside the national discourse, which largely referred to them only in relation to their historical role as the original inhabitants of the country. In the 1980s, following a drastic change in the national economic model under the influence of the military government of the time, important State enterprises were privatized and legislation adopted which had far-reaching effects on the indigenous population, including the privatization and creation of a market for water, the Act on mining concessions and Legislative Decree No. 701 on forest development. These measures created incentives for the concentration of private property and established an economic system based primarily on the exploitation of the natural resources of the country.

Following the end of the military dictatorship, and as a result of the work undertaken by various indigenous organizations, the demands of indigenous peoples were included in the government programme of the Coalition of Parties for Democracy. The Presidential candidate

⁸ Boccara, Guillaume. and Seguel-Boccara, Ingrid, 1999: “Políticas indígenas en Chile (siglos XIX y XX) de la asimilación al pluralismo (el caso Mapuche)”, in *Revista de Indias*, LIX(217), pp. 741-774; Boccara, Guillaume, 2009: *Los vencedores: Historia del pueblo Mapuche en la época colonial*, 2nd edition, San Pedro de Atacama, IIAM (Instituto de Investigaciones Arqueológicas y Museo), Universidad Católica del Norte, Ocho Libros.

⁹ Foerster, Rolf, 2008: “Del pacto colonial al pacto republicano”, in *Revista TEFROS*, 6(1), online review.

¹⁰ Aylwin, José (coord.), Yáñez, Nancy and Meza-Lopehandía, Matias, 2013: *Los pueblos indígenas y el derecho*, Santiago, Lom-Observatorio Ciudadano.

¹¹ Bengoa, José, 2000: *La emergencia indígena en América Latina*, Santiago, Fondo de Cultura Económica.

¹² Correa, Martín, and Mella, Eduardo, 2010: *Las razones del illkun/enojo: Memoria, despojo y criminalización en el territorio Mapuche de Malleco*, Santiago, Lom Ediciones and Observatorio de Derechos de los Pueblos Indígenas.

of the Coalition, Patricio Aylwin, signed the Pact of Nueva Imperial with indigenous representatives on 1 December 1989, in which the following commitments were included: the constitutional recognition of indigenous peoples; the establishment of a National Indigenous Development Corporation and an ethnic development fund; the adoption of an indigenous Act and the ratification of ILO Convention No. 169.

Indigenous matters in Chile have currently taken on greater relevance, both in view of the growing mobilization and demands of indigenous movements themselves, as well as the action taken by governments over the past two decades in this area, promoting the creation of a new institutional framework for relations between the State and indigenous peoples. It should be noted that draft legislation is currently being examined for the establishment of a Ministry of Indigenous Affairs and a National Council of Indigenous Peoples.

The road towards the recognition of the rights of indigenous peoples has not been without controversy. Over recent decades, the Government of Chile has taken important measures to regulate and address the demands of indigenous peoples, although indigenous peoples' representatives often consider that the measures taken are not yet sufficient. Accordingly, despite the public policies implemented over recent years to give effect to the Indigenous Act of 1993 (Act No. 19,253) and the ratification in 2008 of ILO Convention No. 169, relations between the State and indigenous peoples in general, and with the Mapuche in particular, have been characterized by conflicts and controversies of various types. Of the commitments set out in the Pact of Nueva Imperial, referred to above, the recognition of indigenous rights at the constitutional level is still pending. Moreover, the institutional framework which led to the adoption of the Indigenous Act has remained practically unchanged since 1993.

Act No. 19,253 of 1993 recognizes a series of rights of indigenous peoples to their lands, languages and cultures, rights of participation and rights relating to development. It also established the National Indigenous Development Corporation (CONADI), which is still responsible for the implementation and operationalization of these policies.

The ratification of ILO Convention No. 169 was the result of the strong demand by indigenous peoples and a long parliamentary debate lasting over 15 years. In January 1991, the first draft text was submitted to the National Congress for the ratification of Convention No. 169 with a view to giving effect to the commitments made previously to indigenous peoples in the Pact of Nueva Imperial. But it was only in October 2008, following a long legislative process, that the ratification of Convention No. 169 by Chile was approved so that it entered into force for the country in September 2009.

It should be noted that the parliamentary discussions were very intense, and included opinions on the Convention issued by the Constitutional Court on two occasions. The first concerned the Convention in relation to an appeal in 2000 for unconstitutionality¹³, the second, concerned the constitutionality control undertaken by the Court in 2008 after the approval of the Convention by Parliament.¹⁴

¹³ Case No. 309 2000, Constitutional Court of Chile.

¹⁴ Case No. 1050-08 2008, Constitutional Court of Chile.

It should also be noted that a growing number of cases concerning Convention No. 169 are brought to the courts, particularly in relation to prior consultation. Chilean courts have ruled on several occasions on the application of the right to consultation, mainly through the adoption of “protection measures” for indigenous persons and communities seeking the correct implementation of claims for prior consultation in relation to administrative decisions concerning development projects affecting their lands.¹⁵

¹⁵ Fuenzalida, Sergio, 2015: “Desarrollo de la jurisprudencia en Chile sobre la consulta indígena: Los casos del Tribunal Constitucional y la Corte Suprema”, in *Revue Québécoise de droit international*, special edition, 2015, pp. 149-177.



5. Legal framework applicable to consultation

Since the ratification of Convention No. 169 by Chile, there has been intense debate concerning its implementation, the conformity of the legislation and domestic policy with the requirements of the Convention and, in general terms, its significance for relations between the State and indigenous peoples. Since then, three Presidential Decrees have been issued (No. 124 of 2009, No. 40 of 2012 and No. 66 of 2013) which have endeavoured to regulate the exercise of the right to consultation in various areas, and particularly the consultation of indigenous peoples on measures likely to affect them directly, especially in the context of projects subject to environmental impact assessment procedures.

In 2011, a process of indigenous consultation was commenced which, following three years of discussions and significant difficulties with indigenous representatives, resulted in two regulations being issued to replace Decree No. 124. Two legislative texts are applicable in cases where consultation is required in any situation in which the rights of indigenous peoples are likely to be affected: Presidential Decree No. 66 of 2013 (DS No. 66), which regulates the procedure for indigenous consultation in the event of administrative or legislative measures which may affect indigenous peoples;¹⁶ and Presidential Decree No. 40 of 2012 (DS No. 40) issuing Regulations respecting the system for environmental impact assessment (“SEIA”).

DS No. 66 sets out the administrative measures that must be subject to consultation: “Administrative measures that are likely to affect indigenous peoples directly are those formal acts undertaken by bodies which are part of the administration of the State and which contain a declaration of will, the nature of which, if unregulated, would allow the exercise by those bodies of a margin of discretion which empowers them to reach agreements with or obtain the consent of indigenous peoples to their adoption (...)” (section 7).

With regard to legislative measures, DS No. 66 provides that “legislative measures likely to affect indigenous peoples directly are those preliminary draft bills and preliminary draft Constitutional reforms, initiated by the President of the Republic, or parts thereof, where they are the direct cause of a significant and specific impact on indigenous peoples as such, affecting the exercise of their ancestral traditions and customs, religious, cultural or spiritual practices, or their relationship with their indigenous lands” (section 7).

One important aspect of DS No. 66 that should be noted is that, following its entry into force, two systems of consultation have coexisted in Chile: the system envisaged for SEIA investment projects and the system of general consultation regulated by DS No. 66. Indeed,

¹⁶ Section 2 provides that: “Consultation shall be a duty for bodies of the administration of the State and a right of indigenous peoples likely to be affected directly by the adoption of legislative or administrative measures, and shall be conducted through an appropriate procedure, in good faith, with the objective of reaching agreement or securing consent for the measures likely to affect them directly and which shall be conducted in accordance with the principles set out in Title II of the present Regulation.”

DS No. 66, in section 8, provides that measures related to projects or activities covered by the SEIA shall not be governed by the Regulation on consultation. The Regulation excludes from its scope of application measures relating to projects or activities covered by the of indigenous consultation.

In order to determine whether consultations have to be held on a measure, the provisions in force establish an administrative procedure through which public bodies and the persons concerned may consult on the pertinence of engaging in a process of consultation with indigenous peoples. Public bodies have to consider the Ministry of Social Development as the competent public body for the determination of whether or not consultation is required, while the persons interested in the holding of consultations, or those who consider themselves affected, have to engage with the public body responsible for the adoption of the measure.

In addition, these provisions determine the form to be taken by consultations and set out how they are to be convened.¹⁷ Once the invitation has been sent out, a process of indigenous consultation has to be composed of five basic stages, as set out in section 16 of DS No. 66.

With regard to time limits, in accordance with DS No. 66, in the case of legislative measures to be adopted in accordance with a message of the President of the Republic, each of the stages must be completed within a period of not more than 25 working days. In the case of administrative measures, each of the stages must be carried out within a period of not more than 20 working days. Without prejudice to these time limits, the body responsible for the measure, through dialogue with the representative institutions of the indigenous peoples likely to be directly affected may, during the planning stage, modify the time limits for justified reasons, taking into consideration the need to establish flexible procedures adapted to the circumstances of each consultation exercise.

In the event that agreement is not reached during a consultation process, DS No. 66 provides that: “The body responsible shall make the necessary efforts to achieve agreement or obtain the consent of the peoples affected, in accordance with the principles of consultation through the procedure set out in the Regulation. Under these conditions, it shall be considered that the duty of consultation has been complied with, even where it is not possible to achieve that objective” (section 3).

¹⁷ “The process shall be commenced by inviting the indigenous peoples likely to be affected directly to the first meeting for the planning of the consultation process to be conducted by the responsible body, in accordance with the national, regional or local scope of the impact likely to result from the measure”. The representative institutions of indigenous peoples shall be convened (...) by means of two publications in a journal with a circulation covering the area in which the indigenous peoples likely to be affected directly reside. The meeting shall be held at least 15 days following the latest publication, and there shall be a period of no fewer than five days and no more than ten days between the first and second publication. (...) The communities and associations registered in accordance with Act No. 19,253 shall be convened by means of a registered letter sent to the address indicated in the corresponding register of the National Indigenous Development Corporation. *The invitation shall be made in Spanish and in a language that can be understood by the indigenous peoples directly affected, where necessary. (...) The invitation shall indicate the body responsible, the reason for the consultation and the day, time and place of the commencement of the planning stage, as well as a telephone number and electronic mail address through which questions can be raised concerning the process.*”

The stages of the consultation process, in accordance with Presidential Decree No. 66

Planning of the consultation process. During this stage, preliminary information on the measure subject to consultation with the indigenous peoples has to be provided, and a decision taken concerning those who will participate, their roles and functions; and the methodology defined jointly. This stage must include at least three meetings to achieve consensus on the procedures and mechanisms to be used.

Provision of information and dissemination of the consultation process. The objective of this stage is to provide all the background information on the measure subject to consultation in an appropriate manner and using methods adapted to the circumstances.

Internal deliberation by the indigenous peoples. The objective of this stage is for the indigenous peoples to analyse internally, examine and define their positions with regard to the measure.

Dialogue. The objective is to reach agreements through a process of the exchange of views and positions based on respect and genuine dialogue. All the possible dialogue mechanisms must be used within the period set out in the Regulation so that the possibilities of reaching agreement are exhausted. All agreements (and disagreements) must be set out in the report of the process so as to record the difficulties and progress achieved.

Organization, dissemination of the outcome and ending of the consultation process. The objective is to organize the consultation process through evaluation of the need for the process, the agreements reached and areas of disagreement, among other elements.

The “Indigenous Affairs Unit”, under the responsibility of the Sub-Secretariat for Social Services of the Ministry of Social Development, is the Government body that has the principal responsibility for ensuring that effect is given to Convention No. 169 in Chile. This Unit is the body specialized in matters related to Convention No. 169 and advises the various public bodies on the implementation of consultation processes and, where appropriate, in determining the necessity for such processes.



6. Constitutional recognition and indigenous peoples

Starting in the 1990s in Latin America, important legal and constitutional recognition processes commenced in response to what has been called the “indigenous appearance”¹⁸ in Latin America.¹⁹

All the countries that have ratified the Convention have introduced some measure of constitutional protection for indigenous peoples, whether inspired by the political debate or through jurisprudence. Although there are countries in which there is no explicit recognition of indigenous peoples in the Political Constitution (Peru, Honduras, Guatemala, Chile, Brazil), the situation has developed through the recognition of cultural diversity or the constitutional protection of ILO Convention No. 169 through their constitutional jurisprudence.²⁰

It should also be noted that no Chilean Constitution has recognized, or even envisaged the existence of indigenous peoples in Chile. Since 1990, eight draft constitutional reform projects have been put forward in Chile for the recognition of the rights of indigenous peoples, but none of them have ended up as law. Since the presentation of the first draft reform, there has been a transition from a discussion focussing on the protection of indigenous peoples towards an approach based on collective rights, including the right of political participation. Nevertheless, despite these multiple initiatives, no draft reform has progressed through the legislature. The subjects addressed by the draft reforms vary, but have a common denominator: the quest for the constitutional “recognition” of indigenous peoples. However, what differs between the proposals is the level of recognition.²¹

The latest draft reform was put forward by President Michelle Bachelet during her first period of office and was drawn up by the Ministry of the General Secretariat of the Office of the President. In a single article, it set out the following:

Introducing the following amendments to the Political Constitution of the Republic: (1) add the following fourth subparagraph to Article 3: “The Chilean nation is multicultural. The State recognizes the existence of the indigenous peoples which live on its territory and the right of indigenous peoples, communities and persons to conserve, develop and strengthen their identity, languages, institutions and social and cultural traditions”; and (2) add the following new tenth subparagraph to Article 19, No. 24, with the current subparagraph being numbered as the eleventh, with the following text: “In all respects, the law shall protect the lands and water rights of indigenous persons and communities.”²²

¹⁸ Bengoa, 2000, op. cit.

¹⁹ Aylwin, José, 2002: “El derecho de los pueblos indígenas a la tierra y al territorio en América Latina: Antecedentes históricos y tendencias actuales”, paper prepared for presentation at the Organization of American States.

²⁰ Working paper for the Regional Forum on the Implementation of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), *Compartiendo experiencias, construyendo alianzas y sosteniendo el progreso*, Lima, November 2017: http://www.ilo.org/americas/eventos-y-reuniones/WCMS_601466/lang-es/index.htm.

²¹ Nash, Claudio, and Núñez, Constanza, 2016: *Reforma constitucional y pueblos indígenas en Chile: Apuntes para el debate*.

²² Message No. 1101-355, “Draft constitutional reform for the recognition of indigenous peoples in Chile”, Santiago, 23 November 2007.

The draft reform, which was subject to many criticisms, did not proceed further through the necessary procedures, as a process of consultation with indigenous peoples was not carried out, as required by Article 6 of Convention No. 169 and by the domestic legislation in Chile.



7. The national constituent process: Citizens as the basis for a new Constitution

7.1. General process

Based on a context of the loss of legitimacy of the current Constitution and the demand by citizens for a new Fundamental Charter, the President of the Republic announced in October 2014 a schedule for initiating the constituent process, which she has been moving forward over the last two years of her mandate. It would consist of a “participatory, legitimate and institutional” process²³ to draw up a new Political Constitution.

Three levels of participation (local, provincial and regional) were envisaged throughout the country, based on the following procedures: first, between 23 April and 6 August 2016, “individual consultations” were undertaken through the Internet and local self-convened meetings were held between 23 April and 28 June; and, second, “provincial meetings” were held, followed by regional meetings on 6 August.

According to the report on the organization of the participatory stage of the constituent process open to citizens, prepared by the Organizing Committee (2017),²⁴ there were 90,804 individual consultations, of which 42.6 per cent were with women (38,699) and 57.4 per cent (52,105) with men. There were a total of 105,161 participants in the local self-convened meetings, of whom 46 per cent were men (48,348) and 54 per cent women (56,813). The Provincial Meetings subsequently included 656 working meetings, with the participation of 12,852 persons, of whom 54 per cent were men and 46 per cent women. Finally, 15 Regional Meetings were held, with the participation of 8,621 persons, organized in 491 working groups, of whom 54 per cent were men and 46 per cent women. The process as a whole brought together 218,689 persons, of whom 48.5 per cent were women and 51.5 per cent men.

Based on a methodology known as “convergent deliberation”, spaces for dialogue were created in which the participants reached collaborative conclusions, resulting in agreements based on their diverse views of the Constitution, and also recording their areas of partial agreement and disagreement. Among the subjects discussed, emphasis may be placed on democracy, equality, decentralization, justice, respect for/conservation of nature and the environment, and common well-being/community.²⁵

²³ *La Tercera*, “Cronología del proceso constituyente impulsado por Bachelet”, 13 October 2015.

²⁴ Organization of the indigenous participatory constituent process, University of Chile, May 2017, Santiago de Chile.

²⁵ *Ibid.*

7.2. The indigenous participatory process

In parallel, on 13 May 2016, the Government set in motion a “participatory constituent process for indigenous peoples” to supplement the general constituent process. As indicated by the then Minister of Social Development: “Indigenous citizens can participate in the general process in which all Chilean men and women are convened, as they are not exclusive processes, but are complementary in the case of indigenous peoples.”²⁶

The objective of the process was for the members of the nine indigenous peoples recognized by Act No. 19,253, namely the Aymara, Quechua, Atacameño or Lican Antai, Diaguita, Kolla, Rapa Nui, Mapuche, Kawéskar and Yagán, to discuss the constitutional recognition of their individual and collective rights.

Observation of the process was left in the hands of a Follow-up Council, composed of various United Nations bodies, including UNDP, the ILO and the High Commissioner for Human Rights. The National Human Rights Institute also participated as an observer.

This distinct and specific process was undertaken at the national level during the period between August 2016 and January 2017, using the following participatory mechanisms:

Planned convened meetings	- this procedure was used for the “traditional organizations (communities and associations) and authorities” of indigenous peoples.
	- the participatory process was carried out through the direct holding of “meetings” organized by a Regional Committee and implemented by universities in a concerted manner.
	- the universities took on the role of organizers of the process, organizing the “meetings” as planned and programmed by the Regional Committee.
Self-convened gatherings to hold their own meetings	- the self-convened meetings were for cases in which organizations and/or groups indicated their intention of participating in the process and holding their own participatory meeting.
	- in these cases, the “organization and/or group” was directly responsible for convening, managing and organizing the meeting and for preparing the report on the subjects covered in a predesigned format.
	- the organizations and/or groups registered through the webpage could participate in this manner.
Individual participation through the questionnaire	- individuals could participate through an on-line questionnaire (the webpage) at their own initiative.

²⁶ *La Tercera*, “Se inicia proceso participativo constituyente para pueblos indígenas”, 13 May 2016.

As indicated in the report “Organization of the indigenous participatory constituent process”, the meetings that were convened were organized by the Regional Ministerial Secretariats (SEREMI) of the Ministry of Social Development, with the support of various universities in the different regions (Arturo Prat University, Alberto Hurtado University, Del Maule Catholic University, Bío-Bío University, La Frontera University, Los Lagos University, Magallanes University) and a service provider in the case of the Valparaíso region. The role of these organizations was to provide support for the convening and organization of the meetings and in drawing up the records (University of Chile, 2017). Self-convened meetings were organized by their participants, with the assistance of an intercultural facilitator for their coordination and the preparation of the record.

Throughout the 15 regions of the country, participation consisted of 17,016 persons belonging to the nine recognized indigenous peoples in their capacity as members of traditional authorities, representative institutions (communities, associations and other organizations) groups and indigenous individuals. Of this total, 538 persons participated as individuals, representing 3 per cent of national participants, 5,354 participated through convened meetings, representing 32 per cent, and 11,124 participated in self-convened meetings, representing 65 per cent of the total.

7.3. Individual participation through a web-based questionnaire

A total of 538 persons participated individually, of whom 85.1 per cent indicated that they were from the Mapuche people, followed by 4.1 per cent from the Aymara and then 3.2 per cent from the Diaguita.²⁷

Based on the responses to the questionnaire, the subjects most frequently raised were: the demand for land/territory, the demand for constitutional recognition, pluriculturalism, self-determination/autonomy, the demand for natural resources, as well as the political participation of indigenous peoples.

7.4. Convened and self-convened indigenous meetings

At the national level, a total of 255 meetings were held in the form of convened meetings, with the participation of 5,354 persons. Some 350 meetings took the form of self-convened meetings, with a total of 11,124 participants. The total number of participants was 16,478 in both forms of meeting combined, 52.5 per cent of whom were women and 37.1 per cent men, with no indication of gender for 10.3 per cent of them.²⁸

In terms of regional variations, of the total number of participants in meetings at the national level, both convened and self-convened, the Araucanía region stands out as accounting for 32.8 per cent of all participants at the national level. This was followed by the Los Lagos region (13.7 per cent) and, finally, the Bío-Bío region (11.8 per cent). It should be emphasized that these regions have a high incidence of the Mapuche population, which is the majority indigenous people in the country.

²⁷ Organization of the indigenous participatory constituent process, University of Chile, May 2017, Santiago de Chile.

²⁸ Ibid.

Based on the methodology of “convergent deliberation”, referred to above, the following subjects were discussed at each meeting: constitutional recognition; the plurinational State; self-determination; the right to land, territory and natural resources; and political, cultural, linguistic and social rights.

On 4 May 2017, President Michelle Bachelet took delivery of the report on the organization of the indigenous participatory constituent process, on which occasion she said that: “We are talking about 605 meetings held between the months of August and December last year. Of those, 255 were meetings convened by the Ministry of Social Development, 350 were self-convened meetings and another 538 persons participated through the Internet.”²⁹

Among the results of the process, emphasis may be placed on the general views of participants from indigenous peoples concerning constitutional recognition and the plurinational State, the rights to freedom of determination and autonomy, the right to land, territory and natural resources, special indigenous representation rights, and linguistic and social rights. In addition, there was a demand for a series of specific rights in relation to culture, languages, land and the manner in which their natural resources are used. In this regard, President Bachelet indicated: “The most relevant proposals put forward in these reports will be taken into consideration in the draft text of the new Constitution, which will be sent to Congress. The provisions respecting constitutional recognition and other specific matters relating to indigenous peoples will naturally be submitted for indigenous consultation.”³⁰

The Minister of Social Development, Marcos Barraza, emphasized that “since the Pact of Nueva Imperial of 1990, the Indigenous Act of 1993 and the ratification of ILO Convention No. 169 by Chile, this participatory process for the new Constitution is in itself the most important political event in relation to the economic, social, cultural and political rights of indigenous peoples.”³¹

This process was distinct from the general constituent process, in light of the recognition of the rights of indigenous peoples in the legislation. As a result of the participatory process and the claims made by indigenous peoples, on 1 June 2017, the President of the Republic announced in her speech that constitutional recognition and indigenous political participation would be included in the draft text of the new Constitution to be issued in the second half of the year, following indigenous consultation.

²⁹ Ministry of Social Development, *El Proceso Constituyente Indígena recogió por primera vez la opinión de los nueve pueblos en la elaboración de la nueva Constitución*, 4 May 2017.

³⁰ *La Tercera*, “El deseo de mayor reconocimiento marca el Proceso Constituyente Indígena”, 4 May 2017.

³¹ Ministry of Social Development, 2017, *op. cit.*



8. The indigenous constituent consultation

During the second half of 2017, a process of indigenous consultation was commenced at the national level with the nine indigenous peoples recognized by the law to discuss and hold consultations on the content respecting indigenous rights that would be included in the proposed text of the new Constitution. The subjects addressed in the consultation related to: constitutional recognition, implying the recognition of indigenous peoples in the Constitution; recognition of their territory, linguistic and cultural rights; and political participation, involving recognition of their participation and political representation in bodies elected by the people.³²

The consultation stage of the indigenous constituent process involved local and regional meetings and a national meeting. The regional meetings included the organization of 18 meetings in the 15 regions of the country, held between 1 and 14 October in various urban and rural areas, including Easter Island, with a total of 619 registered participants.

At the request of the representatives of the peoples on the National Council of the CONADI, as well as the State, with a view to achieving the conditions necessary for a productive dialogue for both parties, the United Nations system participated in the process as guarantor and observer through its agencies and programmes, under the terms of a Memorandum of Understanding (MoU). The National Human Rights Institute (INDH) was also an observer. Finally, an agreement was concluded with some of the councillors of the CONADI for their participation in the process.

Those attending the national meeting were chosen in their regions at the conclusion of the regional processes conducted during October 2017. This resulted in a total of 144 representatives participating from the 15 regions of the country. It should be emphasized that a procedure was established for the election of indigenous delegates that was proportional to the number of persons identifying themselves as belonging to each people. For that reason, the Mapuche people, which accounts for 80 per cent of the indigenous population in the country, had the majority of the delegates.

The national meeting, held from 16 to 21 October 2017, first in the meeting room of the United Nations Food and Agriculture Organization (FAO), then in a hotel in the centre of Santiago, and finally once again in the meeting room of the FAO, was inaugurated at a ceremony which included speeches outlining the claims of the Mapuche, Lican Antai and Aymara peoples, and interventions by the President of the Republic, Michelle Bachelet, and the United Nations Resident Coordinator, who emphasized the historic nature of the dialogue.

With a view to gathering together as many observations as possible, and taking into consideration the specific characteristics of each people, this stage of the national dialogue of the

³² Organization of the indigenous participatory constituent process, University of Chile, May 2017, Santiago de Chile.

indigenous consultation process opened with the establishment of working groups, differentiated by indigenous peoples was, taking into consideration also a territorial criterion, as in the Southern region of the country.³³ During this first stage, the indigenous participants worked on the basis of the Government's first proposal and the national plan prepared by the team from the University of Chile.

During this process of proposal/counter-proposal, the indigenous peoples held moments of internal discussion and deliberation, without the presence of the State, which were moderated by the United Nations team. It is important to emphasize that throughout the meeting there were moments of tension during the negotiations, when some groups asked for more time, better physical conditions for holding meetings, greater openness from the Government, and during which historical mistrust emerged, as well as disagreements between and within indigenous peoples.

Accordingly, "on the last day of the dialogue they asked for the process not to be closed at that time, seeking two additional weeks to pass on the information to their communities and discuss the points on which agreement had not been reached, with a view to then having another period of dialogue with the Government. The Government made a counter-proposal to sign a report containing the agreements reached and to wait to receive comments and observations until Monday 30 October 2017. The Government also proposed that a dialogue meeting should be held on Friday 3 November 2017 on the areas on which there was no consensus (partial agreements and disagreement) and to follow-up on the agreements reached."³⁴ That meeting was held on the date envisaged.

After five days of work, during which the predominant methodology consisted of analysing proposals by the State and counterproposals by the peoples, some of the representatives signed the "Report on the outcomes of the national dialogue of the consultation process for the constitutional recognition of the rights of indigenous peoples" in the small hours of the morning in the presence of the Minister of Social Development, Marcos Barraza. The wording of the outcome was approved by the representatives who were present at that time: the Aymara (from the region of Arica y Parinacota and the region of Tarapacá), Lican Antai, Kolla, Diaguita, Quechua (from the region of Antofagasta), Williche de Chiloé, Williche de Magallanes (Southern region), Mapuche-Williche de Osorno, Mapuche-Williche de Aysén and Mapuche peoples. Other participants decided not to sign the record of the outcome and not to participate in the meeting. Another group of indigenous participants was not present at that time, including the representatives of the Quechua, Yagán and Kawéskar peoples.

The outcome included full agreement on: recognition of the pre-existence of the peoples; the duty of the State to preserve, strengthen and develop their history, identity, culture, languages, institutions, traditions and ancestral authorities; the duty of the State to promote the cultural diversity of the country; recognition and protection of cultural and linguistic rights, and their cultural, material and immaterial heritage; and the principle of equality and non-discrimination. There was partial agreement, that is agreement on the substance, but disagreement on the wording, in relation to: the interpretation of the Constitution; the per-

³³ Ibid.

³⁴ Ibid.

centage of political representation and participation; the right to health; and consultation and self-determination. The only point on which there was disagreement during the discussions was on the concept of indigenous territory.

It should be emphasized that the most complex points which gave rise to substantive disagreement during the five days of discussions in the national meeting concerned: the State of Chile being of a plurinational nature; territories; and recognition of the right to self-determination of indigenous peoples. Another relevant issue which should be borne very much in mind is the importance at all times of ILO Convention No. 169 as a regulatory framework for the consultations and an aspiration for the indigenous peoples of a model to be implemented and followed to assert their rights.

Another important point was the methodological innovation during the consultations, with a process emerging that was not confined to the strict terms of DS No. 66 of the Ministry of Social Development on indigenous consultation, as consultation and participation were considered to be a continuous process, and not separate processes, with more time being granted than the period set out in the Presidential Decree.

Outcome of the National Meeting of the Indigenous Consultation:

Agreements, partial agreements and disagreements

Agreement – Recognition of the pre-existence of the indigenous peoples that inhabit the territory: that the State recognizes the pre-existence of the indigenous peoples that inhabit the territory. It also recognizes that the indigenous peoples are the descendants of the peoples which inhabited the national territory from ancestral and/or pre-Colombian times, that they conserve their culture and that for them the land and territory is the principal foundation of their existence and culture. Clarification 1: This definition includes all the indigenous peoples who inhabit the territory. Clarification 2: The indigenous peoples which sign this record self-identify as native nations.

Agreement – Recognition of the right of the indigenous peoples to conserve, strengthen and develop their own history, identity, culture, languages, institutions and traditions: that the Constitution recognizes the right of indigenous peoples to conserve, strengthen and develop their history, identity, culture, languages, institutions, their own traditions and their ancestral authorities. The duty of the State to take measures to permit the exercise of the right of the indigenous peoples to conserve, strengthen and develop their history, identity, culture, languages, their own institutions and ancestral authorities, and providing for that purpose, where necessary, interpretation services and other appropriate means. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. That includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, objects, ceremonies, technologies, visual, interpretive and literary arts. The indigenous peoples have the right to revitalize, use, promote and transmit to future generations their history, languages, oral traditions, philosophies, systems of writing and literature, and to give names to their communities, places and persons, and to maintain them.

Agreement – Duty of the State to preserve the cultural diversity of the country. The Constitution shall set out the duty of the State to preserve the cultural and linguistic diversity of the indigenous peoples with a view to preserving their cultures, traditions, languages and in general any of their own manifestations of their cosmo-vision.

Partial agreement – Interpretation of the new Constitution. The interpretation of the new Constitution shall be in conformity with the rights, duties and obligations that the Constitution itself and the law establish for indigenous peoples, in accordance or conformity with international treaties.

Partial agreement – Self-determination. The indigenous peoples shall have the right to freedom of self-determination. By virtue of this right, they shall determine freely their political condition and pursue freely their economic, social and cultural development. The right of self-determination of the indigenous peoples shall be exercised within the framework of the Constitution. Implementation measures: the indigenous peoples, in the exercise of their right to freedom of determination, shall have the right to autonomy or self-government in respect of issues relating to their internal and local affairs, and to have the means to finance their autonomous functions. The indigenous peoples have the right to conserve and reinforce their own political, legal, economic, social and cultural institutions, while maintaining their right to participate fully, if they so wish, in the political, economic, social and cultural life of the State.

Agreement – Principle of equality and non-discrimination. Indigenous peoples and persons are free and equal to all other peoples and persons, and have the right not to be subject to any type of discrimination in the exercise of their rights, particularly based on their indigenous origin or identity.

Disagreement – Indigenous territory. That the Constitution shall recognize for the indigenous peoples the existence of indigenous territories. A law shall set out the criteria and procedures necessary for the establishment and demarcation of indigenous territories where appropriate, the bodies and mechanisms through which they shall be administered, the procedures and forms through which the indigenous peoples shall enjoy the full exercise and benefit of the rights that will be in force in these territories, including access to land and to natural resources, in accordance with the national legal framework.

Agreements – Recognition and protection of the cultural and linguistic rights of the indigenous peoples, their cultural, material and immaterial heritage.

Indigenous peoples have the right to revitalize, use, promote and transmit to future generations their histories, languages, oral traditions, philosophies, systems of writing and literature, and to give names to their communities, places and persons, and to maintain them.

Duty of the State to preserve and promote the development of the traditional knowledge and cultural practices of the indigenous peoples respecting their autonomy and fundamental rights, on condition that they are not incompatible with the fundamental rights recognized in the new Constitution.

Recognition of the emblems and symbols of the indigenous peoples, in accordance with their own cosmo-vision.

Recognition of the languages of the indigenous peoples as official in the territories where they live.

Recognition of the education systems of the indigenous peoples, in accordance with the general system of education. Indigenous persons, and particularly boys and girls, have the right to all levels and forms of State education without discrimination.

Partial agreement – Right to health. Within the framework of the right to health, the Constitution recognizes intercultural health, as well as traditional medicine and health, in accordance with the health system. Indigenous persons shall also have the right to enjoy the highest possible level of physical and mental health. The State shall take the necessary measures to progressively give full effect to this right.

Partial agreement – Representation and political participation. The indigenous peoples have the right to participate fully in the political life of the State in all collegial bodies. The Constitution shall provide that the political representation of indigenous peoples shall be effective in the National Congress through 10 per cent of reserved seats, with the assurance of gender equality.

Partial agreement – Consultation. The duty of the State to consult through appropriate procedures through their representative institutions shall have constitutional rank, in the form and in accordance with the criteria set out in ILO Convention No. 169.

Source: Final report, Organization of the indigenous participatory constituent process, (University of Chile).



9. Observers of the process and their roles

9.1. Universities

One of the innovative issues referred to by several of the actors in this study related to the participation of universities in both the participatory stages and during the consultation process. In the other consultation processes undertaken by the Government of Chile, the role of implementing the process was generally the direct responsibility of the Government department responsible, which normally contracted it out to an external consultation. In this case, the function was fulfilled by various universities, which undoubtedly gave the whole process greater content and depth.

As noted previously, during the participatory stage of the indigenous constituent process, several universities³⁵ were given responsibility for conducting the process, organizing meetings, providing support for the convening and conduct of meetings and preparing the records. During that stage, the University of Chile assumed the functions of organizing and analysing the meetings and their outcome, as set out in the report “Organization of the indigenous participatory constituent process”. The report was taken into consideration in the preparation of the measures to be made subject to consultation by the Government.

Subsequently, during the indigenous consultation stage, based on the meetings held in the 15 regions of Chile, reports were prepared with the support of teams from the Alberto Hurtado University and the La Frontera University, which were forwarded by the SEREMIs of the Ministry of Social Development in each region to the University of Chile team, which prepared the final report “Organization of the indigenous participatory constituent process”, which served as the basis for the preparation of the draft constitutional reform which was proposed.

Based on the interviews undertaken with several academics from the universities that participated in the process with a view to the preparation of the present study, it may be noted that in general they assessed their participation positively, even though it was indicated that it is necessary to take measures to strengthen their role and to coordinate their participation more systematically in order to succeed in reducing and overcoming the traditional mistrust felt by the indigenous peoples towards the State.

In this way, the possibility of establishing constitutional recognition, and the resulting recognition of indigenous peoples in the country, as well as the public role that can be played by universities in this respect, was evaluated very positively. For this reason, in several of the interviews with participants from universities, emphasis was placed on the need for such subjects to be moved out of academic and intellectual circles and brought closer to indigenous citizens, as occurred during this process.

³⁵ Arturo Prat University, Alberto Hurtado University, Del Maule Catholic University, Bío-Bío University, La Frontera University, Los Lagos University, Magallanes University.

“I believe that it was positive to be able to send out the message of how relevant it is to be able to discuss the Constitution of a country and to discuss the subjects, for example, of the recognition of peoples and self-determination ... Today, no one finds it strange for them to be the subject of public debate, and yet a couple of years ago they were not on anyone’s agenda – they were niche themes, academic subjects, or subjects closely related to the causes of indigenous peoples. But today they are topics that have become more related to citizenship. And this seems to me to be extremely relevant as a lesson from the process.”
(University academic)

Similarly, in several of the interviews it was emphasized that the interviewees had not expected to find indigenous leaders who were so well prepared on these subjects. Various academics indicated that it was necessary to value indigenous participation and to consider them to be political actors with the capacity to negotiate and reach agreements with the Government. As indicated by one of the interviewees:

“What was interesting was that the proposals were very well prepared by the organizations, and those who participated were prepared. They knew what a constitutional change implies, their proposals were extremely clear and in that sense it was a good process (...). The leaders were very well prepared and knew what they wanted, and are therefore now political actors. The leaders knew what it implied, were aware of ILO instruments and were prepared.” (University academic)

Similarly, emphasis was placed on the need for consultation mechanisms and processes that recognize the negotiating capacity of the indigenous peoples, incorporating their own dynamics of dialogue and discussion. The academics interviewed recommended, for example, making greater efforts to study the characteristic means of resolving controversies of the different indigenous peoples. Some of the participants from universities indicated that one of the main failings was that, in their view, they perceived a fragile relationship between the indigenous peoples and the State, as reflected in the mistrust shown by certain communities regarding their participation in the process. With a view to resolving this issue, the interviewees recommended the use of a less invasive methodology to come closer to the communities.

The interviewees also recommended better planning of the process, and the establishment of means for the self-evaluation of the process while it was taking place. In that way, the deficiencies would be clear and could be corrected at the right time.

“I believe that it is necessary to have a technical committee on which all the actors are represented from the outset. The organization that understands how the Convention operates has to be represented, and there need to be experts, in all senses. There also need to be anthropologists, lawyers, the State and indigenous representatives. The process needs to be more gradual, divided into stages, including on how the process is going and for the resolution of problems.” (University academic)

In this respect, it was noted that the methodologies used by the universities in the various regions were very different. As a result some of the university academics who participated in regional bodies identified as one of the difficulties the inconsistency between the various methodologies used in the indigenous constituent process in each region of the country.

Some of the academics interviewed also observed that many of the relevant topics that were discussed in the participatory process in which they were involved, and on which they then prepared the record, were not reflected in the subjects selected for submission to consultation. They recommended that greater value should be given to the work of the recording of national meetings so as not to duplicate the efforts made by participants.

Another of the difficulties noted by those involved was related to the fact that, when preparing the methodology to be applied in the discussions, recognition was not given to the political experience of the indigenous leaders or the history of indigenous movements.

With reference to the time period over which the consultation was conducted, the academics generally agreed that it was one of the difficulties inherent in undertaking the task with which they were entrusted. They referred to the existence of problems of time, in view of the complexity and importance of the subjects submitted for consideration, as well as the need for greater coordination between those implementing the process and the participants in the discussions. That was undoubtedly the most complex issue noted by all the interviewees in relation to a consultation process of that magnitude.

9.2. The United Nations system in Chile

As noted above, the United Nations system, including the ILO, actively supported the indigenous constituent consultation process. At first, it was part of the follow-up committee during the participation stage, and then it participated actively in the National Meeting, where it was an “observer and guarantor”, in accordance with the MoU signed by the Government, the national councillors of the CONADI and the United Nations system, as represented by its Resident Coordinator, Silvia Rucks. It should be emphasized that the United Nations system also played a role in the preparation of the National Meeting and in the development of the methodology.

The role of the United Nations as “guarantor and observer”

2.1 The role of guarantor of a process of dialogue with the actors (for dialogue, participation, the reaching of agreements) has the purpose of ensuring, supporting and approving the characteristics (principles, standards) of the process conducted and, in that way, the validity of the outcome.

2.2 In the case of a process of dialogue and consultation such as the present, the principles or standards to be “guaranteed” have their origins in the general development of the doctrine of human rights, and the specific applicable international instruments (United Nations Universal Declaration of Human Rights, the Indigenous and Tribal Peoples Convention, 1989 (No. 169), of the ILO), national standards on the subject and, fundamentally, the specific agreements reached by the actors at the beginning of the process.

2.3 The role of “guarantor” also encompasses the preparation of methodological proposals and dialogue mechanisms which make it possible to align the process with the principles and standards identified and find alternatives for their implementation.

2.4 The role of “observer” refers to the accompaniment of the process, guaranteeing the minimum principles agreed through standardized systems (“monitoring reports”, checklists”, etc.) for the practical implementation of the activities and drawing attention to relevant elements for their implementation.

Source: Memorandum of Understanding concluded between the Government, the national councillors of the CONADI and the United Nations system in Chile.

In this way, the role of observer and guarantor was intended to ensure compliance during the indigenous consultation process with all the basic principles set out in the international instruments on the rights of indigenous peoples and, at the same time, it established the function of accompanying and observing the dialogue and consultation process, thereby strengthening trust. The United Nations system in Chile could also propose discussion methodologies or mechanisms to help find alternatives during the process of dialogue.

The process was coordinated by the United Nations Development Programme (UNDP), which also assumed the challenge of preparing, with the support of the FAO, a methodology for the National Meeting with a view to facilitating dialogue during the meeting. The International Labour Organization and the Office of the High Commissioner for Human Rights also provided support, including technical assistance, during the National Meeting in relation to ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples, respectively.

The views of those interviewed from the various organizations who participated in the process was generally positive. Emphasis was placed in particular on the importance of the participation of the United Nations system in the process, the role of promoting dialogue between the Government and the indigenous peoples and, in particular, on the opportunity to discuss and negotiate these matters. Emphasis was also placed on the importance of the initiative of bringing together the nine indigenous peoples in a single place, and the use in the discussion of the “language of human rights”, that is the terminology used in the international instruments on the rights of indigenous peoples. Certain questions were raised concerning the meaning of the role of “observer and guarantor” assumed by the United Nations and the possibility of fulfilling that role effectively.

The MoU that was concluded indicates that the United Nations system shall play the role of observer and guarantor in the indigenous consultation process, and particularly in the National Meeting. According to the views expressed during the interviews, the roles that were assumed gave rise to certain doubts concerning their nature and the possibility for their replication in other processes:

“If you read the agreement that we signed with the Ministry of Social Development, it is clear that the only aspect that we guaranteed was a methodological proposal for the dialogue. And we were careful not to guarantee results, as there was no way we could do so.” (Representative of the United Nations system)

“I have the feeling that the only thing that we could guarantee was the good faith of the parties. Because in practice we did not participate in the methodological design of the process as a whole, but only in providing specific guidance for the national dialogue. The one thing that it was possible to guarantee during the process was that the concept of human rights was understood by all those participating, and that what was in practice being agreed and discussed was related to those concepts. In other words, we were not guaranteeing agreements, but that the dialogue and concepts used were subject to a common understanding, to use a United Nations phrase, and that, when we were talking about territories, we were all talking about the same thing, and that when we were referring freedom of determination, we were talking about the same thing. For that reason, I maintain that it was not possible for us to guarantee the whole process. We guaranteed a specific stage of the indigenous constituent process, in this case the national dialogue, so that those involved were talking on the basis of an understanding in line with international standards and that the dialogue was based on good faith.” (Representative of the United Nations system).

The interviewees indicated on various occasions, as an important positive and fundamental element, that the indigenous and government representatives spoke in the terms found in the instruments that set out the rights of indigenous peoples, thereby establishing a common language.

The representatives of the United Nations generally valued their participation in the National Meeting and considered that there was a genuine attempt at dialogue and negotiation between the Government and the indigenous peoples. They emphasized in particular that the process provided an opportunity for the representatives of all the indigenous peoples to meet and agree on positions and approaches, the coordination of a group of indigenous women and the achievement of important minimum agreements relating to the rights of indigenous peoples.

In general, the representatives of the United Nations indicated that, with regard to the role of the United Nations in further processes, care will need to be taken in relation to the preparation of the methodology, which will have to be agreed with the indigenous peoples. More time will also have to be taken and coordination increased in the preparation of the process. Greater support will need to be provided for prior capacity-building of indigenous leaders in relation to their internationally recognized human rights. Several of those interviewed who had participated in the process representing the United Nations indicated that, to deal with the problems of the asymmetry that exist between indigenous peoples and governments, it is necessary during the consultations and negotiation for the United Nations to adopt a more active role in building the capacity of and preparing indigenous leaders.



10. Experiences and viewpoints of indigenous and governmental participants in the process

10.1. Representatives of the indigenous peoples

When preparing the present study, interviews were conducted with 18 leaders of the nine recognized indigenous peoples, that is the: Mapuche, Aymara, Quechua, Atacameño or Lican Antai, Diaguita, Kolla, Rapa Nui, Kawéskar and Yagán. The representatives participated in all the stages of the indigenous constituent process, in both the meetings of the participatory process, as well as in the consultation process at the local, regional and national levels, and they participated at the national level as representatives of their peoples and regions. Based on their experience, the representatives of the nine indigenous peoples described in the interviews their main observations and difficulties, and made recommendations which, in their view, would improve the process.

10.1.1. The observations of the indigenous representatives

Unprecedented process

The representatives of the indigenous peoples who were interviewed considered that the Government's will to hold a consultation process which recognizes them and offers them political inclusion is unprecedented in the history of Chile.

“What is good is that for the first time in history a consultation is being held. Chile has had over ten Constitutions and the Mapuche people has never been taken into consideration. We are like the son of a single mother without a father in not being recognized, and if we are not recognized by the State, we do not have rights. Now for the first time recognition is being given to a People” (Representative of the Mapuche People)

“I think that the consultation is an act of good faith by the Government.” (Representative of the Aymara People)

“In general terms, the consultation allowed the nine original peoples recognized by Act No. 19,253 to give our views on the four important points that were covered by the consultation process on territorial, cultural, educational and political matters. I think that it is important that the Government has listened to the claims of each people, that is what is most important. It is important that we, as indigenous leaders, are being given voice.” (Representative of the Diaguita People)

Establishment of links between indigenous peoples

Another of the observations made by the participants was the possibility to establish links with the representatives of other peoples, which allowed common needs and demands to be determined.

“The good thing is that you grow as a leader and can get to know other situations, which allows you to grow (...). I saw one thing that is transversal in relation to the needs denounced by peoples throughout Chile, which is clearly related to the origin of our problem as Ancestral Peoples, or Original Peoples (...). We all agree that territory is at the heart of the conflict, because we gain nothing from having rights if we have nowhere to exercise them. This was seen very clearly. I also saw a possibility for us to unite as peoples with a sole common voice.” (Representative of the Mapuche People)

“One of the observations is the fact of having brought the nine peoples together.” (Representative of the Quechua People)

“I believe that a mechanism of this type strengthens us as peoples because, as we are distant, we do not talk much, but if we have the mechanisms we can do it and usefully, and this is part of our independence, deciding how we want things to be.” (Representative of the Lican Antai People)

Bringing the indigenous peoples and the State closer

Some of the representatives considered the mechanism in terms of the creation of a space that could improve relations and trust between the State and the indigenous peoples.

“I believe that this space was useful for dialogue between the peoples and so we could get to know each other, and it was also a space that allowed us as indigenous peoples to trust the State, which is difficult for us as we always thought “it must be a trap”, because it has always been like that. But these mechanisms can be useful in bringing indigenous peoples and the State together, which is necessary.” (Representative of the Lican Antai People)

10.1.2. Difficulties and challenges identified by indigenous representatives

Duration of the indigenous constituent process

In all the interviews, one of the failings most frequently referred to by the representatives throughout the country was related to the fact that the constituent process was conducted without sufficient time to assess all the various subjects, taking into account their complexity.

“It was all very quick, in view of the size of the consultation. Because this is about a new political Constitution and, as the Mapuche we were participating for the first time in history, it wasn't taken seriously enough and it was done very quickly. Within a month everything was decided, under a lot of pressure, with the Government practically running, doing things at the last minute. And we, the Mapuche, participated as well, following them, and that way things were not done well, because many things were left up in the air. It should have been prepared earlier.” (Representative of the Mapuche People)

“Right up to the end we were calling for more time so that we could plan properly for the process that we would experience, which was and still is important for us. We did everything we could, but it was very quick and very frustrating for us.” (Representative of the Lican Antai People)

“There were also many peoples who were limited in time, many people who had to return home and the consultation was continued with other peoples who remained, but for example the Tarapacá region was no longer represented, either by the Aymara or the Quechua. We lacked time to work during the process, we were working under pressure, our days were very full (...). We cannot work on something so important in that way. We couldn't work properly.” (Representative of the Quechua People)

Previous mistrust of the indigenous peoples towards the State

Some of the representatives of the indigenous peoples referred to the problem of the previous mistrust by the members of the communities towards the State, which on many occasions affected due process and good faith.

“Our people is very separate and that was not good for us. I think that if we had been united we would have achieved more. But unfortunately when it is necessary to speak about political subjects, they often don’t want to do so and say: ‘Why should we talk to the State if it will never give us what we want?’ But I believe that closing ourselves off is not good. We have to be open to dialogue, because that is what opens doors.” (Representative of the Mapuche People)

The lack of social dialogue with the communities in the national consultation

Representatives of various peoples also noted the shortcoming of the lack of a further stage of social dialogue and discussion of the subjects with their own peoples following the week long National Meeting, and prior to the adoption of the final decisions, to achieve greater representativity in their territories.

“We hoped to be able to share the issues more with our communities. We, as representatives, were left with a bitter taste because we wanted to transmit what happened in Santiago to our people and to tell them about the meeting. But in practice our time was very limited.” (Representative of the Mapuche People)

“The Government was not prepared to continue the dialogue when we asked for time to report back on everything that had been discussed so that we could review our positions and return to the dialogue.” (Representative of the Diaguita People)

Cultural belonging

The leaders of the Lican Antai People indicated that there was a lack of cultural belonging in the implementation of the constituent process, as the process coincided with the cultural and religious ceremonies and practices of the people that they represent and to which they belong.

“If you want a programme to be successful and to have an impact on the territories, you need to plan with the people living in the territory and be aware of the time and, in this case, of how each community organizes its annual schedule of activities. During that period, we had celebrations in various places, as it was the planting period ... It was horrible. We also had the cleaning of the water channels, which is a community work activity, as well as a ceremony. It was not therefore possible for our people to be ready, but we the leaders had to work anyway, against time, because we didn’t want to be left out of the process.” (Representative of the Lican Antai People)

The diversity of the indigenous peoples was not visible

Another shortcoming noted by the representatives was that the joint agreements often ignore the specific cultural and territorial characteristics of each indigenous people, as well as their claims and needs.

“The Mapuche People has its problems, its way of seeing things, its distinct cosmo-vision, as does the Aymara People ... Each people. But they make us believe that there will be a single proposal for all nine peoples, and I think that is a mistake. The State of Chile made a mistake in calling for a national agreement of indigenous peoples, because their spirituality, cosmo-vision and territories are not the same. We are distinct.” (Representative of the Aymara People)

The representativity of the indigenous peoples in the national consultation

As the number of representatives of the various peoples who participated in the constituent consultation at the final meeting at the national level was proportional to the number of persons who throughout Chile identify as belonging to each people, the Mapuche had a larger number of leaders participating in the meeting. The representatives of the other indigenous peoples indicated that this was a problem as their vote was in the minority in the final decisions.

“We are in a minority in relation to the national leadership of the Mapuche. We are ten, while they are 100, which leads to a problem. When western democracy is applied, it is always the total number of votes.” (Representative of the Aymara People)

For some representatives, this was not only a problem of votes, but also of obtaining consensus within the Mapuche which, in their view, affected the development and duration of the process.

“It was also a little frustrating for us that we always have to depend on the majority people, which in this case is the Mapuche, in terms of timing and working methods, as I also think that we should work in a way that makes good use of the time available. I think that we should work in the territories at the rhythm of each people, and then when the proposal has been prepared and agreed upon, take it to a national body.” (Representative of the Lican Antai People)

Technical and legislative language predominated in the discussions

Another issue raised by the representatives is that technical legislative language was predominant in the discussions of the indigenous constituent consultation at the national level. According to the views expressed, that led to the exclusion of participants who were not familiar with the terminology.

“Many of us are common people and we often have no knowledge of legal matters or Convention No. 169.” (Representative of the Quechua People)

Some representatives considered that this shortcoming can lead to misunderstandings between indigenous peoples and representatives of the Government.

“The *peñi* (“brothers” in the Mapuche culture), during the process in which we participated in Santiago, had to begin to pick up a vocabulary that was totally different from the one that we had prepared in the community. You need to take into account the fact that we are leaders in rural communities where school attendance is very low, and the educational level is low and many people cannot read or write, and do not understand the Constitution. I find it totally unjust to take a leader from this community up to Santiago and expect her or him to talk like a lawyer about international law (...). We realized that if we did not use a word exactly as it appears in the laws, we could lose out, and we therefore lost good faith. (...) In extreme cases, for example in relation to natural resources, we have to refer to water, but at the same time refer to it in all its states so that there are no loopholes that the State can exploit.” (Representative of the Mapuche People)

“Legal terminology excludes people because, when you choose someone as a representative, it is not because they are a lawyer or understand legal matters, but because they have been indigenous leaders for many years. There are many legal concepts that you don’t understand and so when you reach the final discussion with the State you have to have your advisers.” (Representative of the Kawéskar People)

Lack of advisers for the representatives of indigenous peoples

In that connection, the indigenous peoples indicated that there was a problem concerning the lack of expert legal advisers on indigenous peoples, particularly during the final stage of the National Meeting.

“Thank goodness we had a young person in the Aymara People who was studying law, because they did not allow our lawyer and adviser to enter. We needed our adviser. Although clearly we knew about some aspects of Convention No. 169, we don’t know it all because we are not professionals. That’s why we needed our adviser.” (Representative of the Kolla People)

According to some of the representatives, this affected relations between the State and the indigenous peoples and the good faith of the dialogue.

“Before a consultation of this magnitude, the authorities should inform people more. If there had been more information, the communities would not have appointed any leader without their consent. It is necessary to provide more information, send out the invitations earlier, provide better facilities ... Our facilitators, without going further, who were placed in the communities, could not accompany us to Santiago, so we had to go it alone. It would be welcome if this were improved, because it would show that the State is acting in good faith and that it wants to treat its communities, or in this case its native population, differently.” (Representative of the Mapuche People)

Scarce coverage by the national press

Some of the representatives noted as a deficiency the low level of coverage of the indigenous constituent consultation process by the national press. Media coverage is fundamental for the representatives of indigenous peoples, as it lends importance and legitimacy to the process, not only for indigenous peoples, but also for the rest of Chilean society.

“In the case of a consultation as important as this one, related to the constitutional recognition of indigenous peoples, the media have to inform the people of Chile that the indigenous peoples are in a process of consultation, so that Chilean society understands what is going on.” (Representative of the Aymara People)

10.1.3. Recommendations made during the indigenous constituent process

Some of the recommendations made by the representatives of the indigenous peoples which are intended to lead to improvements in the indigenous constituent consultation process relate to the promotion of greater participation and interest by the communities, as well as a greater presence by Government authorities in the process and in the territories.

“The idea is to maintain the relation, so that the State is concerned to continue holding consultations, making the effort to consult the indigenous peoples as a constant practice. But it needs to be at the territorial level. The Government and the representatives of the State need to go out to the regions and communes so that they can get to know them a little more. But what interests us the most is the practice of consultation, because neither the State nor we ourselves had experience of it, but we are now acquiring experience of this practice.” (Representative of the Aymara People)

10.2. Representatives of the public administration

The Ministerial Committee for Indigenous Affairs decided that the Ministry of Social Development would coordinate and implement the consultation process and that an inter-ministerial committee would be set up to provide guidance on the content of the measures subject to consultation. The committee was composed of the Ministry of the Interior, the Ministry of the General Secretariat of the Office of the President and the Ministry of Social Development. The process was coordinated by the Indigenous Affairs Unit (UAI) in the Ministry of Social Development. In each region, responsibility for the process lay at the decentralized level with the respective SEREMIS of Social Development which, in coordination with the CONADI, were responsible for the implementation of the consultation.

In general, it can be seen that the Government’s evaluation of the whole indigenous constituent consultation process is positive, with emphasis being placed constantly on the existence of the desire to negotiate, the good faith in which the whole process was conducted, the unprecedented nature of this type of process in Chile, the capacity to “convince” other State bodies of the importance of holding the consultation, and of including the rights of indigenous peoples in the future draft of the new Constitution. In terms of challenges or problems, the interviewees fundamentally refer to the operational difficulties involved in carrying out a consultation of this magnitude at the national level, the complexity of negotiating with nine different peoples and having to end up with a single proposal, and the various budgetary problems.

10.2.1. Observations made by the representatives of the Government

Unprecedented process

The interviewees often referred to the unprecedented nature of the consultation process, both in terms of the importance of the subject under consultation and the direct reference

to ILO Convention No. 169, and the joint application of Articles 6 and 7 of the Convention, among other factors.

“It was an unprecedented process from our point of view: unprecedented in terms of participation, unprecedented in terms of submitting a subject such as the Constitution of the country to the participation of indigenous citizens, who are not even currently referred to in the Constitution; unprecedented due to the application of an instrument ratified by Chile (Convention No. 169); and unprecedented because there were many services and Ministries observing the process. For these reasons, I believe that, more than a positive or negative evaluation, it was a tremendous challenge to keep creating, based on what was happening and using many tools. It was therefore unprecedented and interesting, but it is always possible to improve.” (Representative of the Ministry of Social Development)

“And we innovated in another way, to integrate guarantees that the process would be more transparent and seen to be entirely in good faith, and so that it could offer us a new way forward with the indigenous peoples. From the outset, it was designed, in the methodology and the negotiation itself, so that a third party could participate as an impartial entity and could offer guarantees of human rights, and in this case it was the human rights system.” (Representative of the Ministry of Social Development)

Flexibility

Another issue on which emphasis was placed by the Government was the joint use of the provisions on participation and consultation contained in Convention No. 169, which allowed the process to be more flexible.

“This resulted in the indigenous participation process and consultation based on the joint application of Articles 6 and 7 of Convention No. 169. And not only Articles 6 and 7. And so, when it is said that there was little time for consultation, that was not true, because there was a lot of time for the process as a whole. And this offered the advantage that, in contrast with Article 6 on consultation, which was based on a specific process, with a type of checklist set out in the Article as a formula, Article 7 does not establish a procedure or a checklist, and therefore allows processes that are more heterogeneous or relevant for each people, without simply applying a procedure. That is what can be seen up to now from consultation processes. So for us, the concept of applying Articles 6 and 7 together offered a dual advantage, with a process that offered greater freedom to gather views, and what we assumed we would gather was a large part of the subsequent process.” (Representative of the Ministry of Social Development)

“We were also weighed down by the excessive rigidity of the consultation processes, in which it was not possible to leave the framework, and as it was not possible to escape the framework, all the collateral views expressed by the indigenous peoples were not taken into consideration. We tried to make the consultation process as flexible as possible so as to be able to overcome this criticism.” (Representative of the Ministry of Social Development)

Innovative consultation

The interviewees considered that the consultation had characteristics which differentiated it from other consultation processes that had been conducted, as it opened up more spaces for dialogue and negotiation. In particular, reference was made to what was called “incremental negotiation” in which agreements were reached through a process of proposals and counter-proposals, which allowed a more open dialogue.

“From the beginning it became clear that the questions were more of a type of survey than anything else. The Government submitted a measure to the indigenous peoples, which indicated whether or not they were in agreement. Accordingly, it appeared to be more an opinion survey than anything else. When examining the provisions of Convention No. 169 and everything that has been written in parallel to that, and decided upon by international bodies, it was a real negotiation process. And hopefully a dialogue between equals, for which reason the State had to adopt a series of guarantees, which we endeavoured to implement. In that respect, we sought to ensure that it was a sort of negotiation, but the complexity of the subject meant that it was difficult for it to be a real negotiation. And I am left with the impression that there is a long way to go, because it is not possible to speak of strict rigour in any negotiation. I do not believe that this is a subject in relation to which you can speak of proper negotiation.” (Representative of the Ministry of Social Development)

“So the concept of a gradual and incremental process to achieve agreement meant that a different model of negotiation was sought. In other processes, it can be said whether we want to add this or not, and that implies give and take. Because deep down I am putting forward a viewpoint that is more indigenous than western. I am doing something that is very close to the peoples, in which at each turn I come back and go over the same point again. It is the logic of the spiral that is indigenous. And it results in great exhaustion, because you discuss something that has already been discussed, but it is part of the process. Among the peoples, a subject is discussed again and again, and you have to be careful of the elements that are picked up each time. And so a negotiation logic was needed that was different from “Do you think what we are proposing is good or not?” But the fact that someone offers something different implied holding close political conversations, channels of communication with Ministers who had been appointed by the President, as persons who have the capacity to negotiate. And as such they gave political viability to what was being decided. And things were always decided in this way.” (Representative of the Ministry of Social Development)

“And so, as we understood that the consultation processes would be longer than the consultation itself, we also introduced the principle of the incremental development of agreements. And when you have a gradual and incremental concept of possible agreements, you have to develop a process in which you are available to receive proposals that are not those that you initially suggested. What had been observed in previous processes is that there was a dichotomy in the question, do I like it or not, do I agree or not.” (Representative of the Ministry of Social Development)

Progress in the rights of indigenous peoples

In general, the institutional actors valued highly the space for dialogue that was established between them and the peoples, and particularly the agreements reached on the minimum content to be included in the new Constitution and the form of negotiation, known as incremental negotiation.

“Today we have agreements with the indigenous peoples which were not there before, as well as others that are more substantive. And we have total agreement for some and partial agreement on others. And so I believe that this consultation established a threshold from which the political and legal relationship with indigenous peoples will henceforth have to start. I believe this is the most important achievement and, although it is related to the constituent process in general, it is fairly independent, because the Constitution can be reformed again. It may not be changed and there may be no new Constitution, but the present Constitution is indeed being reformed, with the threshold of the indigenous peoples in the current Constitution. And that is fundamental and will mark out the process that we conducted for the future.” (Representative of the Ministry of Social Development)

“There was a substantial improvement in the participation of members of the indigenous peoples in the process of constituent consultation in the various parts of this region and at the national level.” (SEREMI of Social Development)

Duration

In general, the representatives of the Government considered that the period over which the consultation was conducted was a prudent length of time and adequate in view of the circumstances. They considered that the process, including its participation and consultation stages, was long, complex and allowed the adequate participation of the actors. They noted that:

“I believe that the constituent process lasted over a year, which is sufficiently long. It began in August 2016 and was completed on 3 November 2017. Over a year. If a comparative analysis is made, for example, with the duration of a constituent assembly, it is the period that a constituent assembly lasts, which is more or less what we are talking about. I consider that the time was more than prudent and sufficient. The national dialogue lasted six days, to be precise, and it was extended, because it was planned to last four days. And that shows the flexibility of the dialogue itself. I believe that the request for more time is a little unjustified in light of the process as a whole.” (Representative of the Ministry of Social Development)

“It was a political moment. I would have liked to hold many more meetings, because recently in the three meetings with them the discussion covered everything. At the outset, there were many complaints about all the consultations that did not work, such as the third, but recently the content itself began to be discussed, and so more time was needed to digest that.” (SEREMI of Social Development)

10.2.2. Difficulties and challenges noted by the institutional actors

The possibility of dialogue with nine indigenous peoples

“If I had to make a methodological change, the change that I would make would be a separate space for each people, and I would not bring them together in the final dialogue for the development of the final agreements.” (Representative of the Ministry of Social Development)

“And so the challenge is how to translate these generic rights into reality in each country and in measures at the territorial level for each people. And I believe that here the implementation of international instruments comes up against a serious problem. Because it is strange that certain countries that have not approved agreements have made more progress in implementation at the territorial level, or with each of the peoples, than those countries with peoples which have approved these Conventions.” (Representative of the Ministry of Social Development)

Interest by the press

One issue observed by several Government interviewees concerned the scarce press coverage of the consultation process, emphasizing that wherever there is conflict there is broad coverage, but on this occasion when there was dialogue there was practically no press or television coverage.

“If we go outside, the first thing that they will say is that there is a conflict, that the region is on fire, but this type of action shows the existence of communication, interaction and that the Region of Aucasania can enter into dialogue. When you look, the press did not give this the coverage that it deserved, did not place appropriate emphasis on it, although small disputes that affect a very small population (the press) are focussed upon, as if to show what is happening throughout the region, which is not the case, as in the Region of Aucasania, where dialogue is possible.” (SEREMI of Social Dialogue)

Advisers for indigenous peoples

With reference to advisers, a subject brought up by the indigenous representatives as one of the most relevant shortcomings, the Government interviewees noted that there is a lot of confusion in this regard. They noted that, although the indigenous peoples were entitled to and had access to advisers during the whole regional process, at the National Meeting some peoples had advisers and others did not, which gave rise to difficulties and asymmetry.

“On the one hand, it is clear that the leaders are the ones who have to participate in the agreements, and not the advisers. But the State has a whole range of advisers. Those of us here are advisers. We have experts in specific areas required for the final negotiation process, and there we could have opened the process up more and determined a more specific formula. Basically, what we did was respond to the needs expressed at the regional level. In some cases they came, and in others they didn't. In some cases, they wanted to take advantage, and in others not. But here we should have defined the situation more and made the rules clearer. We were wrong on that. And careful, because the councillors of the CONADI, at the last national meeting, categorically refused the presence of advisers in the national dialogue on the grounds that it betrayed the immaturity of the indigenous leadership when entering into an agreement or political dialogue with the State. We considered that conceptually in political dialogue this position was sound and reasonable. But when you get to that moment, you realize that they could have given more to the negotiation if they had had good quality advisers. Because there were advisers, but more importantly they were where they were.” (Representative of the Ministry of Social Development)

Budgetary and/or institutional problems

With regard to deficiencies that were observed in the process, the institutional actors referred generally to difficulties of institutional capacity and methodology in the implementation of a process of indigenous consultation of this magnitude. Reference was made repeatedly to problems in the administration of the budgets allocated.

“And there were serious problems there because the institutions were not prepared for national consultations with an implementation capacity to ensure that there was sufficient strength at the beginning of the process for what came later. Because in the end those who remained were within their rights not to participate. But what cannot happen is that you initiate the process and then someone says ‘they never told me, I wasn't invited, I never heard anything.’ Because that legitimately interrupts the process. A leader who says they didn't tell me. It is different if they knew but didn't come. That was a problem that required a lot of effort and could have been done better at the beginning of the process. The invitations could have been more inclusive.” (Representative of the Ministry of Social Development)

“The centralized methodological design. Lack of flexibility. Each people, region, location and territory has specific characteristics that need to be borne in mind when organizing indigenous consultations. Some confusion arose in the organization of meetings on specific days and stages.” (SEREMI of Social Development)

10.3. The National Council of the CONADI³⁶

The National Council of the CONADI played an important role in the indigenous constituent process. It participated in all the stages as the counterpart of the Government for the planning of the consultation, it requested the presence of the United Nations at the National Meeting, and several of its councillors were present during the various stages of the process. For the present study, two elected indigenous councillors were interviewed, who emphasized the will to organize negotiation and political dialogue, and that the debate took place using “human rights language”. In contrast, they were critical of the Government’s genuine willingness to reach agreements, and agreed that the consultation should have always had the objective of enshrining the human rights of indigenous peoples established by international legal instruments that have been ratified by Chile.

10.3.1. Observations made by the councillors of the CONADI

Political dialogue

“I believe that what stood out, in spite of everything, was the space for dialogue that we achieved. Because never before in any consultation process had dialogue of that type been achieved, even though they were only the completion of regional consultations in a major meeting, where everyone endorsed certain points. That existed, with at least the Government being open to dialogue at the national level, with all the fears that they had which were finally confirmed, for example that it would just be a semblance of a meeting, that there would be confusion.” (National Indigenous Councillor of the CONADI)

“I think that people are very slowly becoming educated about consultation. There are various sectors which have understood what consultation means, and particularly regional territories and rural areas, which have understood that it is a right that they have to exercise, and that they needed to prepare more. Mere discussion was not sufficient. They needed to have different strategies, discuss among themselves to reach agreement, and not go there for everything or nothing. Because, in a logic of making demands on the State, a lot is demanded but they end up obtaining nothing. I think that people have learnt that consultation is not all or nothing, it is not black or white. It is a process of discussion and debate, with the major objective of reaching political agreements which, if they are achieved in good faith, are obviously binding.” (National councillor of CONADI)

Duration

In general, the interviewees indicated that the time allowed for the process as a whole was not short, that the leaders should have been better prepared, particularly on a subject on which they had been making demands for over two decades.

³⁶ Section 40 of Act No. 19,253. The highest direction of the Corporation shall be the responsibility of a National Council composed of the following members : (a) the National Director of the Corporation, who shall be appointed by the President of the Republic, who shall chair the Council; (b) the Sub-Secretaries or their representatives specifically nominated for that purpose, of each of the following Ministries: the Office of the Secretary General of the Government, of Planning and Cooperation, Agriculture, Education and National Heritage; (c) three councillors appointed by the President of the Republic; (d) eight indigenous representatives, four Mapuche, one Aymara, one Atacameño, one Rapa Nui and one resident in an urban area of the national territory. They shall be appointed, upon the proposal of the Indigenous Communities and Associations, by the President of the Republic, in accordance with the rules issued for that purpose.

“I think that the criticism regarding time is an excuse. When the indigenous movement is prepared, it does not need to reach agreement to discuss subjects such as territory. The indigenous movement does not require two or three years of preparation for self-determination because it is part of the action for which the indigenous movement was established. It was established for this, created for this, organizations were established to defend these rights. For this reason, the real duration is a brutal excuse by the leaders because it reflects an incapacity to engage in dialogue. You need capacity to enter into dialogue with the Government. This is where I am critical of the indigenous movement. And I am also, of course, critical of the institutional system, where the same applies. Those connected with consultation are not the most gifted within the State structure. They are people with no knowledge at all of the scope of the legal instruments, the purpose of the consultation. For those in government, this is just a procedure. For us, it is much more than that, as it is something that is related to the achievement of political agreements.” (National Councillor of the CONADI)

“In my view, the duration was excessive. It was a question, no more, no less, of recognizing the rights of indigenous peoples, which had been discussed for so long at the international level. It would be another matter to hold consultations on the regulation of those rights, which is the manner in which the State always succeeds in not giving effect to its obligations.” (National Councillor of the CONADI)

Based on human rights that are already recognized in international instruments

“I think the conditions were there to reach a good agreement. It was a question of making progress in law. It is not a matter of minorities or majorities, but of how the State recognizes in the Constitution rights that are already recognized in legal instruments. So, in other words, we weren't inventing anything new. We were simply setting out in the Constitution the rights already recognized in international treaties.” (National Councillor of the CONADI)

10.3.2. Difficulties and challenges noted by CONADI councillors

The measures that were submitted for consultation

“The fundamental issue for indigenous peoples, namely self-determination, which is their final aim, was not discussed. If Chile wishes to recognize the rights of indigenous peoples, it is a joke, just recognize the Declaration and the Convention and incorporate the rights in the Constitution. There is no reason to consult us and waste our time.” (National Councillor of the CONADI)

“The truth is that it was an unpleasant surprise to realize that the subjects raised during the participation process were not reflected in the measures proposed for consultation. Those subjects were transversal and concerned political rights, self-determination, territory, the council of the peoples, from which substantive rights would be derived. But from the beginning the consultation was a deception because of how the State, the Government once again summarized the rights, and only referred to cultural rights, not political rights. The measures proposed for consultation bore no resemblance to the outcome of the participation process. If the discussion was opened up and included new measures it was as a result of the different types of pressure that we exercised as the National Council of the CONADI.” (National Councillor of the CONADI)

Lack of preparation of indigenous leaders

It was noted in the interviews that greater preparation was expected of the leaders, better knowledge of their rights and a greater real capacity for dialogue.

“We supported the leadership, and were open to new measures, but we did not have the response from the leaders that we were hoping for Clearly, there was a terrible lack of preparation. My diagnosis is that the lack of preparation, the conceptual poverty of the leadership was terrible and disappointing, because Convention No. 169 has already been in force for nearly 10 years, and the United Nations Declaration was adopted years ago. That was something that the indigenous political movement had always called for, based on free determination, based on the concept of peoples, and there was therefore no reason to believe that the leadership was behind the times. Unfortunately, those who participated showed that they were very much behind the times. While others, who were more prepared, refused to be involved because of their historical mistrust of the Government. And I believe that was also an error, because avoiding discussion in open forums like this is tantamount to leaving it to people who are unprepared, and who do not have the necessary knowledge of the human rights of our peoples. There is merely a pamphlet, a slogan, but no empowerment based on these instruments that are fundamental for the defence of the rights of indigenous peoples.” (National Councillor of the CONADI)

“Those who participated were not representatives of the peoples, but of an assembly established for the consultation. That was clear. It was convened openly, and it seemed to me to be good that it was convened on a broad basis, as set out in the Convention, with voluntary participation. But those who were elected by the communities, in the manner and through the procedures set out by the Government, were representatives who, without being known, were elected for an activity known as consultation, and this also clearly weakened the discussion and the constituent process.” (National Councillor of the CONADI)

Meeting of the nine peoples

The decision to enter into dialogue and the final negotiation was considered by one of the Councillors to be one of the positives of the process, but was rejected by the other, who indicated that it was better to negotiate people by people, respecting the specific characteristics of each of them.

“I believe that bringing all the peoples together in a single body was a positive, one of the virtues of the process.” (National Councillor of the CONADI)

“In the final analysis, I consider that we the peoples have to negotiate separately, coming together but not negotiating together. Clearly bringing us together was detrimental to the negotiations because, in the end, it is the same colonizing States that put you in a process of assimilation, in which all peoples are the same. States subject peoples and treat them as being the same.” (National Councillor of the CONADI)

Advisers

The absence of advisers in the National Meeting was identified as one of the most relevant problems for the indigenous peoples, although the CONADI councillors interviewed considered that they were not used well in the regional dialogues. In any case, they considered that they are a determining factor in the asymmetry of negotiations between indigenous representatives and the Government.

“What happened was that the subject of advisers remained open throughout the internal process in the peoples, where they all had trusted advisers. Unfortunately, many only selected advisers to use up the resources, but not for in-depth and high-quality internal capacity building. I am informed that the advice given left much to be desired, but that is not in our control or that of the Government. As consultation is a dialogue between representative institutions and the Government, we did not trust the reports, which could have contained good advice, and finally the dialogue may have been distorted by that, and that was the reason why many of us were against the presence of advisers. In any case, the advisers who came to Santiago left much to be desired and acted, more than as advisers, as political operators for a specific group, with no real contribution to make.” (National Councillor of the CONADI)

Role of the United Nations in the process

With regard to the work of the United Nations system, opinions differed. It was hoped that it would play a more active and committed role, and that it would then evaluate the outcome.

“I think that the role of the United Nations was very complex in this process, but I value it. It is like a judge who sees a crime in the street and says ‘I’m not going to do anything until it arrives in my office, and if it does not come before me I will do nothing.’ There is a certain passive hypocrisy in its way of acting, although I understand why. It has to act in a very diplomatic manner, because this is an issue in many countries, which makes it complicated. But I think that the intervention of Ms Silvia Ruck was very positive. At least, I liked how she worked, and I have no criticisms of that. I found it interesting to work with the United Nations, although it is unfortunate that it only goes this far, as mere journalism.” (National Councillor of the CONADI)

“The intervention of the United Nations seemed to me to be useful, although I would have liked it to be more active in the measures taken and the content, and in recognizing our role as CONADI councillors.” (National Councillor of the CONADI)



11. Final remarks

The objective of the present study is to document the indigenous constituent process conducted in Chile between May 2016 and November 2017. It was the first time that a process of this type and magnitude had been carried out in the country and it will no doubt be a milestone in the relations between indigenous peoples and the State of Chile.

The methodology of the study does not claim to provide an exhaustive analysis of the process or its outcome, but to shed light on the principal elements and present the views of the participants in relation to their experience. The study thus describes the process and offers a channel for participants to express their views and comment on the subjects that they consider the most relevant. The approach adopted is intended to facilitate learning.

In general, all those interviewed for the study, that is representatives of the indigenous peoples, Government actors, representatives of the National Council of the CONADI, representatives of the universities which played a role in the process, United Nations officials who participated in the consultation, all agree that it was an unprecedented process and that these constitutional issues had never been discussed in a forum that brought together the nine indigenous peoples and the Government. This allowed for discussions between the representatives of the nine indigenous peoples and the Government, but also for interactions among those representatives.

The participants recognized the importance of ILO Convention No. 169, a treaty ratified by Chile, and also of the United Nations Declaration on the Rights of Indigenous Peoples. The discussions during the consultation process were couched in the terms (or language) of human rights. Interviewees found that the Government acted in good faith in this process, and that the role of the United Nations and universities had been useful.

As noted in the study, some different views were expressed regarding the content of the measures put forward for consultation, the time devoted to consultation, the relevance and need for indigenous peoples to have advisers, and regarding some issue related to the methodology used. The views expressed by the actors also hint at the importance of preparation and coordination of all participants early on and of foreseeing and addressing difficulties that arise in the process in an effective manner. It was noted that methodologies for consultations at the national level bringing together all the indigenous peoples were important, while also recognizing the specific characteristics of each of the peoples.

The process of consultations on constitutional recognition that took place in 2016-2017 in Chile can be said to have opened a new chapter in the relations between indigenous peoples and the State, and it would appear to be of great importance to continue having recourse to the path of dialogue and the building of trust. Most of the actors interviewed recognized this.

It is hoped that the present documentation of experiences concerning consultations with indigenous peoples will be useful for ILO constituents and indigenous peoples in Chile and other countries, in their efforts to promote the full and effective implementation of ILO Convention No. 169.



Annex

Consultation and participation in ILO Convention No. 169 – extract from the ILO publication *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for ILO tripartite constituents*

The rights to be consulted and to participate in decision-making constitute the cornerstone of Convention No. 169 and the basis for applying the broader set of rights enshrined in the Convention. This section will answer some of the key questions that are often raised by ILO constituents in relation to these intertwined rights of indigenous peoples.

WHY IS CONSULTATION AND PARTICIPATION THE CORNERSTONE OF THE CONVENTION?

Consultation and participation are fundamental principles of democratic governance and of inclusive development. The provisions on consultation and participation were introduced in Convention No. 169, in order to eliminate the integrationist approach of the earlier Convention No. 107. Consultation and participation are important objectives in themselves, but are also the means through which indigenous peoples can fully participate in the decisions that affect them. Consultation and participation are not rights exclusively ascribed to indigenous peoples. Consultation is a fundamental principle that is to be found in all other ILO Conventions, providing for consultation between governments, employers' and workers' organizations as well as those specifically concerned by a given Convention. In this regard, Convention No. 169 is no exception, but affirms the requirement for specific consultations with indigenous peoples.

Given the enormous challenges facing indigenous and tribal peoples today, including the regularization of land titles, health and education, and the increasing exploitation of natural resources, the involvement of the indigenous and tribal peoples in these and other areas which affect them directly, is an essential element in ensuring equity and guaranteeing social peace through inclusion and dialogue ... Consultation can be an instrument of genuine dialogue, social cohesion and be instrumental in the prevention and resolution of conflict.

CEACR, General Observation on Convention No. 169, 79th Session, 2008, published 2009.

WHAT DOES THE CONVENTION SAY ABOUT CONSULTATION?

The general requirement to consult with indigenous peoples is reflected in Article 6(1) of Convention No. 169. Consultation with indigenous peoples thus arises as a general obligation under the Convention, whenever legislative or administrative measures affect them directly. Such measures could, for example, concern the elaboration of national legislation regarding consultations or the construction of road infrastructure on the lands of a specific indigenous community. In addition, the Convention particularly emphasizes the need to consult under certain circumstances, including prior to exploration or exploitation of sub-surface resources and prior to relocation and land alienation.

Article 6(1) stipulates that governments should: “Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly”.

Further, Article 6(2) of the Convention specifies that “consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures”.

The Convention particularly emphasizes the need to consult in the following circumstances:

- Prior to exploration or exploitation of mineral and sub-surface resources (Article 15(2));
- Prior to relocation, which should take place only with the free and informed consent (Article 16);
- When considering alienation or transmission of indigenous peoples’ lands outside their own communities (Article 17);
- On the organization and operation of special vocational training programmes (Article 22);
- On literacy and educational programmes and measures (Articles 27 and 28).

The core area of application for the concepts of consultation and participation is in the context of relationships between indigenous peoples and States. The requirement for undertaking consultations with indigenous peoples is both broad and specific. In operational terms, this will often imply establishing institutionalized mechanisms for regular and broad consultation along with specific mechanisms to be applied, whenever a specific community is affected.

This is in line with the experience of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), which in its 2009 general observation noted two main challenges: (i) ensuring that appropriate consultations are held prior to the adoption of all legislative and administrative measures which are likely to affect indigenous and tribal peoples directly; and (ii) including provisions in legislation requiring prior consultation as part of the process of determining if concessions for the exploitation and exploration of natural resources are to be granted.

Consultation under the Convention means:

1. Consultations must be formal, full and exercised in good faith; here must be a genuine dialogue between governments and indigenous and tribal peoples characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord;
2. Appropriate procedural mechanisms have to be put in place at the national level and they have to be in a form appropriate to the circumstances;
3. Consultations have to be undertaken through indigenous and tribal peoples’ representative institutions as regards legislative and administrative measures;
4. Consultations have to be undertaken with the objective of reaching agreement or consent to the proposed measures.

Pro forma consultations or mere information will not meet the requirements of the Convention. At the same time, such consultations do not imply a right to veto nor is the result of the consultations necessarily the reaching of agreement or consent.

See CEACR General Observation, 2010, published 2011.

One of the issues that the Committee of Experts on the Application of Conventions and Recommendation (CEACR) has most regularly examined since the Convention was adopted is the “obligation to consult”. Therefore, CEACR prepared a detailed general observation to further clarify the concept of consultation, which, inter alia, states:

The Committee cannot over-emphasize the importance of ensuring the right of indigenous and tribal peoples to decide their development priorities through meaningful and effective consultation and participation of these peoples at all stages of the development process, and particularly when development models and priorities are discussed and decided. Disregard for such consultation and participation has serious repercussions for the implementation and success of specific development programmes and projects, as they are unlikely to reflect the aspirations and needs of indigenous and tribal peoples.

CEACR, General Observations on Convention No. 169, 2009 and 2011.

WHY DOES CONSULTATION WITH INDIGENOUS PEOPLES REQUIRE SPECIAL ATTENTION?

Indigenous peoples have the same rights as all other citizens to participate in the general democratic life of the State and to vote in such processes. In addition, States have the obligation to specifically consult with and ensure the participation of indigenous peoples, whenever measures are being considered which may affect them directly. This does not mean that indigenous peoples have special rights but that given their situation, special measures for consultation and participation are required, to safeguard their rights within the framework of a democratic State. The collective nature of indigenous peoples’ rights and the need to safeguard their cultures and livelihoods are among the reasons why governments should adopt special measures for their consultation and participation in decision-making.

WHO HAS THE RESPONSIBILITY FOR UNDERTAKING CONSULTATIONS?

In the context of Convention No. 169, the obligation to ensure appropriate consultation clearly and expressly falls on governments and not on private persons or companies. In some cases, governments may delegate the operationalization of the consultation process to other entities. However, the responsibility to ensure that consultations are carried out in compliance with the provisions of the Convention rests with the government, even when it does not conduct the processes itself.

WHO SHOULD BE CONSULTED?

The Convention stipulates that indigenous peoples should be consulted through their representative institutions. What constitutes a representative institution should be determined taking into account the characteristics of the country, the specificities of the indigenous peoples and the subject and scope of the consultation. Given the circumstances, the appropriate institution may be representative at the national, regional or community level; it may be part of a national network or it may represent a single community. The important criterion is that representativeness should be determined through a process of the indigenous peoples themselves. This also implies, that an indigenous institution cannot claim representativity without being able to clearly identify its constituents and its accountability towards these constituents. In some cases, the alleged lack of representativeness of a given institution has been contested in court or brought to the attention of the ILO supervisory bodies.

In circumstances where representation is contested or there is a diversity of competing institutions, the identification of a single representative institution may not be possible. In broad national consultations, there will be a need to take an inclusive approach, allowing for participation of the diversity of organizational expressions. In more specific consultations, the scope of consultations should be determined on the basis of the impact assessments stipulated in Article 7(3) of the Convention. Ensuring that the institutions concerned are representative may in some cases also imply going beyond traditional institutions. For instance, the Convention requires that its provisions should be applied equally to women and men, but in some cases indigenous women may not have a voice in traditional decision-making.

If the institutions consulted are not considered representative by the people they claim to represent, the consultation may have no legitimacy. “If an appropriate consultation process is not developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention” (ILO Governing Body, 282nd session, 2001, GB.282/14/2).

Further, the Convention provides in Article 6(1)(c) that government shall “establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose”.

When it comes to determining what institutions are representative, the ILO supervisory bodies have stated that “the important thing is that they should be the result of a process carried out by the indigenous peoples themselves”

Governing Body, 289th session, 2004, document GB.282/17/3

WHAT ARE APPROPRIATE PROCEDURES?

The requirement that consultations should take place through appropriate procedures implies that consultations should take place in a climate of mutual trust. In general, Governments need to recognize representative organizations and both parties should endeavor to reach an agreement, conduct genuine and constructive negotiations, avoid unjustified delays, comply with the agreements which are concluded and implement them in good faith. Governments also need to ensure that indigenous peoples have all relevant information and that it can be fully understood by them. Sufficient time must be given to allow indigenous peoples to engage their own decision-making processes and participate effectively in decisions taken, in a manner consistent with their cultural and social traditions. Thus, consultation often means establishing an intercultural dialogue. This means making a real effort to understand how indigenous peoples’ cultures and traditional decision-making processes function, and adapting the form and timing of consultation to these.

Procedures are thus considered appropriate if they create favourable conditions for achieving agreement or consent to the proposed measures, independent of the result obtained. General public hearing processes would not normally be sufficient. The form and content of the consultation procedures and mechanisms need to allow the full expression of the viewpoints of the peoples concerned, in a timely manner and based on their full understanding of the issues involved, so they may be able to affect the outcome and a consensus could be achieved, and be conducted in a manner that is acceptable to all parties. The Committee of

Experts has emphasized that there should be a periodic evaluation of the operation of the consultation mechanisms, with the participation of indigenous peoples, with a view to continuing to improve their effectiveness.

IS THERE A REQUIREMENT TO REACH CONSENT?

As stipulated by Article 6(2), consultations must be undertaken in good faith and with the objective of obtaining agreement or consent. In this sense, Convention No. 169 does not provide indigenous peoples with a veto right, as obtaining the agreement or consent is the purpose of engaging in the consultation process, and is not an independent requirement. On the other hand, the ILO supervisory bodies have clearly stated that a simple information meeting, where indigenous peoples could be heard without having any possibility of influencing decision-making, cannot be considered as complying with the provisions of the Convention. The adequate implementation of the right to consultation thus implies a qualitative process of good faith negotiations and dialogue, through which agreement and consent can be achieved if possible. Here again, it is appropriate to underline the interconnection between broad and specific consultations. If indigenous peoples' rights, concerns and aspirations are reflected in legislation and broader policies, it will likely be easier to reach agreement and consent on specific measures or projects affecting their lands and territories. It must also be highlighted that even if the consultation process has been concluded without agreement or consent, the decision taken by the State must still respect the substantive rights recognized by the Convention, e.g. indigenous peoples' rights to land and to property. The more severe the potential consequences are for the concerned indigenous peoples, the greater is the importance of obtaining agreement or consent. If, for instance, the continued existence of an indigenous culture is at stake, the need for consent to proposed measures is more important than in cases where decisions might result in minor inconveniences, without severe and lasting consequences.

Convention No. 169 in its Article 16, paragraph 2 provides for "free and informed consent" of indigenous and tribal peoples where relocation of these peoples from lands which they occupy is considered necessary as an exceptional measure.

DOES CONSULTATION HELP TO PREVENT CONFLICT?

Effective consultation and participation are principles of good governance and are means to reconcile different interests and pursue objectives of inclusive democracy, stability and economic development. In contrast, the lack of effective consultation will often lead to further exclusion and, in the worst cases, conflicts and confrontations. Convention No. 169 has twice been ratified as an integral element of peace accords, to put an end to civil wars that were rooted in the exclusion of certain sectors of the population (Guatemala, 1996; Nepal, 2007). At the local level, consultation is the mechanism for establishing dialogue and facilitating agreements. Likewise, where the ILO supervisory bodies have analyzed specific situations of conflict, it has been clear that these conflicts emerged when the provisions on consultation and participation had not been adequately implemented.

WHAT ARE THE BARRIERS FOR CONDUCTING CONSULTATIONS?

A key obstacle to effective consultation is the situation of exclusion and mistrust, which often exists between indigenous peoples and States. As expressed by a Tripartite Committee of the Governing Body in the context of a particular country, "...the climate of confrontation,

violence and lack of mutual trust stopped the consultations from being conducted more productively. It is imperative in all consultations to establish a climate of mutual trust, but all the more so with respect to indigenous peoples, given their lack of trust in state institutions and their feeling of marginalization, both of which have their origins in extremely old and complex historic events, and both of which have yet to be overcome”.

There are other reasons related to the failure to consult adequately, including the fact that widespread recognition of this right is fairly recent and both governments and indigenous peoples are in the process of developing appropriate institutions and modalities for consultations. As noted by the CEACR in its general observation, “[i]n certain cases, agencies have been established with responsibility for indigenous or tribal peoples’ rights, however, with little or no participation of these peoples, or with insufficient resources or influence. For example, the key decisions affecting indigenous or tribal peoples are in many cases made by ministries responsible for mining or finance, without any coordination with the agency responsible for indigenous or tribal peoples’ rights. As a result, these peoples do not have a real voice in the policies likely to affect them. While the Convention does not impose a specific model of participation, it does require the existence or establishment of agencies or other appropriate mechanisms, with the means necessary for the proper fulfillment of their functions, and the effective participation of indigenous and tribal peoples. Such agencies or mechanisms are yet to be established in a number of countries that have ratified the Convention” (CEACR 2008, published 2009).

WHAT DOES THE CONVENTION SAY ABOUT PARTICIPATION?

The concept of participation is closely linked to that of consultation. In a general manner, Convention No. 169 states in Article 6(1) that governments shall “establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them”.

The Convention thus recognizes that indigenous peoples often are in a disadvantaged position, which hinders their equal participation. This happens, for example, in the numerous cases where indigenous peoples, and in particular women, do not have recognized citizenship or identification documents, which would allow for their participation in elective processes. In other cases, electoral rules do not allow for minority representation, implying that indigenous peoples may be effectively excluded from participating in decision-making.

In addition, Article 7(1) of Convention No. 169 specifically stipulates that indigenous peoples shall “participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly”. Further, Article 33 of the Convention requires governments to establish agencies or other appropriate mechanisms to ensure “the planning, coordination, execution and evaluation, in cooperation with the peoples concerned, of the measures provided for in this Convention”.

Convention No. 169 contains numerous references to the concept of participation and also uses other terms such as the obligation to “cooperate” with indigenous peoples; the obligation not to take measures contrary to the “freely- expressed wishes” of indigenous peoples; and the obligation to seek “free and informed consent” of indigenous peoples where “relocation...is considered necessary as an exceptional measure”.

Members of indigenous peoples shall benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population.

Enjoyment of the general right of citizenship, without any discrimination, shall not be prejudiced in any way by special measures established to safeguard the persons, institutions, property, labour, cultures and environment of indigenous peoples.

See articles 2(2) (a) and 4(3) of Convention No. 169.

WHAT IS THE LINK BETWEEN CONSULTATION AND PARTICIPATION?

The right to consultation of indigenous peoples is not limited to the right to react to externally initiated or imposed measures. The ILO supervisory bodies have underlined the interconnectedness of the concepts of consultation and participation. This implies that indigenous peoples should not only respond and be able to influence externally initiated proposals, but should actively participate and propose measures, programmes and activities that shape their development. Participation implies going further than mere consultation and should lead to concrete ownership of initiatives by indigenous peoples. In this sense, the intertwined concepts of consultation and participation are the mechanisms to ensure that indigenous peoples can decide their own priorities for the process of development and exercise control over their own economic, social and cultural development, as stipulated in Article 7(1) of the Convention.