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THE PRIOR CONSULTATION OF INDIGENOUS PEOPLES IN LATIN AMERICA

INSIDE THE IMPLEMENTATION GAP

Edited by

Claire Wright and Alexandra Tomaselli



The Prior Consultation of Indigenous Peoples in Latin America

This book delves into the reasons behind and the consequences of the implementation gap regarding the right to prior consultation and the Free, Prior and Informed Consent (FPIC) of Indigenous Peoples in Latin America.

In recent years, the economic and political projects of Latin American States have become increasingly dependent on the extractive industries. This has resulted in conflicts when governments and international firms have made considerable investments in those lands that have been traditionally inhabited and used by Indigenous Peoples, who seek to defend their rights against exploitative practices. After decades of intense mobilisation, important gains have been made at international level regarding the opportunity for Indigenous Peoples to have a say on these matters. Notwithstanding this, the right to prior consultation and the FPIC of Indigenous Peoples on the ground are far from being fully applied and guaranteed. And, even when prior consultation processes are carried out, the outcomes remain uncertain.

This volume rigorously investigates the causes of this implementation gap and its consequences for the protection of Indigenous Peoples' rights, lands, identities and ways of life in the Latin American region.

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Inside the Implementation Gap

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3 Binding consent of Indigenous Peoples in Colombia

An example of transformative constitutionalism¹

Juan C. Herrera

Introduction

The Free, Prior and Informed Consent (FPIC) of Indigenous Peoples on matters that have the potential to affect their interests and territories has become one of the most powerful tools that positive and jurisprudential law has created in recent decades to protect the collective rights of these peoples.² The Constitutional Court of Colombia (CCC) is one of the most relevant and engaged bodies in the construction of transformative constitutionalism in Latin America. “Transformative constitutionalism seeks to remake a country’s (supposedly deficient) political and social institutions by moving them closer to the sets of principles, values, and practices found in the constitutional text” (Landau, 2005, p. 1535).³

Together with other Courts, especially the Inter-American Court of Human Rights (IACtHR), the CCC is part of a group of Latin American courts that have found a creative way to embrace the main characteristics and principles of the recent constitutions issued in the region. This is a unique version of judicial case law that links transformative and dialogic constitutionalism to plausible results.

Regarding the Indigenous question in the Latin American constitutional context, Gargarella has asked: “how should we solve, then, the questions posed by the emerging tensions between the rights and interests of indigenous groups and rights and interests of the rest of the population?” (Gargarella, 2013, p. 180).

This chapter offers an answer to that question by studying Colombian constitutional case law. It thus complements and critically annotates the jurisprudential and legal grounds of the right to prior consultation of Indigenous Peoples by focusing on the issue of binding consent. For this reason, this chapter does not provide an empirical review of how the right to prior consultation itself is implemented. Instead, it explains how the court introduced one of the region’s most transformative case laws regarding FPIC. Furthermore, it provides strong reasons for not linking prior consultation to a “veto right” but rather to a contextualised “binding consent”. Finally, it explains why the outcomes of the precedents are at risk. One way or another, our comprehension of a good example of judicial practice may help to reduce the “implementation gap”.