

Prior Consultation and the Risks of Its Virtualization for Indigenous Peoples in Peru

Consulta previa y los riesgos de su virtualización para los pueblos indígenas en Perú

Alfonso Renato Vargas-Murillo[§]

Ilda Nadia Pari-Bedoya[‡]

Delia Yolanda Mamani-Huanca[¶]

Francisco de Jesus Guevara-Soto[¶]

Abstract

* Artículo de reflexión.

[§] Máster en Gobernanza Global y Derechos Humanos por la Universidad de Castilla-La Mancha, España. Jefe de Prácticas en Líneas de Investigación, Facultad de Derecho y Ciencias Políticas, Universidad Privada de Tacna, Perú.

Correo electrónico:
alfonso.vargas@upn.edu.pe

 0000-0003-4205-2215

[‡] Máster en Cuestiones Contemporáneas, Universidad Pablo de Olavide, España. Jefa de Prácticas en Líneas de Investigación, Facultad de Derecho y Ciencias Políticas, Universidad Privada de Tacna, Perú.

Correo electrónico:
yldapb25@gmail.com

 0000-0002-2078-3175

[¶] Doctora en Derecho, Universidad Privada de Tacna, Perú. Docente de la Facultad de Derecho y Ciencias Políticas de la Universidad Privada de Tacna, Perú.

Correo electrónico:
deliamamanih@gmail.com

 0000-0002-0147-2275

[¶] Licenciado en Comunicación Social, Universidad Privada de Tacna, Perú.

Correo electrónico:
fj.guevarasoto@gmail.com

 0000-0003-4441-6078

Cómo citar:

Vargas-Murillo, A. R., Pari-Bedoya, I. N., Mamani-Huanca, D. Y., y Guevara-Soto, F. de J. (2023). Prior consultation and the risks of its virtualization for indigenous peoples in Peru. *Civilizar*, 23(44), e20230109. <https://doi.org/10.22518/jour.ccsch/20230109>

Recibido: 13/07/2022
Revisado: 27/07/2022
Aceptado: 31/10/2022

Licencia Creative Commons
Atribución-NoComercial-SinDerivar
4.0 Internacional
(CC BY-NC-ND 4.0).
Publicado por Universidad
Sergio Arboleda



Resumen

El objetivo de este artículo es analizar la situación de la regulación de la consulta previa en el Perú, prestando especial atención a la garantía del derecho a la consulta previa durante el Estado de excepción a través de la propuesta de consulta previa virtual. Para ello, se realizó un análisis de la literatura científica reciente sobre la consulta previa en el Perú, la normativa pertinente a nivel nacional e internacional, así como los pronunciamientos de la Comisión Interamericana de Derechos Humanos sobre la propuesta de consulta previa virtual. En el caso de la consulta previa virtual, las recomendaciones de la CIDH son claras al señalar que, dadas las fallas estructurales que incluyen la brecha digital existente en los pueblos indígenas, esta medida no permitiría realizar una consulta previa que cumpla con la participación plena y la formación de la voluntad libre e informada. Asimismo, considerando las deficiencias institucionales y los desincentivos señalados respecto de la consulta previa estándar, de llevarse a cabo, agudizaría la desventaja existente entre los pueblos indígenas frente al Estado.

Palabras clave

Consulta previa, pueblos indígenas, brecha digital, COVID-19.

Introduction

The history of Peru in the 21st century has been marked by an event that shaped the future of indigenous peoples and their relationship with the Peruvian State: the “Baguazo”. In 2009, the Awajun and Wampis peoples of Peru, located in the province of Bagua within the Amazonas region, rose in protest against the government. This protest involved blocking highways for a period of two months. The catalyst for this protest was the introduction of new government policies, which were perceived by these communities as undermining their rights over their own territory and favoring the exploitation of natural resources. This protest culminated with 33 fatalities recorded among the protesters and the police, and hundreds more injured.

Following this tragic event, socio-environmental conflicts and the demands of the indigenous people regained strength in the public eye and the political forums. This resurgence underscored the need for the implementation of laws and policies that could channel these conflicts and recognize the rights of these communities. Consequently, on August 23rd, 2011, Law No. 29785 was approved (Law on the right to prior consultation with indigenous or native peoples). At the time of this law's approval, the Ombudsman's Office (2022) reported that 41% of environmental conflicts were related to projects that involved the territorial displacement of indigenous communities. However, nearly eleven years later, on August 8th, 2020, on the eve of the Day of Indigenous Peoples, three natives tragically lost their lives due to gunshot wounds inflicted by the National Police. This occurred while they were protesting against the activities carried out in Oil Lot No. 95 in the Amazon province of Loreto.

The objective of this article is to analyze the situation of the regulation of prior consultation in Peru, paying particular attention to the guarantee of the right to prior consultation during the state of emergency through the proposal of virtual prior consultation.

To do this, we analyzed the recent scientific literature on prior consultation in Peru, the relevant regulations at the national and international level, as well as pronouncements of the Inter-American Commission on Human Rights on the proposal for virtual prior consultation. This investigation is justified due to the fact. The investigation is justified due to the fact that virtual prior consultation is a mechanism that has been discussed regarding its benefits to speed up prior consultation processes that had begun to be implemented in other countries such as Colombia; therefore, it would not be surprising if this proposal reemerges, as it would be convenient to analyze its possible impact on the rights of indigenous peoples. This article is part of that discussion.

Prior Consultation and Environmental Conflicts in Peru

Within the preliminary steps for a state to carry out investment projects of an extractive nature that imply profound changes in the geography and/or ecosystem of indigenous territory, there is a process called prior consultation. Therefore, it can be defined as an institution whose origin derives from international human rights law, which seeks to guarantee the physical, cultural and ethnic subsistence of

indigenous and tribal peoples, as these groups have historically suffered persecution, mistreatment and marginalization at the hands of the state (Merino, 2017; Kania, 2016; Cueto et al., 2012). This process must be carried out in accordance with the guidelines established in the Indigenous and Tribal Peoples Convention No. 169 of the International Labour Organization, and in the Declaration on the Rights of Indigenous Peoples of the United Nations, which develop the prior consultation in general terms, under the conditions shown in Table 1.

Table 1
Comparison of Prior Consultation in Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples

Indigenous and Tribal Peoples Convention -C169 of the International Labour Organization	The United Nations Declaration on the Rights of Indigenous Peoples
Article 6 No. 1. In applying the provisions of this Convention, governments shall: (a) 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; (b) 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. No. 2. The 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 [emphasis added].	Article 15 No. 2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.
Article 7 No. 1. The peoples concerned shall 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, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly. No. 3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities	Article 19 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.
	Article 27 States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.
	Article 32 No. 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. No. 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Note. Own elaboration. From "Convention concerning Indigenous and Tribal Peoples in Independent Countries", 05 Sep 1991, NORMLEX (https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169) and "United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295)", 13 Sep 2007, United Nations (<https://documents.un.org/doc/undoc/gen/n06/512/07/pdf/n0651207.pdf>)

In this way, the Law on Prior Consultation of Indigenous Peoples (Law No. 29785) was created; this law established that indigenous peoples would be consulted prior to the approval of any normative provision that could affect their collective rights, in accordance with Convention No. 169 of the International Labour Organization. This law was not only a step forward in Peru in terms of indigenous legislation, but it was also the first in Latin America to foresee its application in any sector and any type of norm or policy (Merino, 2017).

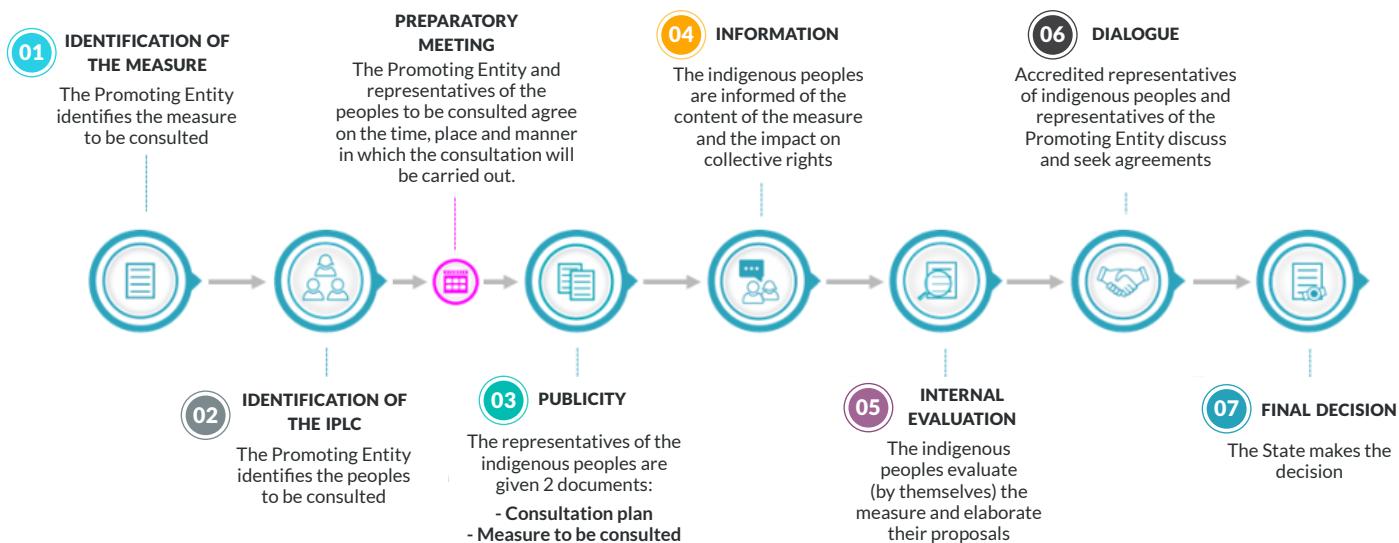
Even if the right to prior consultation has not yet been explicitly included in the Political Constitution of Peru, as the Constitutional Court has stated with regard to the need to develop this right through legislation, prior consultation was an expression of the right to political, economic, cultural and social participation provided for in article 2, number 17, of the constitutional text. In this way, we must emphasize that before the promulgation of the Law of Prior Consultation in 2011, the Constitutional Court was an important actor that paved the way for its regulation in the rulings reiterated in the Expedients Nos. 03343-2007-PA/TC, 0022-2009-PI/TC and 05427-2009-PC/TC.

The Regulations of the Law on Prior Consultation, approved by Supreme Decree No. 001-2012-MC, provide, between Articles 14 and 23, that prior consultation has seven stages:

1. Identification of the state measure to be consulted (it can be administrative or legislative).
2. Identification of the peoples that would be affected by the measure to be consulted.
3. Guarantee of publicity regarding the administrative or legislative measure.
4. Timely information regarding the measure in consultation will be provided.
5. The measure will be submitted for evaluation by the internal institutions and organizations of indigenous or native peoples.
6. The dialogue process will be carried out between state representatives and indigenous or native peoples, a stage known as intercultural dialogue.
7. It concludes with the issuance of the duly substantiated decision by the state authority.

It is also important to emphasize that the stage of intercultural dialogue stage is activated only if there is a disagreement about the measure in the internal evaluation stage and the final decision (Sarmiento & Seedhouse, 2019); if no agreement is reached in the dialogue stage, it will be made by the State, so we can see that the Law of Prior Consultation does not include the obligation to obtain the free and informed prior consent of the United Nations Declaration on the Rights of Indigenous Peoples (art. 32), opting for the optional formula of consent as contained in Convention No. 169 (subsec. 2 art. 6). The way in which this stage is articulated can be seen in Figure 1.

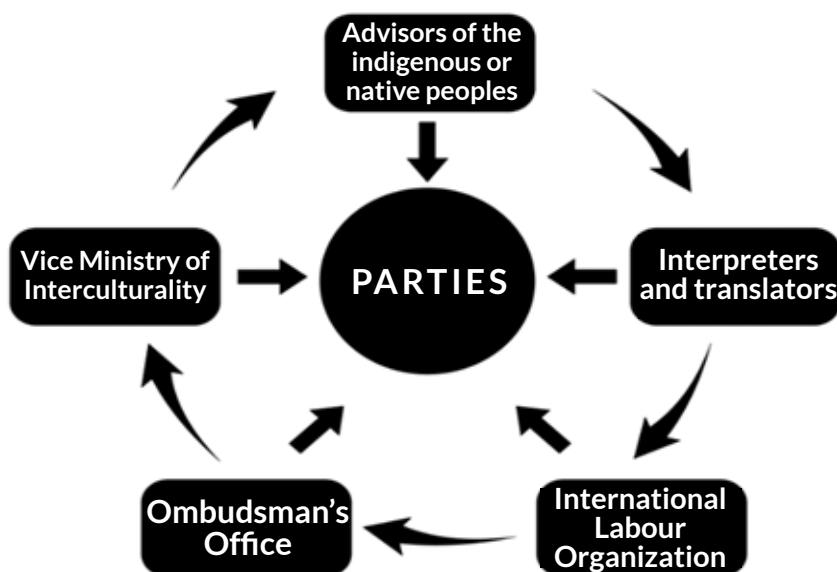
Figure 1
Stages of the Prior Consultation Process



Note. Chart of Peruvian Ministry of Culture (2022) (<https://consultaprevia.cultura.gob.pe/etapas>) [Own translation]

Although these seven stages are well established, we can see that between the second and third stages there is a preparatory meeting which, although it doesn't consist of another stage in the proper sense of the word, will determine the way in which the consultation will take place. Regarding the actors that participate in this process of prior consultation, articles 5 and 8 of the Law of Prior Consultation recognize the indigenous peoples as part of the process, as well as the promoting entity, which can be an entity of the local, regional or national government. However, since it is a process that has several stages, and since intercultural dialogue has certain requirements for its effective implementation, there are other relevant actors that interact with the parties throughout the process, as can be observed in Figure 2.

Figure 2
Stages of the Prior Consultation Process



Note. Own elaboration, based on information from the Peruvian Ministry of Culture (2022) (<https://consultaprevia.cultura.gob.pe/actores>)

Since the main fundamental actors of the process (and the reason for its existence) are the indigenous or native peoples, it should be noted that, currently, the Ministry of Culture (2022a), according to the last list consulted in the Database of Indigenous or Native Peoples recognizes 55 indigenous or native peoples in Peru, of which 51 are Amazonian peoples, while 4 are Andean; this represents 92.73% of Amazonian peoples. However, despite the proportion, the majority of prior consultations that have been carried out or are being carried out in Peru, out of a total of 73 consultations, 43 correspond to Andean peoples, 25 to Amazonian peoples and 5 to federations of indigenous peoples, given its national scope. In other words, 58% of the consultations have been carried out with Andean peoples. This can be explained, as in most of these consultations, as it can be seen from the list of prior consultation processes of the Ministry of Culture (2022b), there have been consultations on the subject of mining, with the main mining projects being the coast and mountains, areas where the territories of the Andean peoples are located. Additionally, as noted in the last monthly report issued by the Ombudsman's Office (2021), of the 128 socio-environmental conflicts that were active as of November, the majority were found to be related to mining issues; as shown in the following table:

Table 2
Socio-environmental Conflicts by activity as of November 2021

Activity	Count	%
Mining	84	65.6%
Hydrocarbons	25	19.5%
Waste and sanitation	8	6.3%
Others	6	4.7%
Energy	2	1.6%
Agribusiness	2	1.6%
TOTAL	127	100%

Note. *Elaborated by the Ombudsman's Office (2021).*

As can be seen, 84 cases, that is, 65.6%, were related to mining, followed by conflicts related to hydrocarbons with 25 cases, which only represented 19.5%. This way, we can explain why the majority of prior consultation processes have been carried out or are being carried out with indigenous or native Andean peoples; as they are settled in areas of interest for mining activity, this activity being the origin of most socio-environmental conflicts in Peru (Cuya et al., 2021; Himley, 2019; Rey-Coquais, 2021). The absence of a shared understanding among stakeholders with respect to the regulation of prior consultation has contributed to the heightened level of conflict surrounding this issue. Notably, indigenous organizations and civil society groups have expressed opposition to such regulation (DPLF & OXFAM, 2011; 2015).

Prior consultation and the risks of virtuality in Peru

Regarding the reception of Law No. 29785, Law on the Right to Prior Consultation with Indigenous or Native Peoples of 2011, this generated great expectations about the possibility of redirecting relations between the State, the

company and indigenous peoples towards more democratic ways (Schilling-Vacaflor & Flemmer, 2015; Paredes, 2019; Gil & Linares, 2019). However, critical positions argued that the law of prior consultation has colonial features, in which they are only limited to restrictively recognize certain property rights in their condition as minorities, but not as nations with their own rights over their territory (Rousseau, 2012; Alden, 2018). In that regard, one of the criticisms states that this law does not rigorously meet the standards of the United Nations Declaration on the Rights of Indigenous Peoples of 2007, nor is it aligned with the various pronouncements of the Inter-American Court of Human Rights. Therefore, although it translated into a significant advance in the rights of indigenous peoples (Paredes & Došek, 2020), this instrument maintains the situation of coloniality to which these peoples have been subjected historically (Parsons & Fisher, 2020; Merino, 2014; Merino, 2015), maintaining the logic of underlying exclusion subjacent to the State-Nation model as a homogenizing project, summing up the self-determination of the peoples to the determination on the ownership of the land (Callirgos, 2018).

In the same sense, other scholars maintain that this norm does nothing more than reproduce asymmetric relationships where the indigenous peoples find themselves in a situation of subordination (Arellano-Yanguas, 2016; Botero et al., 2017; Staley, 2022); as well as the deficiencies of the law are intentional (Ruiz, 2015) so that prior consultation does not prosper and that it is favored by the weakness of the indigenous movement and mistrust of the communities towards the State (Flemmer & Schilling-Vacaflor, 2016; Celi, 2017). Like-wise, although it is pointed that prior consultation is one of the mechanisms of "global" governance that must guarantee the human safety of indigenous peoples, the worrying presence of the illegal mining activity that is predominant in certain territories puts said security in danger, turning it into an ineffective mechanism (Schilling et al., 2021; Merino, 2018). Secondly, although there are more optimistic postures on the possibilities of prior consultation (Vilchez et al., 2019) maintain that it is necessary to make adjustments that allow mainstreaming of the intercultural approach in every procedure where the State interacts with the indigenous peoples and that this participation is continuous and permanent; as well as posing the possibility of indemnify the communities that have been denied of this right since the ratification of Convention No. 169 of the ILO (1995-2011).

Regarding the conceptual distinction between consultation and consent, and its practical implications, the approval of the Law of Prior Consultation, opting to implement Convention No. 169 of the ILO instead of the United Nations Declaration on the Rights of Indigenous Peoples, emphasized the idea of prior consultation against the idea of consent (Merino, 2017; Merino, 2018; Alva-Arévalo, 2019). This option resulted in the regulation containing questionable provisions from a reading of the UNDRIP, such as the one that provides that infrastructure projects in education, health and public services are exempt from consultation and the reduction of consent to situations in which the State seeks to displace them; therefore, the State, in the face of disagreement, will act by resolving unilaterally. Likewise, it is noteworthy that the intercultural dialogue stage will only be activated

when the internal evaluation stage fails and that, despite this dialogue, the State maintains the last word regarding the decision to be adopted, for which the author questions that intercultural dialogue is not the first step in this procedure.

Even though there have been noted a series of deficiencies in the design and practice of prior consultations, much of the research has left aside the issue of ethical assumptions. This is how, being built on the idea of necessary consensus, they leave aside some questions of an epistemic nature that should be reflected on, such as disagreement. This is how, in the face of the positive charge of consensus, dissent emerges as something to cancel, the problem is that the asymmetric situation of indigenous peoples with the State can generate tragic situations such as those warned in the introduction. That is why Ilizalde (2019) wonders about the way in which state and indigenous representatives process disagreement, as well as the challenges that cultural difference can impose on these dialogue processes. The author warns that far from being something to eliminate by any means, disagreement is an element that must be assumed if one wants to speak of a true democratic dialogue. In that sense, it is preferable, by virtue of considering the roots of disagreement and mutual mistrust, to reconstruct the processes of dialogue. From this perspective, the prior consultation procedure in Peru would be insensitive to disagreement, as long as the State has the last word.

Following what was stated in this last position and considering the critiques mentioned previously, we can point out that there are no real institutional incentives for state officials to make an effort not only to persuade but also to collectively build a measure that respects the rights, interests, and needs of indigenous peoples. This would be dangerous to the extent that the commitment to an intercultural approach remains at the discretion of state officials. In this way, the absence of free and informed consent as the final objective of the prior consultation process can turn the dialogue stage into a formality. This can explain why, despite initially generating some positive expectations, critics interpret that, as it is not a mechanism that fully guarantees the rights of indigenous peoples, it becomes a mechanism to legally justify the prolongation of historical situations of exclusion.

As a result of the global pandemic by COVID-19, indigenous peoples, having been affected for a long time by the structural inequalities of the countries in which they live, constitute a vulnerable group that has been affected by the scarcity and slow response of the State to develop special protection measures (Economic Commission for Latin America and the Caribbean, 2020). Despite this, on June 30th, 2020, the Minister of Economy and Finance, María Antonieta Alva, indicated that, at a national level, the coordination had been carried out with the Ministry of Culture so that the prior consultation (referring to the case of San Gabriel) could be carried out through virtual mechanisms, except in the last stage of "dialogue itself" in order to reduce the consultation time to enable mining projects. This measure aroused the concern of indigenous peoples, human rights associations and some academics. The main concern was whether the purpose of this measure was to guarantee the right to health of indigenous peoples while recognizing their right to prior consultation, or was it a way to benefit state companies and projects considering the digital divide that would disadvantage indigenous peoples.

The National Indigenous Organizations AIDESEP, ONAMIAP, CCP, CNA, and CONAP, along with the NGO Coordinadora Nacional de Derechos Humanos, have issued a statement rejecting the idea of virtual prior consultations for large extractive projects. They argue that virtual meetings do not allow indigenous peoples to share information and analyze it in a manner consistent with their traditions and decision-making processes. Furthermore, indigenous territories often suffer from poor connectivity and limited internet access, making virtual communication platforms difficult to use. Even if these connectivity issues were resolved, virtual processes do not guarantee the right to free, prior, and informed consultation, which has been criticized as being distorted. They affirm that virtual consultations violate the constitutional right to prior consultation and its principles, as recognized in international treaties and national laws. Additionally, these actions jeopardize indigenous peoples' fundamental rights to life, health, ancestral lands, and the environment. The Inter-American Commission on Human Rights has instructed states not to authorize extractive projects in indigenous territories during the COVID-19 pandemic due to the inability to conduct adequate prior consultations. Finally, they urge the government to ensure full and effective indigenous participation in decisions that affect them and to guarantee that economic recovery measures are compatible with their rights and those of the broader population (OXFAM, 2020). Thus, we can identify key points in the rejection by the main Peruvian indigenous organizations mentioned, as proposed by Luna and Pariona (2021). These nodal points of the discussion around the virtualization of prior consultation proposed by the authors are:

- Do Convention No. 169 and Law No. 29785 make it possible to carry out prior consultation in the virtual modality?
- Does prior consultation guarantee the right to participation of indigenous peoples?
- Does prior consultation guarantee the principle of interculturality and the guarantee of the intercultural dialogue stage?
- Can we reach a previous consent, free and informed, through virtual prior consultation?
- Does the State coerce and take advantage of the virtuality of prior consultation?

In this regard, in said investigation it is noted that, in principle, since there is a broad regulation of prior consultation in Convention No. 169 and Law No. 29785, this could open the possibility for it to be carried out in the virtual modality. However, regarding the guarantee of the participation of indigenous peoples or their representatives, it may be affected by factors related to the geographical area, connectivity, use and management of technology. As we noted earlier, although the right to prior consultation is not found literally in the Political Constitution of Peru, the Constitutional Court has specified that it is included in the right to political, economic, cultural and social participation, as stipulated in Article 2, Clause 17 of the constitutional text. In this context, it would be convenient to note the impact of digital mechanisms on democracy and citizen participation.

Although virtuality can strengthen democracy, streamlining certain procedures and allowing interaction without the limit of geographical space, this can only happen as long as ideal conditions are presented for its use: that the participants have access to the required digital media and the knowledge necessary to use it in a way that expresses their free will. However, when there are situations such as the digital divide, that is, the existence of population groups that still encounter difficulties or deficiencies in the access and use of information technologies, these can -on the contrary- seriously jeopardize democracy and citizenship (Jamil, 2020; Normore, 2015; Candón-Mena, 2018). Thus, even though Convention No. 169 and Law No. 29785 allow virtuality from its broad and generic wording, there are preconditions that, if not met, would not guarantee the participation of indigenous peoples through this mechanism, which would violate the fundamental right to citizen participation.

In their statement, indigenous organizations argued that one of the reasons for opposing the virtual prior consultation was a procedural issue rooted culturally in the dialogue. They stated that “virtual rhythms are very fast and have different dynamics that make it impossible to establish a culturally appropriate process of information transfer and analysis, especially considering the various means that indigenous or native peoples have to form their opinions, deliberate, and make decisions” (OXFAM, 2020). As decision-making in indigenous and native communities is based on orality, as well as the presence of illiteracy in said communities, virtuality may not comply with the principle of interculturality and the guarantee of the process of intercultural dialogue in prior consultation. From a democratic standpoint that promotes public deliberation in principle of equality and respects the principle of interculturality (Peruzzo & Botelho, 2019), forcing indigenous peoples to participate virtually in the prior consultation would be inappropriate if these media did not adapt to their way of deliberating and making decisions. Interculturality seeks recognition and respect for cultural differences and promotes equitable and enriching intercultural dialogue and interaction (Ratzmann, 2019). Forcing indigenous peoples to participate in consultations via virtual media that do not respect their mode of communication and decision-making may result in exclusion and a lack of representation of their interests and perspectives.

Regarding prior, free and informed consent, in order to achieve this, the State should carry out training as a policy prior to activating this mechanism, since only then the use of the Internet would be made possible as a means of accessing information that allows to form the free will of the indigenous representatives (Luna & Pariona, 2021). The need to mainstream the intercultural approach noted by Vilchez et al. (2019) is even more urgent; however, deficiencies in the design of prior consultation in Peru have placed intercultural dialogue in last place and subject to the commitment of state officials (Ilizalde, 2019). In this way, the lack of capacity to use the means by which the prior consultation would be carried out to obtain information in a free and informed manner, would add to another problematic situation: the State can unilaterally force indigenous peoples to participate virtually even with all the deficiencies noted above, being able to take advantage of the fact that prior consultation, in the face of disagreement on the part of the indigenous

peoples, maintains the last word. This, having opted for consultation before consent (Merino, 2017) and given the state's insensitivity to disagreement (Ilizarbe, 2019).

Since Peru is not the only country to propose this type of measure, in order to unlock various mining projects and other projects that require prior consultation with the indigenous peoples that may affect them, the Inter-American Commission on Human Rights (IACHR) issued a statement calling for the elimination of these proposals, achieving its purpose in countries such as Colombia (Duque, 2021). In the Timely and Integrated Response Coordination Room to the COVID-19 pandemic crisis, it was stated that "due to structural discrimination, a good part of the indigenous peoples do not have access to the Internet, so the imposition and implementation of consultative processes through digital platforms would represent a violation of the right to real and effective participation of these groups" (IACHR, 2020).

Said exhortation would reinforce the provisions of recommendations 54 and 57 contained in Resolution No. 1/2020 issued by the IACHR, where it recommends that States abstain from issuing laws or authorizing extractive projects or of any kind that may affect the territories of indigenous peoples during the pandemic, since they considered that, under the conditions of social distancing recommended by the WHO, it was impossible to carry out free and informed prior consultation. However, it should be noted that Peru has not adopted the most rigorous standards regarding prior consultation, such as those contained in the United Nations Declaration on the Rights of Indigenous Peoples of 2007 or in the various pronouncements of the Court Inter-American Human Rights (Merino, 2017). The Inter-American Commission on Human Rights (IACHR) Resolution No. 1/2020 demands that States reconsider the feasibility of virtual prior consultation as an appropriate solution during the pandemic and ensure that any measures taken to address the current situation respect and protect indigenous peoples' rights. To protect these vulnerable groups, it is critical to avoid the passage of laws or the approval of projects under such conditions. However, it is also important to consider how states can ensure that indigenous peoples' participation and consultation are carried out effectively in the future, even in emergency situations. As a result, while virtual prior consultation may appear to be an appealing solution in a health emergency, it may not be culturally appropriate or effective in assuring meaningful participation (Luna & Pariona, 2021). In this context, it is critical that states consider options that protect indigenous communities' cultural elements and specific needs while addressing disparities in technology and physical structures that afflict said communities, with the goal of ensuring genuine protection and respect for their rights.

In this way, the institutional design of prior consultation in Peru, having opted for mandatory consultation and justified optional consent in ILO Convention No. 169 and translated into the Prior Consultation Law, the State could protect a measure such as prior virtual consultation in said mechanisms, correcting the structural gaps in internet access of indigenous communities. This situation is critical, since ECLAC (2020) warns that, in 2020, around 90% of rural households -where indigenous peoples are concentrated- did not have technologies for internet access. However, in addition to assuming an effort that could be positive for the living conditions of

these peoples, this mechanism could hardly be interpreted as a positive advance to guarantee the rights of indigenous peoples in Peru, even if virtual prior consultation was implemented without major problems (that is, each of the stages provided for in articles 14 to 23 of Supreme Decree No. 001-2012-MC can be carried out without difficulty) if the design of the prior consultation process is not corrected to be a process that translates the disagreement into an opportunity for a better and more robust and horizontal dialogue between the communities and the State, in which we aim for a free and informed consent.

As a result, indigenous communities face a variety of communication gaps due to the digital divide. Because many of these communities are located in rural or remote areas with inadequate infrastructure, limited internet access is a significant issue. Furthermore, a lack of technological devices such as computers, tablets, or smartphones can be a significant barrier to virtual participation in prior consultation processes. Another factor to consider is a lack of digital skills, since a lack of training and experience with information and communication technologies can make effective communication and participation of indigenous communities on digital platforms difficult (Anaya et al., 2021). Furthermore, the fact that these communities speak local languages or dialects that are not always present on digital platforms can impede online information comprehension (Grazzi & Vergara, 2012). Cultural differences also play a crucial role in communication gaps, because indigenous communities have unique communication and decision-making methods (Damonte et al., 2020) that cannot be easily adapted to conventional virtual communication methods. For example, digital platforms may not allow or make it difficult to include cultural and spiritual practices in consultation and communication processes. Furthermore, the communication rhythms and times of indigenous communities may differ from those of conventional virtual communication. The speed and dynamics of digital platforms can make appropriate participation difficult for indigenous peoples, who need time to form opinions, deliberate and make decisions collectively while respecting their traditions (OXFAM, 2020). These communication gaps pose a significant challenge for indigenous communities in the context of the digital divide, potentially limiting their ability to fully participate in consultation processes and other critical communication and decision-making instances.

In recent years, the use of information and communication technologies for indigenous peoples has increased through programs such as "Conecta Selva" (El Peruano, 2022). However, challenges remain in terms of access and application of these technologies, particularly in rural areas and among indigenous communities. Despite the digital divide, there are examples of indigenous youth and other sectors who have gained access to and used technology for political activism (ONAMIAP, 2022a; 2022b). Because they have digital skills, it could be considered that these young people can act as mediators and representatives for their communities, sharing information and facilitating dialogue between members who do not have access to ICTs. However, it is important to note that mere participation of indigenous youth with internet access does not guarantee effective and representative participation in virtual consultation processes. Furthermore, it is important to

emphasize that political representation through individuals or sectors with access to ICTs is insufficient to ensure full exercise of the right to prior consultation. Prior consultation is a collaborative process that requires the participation of the entire community, including members who do not have access to ICTs. In this regard, it is critical to address the limitations of virtualization in the context of prior consultation and to promote solutions that ensure genuine, informed, and culturally appropriate participation of all indigenous community members.

Conclusions

Prior consultation in Peru is a mechanism that, although inspired by Convention No. 169, it has not incorporated the highest standards that exist in International Human Rights Law. For example, instead of opting for the United Nations Declaration on the Rights of Indigenous Peoples (Art. 32), it has opted for the optional formula regarding consent such as the one contained in Convention No. 169 (Subsec. 2 Art. 6). Likewise, the main deficiencies detected in the institutional design of prior consultation, following the criteria of the United Nations Declaration on the Rights of Indigenous Peoples, the Peruvian Constitutional Court and the rulings of the Inter-American Court of Human Rights, refer to the fact that, by opting for consultation instead of free and informed consent, it gives the final decision to the State, which constitutes a disincentive to engage in intercultural dialogue and take a constructive view of intercultural disagreement. In the case of virtual prior consultation, given the structural shortcomings (which include the existing digital divide in indigenous peoples) this measure would not make it possible to carry out a prior consultation that guarantees full participation, the formation of a free and in-formed will, as well as -considering the deficiencies and institutional disincentives noted regarding the standard prior consultation- if carried out, it would exacerbate the existing disadvantage between indigenous peoples against the State.

In conclusion, the examination of the hazards associated with the virtualization of the prior consultation process has brought to light noteworthy apprehensions regarding the rights of indigenous communities. The digital divide poses a challenge to the principle of equality. However, even if access were ensured and training provided for the development of digital skills, this would not necessarily entail a seamless adaptation of the ritual or spiritual practices of indigenous peoples to a digital environment. Furthermore, even though certain groups such as indigenous youth may have greater ease in accessing ICTs and developing digital skills, it cannot be assumed that this group more effectively represents the interests of the entire indigenous community. As a result, while public policies can address some material and procedural issues, the capacity for virtual prior consultation, which will effectively guarantee indigenous peoples' rights, will only be possible if indigenous peoples accept and adapt their cultural practices in terms of deliberation and decision-making in the digital sphere.

References

Alden Wily, L. (2018). Collective land ownership in the 21st century: Overview of global trends. *Land*, 7(2), 68. <https://doi.org/10.3390/land7020068>

Alva-Arévalo, A. (2019). A critical evaluation of the domestic standards of the right to prior consultation under the UNDRIP: lessons from the Peruvian case. *The International Journal of Human Rights*, 23(1-2), 234-248. <https://doi.org/10.1080/13642987.2018.1562914>.

Anaya Figueroa, T., Montalvo Castro, J., Calderón, A. I., & Arispe Alburqueque, C. (2021). Escuelas rurales en el Perú: factores que acentúan las brechas digitales en tiempos de pandemia (COVID-19) y recomendaciones para reducirlas. *Educación*, 30(58), 11-33. <https://doi.org/10.18800/educacion.202101.001>

Arellano-Yanguas, J. (2016). Mining policies in Humala's Peru: A patchwork of improvised nationalism and corporate interests. In *The Political Economy of Natural Resources and Development* (pp. 196-212). Routledge.

Botero, D. I. R., & Galeano, C. A. P. (2017). Territories in Dispute: Tensions between 'Extractivism', Ethnic Rights, Local Governments and the Environment in Bolivia, Colombia, Ecuador and Peru. In *Alternative Pathways to Sustainable Development: Lessons from Latin America* (pp. 269-290). Brill Nijhoff.

Callirgos, J. C. (2018). Neoliberal discourses and ethnonormative regime in post-recognition Peru: redefining hierarchies and identities. *Cultural Studies*, 32(3), 477-496. <https://doi.org/10.1080/09502386.2017.1420088>.

Candón-Mena, J. (2018). Riesgos y amenazas de Internet para la ciudadanía y la democracia. Más allá del alarmismo. *CES contexto*, 22, 38-47.

Celi, M. F. (2017). La implementación del Convenio 169 en los Andes peruanos: ¿De un nuevo espacio de participación a una oportunidad perdida?. *Revista Andina de Estudios Políticos*, 7(1), 77-100. <https://doi.org/10.35004/raep.v7i1.52>.

Cueto, S., Guerrero, G., León, J., Seguin, E., & Muñoz, I. (2012). Explaining and overcoming marginalization in education: Ethnic and language minorities in Peru. In *Childhood Poverty* (pp. 261-282). Palgrave Macmillan.

Cuya, A., Glikman, J. A., Groenendijk, J., Macdonald, D. W., Swaisgood, R. R., & Barcas, A. (2021). Socio-environmental perceptions and barriers to conservation engagement among artisanal small-scale gold mining communities in Southeastern Peru. *Global Ecology and Conservation*, 31, e01816. <https://doi.org/10.1016/j.gecco.2021.e01816>.

Due Process of Law Foundation (DPLF) & OXFAM. (2011). *El Derecho a la consulta previa, libre e informada de los pueblos indígenas: La situación de Bolivia, Colombia, Ecuador y Perú*. DPLF & OXFAM.

Due Process of Law Foundation (DPLF) & OXFAM. (2015). Derecho a la consulta y al consentimiento previo, libre e informado en América Latina. Avances y desafíos para su implementación en Bolivia, Brasil, Chile, Colombia, Guatemala y Perú. DPLF & OXFAM.

Duque, G. (2021). Del control constitucional al control de convencionalidad: pasos jurídicos hacia la consolidación de instituciones de gobernanza global. *Revista española de derecho constitucional*, 41(123), 167-201. <https://doi.org/10.18042/cepc/redc.123.06>

Economic Commission for Latin America and the Caribbean (2020). El impacto del COVID-19 en los pueblos indígenas de América Latina - Abya Yala: entre la invisibilización y la resistencia colectiva, Documentos de Proyectos (LC/TS.2020/171). <https://www.cepal.org/es/publicaciones/46543-impacto-covid-19-pueblos-indigenas-america-latina-abya-yala-la-invisibilizacion>

Economic Commission for Latin America and the Caribbean. (2020). Informe especial N° 7, Universalizar el acceso a las tecnologías digitales para enfrentar los efectos del COVID 19. CEPAL. https://repositorio.cepal.org/bitstream/handle/11362/45938/4/S2000550_es.pdf

El Peruano. (2022). Conecta Selva: 1,302 instituciones públicas ya acceden a internet satelital. <https://elperuano.pe/noticia/174968-conecta-selva-1302-instituciones-publicas-ya-acceden-a-internet-satelital>

Flemmer, R., & Schilling-Vacaflor, A. (2016). Unfulfilled promises of the consultation approach: the limits to effective indigenous participation in Bolivia's and Peru's extractive industries. *Third World Quarterly*, 37(1), 172-188. <https://doi.org/10.1080/01436597.2015.1092867>.

Gil, A. G.; Linares, C. C. (2019). Mineralizing the right to prior consultation: from recognition to disregard of indigenous and peasant rights in Peru. *Global Jurist*, 20. <https://doi.org/10.1515/gj-2019-0019>.

Grazzi, M., & Vergara, S. (2012). ICT in developing countries: Are language barriers relevant? Evidence from Paraguay. *Information Economics and Policy*, 24(2), 161-171.

Himley, M. (2019). Extractivist geographies: Mining and development in late-nineteenth and early-twentieth-century Peru. *Latin American Perspectives*, 46, 27-46. <https://doi.org/10.1177/0094582X18820274>.

Ilizarbe, C. (2019). Intercultural disagreement: Implementing the right to prior consultation in Peru. *Latin American Perspectives*, 46(5), 143-157. <https://doi.org/10.1177/0094582X19854098>.

Inter-American Court of Human Rights (2020). Comunicado de Prensa N°. 103/20:

La CIDH alerta sobre la especial vulnerabilidad de los pueblos indígenas frente a la pandemia de COVID-19 y llama a los Estados a tomar medidas específicas y acordes con su cultura y respeto a sus territorios. <https://www.oas.org/es/IACHR/prensa/comunicados/2020/103.asp>

Jamil, S. (2020). A widening digital divide and its impacts on existing social inequalities and democracy in Pakistan. In *Digital Inequalities in the Global South* (pp. 59-78). Palgrave Macmillan.

Kania, M. M. (2016). The rights of Indigenous Peoples in Peru: From socio-political marginalization to the modern principles of multiculturalism. *Ad Americam. Journal of American Studies*, (17), 11-32. <https://doi.org/10.12797/AdAmericam.17.2016.17.02>.

Luna, G., & Pariona, E. (2021). La consulta previa virtual en los derechos colectivos de los pueblos indígenas u originarios de la Provincia de Lucanas-Región Ayacucho-2021 (Bachelor's thesis: Universidad Cesar Vallejo).

Merino, R. (2014). Prior consultation law and the challenges of the new legal indigenism in Peru. *Hendu-Revista Latino-Americana de Direitos Humanos*, 5(1), 19-28. <https://doi.org/10.1016/j.cosust.2020.03.006>.

Merino, R. (2015). Coloniality and indigenous territorial rights in the Peruvian Amazon: A critique of the prior consultation law. *Bath Papers in International Development and Wellbeing Centre for Development Studies*, 38.

Merino, R. (2017). Law and politics of indigenous self-determination: The meaning of the right to prior consultation. In I. Watson (Ed.), *Indigenous peoples as subjects of international law*, (pp. 121-140) Routledge..

Merino, R. (2018). Re-politicizing participation or reframing environmental governance? Beyond indigenous' prior consultation and citizen participation. *World Development*, 111, 75-83. <https://doi.org/10.1016/j.worlddev.2018.06.025>.

Merino, R. (2021). The Land of Nations: Indigenous Struggles for Property and Territory in International Law. *American Journal of International Law*, 115, 129-134. <https://doi.org/10.1017/aju.2021.10>.

Ministry of Culture of Peru (2022). Base de datos de pueblos indígenas u originarios. <https://bdpi.cultura.gob.pe/pueblos-indigenas>.

Ministry of Culture of Peru (2022). Consulta previa. <https://consultaprevia.cultura.gob.pe/>.

Normore, A. H., & Lahera, A. I. (2020). Social Justice Leadership, Equity, and the Digital Divide. In *Oxford Research Encyclopedia of Education*.

Ombudsman's Office of Peru (2022). Violencia en los conflictos sociales: Informe Defensorial No. 156. Defensoría del Pueblo. <https://www.defensoria.gob.pe/wp-content/uploads/2018/05/informe-156.pdf>.

Ombudsman's Office of Peru (2021). Reporte de conflictos sociales N.º 213. <https://www.defensoria.gob.pe/wp-content/uploads/2021/12/Reporte-Mensual-de-Conflictos-Sociales-N%C2%B0-213-noviembre-2021.pdf>

ONAMIAP (2022a). Jóvenes indígenas de Cotabambas conocieron más sobre el uso de las redes sociales para hacer activismo digital. <https://onamiap.org/2022/08/jovenes-indigenas-de-cotabambas-conocieron-mas-sobre-el-uso-de-las-redes-sociales-para-hacer-activismo-digital/>

ONAMIAP (2022b). Jóvenes indígenas de Ocvirí participan en taller de activismo digital para la defensa de sus derechos. <https://onamiap.org/2022/05/activismo-digital-ocviri22/>

OXFAM (2020). PRONUNCIAMIENTO: Consultas virtuales van contra el diálogo intercultural y el derecho a la consulta previa libre e informada de los pueblos indígenas u originarios, <https://peru.oxfam.org/latest/stories/pronunciamiento-consultas-virtuales-van-contra-el-dialogo-intercultural-y-el-derecho>

Paredes, M. (2019). Indigenous Activism and Human Rights NGOs in Peru: The Unexpected Consequences of Armed Conflict. In H. Soifer & A. Vergara (Eds.), *Politics After Violence: Legacies of the Shining Path Conflict in Peru* (pp. 176-201). University of Texas Press. <https://doi.org/10.7560/317310-009>.

Paredes, M., & Došek, T. (2020). The subnational indigenous quota in Peru: the paradoxes of political representation. *Latin American Politics and Society*, 62(3), 123-148. <https://doi.org/10.1017/lap.2020.9>.

Parsons, M., & Fisher, K. (2020). Indigenous peoples and transformations in freshwater governance and management. *Current Opinion in Environmental Sustainability*, 44, 124-139. <https://doi.org/10.1016/j.cosust.2020.03.006>.

Peruzzo, P. P., & Botelho, T. R. (2019). Diálogo intercultural, democracia deliberativa e participação política. *Arquivo Jurídico*, 6(2), 13-38. <https://revistas.ufpi.br/index.php/raj/article/view/11187>.

Ratzmann, N. (2019). Intercultural dialogue: a review of conceptual and empirical issues relating to social transformation. UNESCO.

Rey-Coquais, S. (2021). Territorial experience and the making of global norms: How the Quellaveco dialogue roundtable changed the game of mining regulation in Peru. *The extractive industries and society*, 8, 55-63. <https://doi.org/10.1016/j.exis.2020.05.002>.

Rousseau, S. (2012). La Ley de Consulta Previa y las paradojas de la indigeneidad en la sierra del Perú. *Argumentos*, 6(5), 1-7.

Sarmiento, J. & Seedhouse, L. (2019). The truth and reconciliation commission and the law of prior consultation: Obstacles and opportunities for democratization and political participation in Peru. *Latin American Perspectives*, 46, 111-127, <https://doi.org/10.1177/0094582X19857153>.

Schilling, J., Flemmer, R., & Froese, R. (2021). A political ecology perspective on resource extraction and human security in Kenya, Bolivia and Peru. *The Extractive Industries and Society*, 8(4), 100826. <https://doi.org/10.1016/j.exis.2020.10.009>.

Schilling-Vacaflor, A., & Flemmer, R. (2015). Conflict transformation through prior consultation? Lessons from Peru. *Journal of Latin American Studies*, 47, 811-839. <https://doi.org/10.1017/S0022216X15000826>.

Staley, K. (2022). The Extraction Industry in Latin America and the Protection of Indigenous Land and Natural Resource Rights: From Consultation Toward Free, Prior, and Informed Consent. *Hastings Law Journal*, 73(4), 1145-1172.

Ulloa, A., Damonte, G., Quiroga C., y Navarro, D. (2020). Gobernanzas plurales del agua: Derechos al agua en contextos mineros en Perú y Colombia. *Análisis & Propuestas*, 48. GRADE - UNAL.

Vílchez, K. M. R., Tupia, D. M. U., & de la Cruz, J. V. N. (2019). Una mirada crítica a la aplicación de la consulta previa en el Perú a propósito del 30º aniversario del Convenio 169 de la Organización Internacional del Trabajo. *Lumen*, 2(15), 214-229. <https://doi.org/10.33539/lumen.2019.v15n2.1821>.

**Available in:**

<https://www.redalyc.org/articulo.oa?id=100281534009>

How to cite

Complete issue

More information about this article

Journal's webpage in redalyc.org

Scientific Information System Redalyc

Diamond Open Access scientific journal network

Non-commercial open infrastructure owned by academia

Alfonso Renato Vargas-Murillo, Ilda Nadia Pari-Bedoya,
Delia Yolanda Mamani-Huanca,
Francisco de Jesus Guevara-Soto

**Prior Consultation and the Risks of Its Virtualization for
Indigenous Peoples in Peru**

**Consulta previa y los riesgos de su virtualización para los
pueblos indígenas en Perú**

Civilizar Ciencias Sociales y Humanas

vol. 23, no. 44, e20230109, 2023

Universidad Sergio Arboleda,

ISSN: 1657-8953

ISSN-E: 2619-189X

DOI: <https://doi.org/10.22518/jour.ccsn/20230109>