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INDIGENOUS CONSULTATION AS A SOCIAL ACCOUNTABILITY MECHANISM[1]

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ABSTRACT

The Indigenous Consultation is a special mechanism of participation to obtain consent in the implementation of legal and/or political decisions that affects indigenous people. It constitutes the basis of ILO Convention 169, and may unveil a dimension of accountability. The objective of this paper is to identify elements of accountability in the Indigenous Consultation using two types of analysis categories: those based on the conceptual accuracy of accountability, and those grounded in concrete and explicit orientations from the particular design of the Indigenous Consultation and its implementation in Chile. The existing categories of social accountability in the current design of the Indigenous Consultation in Chile are presented, distinguishing their potential in the scope of social responsibility as a mechanism for citizen participation, using documentary analysis as work methodology. As result, this work proposes an analysis matrix, concluding that, in order to become an effectively mechanism of social accountability, the Indigenous Consultation requires substantial improvement in normative standards, as well as redesign, restructuring and articulation with other existing mechanisms. The foregoing with no damage to other factors that

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allow symmetric, in good faith, an active involvement and effective influence at each stage.

***Keywords**: accountability; citizen participation; indigenous consultation; social accountability.*

A CONSULTA INDÍGENA COMO UM MECANISMO ESPECIAL DE ACCOUNTABILITY SOCIAL

RESUMO

A consulta indígena é um mecanismo especial de participação para alcançar o consentimento na implementação de decisões jurídicas e/ou políticas que os afetem. Constitui a base da Convenção 169 da OIT, podendo revelar uma dimensão de prestação de contas. O objetivo deste trabalho é identificar elementos de accountability na Consulta Indígena utilizando dois tipos de categorias de análise: as que se baseiam nas precisões conceituais do accountability e nas orientações concretas e explícitas provenientes da elaboração particular da Consulta Indígena e da sua implementação no Chile. São apresentadas as categorias de responsabilidade social existentes na atual concepção da Consulta Indígena no Chile, distinguindo o seu potencial no âmbito da responsabilidade social como mecanismo de participação cidadã, utilizando a metodologia de análise do conteúdo documental. Como resultado, propomos uma matriz de análise, concluindo que, para se tornar um mecanismo eficaz de accountability social, a consulta indígena requer uma melhoria substancial das normas regulamentares, bem como a reformulação, reestruturação e articulação com outros mecanismos existentes. O anterior sem prejuízo de outros fatores que permitam simetria, boa-fé, envolvimento ativo e influência efetiva em cada etapa.

***Palavras-chave**: accountability social; consulta indígena; participação cidadã; prestação de contas.*

INTRODUCTION

The International Labour Organization (ILO) Convention 169 on Indigenous and Tribal Peoples in Independent Countries – hereinafter "the Convention" – was adopted by the General Conference of the International Labour Organization at its 76th session on June 27, 1989, in cooperation with the United Nations system. The instrument entails from a consensus among the tripartite constituents of the International Labour Organization, and in the exercise of its mission to promote social justice and the labor-related Human Rights in an attempt to implement measures to overcome the historical discrimination suffered by these groups.

The Convention institutes not only the floor but also the ceiling of indigenous rights in international law, since it is the only binding instrument of the United Nations system concerning indigenous peoples and the corollary of a long-standing struggle of indigenous organizations within the United Nations bodies. The fight that dates to the 1970s to obtain recognition of different collective rights for different groups culminated in the review of Convention nº 107 on "Indigenous Populations", of 1957, and the promulgation of Convention nº 169 on "Indigenous and Tribal Peoples" that superseded the early in 1989.

In addition, the Convention refers to several rights related to indigenous peoples, based on the respect for diverse cultures and ways of life, recognizing collective rights such as territory, work, health, social security, cooperation, religion, languages, access to natural resources, traditional institutions or customary law. Rights may be classified into four main areas: political or participatory rights, rights to land and territory, social and cultural rights, and own rights. The Indigenous Consultation is included among the political rights. It is the cornerstone of the treaty and aims to recognize the right of indigenous peoples to decide on their priorities in the context of development processes. It is where the fundamental principle of indigenous peoples' participation in the decision-making on measures and/or projects that affect them is enshrined, being materialized in the establishment of the Indigenous Consultation.

In Chile, the Convention is a longtime wish of indigenous organizations, and corresponds to one of the axes of indigenous policy committed to the process of resuming democracy. After a time-consuming legislative process, the Convention was enacted through the Supreme Decree nº 236 of 2008, issued by the Ministry of Foreign Affairs, entering into force one

year after being passed by the Congress, on September 15, 2009. This international treaty is binding on all signatory States. Since these rules have been incorporated into the country's legal system, Chile is mandated to perform Indigenous Consultation processes whenever it decides to implement measures (public policy, legislative or administrative) that may directly affect one or more indigenous peoples. The Country became bound to this duty when it ratified the Convention.

In the current work we will try to recognize some particularities in Indigenous Consultation as a mechanism of participation endowed with special characteristics that allow it to be considered a mechanism of accountability. In this way, we will try to identify the elements of accountability that may be found in the Consultation. For that, two categories of analysis will be employed: those based on the conceptual accuracies of accountability, and the concrete and explicit orientations ensuing from the peculiar design of the Indigenous Consultation, and the way it has been implemented in Chile. Thus, the categories of social accountability present in the current wording of the Indigenous Consultation in Chile will be described, differentiating the potential of this particular mechanism of citizen participation in terms of social accountability. All that using the methodology of documentary analysis of the content of established regulations, and documents that deepen the characteristics and, above all, the implementation of the Indigenous Consultation in Chile.

1 INDIGENOUS CONSULTATION AS A MECHANISM FOR CITIZEN PARTICIPATION

First of all, it should be noted that all forms of citizen participation are political by definition. That is so because "their sphere of action resides in the public space in which subjects and their organizations interact with the different levels of government". Moreover, it is conducted in order to "try to influence instruct or modify decision-making in favor of collective, community or sectoral interests". Not only that, but it is also aimed at "exercising some degree of supervision and control over government activity". These, in short, are the basis of accountability mechanisms (CASAS, 2012, p. 61).

Thus, according to Isunza in Canto, both concepts seek to relate to each other in order to establish a new "way of conceiving relations between society and the State", understood as a new stage in the discussion of

democratization processes beyond the traditional relations between rulers and ruled (CANTO, 2010, p. 231). For Isunza Vera (2004), the concept of accountability evokes the "action of computing, i.e., of collectively assessing, judging or verifying something". Following Insunza Vera (2004, p. 344), the use of this term is related not only to the notions of enumeration and justification, but also to the idea of sanction as a logical result of the first two, assuming "the creation of a mechanism that is more of an interface, defined as a relational space". It is in this new relational space that citizens will be able to carry out the actions understood in accountability as a way of citizen participation.

Indigenous Consultation refers to the right of indigenous peoples to participate in the decision-making, and outlining of measures or projects that directly affect them. In turn, as a fundamental principle of governance, are duties of the State: inclusive development, social peace, conflict prevention and resolution in the context of intercultural relations, in order to curb the discretion of the State in the formulation of public policies on indigenous peoples. Thus, the concepts of indigenous participation and consultation are directly related, from the very conceptualization proposed by Convention 169.

In this sense, Convention 169 establishes, in Article 6 (1), 1, that when implementing the provisions of the Convention governments must "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". It immediately adds, as letter b), the government's obligation to "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". In turn, letter (c) establishes the obligation of governments to "set up the means for full development of the institutions and initiatives of these peoples and, whenever appropriate, to provide the resources necessary for that purpose". In addition, Article 6(2) establishes as an obligation of governments that indigenous consultation processes carried out in compliance with the 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 ".

Consistent with this standard, Article 7(1) of the Convention states

that indigenous peoples should "have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use". It adds that indigenous peoples should have the right to "control, to the extent possible, over their own economic, social and cultural development", as well as the right to "participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly".

Therefore, for Convention 169, the participation of indigenous peoples should not only be unidirectional or reactionary, but also bears the objective of intervening in decision-making, programs, measures and/or activities that affect them. It even refers to the power to exercise control over them, thus opening the door to the most advanced level of accountability. Therefore, it is not only a matter of providing and/or accessing requests for information made by indigenous peoples or their members, but also of establishing procedures that involve a genuine dialogue between the parties under conditions of symmetry. This is the very spirit of all the provisions of the Convention that deal with this subject.

The foregoing is also reflected in Article 33(1) of the Convention, which states that the responsible authority for the Convention "shall ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned". It further adds that it should be ensured "that they have the means necessary for the proper fulfilment of the functions assigned to them", complementing Article 33(2) with the mandatory content of such programs. These programs should include not only, according to letter a), "the planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention", but also, according to letter b), "the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned", taking up the concept of control.

As such, participation is a duty of the State that emanates not only from the provisions of Convention 169, but also from the national legislature. Thus, in 1993, when Law No. 19,253, which "Sets rules on the protection, promotion and development of indigenous peoples, and creates the National Indigenous Development Corporation", better known as the "Indigenous Law", entered into force, establishes a "Title V", named "on participation", which on paragraph 1: "On Indigenous Participation",

comprising Articles 34 and 35. In this way, the indigenous organizations' right to have their voices heard and considered by the services of the state administration, and by territorial organizations when approaching matters that have to do with or are related to indigenous issues is enshrined, further stating that they "shall be represented in the participatory bodies recognized for other intermediate groups". Currently, both articles should be read in the sense expressed in Article 6 of Convention No. 169[5].

In turn, on environmental matters, according to Article 4, section 1 of Law No. 19.300 "On the General Bases of Environment" of 1994, the legislature established as a duty of the State the strengthening of citizen participation, understood as a fundamental principle in both laws. In this sense, Convention 169 not only imposes the obligation to implement its provisions in good faith, but also the obligation to ensure that Indigenous Peoples participate in the processes and decisions involving them, particularly through Indigenous Consultation. For the foregoing, most provisions of the Convention emphasize that the processes of planning, coordination, implementation and evaluation of any measure and/or decision adopted must be carried out in collaboration with Indigenous Peoples. For that, the States Parties must establish mechanisms for participation and consultation that are appropriate according to the customs and values of the Indigenous Peoples themselves.

In this way, participation is enshrined as the cornerstone of Convention 169, as without the guarantee and implementation of this right it is not possible to apply the remaining rights enshrined in this international instrument. This is not far from what happens in modern democracies, where citizen participation is also a fundamental principle for governance and the sustainable and inclusive development that must permeate the State in all its dimensions, from the national to the local level. In a similar vein, the United Nations Declaration on the Rights of Indigenous Peoples, in its nineteenth article, states that

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (UNITED NATIONS, 2008).

5 Several authors maintain that, given the highest status of ILO Convention 169, it modifies, complements and even revokes certain provisions of Law 19,253 (Indigenous Law), including those mentioned above, which must be understood from the perspective of Article 6 of the Convention with respect to Indigenous Consultation. Converse the obligation of participation into a mandate rather than a recommendation, as established in the articles of Law n. 19,253.

At the operational regulatory level, the duty of consultation is ruled in Decree No. 66 of 2013 of the Ministry of Social Development, which approves the Rule governing the Indigenous Consultation procedure under Article 6 n. 1, Letter a) and n. 2 of Convention No. 169 of the International Labor Organization, known as the "General Regulation for Consultation". It establishes the stages of the procedure, indicating that they are "planning the consultation process; providing information and publicizing the consultation process; internal deliberation of the indigenous peoples; dialogue; and systematization, communication of the results, and conclusion of the process" (LEPPE GUZMAN, 2015, p. 377), reaffirming that deliberation and dialogue as participatory components are indispensable.

Similarly, it should be noted that the Ministry of Environment Decree No. 40 of 2013, which comprises the Regulations of the Environmental Impact Assessment System, states in Article 83 that the Assessment Commissions or the Executive Officer is responsible for "establishing mechanisms to ensure the community's informed participation". It also states that for the implementation of these mechanisms, the Service "may request the collaboration of the State administrative agencies with environmental competence, or with competence in matters of community, social or indigenous development and/or citizen participation". In addition, "the Service must carry out community information activities, adapting strategies on citizen participation to the social, economic, cultural, and geographic characteristics of the population in the project's area of influence under evaluation, so that they are aware of the environmental assessment procedure, their rights during it, the type of project or activity under evaluation that gives effect to participation, and the main effects of this typology of project or activity". Thus, we agree with Leppe that "the Environmental Assessment Service is legally empowered to design specific procedures, case by case" (LEPPE GUZMAN, 2015, p. 377), so that the call to respect, promote and implement participation as a duty of the State is also materialized through the creation of new procedures of participation.

Finally, it should be clarified that, on the one hand, for procedural purposes, differences are often made between the two concepts, with no prejudice to the fact that some regulations set the prerogatives of citizen participation, including the rights to access information and know the procedures, to make observations and to obtain a well-founded response to them. On the other hand, there are differences regarding the Indigenous Consultation, in that the latter is governed by certain principles of good

faith, proper procedure, and prior, free, and informed consent. However, by defining it as a mechanism that seeks to "facilitate the informed participation of the specific human groups affected, enabling them to have an effective influence", the direct relationship between both concepts is undeniable.

Another issue that should also be mentioned is the non-binding nature of the Indigenous Consultation. It brings about a number of difficulties in terms of non-validation by the consulted community, self-exclusion from the process, and the feeling that it is a *mise en scène* rather than a necessary and regulated procedure that is subject to the principles outlined above.

Moreover, this relationship, which could be described as genus to species, can be found in the analysis of the regulation on Indigenous Consultation contained in certain institutions, such as the Environmental Impact Assessment System. This relationship leads to the conclusion that "nothing would prevent the same environmental impact study from simultaneously giving rise to both a citizen participation stage and an Indigenous consultation process" (LEPPE GUZMAN, 2015, p. 378-380). That is so because both mechanisms seek to concretize the effective participation of those involved in decisions, in an attempt to achieve a given level of influence over them.

In this sense, the participation considered in Convention 169 has a differential character, as it aims to incorporate into the decision-making process groups that have historically been left aside the traditional spheres of participation. Therefore, at this level, this dimension must necessarily be taken into consideration and be adapted to the culture, worldview and procedures of the Indigenous Peoples, with good faith being a core element for its development. Thus, it is clear that Indigenous Consultation ultimately seeks to obtain the free, prior and informed consent of Indigenous Peoples for policy formulation by the State.

In addition to the Indigenous Law, Law nº 19.300, Decree nº 66 of 2013 and Decree n. 40 of 2013, previously mentioned, in January 2020 the "Constitutional Reform Project incorporating Indigenous Consultation into the wording of the Fundamental Charter", identified as Bulletin nº 13169-07, was submitted. It started as a parliamentary motion in the Senate, and is currently in its first constitutional procedure, with no urgency. The motion aims to incorporate in the first clause of Article 5, Political Constitution, an item providing for consultation with indigenous peoples

as an exercise of sovereignty[6]. Another equally recent initiative, introduced in March 2020, seeks to suspend the deadlines established in Law 19.300 for the competent bodies to carry out citizen participation processes, as well as indigenous consultations, and make decisions on environmental impact statements and studies, while the State of Constitutional Emergency of Catastrophe or its extensions are in force. This motion, introduced in the House of Representatives, is identified as Bulletin nº 13349-12, has no urgency, and is currently on file.

2 INDIGENOUS CONSULTATION AND SOCIAL ACCOUNTABILITY

It is possible to outline some characteristics that allow mechanisms of participation to be simultaneously considered accountability mechanisms. Next, we will try to identify the elements of accountability that could be present in the Indigenous Consultation. To this end, two types of analysis will be used: those drawn from the conceptual accuracies of accountability, and the concrete and explicit guidelines ensuing from the unique design of the Indigenous Consultation and the regulations that ruled its implementation in Chile. Thus, the categories of social accountability present in the current design of the Indigenous Consultation in Chile will be described, distinguishing the potential of this unique mechanism of citizen participation in terms of social accountability. This will allow suggesting reformulations, changes, and even coordination with other mechanisms that may contribute to let the Indigenous Consultation fulfill the purposes for which it was originally conceived.

First of all, it should be noted that the control exercised by citizens over the actions of their rulers through accountability can be classified in different ways and, therefore, according to the way it operates and the relationship that exists between those who participate in it. Following Guillermo O'Donnell (2004), one can distinguish between horizontal and vertical controls, where horizontal accountability refers to the idea of control or balance between the powers of the state, performing surveillance based on institutional counterweights through which other state entities monitor different authorities, being this an intra-state mechanism in which the state

6 The proposed text, if approved, would read as follows: "Sovereignty essentially resides in the Nation. Sovereignty is exercised by the people through plebiscites and regular elections, and through consultations with indigenous peoples recognized by law, whenever the State affects their interests, and also by the authorities established by this Constitution. No sector of the people nor any individual may claim to exercise it".

itself supervises itself (NATAL MARTÍNEZ, 2006). This is what is known as the division of powers or systems of checks and balances originated in the political liberalism (MARAVALL, 2003, p. 174).

There is also the diagonal accountability, which refers to a control that is produced through cooperation between citizens (individually or organized) and institutions with a specific mandate to exercise control over government management, as in the Chilean case with the Comptroller General of the Republic. In other words, institutions are tasked with horizontal accountability by mandate or assigned responsibility and, in this way, oversee public and political management (GARCÍA, 2014). In turn, vertical accountability describes a relationship between unequal parties, referring to the control exercised by the citizen, so that the society controls the State's actions (ISUNZA VERA, 2003). For O'Donnell (1998 *apud* CANTO, 2010, p. 241), this type of accountability is made up by control mechanisms from various sources, such as elections, social demands, or the media that make visible the demands and illegal acts by the public authorities.

Thus, the authors refer to electors' vote, the work of citizen groups and the media as instruments that supplement horizontal accountability, classifying them as part of the second strand: vertical accountability (UGALDE, 2002). Within vertical accountability, three types of accountability can be distinguished: internal, electoral and social. In the first case, a type of bureaucratic or decreasing, control, corresponding to that exercised by elected politicians to the heads of the bureaucracy to whom the implementation of public policies has been delegated. Along with it, it refers to cases in which the senior levels of bureaucracy exercise administrative control over lower hierarchical levels, so that the "principals" can control their "agents" in order to achieve efficiency in public management (GARCÍA, 2014, p. 291).

On the other hand, electoral vertical accountability refers to elections as a mechanism for holding governments accountable (DWORAK, 2003, p. 45), being also constituted as representational devices and operate as upward accountability (GARCÍA, 2014, p. 291). It should be noted that O'Donnell (2004) considered elections as the vertical accountability mechanism par excellence due to the importance of elections as a way of citizen control, in which sanctions are exercised by not reelecting the governing party, or by punishing a representative denying them a second term.

Today we know that citizen participation (not understood only as

control) goes far beyond voting, for it is the cradle of the concept of societal accountability, used by Peruzzotti and Smulovitz. The authors point out that this type of control is made up by citizen groups and the media, relying on measures based on moral and public criticism (UGALDE, 2002, p. 32). Dworak (2003, p. 46) describes them as "actions of institutionalized citizen participation aimed at the control, monitoring and evaluation of government programs and actions by individuals or organizations that promote accountability". In this sense, sanctions are constituted as "disclose and disqualify the government for given actions", and may evolve into punishment at the ballot box (UGALDE, 2002, p. 32-33). Similarly, the fact that organized participation can exert pressure for a given public decision to be made constitutes a sanction (DWORAK, 2003).

It should be added that vertical accountability actions may, at a later period, trigger horizontal surveillance, as both horizontal and vertical accountability systems are complementary, as social organizations and the media carry out investigations for denouncing and exposing public officials who lack honesty, probity or transparency (UGALDE, 2002). Thus, societal accountability, also conceptualized as social rendering of accounts, social accountability, social audit, social control or social controllership, refers to "the set of auditing and regulatory actions and practices autonomously developed by the society in the public sphere" (CUNILL GRAU, 2009, p. 5).

With regard to the concept of accountability and its application, there are different types of control over the actions of the state. These actions may be grouped according to who exercises it and the level of depth it reaches, to the extent that participation mechanisms aimed at gathering the subjects' opinion certainly do not entail the same effects as if they were conceived as spaces of deliberation, cooperation and agreement between the state and society (CUNILL; GAC, 2013). Thus, in relation to their level of depth, three basic dimensions may be distinguished. Firstly, an informative one that, as its name indicates, seeks to know what has been done or will be done, listing facts, making information transparent through the account of actions and results, providing relevant management-related data related.

Secondly, an explanatory dimension, also known as argumentative, to the extent that it justifies what has been or should be done by providing reasons, reflections and judgments, communicating justifications for the actions and results achieved. At this level, one can evidence the process

called answerability, or responsibility, in which citizens have the right to claim rendering of accounts, to inquire and challenge the responsible party, and ask for explanation and reasons for its decisions. Therefore, it implies demanding the responsible party to justify its actions: it must argue what it has done and why it has done it and, consequently, according to Tsai (2011 *apud* GARCÍA, 2014, p. 305) "this level requires the existence of the information level considering the need for transparency on the actions by the responsible party".

Finally, a mandating dimension that, according to Schedler (1999 apud OLVERA; ISUNZA VERA, 2004, p. 344) "is that responsible for recognizing what is right and/or sanctioning what is wrong". As such, it is associated to coercion and punishment to the extent that, in this dimension, citizens can not only evaluate the performance of their rulers, but also exercise the right to establish proportional sanctions accordingly to the evaluation of that performance, and politicians and bureaucrats must assume the consequences of their actions (GARCÍA, 2014, p. 305).

Having made these preliminary conceptual clarifications, we will now review the potential for vertical social accountability presented by the Indigenous Consultation in its configuration and implementation in the Chilean legislation. In this sense, the categories of social accountability allow the effective enforcement of vertical social control through this mechanism, since it aims at the participation of citizens belonging to Indigenous Peoples.

In terms of the level of depth achievable by means of its implementation, the Indigenous Consultation allows reaching the level of justification, that is, that authorities are accountable and citizens ask for explanations about what has been decided and/or performed. This mechanism does not reach the level considered "ideal", corresponding to the demanding level, insofar as it is not possible to remove from their functions any underperforming agent, at least not directly through Indigenous Consultation processes. This fact does not damage the possibility of suspending the process pursuant to the rules of Convention 169 and the Supreme Decree 66 of the Ministry of Social Development.

Reviewing the categories that emerge from the design and implementation of Indigenous Consultation in Chile, it is a highly flexible mechanism, as it may be convened by the state bodies that implement it, and also by the citizens involved (indigenous peoples). The same applies to the issues to be addressed, which can be perfectly jointly defined by the State

and the indigenous peoples involved, their limit being the issues that are likely to affect them directly. In this sense, we speak of "indigenous peoples involved" to indicate that participants can be all of them, and that it is up to the indigenous peoples to define who should participate through their representative organizations, according to their customs and values. Therefore, the mechanism is highly flexible, and this is observable in the fact that it can fit into any contingent situation that may arise during its execution.

As for the control of the potential bureaucracy that could be exercised through this mechanism, although it provides for the control over the development of the implemented measures, it is not clear whether this could extend to controlling the bureaucracy that executes said measures. Therefore, it cannot be affirmed that it could eventually occur without prejudice to the right of Indigenous Peoples to invoke the Consultation according to their initiative whenever it is not carried out by the State or its entities. With regard to the product and/or results that emerge from this mechanism, it intends to reach agreements and consensus in the decisions and implementation of measures, so that, devising the potential that has become evident in this mechanism, it allows to implement effectively participatory and cooperative measures, since what is sought is the participation of indigenous peoples "in its design and execution, i.e., participation in the actual benefits of the project or measure […]" (ANAYA, 2016, p .28) . Below is a table summarizing the analysis presented above:

Table 1 – Analysis of indigenous consultation as a mechanism of social accountability

Origin	**Category**	**Description**	**Result**
From social accountability	Type of control	Vertical social	Citizens are the ones called to participate (original peoples)
	Level of depth	Level of justification	It allows justifying and rendering accounts for given decisions
	Summons	Both and all	The summons and themes to be addressed may (should) be jointly defined Universal summon (indigenous organizations and individuals)
	Participants	Anyone	There is no prior definition, so it is open

From social accountability	Flexibility	Very flexible as to design	It is flexible, being able to adapt to contingent situations as they arise
	Way to control bureaucratic	One of its objectives is to control the measures delivery	Could extend to the bureaucracy that implements them (not so clear)
	Political moment	Control may be exercised at all stages of the measure (ex-ante and ex-post)	It may be executed at any period of time
	Product and/or outcome	Agreements	Consensus on decisions and implementation of measures

Source: prepared by the authors.

3 INDIGENOUS CONSULTATION AS AN ELEMENT IN THE FORMULATION OF NATIONAL AND LOCAL PUBLIC POLICY: DIRECT IMPACT

Indeed, indigenous peoples' right to consultation can be transformed into an effective mechanism for participation and accountability in relation to public policymaking with culturally relevant approach. However, this requires significant efforts by the state in order to comply with international consultation standards. This implies more specific and particular responsibility, since Convention 169 establishes a standard of participation that is higher than that not involving indigenous peoples. Moreover, it adds an additional requirement for State bodies when implementing the administrative or legislative measure.

It is unnecessary to recall that participation is one of the inspiring principles of the Convention 169, and also of the Indigenous Consultation, which will occur whenever the State adopts measures, whether legislative or administrative, that could directly affect indigenous peoples. This obligation extends to all entities of the State administration, and not only to the governmental body, but also to the State as a whole, whether at the central, deconcentrated, or decentralized level. In other words, it covers the executive and the legislative powers, and also extends to regional and local governments, such as prefectures, governors' offices, and municipalities.

The Supreme Decree nº 66 is clear in stating that the duty of consultation "applies to ministries, prefectures, regional governments, provinces

and public services established to fulfill administrative functions". This provides ample room for the use of this safeguard in the formulation of public policy, and even in the definition of development priorities in all areas of state administration. However, transforming Indigenous Consultation into an effective mechanism for Indigenous participation and accountability requires an active role for Indigenous Peoples during the process, and their presence in the development of all stages. Significant degrees of flexibility must be incorporated, as well as improved impact on implementation and results, always taking into account the principles that inspire the Convention 169. A relevant aspect is related to the determination of its application, that is, what is known as its direct effect.

The definitions in Convention 169 are broad and, therefore, are an interpretive challenge for those involved. In this sense, the Supreme Decree nº 66 states that there will be an impact whenever the effects of a measure directly affect indigenous peoples and their communities. This will occur when this impact is manifested differently from the rest of the population, or in a way that is different from the rest of society. For example, if it affects – or is likely to affect – indigenous peoples in spiritual terms, in access to natural resources, in the exercise of their culture, or in access to the territory in a way that alters their specific ways of living.

Thus, for Indigenous Consultation to be effective, it demands the indigenous participation in the pre-feasibility processes and in the planning of the measures, effective consideration of the customs and values of the indigenous peoples in the consultation process, good faith access to information, communication through symmetrical dialogue, access to information in a clear and simple manner, as well as transparency in the actions of the State, subsequent evaluation of the adoption of the measure, control over possible mitigations and, finally, equitable participation in the benefits when possible.

CONCLUSIONS

Indigenous consultation is the highest expression of the principle of participation that inspires the ILO Convention 169 and, moreover, is a safeguard for the rights of indigenous peoples in the face of State decisions. As aforementioned, its ultimate goal is to avoid discretion and arbitrariness in governmental decision through the adoption of a special procedure that incorporates the indigenous perspective into the adoption of public decisions

through participatory, symmetrical, and goodwill instances.

For the right to consultation to be real, indigenous peoples must be involved and effectively influence decisions and the implementation of measures that affect them. It implies, on the one hand, the exclusion of "mere consideration of viewpoints" and targeted or formulated participation. On the other hand, it requires the active participation of indigenous peoples in each and every stage of the state measure adoption. In this sense, participation must be present at all stages, from pre-feasibility analysis, planning, design, implementation, execution, and even in the evaluation of the measures It is particularly important to make them part of the benefits they provide.

Achieving this desired level of ownership is only possible through the proper implementation of the Indigenous Consultation procedure, establishing a fair, respectful and collaborative relationship, so that indigenous peoples can effectively decide and influence their priorities, getting involved in the economic, social and cultural development processes that affect them, as established in Article 7 (1) of ILO Convention 169. To achieve this objective, it is necessary to substantially improve the normative standards applied by the State since the entry ILO Convention 169 came into force, as they do not meet the international requirements on Indigenous Consultation. This issue that has been highlighted by broad sectors of civil society and indigenous peoples at the national and international level.

Along with the above, it is essential to articulate Indigenous Consultation with other mechanisms of citizen participation comprised in the general laws, such as those related to environmental protection or natural resource management, in order to convert this participation mechanism into a true space for deliberation and effective governance, reaching its full potential as a tool for conflict resolution and conciliation of interests and dialogue. This would contribute to achieving an inclusive democracy and sustainable development. Advancing the analysis performed, the Indigenous Consultation could be converted into a mechanism of social responsibility, as it would allow indigenous peoples to exercise effective control over the measures and decisions that affect them, and even over the bureaucracy in charge of them.

Finally, the constituent moment that Chile is experiencing since October 2019 and its concretization through a constitutional convention unprecedented in comparative law. This is characterized by equal gender

representation and the guarantee of indigenous participation – through reserved seats – and is an opportunity to respond to the long-delayed demands of indigenous peoples, recognizing their collective, political, cultural and territorial rights. The recent election of scholar Elisa Loncón, an indigenous Mapuche woman, as President of the Constitutional Convention, is a powerful sign of the changes to come.

However, the problem is not limited to establishing collective rights such as Indigenous Consultation at the constitutional level. It comprises the need for an organization, for mechanisms, protocols and procedures, as well as resources to ensure that Indigenous Consultation is carried out in good faith. A good faith that should be sustained not only in the design, but also in the implementation and evaluation of public policies that affect indigenous peoples. Finally, as is well known, good faith requires not only attitudinal components, but also that Indigenous peoples have the necessary, timely, accessible, truthful and sufficient tools and information to carry it out. This is the only way to achieve an inclusive democracy that respects diversity, with the effective participation of indigenous peoples in decision-making on issues that concern them.

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