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The ‘New Jungle Law’: Development, Indigenous Rights and ILO Convention 169 in Latin America

Peter Bille Larsen

1. Introduction: Indigenous Development Challenges in the Rights Era

‘169 is our second bible’,
Ashaninka representative, Peru, 2008

1 This article addresses the relationship between indigenous rights, global standards, and development in Latin America. Several decades of democratisation and legal reforms have in a certain sense constituted a new, if highly contested, rights-based development era in Latin America. In both heterodox and orthodox polities, international standards such as International Labour Organization (ILO) Convention 169 are frequently cited to either defend or contest development policy and practice. Development policies, on paper at least, now promote local ownership, rights to consultation and participation within a multicultural framework. Nonetheless, conflicts abound prompting questions about the nature and significance of this new rights era and the effect of international standards. How do we make sense of indigenous poverty and marginalisation in times of recognition and rights? How and to what extent are international standards, such as ILO Convention 169 on the rights of indigenous and tribal peoples,[1] embedded in highly diverse political and economic contexts? Much has been written about transformed politics in Latin America (Van Cott, 2005), yet how are inequalities transformed in the context of competing development paradigms, rights-based approaches and neo-liberal reform? Rather than embarking on a post-developmentalist critique, this article suggests analytical attention be focused how international standards are vernacularised in particular ways (Levitt and Merry, 2009). After a description of the deep-running inequalities that exist across the region, common explanatory frameworks framed around the ideas of weak national frameworks and non-implementation are discussed. This is followed by an introduction to the core principles of ILO Convention 169. The ensuing examination of indigenous rights and development practice in neo-liberal (Peru and Chile) and heterodox (Bolivia and Ecuador) contexts suggests the persistence of a political economy of indigenous rights driven by state dependency on natural resource extraction. This draws analytical attention to how indigenous rights, in both national and international arenas, are being framed and adapted to accommodate through what I call the ‘new jungle law’.

2. The Persistence of Inequalities

2 While there has been much criticism of policies stigmatising indigenous peoples as natural targets of development objects (ILO, 1955), numerous studies have documented how ‘being indigenous of origin goes hand in hand with poverty’ (Psacharopoulos and Patrimos, 1994, xiii). Stigmatisation should not overshadow the significant inequalities at stake. Surveys have pointed to particular disadvantage in fields such as education, social protection, health and access to public services. A 1994 World Bank study concluded that two-thirds of bilingual individuals and three-quarters of the monolingual indigenous population of Bolivia were poor (Psacharopoulos and Patrimos, 1994, xviii). Ten years and a United Nations ‘Indigenous Peoples’ Decade’ later, ‘few gains were made in income

poverty reduction among Indigenous Peoples’ (Hall and Patrinos, 2005, 3). While declining poverty was reported in several countries, the fall was markedly slower among indigenous peoples (CEPAL, 2014), where average indigenous salaries are only half those of non-indigenous workers (UNDP, 2014, 75). In addition to poverty statistics, and their implicit cultural bias, the pressures on indigenous lands and resources spurred by investments in infrastructure, energy and resource extraction merit focus. It has been estimated that one out of every three hectares offered as mining, agro-industrial or forestry concessions overlap with indigenous lands (CEPAL, 2014, 140).

3 It is no secret that rights-based frameworks have not offered magic bullets with which to end deep-seated inequalities; yet how can we explain the discrepancy between international standards and local realities? In contrast with common tropes that explain poor development outcomes as the result of weak policy or weak implementation, this article draws attention to how the constant renegotiation of internationally recognised rights forms part of the problem complex. I call this emerging legal complex the ‘new jungle law’—a law no longer simply grounded in the idea of the survival of the fittest, but in the mastery and control of new social safeguard mechanisms set out to mediate the relationship between a state and its indigenous citizens. Negotiating the meaning of ILO Convention 169 did not, from this perspective, end with the adoption of the standard itself. Rather, its implementation (a neutralised technical misnomer) is a negotiable normative terrain notably in relation to the nature of peoplehood and the reach of collective rights, revealing tensions and competition between neo-liberal adaptation, state expansion and emancipatory politics.

3. Poor Policy or Poor Implementation?

4 Two explanatory frameworks are frequently used to explain the discrepancy between emancipatory goals of indigenous rights standards and the persistence of inequalities. The first, critical approach sees indigenous rights instruments such as ILO Convention 169 as mainstream policy devices conveniently permitting and deepening market penetration, while rehashing assimiliationist approaches into new guises without effectively contributing to indigenous empowerment. Those who pursue this line of thinking underline the fundamentally flawed nature of multiculturalism and indigenous rights frameworks. Whether interpreted as neo-liberal incorporation or state expansion, indigenous rights are not seen to offer any real transformation of development conflicts other than legitimating further integration and capitalist penetration. From this postcolonial perspective, rights are not seen as a platform of empowerment and potential resistance, but rather the very opposite: political means and devices of hegemonic control. Critical analysis of neo-liberal multiculturalism, for example, points to the convenient reproduction of cultural difference within neo-liberal economic practice, while challenging the more radical of those projects that seek to bring about increased autonomy (Hale, 2002). Added to this is the body of critique of the deepening juridification of indigenous politics, are questions—again—of legal control, but also of reductionist approaches rights (Kirsch, 2012; Schulte-Tenckhoff, 2012).

5 The second more benevolent approach, in contrast to the first, stresses international rights standards as fundamentally progressive, if imperfect and poorly implemented frameworks (Aylwin and Tamburini, 2014; Espinoza, 2015). International standards are seen to foster positive change by recognising indigenous peoples as collective rights-

holders. This approach, in contrast, stresses the lax or poor implementation of indigenous 'paper' rights, which if implemented properly with adequate financing, fundamentally constitutes empowering normativity.

> 'The question in the early twenty-first century is to what extent this legislation is actually being implemented and how it impacts the human rights of indigenous peoples... [pointing] to the existence of a serious implementation gap between the normative framework and administrative, legal, and political practice.' (Stavenhagen, 2013, 55)

6 Several observers point to the fact that legal reforms lag behind constitutions and international commitments. In 2014, the theme of the International Day of the World's Indigenous Peoples was 'Bridging the gap: implementing the rights of indigenous peoples'. A year later, the UN Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, also referred to the 'serious implementation gap in relation to the UN Declaration and the ILO Convention No. 169'.[2] Once international standards are adopted, what remains is the domestic challenge of 'making the declaration work' (Bellier and Préaud, 2012).

7 While both approaches have their merit, this article suggests the need for exploring and further unpacking the complex grey zone between the idea of compromised standards and, analysis identifying lack of implementation as the "culprit". Whereas the latter presumes that not enough is being done, it easily obscures what *is* being done. Critical voices, in turn, may easily neglect actual potentialities for change by seeking to argue that status quo prevails in domestic arenas. It is today not sufficient to emphasise that rights are compromised or are not being respected or that domestic legal protections are simply absent. A more fruitful approach involves acknowledging the 'existence of legislation and regulatory practices that were inconsistent with those rights' (Anaya, 2015, 3). While indigenous rights may prove challenging in practice, there is no reason to throw the baby out with the bathwater, further running the risk discrediting the use of rights language to claim social justice. The implementation gap is, we argue here, not a question of a legislative void. In effect, it is very often the opposite—illustrated by the avalanche of legislative reforms experienced across the region in the fields of natural resources, corporate governance and land reform, which either undermine or reinforce rights obligations. To understand the significance of this, the next section addresses the emergence of constitutional rights language in the region and its multiple connections to ILO Convention 169.

4. Indigenous Rights as a Meta-Norm

8 Constitutional moves towards the recognition of indigenous peoples in Argentina (1994), Bolivia (2009), Brazil (1989), Colombia (1991), Ecuador (2008), Peru (1993) and Venezuela (1999) marked a shift towards the meta-normative recognition of indigenous peoples as political subjects and the right to collective identities. Today, 13 Latin American constitutions recognise indigenous peoples and their specific rights. Seventeen out of 19 countries also recognise indigenous legal and regulatory systems (IADB, 2006, 19). Substantive, if unevenly distributed, moves have been taken place across the region to recognise indigenous territorial rights (Aylwin and Tamburini, 2014). Such recognition has taken place in parallel with the ratification of ILO Convention 169 referencing both individual and collective rights.

9 The birth of development in Latin America after World War II rehashed indigenous peoples as the age-old *others*; no longer colonial subjects, but development targets ready for state intervention. As the ILO organised its first regional conference in the Americas, this was framed as the so-called Indian problem. Interventions such as the Andean Indian Program (Rens, 1963) paralleled the emergence of national institutions and ultimately the 1957 adoption of ILO Convention 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Rodríguez-Piñero, 2005). Securing rights in this framework involved extending general human rights until they were on a par with those enjoyed by the rest of national society as well as important, if often neglected, provisions related to customary law and land rights. Its integrationist emphasis would, down the line, trigger calls for the Convention's revision. Special Rapporteur Martinez-Cobo called for a revision of Convention 107 suggesting policy concepts such as 'ethno-development and independence or self-determination, instead of on integration and protection' (Martinez-Cobo, 1983, 44).

10 The specific language employed emerged in the context of increasingly vibrant indigenous movements, support organisations and UN forums initiated at the beginning of the 1980s to elaborate a declaration on the rights of indigenous peoples[3] (Martinez-Cobo, 1983, 44). Intense negotiations followed in ILO forums, on land rights, peoplehood and consultation (Sambo Dorough, 2015; Swepston, 2015a). An ILO expert meeting l noted how,

> 'the basic orientation towards integration should be removed from the Convention. Recognition should be given to the right of indigenous and tribal populations to determine the extent and pace of the economic development affecting them, to maintain lifestyles different from those prevailing for the remainder of national populations, and to retain and develop their own institutions, languages and cultures independently of the dominant societal groups.'(ILO, 1986, 1).

11 Ecuador during ensuing negotiations stressed how the Convention should not

> 'be prejudicial to the sovereignty, security, development and independence of States, or to the right of the State to the preservation, use and usufruct, for its own benefit, of its natural resources'(ILC, 1988, 8).

12 It also pronounced itself against inserting language on consultation; just as Colombia did not initially consider consultation 'indispensable' (ILC, 1988, 29). The Convention text, like any other international standard, was a negotiated outcome. Calls for wording regarding control, consent and self-determination were replaced by the softer wording of *consultation* and *participation*. Whereas the revision process was criticised for its piecemeal involvement of indigenous representatives in 'a new language of assimilation' (Venne 1989), for others it offered a new mainstay for recasting domestic challenges in international terms. The Convention has been described as the:

> 'outcome of the dialogue between and old handbook of Indigenist policy, which sought to solve the 'indigenous problem' using the recipe of 'development' and applied anthropology, and a new sensitivity towards the affirmation of indigenous peoples' rights to perpetuate and thrive as distinct societies, cultures and territorial entities' (Rodríguez-Piñero, 2005, 291).

13 The core rights approach centres around indigenous and tribal peoples as new political subjects and an emphasis on collective rights to consultation and participation, land rights, and the role of indigenous representative institutions[4] all bundled together in a binding treaty. The complexity of this bundle of rights should not be underestimated. For example, while the explicit decision to refrain from adopting self-determination language

in the Convention is generally observed, the counter-observation that other parts of the Convention in practice promote 'elements of internal self-determination' (Shelton, 2011, 62) is easily ignored. Yet, this complexity and these multiple potentialities are fundamental to an understanding of the significance of the instrument.

14 Ratifying countries are subject to supervision as well as potential complaints. This entails processes of national reporting on implementation, which are analysed and commented upon by a Committee of Experts. Complaints are examined by a tripartite committee. Interestingly, despite the low number of ratifications, complaints procedures are common and the Convention is one of the most well-known ILO Conventions by civil society outside the "world of work" and labour conditions. This also reflects its use as a source of inspiration for other countries and development institutions when addressing indigenous rights. Furthermore, jurisprudence by the Inter-American Commission on Human Rights and Court of Human Rights as well as the recently adopted American Declaration on the Rights of Indigenous Peoples (OAS, 2016) take into account Convention 169 principles related to collective rights, property and effective participation equally for countries that have not ratified the Convention (CIDH, 2010; ILO, 2009b).

15 Still, national rights regimes on topics such as forest tenure and land vary considerably across the region (RRI, 2012). Whereas 52 per cent of lands are under community control in Mexico, the figures drop to 1.7 per cent in Central America. Whereas the average of indigenous landholdings in South America is around 20 per cent, slightly more than a third of Bolivia, Peru, and Colombia is under community ownership or control (RRI, 2015). In Colombia, territorial autonomy was granted in the 1991 constitution, with devolved development planning and budgetary means, to the 567 *resguardos* that make up some 24 per cent of the country. A significant proportion of these land holdings has emerged as a result of recognised indigenous rights (Aylwin and Tamburini, 2014). The following sections address a number of specific dynamics in the region, starting with an ethnographic example from Peru.

5. Neo-Liberal Development Landscapes: From Neglect to Engagement in Peru and Chile

> We are some 150 people crammed into a small meeting room in Cerro de Pasco in the central highlands of Peru. Regional officials present the budget priorities for 2009, much to the discontent of the few Amazonian leaders from the lower lying part of the region feeling that their priorities are neglected. As the meeting ends, Teresita Antazu, an Amazonian leader, dressed in the traditional *cushma*, approaches regional authorities to hand over copies of ILO Convention 169. 'Now you can study what indigenous rights and priorities are', she says before sitting down again. She and others were frustrated over the budgetary process and the lack of consultation and presented the convention as 'a sign of protest and an educational tool for their civil servants' (field notes, 2008).

16 Four decades earlier, Teresita had been part of a delegation that travelled to Huancayo to demand the construction of a school in their community. In line with the integrationist policies of the time, indigenous demands concerned access to social benefits, social inclusion, and citizenship. In 2008, Convention 169 was used as a counter ritual to challenge a budgetary planning process. Similar examples abound. Ever since Peru ratified the ILO Convention in 1994, indigenous Amazonians in particular have made extensive use of the standard to challenge neo-liberal development practices, whether those dealing with natural resources, land titling or business development. Though the Convention was signed by President Fujimori, who spearheaded neo-liberal reform in Peru, the act of putting the convention into regulatory practice remained on the drawing board for years. Between 1995 when the convention entered into force in Peru and 2014 when the first consultation processes on oil in line with Convention 169 was undertaken, a massive spree of mining and oil concessions had been granted across the country. How to make sense of such contradictions?

17 Nineteen eighty-nine, the year when Convention 169 was adopted, was also the year in which the term 'Washington Consensus' was coined to describe a bundle of policy reforms emphasising liberalisation, deregulation and privatisation (Williamson, 2004). In effect, the implementation of the Convention 169 was for many years governed through a policy of neglect and 'irregulation', confining implementation to a legal limbo. Nonetheless, international standards formed part of indigenous boomerang tactics against neo-liberal politics (Keck and Sikkink, 1998) and the critique of specific oil companies (Baqué and Hierro, 2013) or state-driven development projects. While civil society thus maintained the Convention space alive, government foot-dragging kept related regulatory projects in limbo. Indeed, it was only in the aftermath of conflict, and in a context of international pressure and reconciliatory efforts that legislation and regulatory processes in Peru on *certain* aspects of the Convention took off.

18 By 2008, protest and social mobilisation was taking place in large parts of the Peruvian Amazon in response to a bundle of neo-liberal decrees promoted by the then President, Alan Garcia. On June 5, 2009, thousands of protestors, mainly indigenous, gathered outside the town of Bagua. As police forces attacked the protestors' roadblock in the early morning, the escalating violence resulted in some 34 deaths (including both police officers and protestors) as well as many injuries. In the immediate aftermath, the government accused national and foreign conspirators of having manipulated indigenous representatives into taking up arms. The leader of a national federation, Asociación Interétnica de Desarrollo de la Selva Peruana (AIDESEP), fled to the Nicaraguan embassy. Teresita, mentioned above, also hid for several months.

19 Questions of establishing guilt and responsibility were not merely about the immediate violence, but about structural dynamics. Firstly, indigenous voices challenged government reforms and the *Baguazo* violence as running counter to the principles and spirit of Convention 169. In Geneva, theevents coincided with the 98th session of the International Labour Conference, where Peruvian implementation of Convention 169 was under discussion by the ILO Conference Committee. The workers' delegation raised the subject of the Bagua conflicts, calling for 'truly effective institutions' and for the resolution of 'grave conflicts, attributable to an escalation of the exploitation of natural resources in the territories traditionally inhabited by indigenous peoples'. Delegation members also stated that 'non-observance of the Convention had serious consequences for the indigenous peoples.' Acts of violence were embedded in a Convention context as

well as in the ILO mandate of securing social peace. Requests were made for high-level missions and protection measures from the Government. Putting those Convention principles related to consultation into practice was also a central demand made by indigenous organisations during reconciliatory roundtables, ultimately resulting in new regulatory measures.

20 The events marked a shift from state neglect to engagement on the terrain of indigenous rights. Whereas neo-liberal practice in Peru had long relied on the systematic governmental neglect of commitments to indigenous rights, the game had now shifted to one of defining how far-reaching legal consultation provisions were, for whom, and with what legal implications. Such recognition of indigenous rights is partial reflecting a compartmentalized and instrumental reading of certain key provisions that present obstacles to wider development priorities. Across Latin America, governments are domesticating international indigenous rights, not least given the imminent danger of major investment projects coming to a halt due to social protest, judicial process or international criticism. Such 'framing' has also emerged in Colombia, Ecuador, Chile and Bolivia. In Colombia, prior consultation practices are governed by a 2013 presidential decree. Whereas 608 processes of prior consultation were registered between 2003 and 2010, more than four thousand were undertaken according to the established protocol between 2011 and 2014.[5]

21 In Chile, following the ratification of Convention 169 in 2008 rights to consultation soon led to controversy regarding the consequences for (rather than of) large-scale investment projects. One 2013 study thus identified 39 projects immobilised due to socio-environmental conflicts; projects with a collective value of more than USD 55.3 million, or some 21 per cent of the country's GDP in 2012 (PwC Chile, 2014). Such analysis soon triggered further regulatory action in the fields of environmental impact assessments and indigenous consultation. This resulted, for example, from corporate responses, which called for more detailed regulation to stamp out grey zones allowing for a perceived 'judicialisation' (PwC Chile, 2014, 12). The ensuing Supreme Decree 66 is of particular interest as it involved "regularising" consultation dynamics somewhat equivalent to dynamics in Peru. Consultation should *aim* at securing agreement, and would—based on that—qualify as compliance with international obligations 'even when it is not possible to reach the objective'.[6] Whereas NGOs have challenged such regulations as 'falling below the standard of ILO Convention 169' (Aylwin et al. 2015, 206), fine balancing acts were being played out in order to act in conformity with and promote a minimalist understanding of the Convention.

22 While the ratification process in Chile dragged on for two decades compared to that of Peru, there are similarities between both countries in terms of a shift from non-implementation (Peru)/non-ratification (Chile) to the current practice of negotiating the specific meaning of new consultation measures. Such practices illustrate a broader process of framing power through legal and administrative measures, and reducing the comprehensive nature of the ILO Convention to a narrow and instrumental focus. I have elsewhere argued that this is a process not simply of neo-liberal de-regulation, but one of post-frontier re-regulation (Larsen, 2015). The mobilisation of lawyers, consultancy companies and savvy community mediators has become the name of the game in the drive to maintain legitimacy in neo-liberalised environments (Larsen, 2017).

6. Heterodox Development and Contentious Indigeneity: Ecuador and Bolivia

23 How then have indigenous rights fared in heterodox development contexts such as those of Ecuador and Bolivia, committed to *buen vivir* rather than to neo-liberalism? In Bolivia, *vivir bien* forms part of the overarching principles defining the objectives of the state. The Ecuadorian constitution, in turn, defines it as a set of rights to health, food, education, etc. (Gudynas, 2011). In Bolivia, ILO Convention 169 was incorporated into national legislation in 1991 and further cemented constitutionally in 2009 (Parellada and Betancur, 2010, 113). Article 403, for example, recognises indigenous, *originarios* and peasant territories alongside guarantees for indigenous peoples in voluntary isolation. The Bolivian constitution also embraces pluralism, indigenous autonomy and self-government. From the negotiation of autonomy statutes and territorial mechanisms to the concretisation of *buen vivir*, a myriad of development-related aspects are being transformed, built up around concepts of cosmovision, territoriality, justice and education (CEPAL, 2014, 39) in what has been labelled the post-liberal challenge to political boundaries, forms of citizenship and rights (Yashar, 2005). Such phenomena reflect the massive social mobilisation of recent decades. In Bolivia, the 1990 March for Territory and Dignity resulted in presidential decrees recognising four indigenous territories and a major push forward in terms of land titles. By 2011, more than 20 million hectares had been titled in the form of 190 Peasant Native Indigenous Territories (TIOC[7]). Major international collaborative projects have also sought to put indigenous rights into practice, notably in the field of land rights. In Bolivia, for example, the Danish-funded *Apoyo a los Derechos de los Pueblos Indígenas de Bolivia* specifically referred to Convention 169 in terms of state action and institutional mechanisms, land titling, and management of these territories (Parellada and Betancur, 2010, 16-17). The project provided technical support to some 70 per cent of all indigenous territories titled during its existence (Parellada and Betancur, 2010, 10). In Bolivia, implementation not only met resistance from landowners, it also faced challenges in the highlands where titling support was seen as a potential threat to national unity and mining (Parellada and Betancur, 2010, 35). The framing of new constitutional provisions and development language has been no silver bullet with which to meet longstanding challenges; yet it is worthwhile highlighting the significance of Convention 169-related efforts as a platform for engagement and experimentation.

24 In Ecuador in 1992, the government responded to territorial demands from indigenous organisations after a two-week long march involving thousands of people. This led to the recognition of 19 territorial blocks covering more than a million hectares and some 138 legally recognised communities (Yashar, 2005, 294). The 2008 Constitution of Ecuador also contains a strong article (Article 57) on indigenous rights with explicit reference to international instruments. It recognises territorial rights as well as the right to be asked for free, prior and informed consent and the right to benefit-sharing in connection with non-renewable resources.[8] Still, indigenous organisations claim more than 6.3 million ha, roughly a quarter of the country, of which only 3.7 million have been titled (CEPAL, 2014, 130).

25 Yet, overall a growing body of literature challenges the progressive nature and effects of this heterodox experimentation. An issue of major contention concerns the continuous

push for large-scale mining and oil concessions. Notable in this respect was the 2013 Ecuadorian decree to abandon the Yasuní-ITT initiative[9] as well as other contested development projects in the fields of large-scale mining and oil development. Heterodox economies may challenge the market, but remain poorly equipped to address questions of indigenous inclusion and environment (Gudynas, 2013, 24). The second critique is that heterodox welfare schemes rely on resource extraction as a source of finance. This sustains the tension between social equity, from the perspective of redistributive politics, and social equity emanating from politics of recognition. In effect, both the Ecuadorian and Bolivian governments have actively pursued infrastructure development and supported extractive industries in indigenous lands as a means of triggering growth and financing new social programmes (Sacher and Acosta, 2012). Thus, when projects to run roads through the middle of the Isoboro Sécure Indigenous Territory and National Park (TIPNIS) led to protests, the government argued its abandonment would hinder payment of pensions and support to school children financed by gas exports (Gudynas, 2013, 38).

26 Whereas heterodox countries abound in meta-normative references to indigenous rights and state-led social experimentation, the political economy of development in such countries nonetheless generates similar conflicts around land rights, national priorities and resource extraction as those found in countries with an explicit neo-liberal agenda. The overall drive for natural resources has continued—they are, indeed, a crucial source of state revenue—with some differences in terms of benefit-sharing arrangements, indigenous development funds and consultation measures. Yet in both cases indigenous rights are being reframed, domesticated and challenged under what I call the new jungle law.

7. The New Jungle Law

27 Indigenous rights and opportunities for equitable development are today challenged on several fronts. On the one hand, the processes of the recognition and the demarcation of indigenous lands have slowed down substantially. In Peru, it has been estimated that almost 4,000 communities remain to be titled, just as ‘afrodescendants’ in the Caribbean regions of Colombia only have titles to a fraction of their lands (Territorios Seguros para las comunidades del Perú, 2015). This can partly be explained by the growing investment pressures exerted and the competing land claims expressed by extractive industries, soybean projects, and the like. Second, across Latin America, the crafting of legislation that potentially undermines community claims is widespread. Third, the negotiation and ‘domestication’ of international standards such as Convention 169 in order that they accommodate other priorities challenges more radical projects of social transformation. This calls for close attention to be paid to domestic processes of regulation, which from Guatemala to Peru remain highly contested policy procedures.

28 International rights standards are not stable safeguard measures; they are equally vulnerable to what I label ‘the new jungle law’. This law is not governed by brute force and violence alone, but by instrumentalising the regulatory apparatus to rein in more radical projects. As investment-intensive development projects risk getting stuck in the legal and administrative system due to non-compliance with rights measures, there has been an upsurge of rights-related regulatory responses from the government-corporate nexus to ‘clarify’ consultation rights and clear up so-called confusion and misunderstandings. Second, this has triggered a new generation of the politics of

recognition. A fundamental point of contention since the very moment the Convention was drafted is related to the nature of the shift from 'populations' to 'peoples'. While the lack of an explicit commitment in the Convention to indigenous self-determination was perceived as a lethal compromise by some, it nonetheless offered an unprecedented level of recognition with associated collective rights. A couple of decades ago, Nancy Fraser called for a critical theory of recognition that 'identifies and defends only those versions of the cultural politics of difference that can be coherently combined with the social politics of equality' (Fraser, 1995, 69). Social justice, she argued, requires both recognition and redistribution. She would later add 'politics' putting a strong emphasis on frame-setting (Fraser, 2005). Such politics is now at the heart of renegotiating statehood and indigenous citizenship.

29 Counting and identifying indigenous peoples remains a contentious and complicated process in light of such politics of recognition, entitlement, and redistribution. In Peru, for example, there have been major debates about who could legitimately claim Convention 169-related rights to consultation. For a long while, coverage was limited to the Amazon, although prior consultation is now increasingly being taken up in the *sierra* as well. Similar politics of recognition are played out in the context of World Bank safeguarding measures (Rai, 2011, 11; see also box on p.19). Recognition has become an axis of negotiation.

30 Another critical axis concerns the role of state institutions. A total of 17 states in Latin America have institutional mechanisms for indigenous affairs (CEPAL, 2014, 51). A major point of contention concerns the so-called *institucionalidad* of such mechanisms, often relegated to secondary roles, non-binding recommendations and their subjugation to other sectoral regimes. The question is no longer whether or not line agencies are in place, but rather their relative position and power in the institutional hierarchy.

31 The dual pressure of undermining or hollowing out indigenous claim spaces from within, while reinforcing the legislative framework for third-party investments, access and control, is creating tensions across the region. In Peru and elsewhere, indigenous leaders have also emphasised the growing criminalisation of indigenous social protest (Pacto de Unidad de Organizaciones Indigenas del Peru and AIDESEP, 2015, 11). In Ecuador, Amnesty International has pointed to how the 'criminal justice system is being used to try to stifle protests against the government's proposed policies and laws around natural resources' (2012, 6). What is notable is not only the instrumentalised use of law and criminalisation, but its commonality, a wide-spread pattern, in the context of natural resource decision-making, faced with which indigenous communities and organisations have limited bargaining power. For many governments, the indigenous problem is indeed no longer one of integrating the have-nots, but one of dealing with indigenous subjects challenging development practice. This is not only leading to reactions at the national level; it also involves efforts employed at the international level to temper indigenous claim spaces.

8. Consultation in Convention 169: Lost in Translation?

'labour standards are there to ensure that it [economic development] remains focused on improving human life and dignity.' (ILO, 2009a)

32 It is a common assumption that once international standards have been negotiated they represent an agreed framework for assessing national implementation. Yet a closer look at recent developments reveal a terrain of contested politics even reaching the international sphere. This includes international negotiations, in spaces such as the ILO, to manage the scope of contentious topics such as indigenous self-determination and rights to consultation. Consider the ILO Committee of Experts, composed of 20 jurists, who are 'to provide an impartial and technical evaluation of the state of application of international labour standards'. The body has repeatedly stressed the centrality of the right to consultation, a right that is also central to the majority of complaints. Committee language, such as calls for more information from states parties, may appear 'muted and indirect' (Merry, 1992) suggesting they are more about process than substance (Merry, 1992,176). Yet, polished language may disguise deeper battlefields, occasionally erupting such as in 2009 when the ILO Committee of Experts asked the Peruvian government to:

> '**suspend the exploration and exploitation of natural resources** which are affecting the peoples covered by the Convention until such time as the participation and consultation of the peoples concerned is ensured through their representative institutions in a climate of full respect and trust, in accordance with Articles 6, 7 and 15 of the Convention' (author's emphasis).[10]

33 Considering that half of *campesina* communities in the highlands overlap with mining concessions and three-quarters of the Amazon is covered by oil concessions, the implications were huge. The binding nature—in some cases even the constitutional status—of ratification contributes to the legal significance of such requests. In legal systems following the monist tradition, common in Latin America, ratified international treaties form part of domestic law (ILO, 2009b, 7). Demonstrating compliance was also significant, as Convention 169 became a marker of internationally approved good behaviour. Reactions to the request were soon to follow. In 2010, the employer representatives of the Conference Committee on the Application of Standards contended that such requests:

> 'Did not have a basis in the Convention and had to be eliminated as soon as possible. The Committee of Experts was not a court of law and could not, in effect, request economic activity to stop.'[11]

34 This was clear a message that the Expert Committee should "stay out" of the real economy. This 'lawfare' practiced against the Committee was a consequence of its growing influence in terms of focusing the spotlight on violations, notably of indigenous rights to consultation in the context of land and natural resource rights (Swepston, 2015b). The strength of the reaction recalled Brazilian reactions, in 2011, to the Inter-American system of human rights; where Brazil was requested to halt the construction of the Belo Monte dam (*the economist*, 2012). The political limits of international mechanisms was real.

35 The International Organisation of Employers (IOE) also recently encouraged the Committee to 'adhere strictly to its technical mandate and to exercise due self-restraint' . The challenge to ILO supervision went even further and concerned discoursive politics about the Convention text itself—notably in relation to how the legal meaning of *consultation* in resource and development projects should be interpreted. In particular, it involved attempts to challenge the requirement of consent, the need for agreement building and the possible right of veto. In 2011[12] the Committee of Experts responded with a 'general comment' that consultations were

> 'to be undertaken with the objective of reaching agreement or consent to the proposed measures[...].At the same time, such consultations **do not imply a right**

> **to veto, nor is the result of such consultations necessarily the reaching of agreement or consent**' (emphasis added).

36 Not unlike state "agreement building" and regulatory measures in countries like Canada to create legal 'certainty' (Schulte-Tenckhoff, 2012), in practice such legalistic clarifications limited indigenous claim spaces. Not surprisingly, the employers responded to the general comment, being 'pleased'

> 'to see that the experts had confirmed the Employer members' views that consultations did not require agreement or consensus with the people consulted. Moreover, the Committee of Experts had stated that it was not a court of law and as a result could not issue injunctions or provisional measures[...].'[13]

37 This appeared to be another victory for lawfare, reducing the interpretative edge of the consultation provisions. It relegated the matter to one of legal domestication, on the one hand, and of reinforcing a minimalist interpretation of the Convention,limiting its possible implications, supervisory action and international safeguards of indigenous rights to self-determination, on the other. This was the result of a combined process of juridification and institutionalisation, resulting in legal questions of scope (Baxi, 2012, 273): what was to be considered obligatory (consultative process) and what was to be considered a *possible* outcome (consent and calls for remedial action). In effect, the Convention text itself merely speaks of the '**objective** of achieving agreement or consent' (emphasis added), not stating that such agreement or consent is a requirement *per se* (Swepston, 2015a, 245, emphasis added). This interpretation was even consolidated in the authorised discourse of ILO guidance (ILO, 2013, 16). Merely having 'the objective' to consult matched up with rights ritualism perfectly well,[14] yet this is arguably problematic. It should not be forgotten that there was a deliberate decision taken during the drafting process of the Convention to 'anticipate and prepare the ground for higher standards in other international fora' (Swepston, 1990, 678-679). This would logically entail using the UNDRIP as a basis for consultation provisions rather than backtracking to the reservations expressed by states in 1989, while confirming a reductionist interpretation of peoplehood (Schulte-Tenckhoff, 2012).

38 In sum, recent trends of re-interpreting the significance of Convention 169 reveal both legal openings for indigenous political subjectivity as well as closures of potential claim spaces and even the hollowing out of its central provision. In the latter respect, it might even be argued that the essence of the Convention as an instrument of social justice is at risk of being lost in translation. Are there, we might ask, ways of recuperating its essence and significance? Certainly the intensity of development conflicts in Latin America merit attention as well as an up-to-date framework for interpreting the provisions of ILO Convention 169. Yet institutional and technico-legal constraints appear significant. Not only are pressures to limit the scope of Convention 169-based action ever present, the work of the International Labour Office on indigenous issues has historically largely relied, even been dependent, upon extra-budgetary resources. Staffing is currently at a bare minimum, and technical collaboration activities have been scaled down. Indigenous rights continue to be perceived at the margins of the core mandate and raison-d'être of the organisation. When the author co-organised a seminar in connection with the twenty-fifth anniversary of the Convention in 2014, the topic appeared to provoke considerable uneasiness. It was, for example, considered inconceivable to host the event on the ILO's premises, as it was not an official ILO meeting.[15] With the help of Denmark and Mexico, it was in the end organised at the United Nations headquarters in Geneva. Just as the drafting process has been criticised for not enabling indigenous participation,

described as the original sin of the Convention (Rodríguez-Piñero, 2005, 300), it was telling that a meeting on ILO Convention 169 had to take place outside ILO premises in order to consult with indigenous representatives. The meeting eventually generated substantial participation from states, workers and employers along with indigenous representatives. It furthermore resulted in a strong call for action both in terms of further ratification and of implementation.

39 In hindsight, the significant interest the seminar generated could have been expected. For the employers, the significance of the Convention as a risk factor had been acknowledged. For many states, rights represented real governance challenges both in terms of securing political legitimacy and of economic stability. From the indigenous representatives present, there were questions concerning implementation practice and the need for strengthening ratification. In response, the ILO Governing Body tabled the topic in 2015, contemplating a new strategy. Both the employers and the workers had supported to put it on the Governing Body's agenda. Was this a (re)defining moment? As the Latin American employers' representative noted during deliberations, there was continuous uncertainty and a need to clarify doubts, increase applicability and clarify levels of responsibility. Investment projects were being threatened and he expressed concern about the convention being interpreted as a referendum. The workers group, in turn, stressed their support for the Convention as it 'promotes a rights-based approach for indigenous peoples'. Employers spoke of 'eradicating incoherencies', stressing principles such as consulting in good faith and seeking agreement; yet did *not* speak of offering indigenous peoples the right to veto, nor of requiring agreement to be reached.

40 The critical issue was, from the employers' perspective, expressed as defining consultation requirements in 'manageable' terms. The workers, on the other hand, did not 'see the need to restrict the definition', wishing to let the Convention 'speak for itself rather than being rewritten by an administrative instrument' (author's notes). The 2015 Governing Body discussions reflected another chapter in the negotiations between minimalist and maximalist interpretations of the Convention text. Only six countries spoke on the topic in support of the draft ILO strategy—a draft proposed by the Secretariat. It was an irony of not minor proportions that despite the centrality of *consultation* in the Convention, there had not been a public consultation with indigenous peoples on the strategy draft itself. In fact, there was limited, if any, awareness about the strategy process in the wider indigenous community. No indigenous representatives spoke at the meeting despite the obvious centrality of the topic. This did not make the strategy irrelevant. Although some parts were framed using integrationist language and partnership language, the document did represent a timid attempt to reboot Office activities in the field of indigenous rights. Could the ILO 'recuperate its role as a leader' and promote social dialogue in the field of indigenous rights? An action plan and budget was to be tabled in 2016. Will such efforts match the complexity of development challenges in Latin America? Will attempts to reduce the significance and scope of consultation provisions persist or will a renewed institutional emphasis potentially raise the bar? How the international system functions and responds is vital for the relevance of ILO Convention 169 in addressing contemporary Latin American development conflicts.

9. Concluding Remarks

41 How does ILO Convention 169 contribute to the postcolonial predicament of indigenous peoples and development under international law (Rodríguez-Piñero, 2005, 292)? From one perspective, the instrument represents the new language of assimilation (Venne, 1989), reproducing the development-oriented language of its predecessor—ILO Convention 107 (Rodríguez-Piñero, 2005, 320). Yet from another perspective it also recognises indigenous peoples as collective rights holders in a binding set of minimal standards with a 'spillover' reach well beyond the countries, where the convention is ratified. International standards are important for the external recognition of indigenous political agency—the question up for negotiation concerns the boundaries and limits of these new political subjectivities. While often framed in terms of an implementation gap, this article suggests urgent attention be paid to actual implementation practice.

42 Latin America today faces the ambiguity of rights frameworks having contributed to the restructuring of land rights and democratic frameworks in the region (Aylwin and Tamburini, 2014; Yupsanis, 2010) while simultaneously harbouring the seeds of a perpetuation of long-standing inequalities. While this ambiguity is often explained as a consequence of poor implementation and the 'birth defects' of compromised standards, what I call the new jungle law is characterised by judicial, administrative and regulatory assaults on the emancipatory potential of rights. Rights, under the new jungle law, are not simply a response to frontier injustices, extrajudicial punishment and violence; they appear on a sliding scale between empowerment and judicial violence. Instruments like ILO Convention 169 are no longer being ignored. Rather, they are sought approached, instrumentalised and adjusted to business realities and national development priorities. This points to the importance of exploring the constructions and legal imbrications of indigeneity and the connection to international standards as an on-going matter up for contestation.

43 Whether at the national or the international level, efforts to, respectively, minimise or maximise the significance of the Convention are part of the game. The very presence of negotiations reflects the open-ended potentialities between hegemonic and counter-hegemonic approaches to indigenous rights (Rodriguez-Garavito, 2010, 28-29). This is particularly important to understand in the context of intensified state and corporate-driven mega-development, whether in the form of infrastructure, energy, or extractives (Baluarte, 2004; RAISG, 2012). New governance forms may lead to a shrinking of the spaces of democratic politics (Randeria, 2007), as they may lead to innovation and transformation in the fields of autonomy and self-government. The question is no longer one of whether states promote indigenous participation; nor is it about whether efforts are cooordinated and systematic, as Convention 169 suggests. States are increasingly doing all of this. The question is rather one of the quality and emergent patterns of systematic, yet also systemically grounded, rights practices. Instrumental approaches to new forms of consultation and consent, for example, appear to significantly risk narrowing down the claim space. Unsettling and reimagining the politics of indigenous rights is now crucial to the process of challenging the pitfalls of authoritative statements, the coloniality of power (Quijano, 2000) and entrenched development practice.

44 Looking ahead, at least three issues come to mind in terms of future development policy. First, there is a need for a more transparent and equitable debate around how best to

interpret the principles and provisions of Convention 169. Second, there is a clear need to level the playing field in terms of designing more equitable implementation modalities and mechanisms. Third, there is an urgent need to halt the current dynamics that are criminalising indigenous voice and protest, allowing a truly rights-based development dialogue to emerge and endure.

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NOTES

1. To date, of the 22 countries that have ratified the convention. 15 are in Latin America.

2. http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16300&LangID=E, Office of the United Nations High Commissioner for Human Rights (accessed on 11 November 2016).

3. This provided an environment conducive to an internal push by civil servants in the ILO Secretariat to secure a revision process for Convention 107 (Rodríguez-Piñero, 2005).

4. The ILO Committee of Experts expressed that 'consultation is the key to all other provisions of the Convention' (see CEACR Observation on Guatemala 2005, published 95th ILC session (2006)), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2261253 (accessed 25/11/16).

5. http://www.vanguardia.com/actualidad/colombia/271090-consulta-previa-defensa-de-las-minorias-etnicas (accesed on 11 November 2015).

6. http://www.leychile.cl/Navegar?idNorma=1059961 (accessed on 28 October 2015).

7. *Territorio Indígena Originario Campesino* was the term adopted in 2010.

8. http://www.asambleanacional.gov.ec/documentos/constitucion_de_bolsillo.pdf (accessed on 26 October 2015).

9. The initiative attracted global attention by proposing to refrain from extracting almost one billion barrels of petroleum from three oil blocks—Ispingo-Tiputini-Timbochacha (ITT)—located in the Yasuni National Park if the global community would offer half of the expected revenues (3.6 billion USD) by way of compensation.

10. Observation (CEACR) - adopted 2009, published 99th ILC session (2010) Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Peru, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::::P13100_COMMENT_ID:2307227 (accessed on 15 November 2016).

11. report on item III on the agenda: "Information and reports on the application of Conventions and Recommendations", (2010), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_141870.pdf (accessed on 15 October 2015).

12. ILC.100/III/1A, International Labour Conference, 100th Session, 2011. Report of the Committee of Experts on the Application of Conventions and Recommendations, p. 785.

13. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_165970.pdf (accessed on 5 December 2015).

14. James Anaya, former Special Rapporteur, has suggested the term 'rights ritualism', where a government lays 'out its version of the facts and human rights responsibilities [...] rarely admitting any wrongdoing or committing to doing anything different' (Anaya, 2015, 8).

15. To fulfil this criterion would have required a distinct preparatory tripartite process and procedures applied through ILO channels, officials argued.

ABSTRACTS

This article explores the relationship between indigenous rights, international standards, and development in Latin America with a specific focus on ILO Convention 169 on the rights of indigenous and tribal peoples and its application in the region. Whereas, on the one hand, democratic change, constitutional reforms and the recognition of indigenous peoples signal the emergence of a new rights era, on the other hand, deep-running inequalities, persistent poverty and development conflicts reveal structural tensions and the ambiguities of recognition. While such ambiguity is often explained as a consequence of poor implementation and compromised

rights standards, this article analyses trends in both orthodox and heterodox polities as well as in the international arena in order to draw further attention to how rights regimes are being renegotiated. Rights under this ‘new jungle law’ are no longer characterised by neglect and poor implementation, but through reappropriation, strategic attention and regulatory negotiations, revealing a sliding scale of potentialities between empowerment and normalisation.

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institutionsen International Labour Organization (ILO)
themesen human rights, development, indigenous peoples, anthropology, inclusive development

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