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PRIOR CONSULTATION

LAW AND THE CHALLENGES OF THE
NEW LEGAL INDIGENISM IN PERU

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ABSTRACT

The following article exposes how was the formation process of legal indigenism in Peru. Shows several issues in indigenous consultation process and recognition of territorialities. Approaches the indigenous self-determination rights and the consequences of colonial and capitalism about on this subject.

Keywords: Legal Indigenism – Peru – Consultation – Self-determination.

1. INTRODUCTION

In June 2009 the town of *Bagua* was the scene of one of the most relevant political events in recent Peruvian history. Amazonian indigenous people blocked the *Curva del Diablo* highway for two months protesting against a governmental package of decrees approved by President García, which favoured the exploitation of natural resources in the Amazon. As a consequence of public repression hundreds of people were wounded and thirty-three people died.

After this political event known as the *Baguazo*, in Peru emerged a social consensus about the necessity of intercultural policies, directed not just to ‘include’ indigenous peoples but to recognise and

value their different culture and, in this way, to reduce social conflicts (Sevillano, 2010). A Consultation Law was the legal mechanism thought to achieve these aims, a norm based on the ILO Convention 169 to consult indigenous peoples before approving any administrative or legal norm that can affect their collective rights.

The Consultation Law (Law N° 29785, September 2011) is the first of this kind in Latin America; it was welcomed by politicians, international organisations, civil society organisations and even the business sector. This was the beginning of a new wave of legal indigenism given the attention and importance of the Consultation Law and indigenous legal and institutional devices recently approved.

I identify three waves of legal indigenism in Peru. The first wave was inaugurated by the legal recognition of “indigenous communities” in the Peruvian Constitution of 1920 and the reforms of President Leguía (1923– 1927 and 1927–1930). However, radical demands of rural indigenous uprisings were rapidly assimilated by the modernising discourse of President Leguía, who implemented superficial and conservative reforms (Grijalva, 2010; Wise, 1983; Varese, 1978). Indeed, Leguía’s discourse (‘to incorporate the Indian to national society’) was very racist at its basis because the Indian – in the process of incorporation – had to be educated and civilised (Urrutia, 1992).

The second wave of legal indigenism was inaugurated by President Velasco (1968 – 1975). Velasco enacted the 1969 Agrarian Reform Law and created the ‘peasant community’ and in 1974 passed Law 20653 creating the ‘native community’ for the Amazonian region. The peasant and native communities land were strongly protected, however, the aim of recognising natives and peasant communities was not to repair indigenous from

historical plunder and oppression but to integrate these people into Peruvian society to widen the government popular basis (Surrallés, 2009), and to establish state capitalism, modernisation, and national integration, at the same time of minimising peasants and workers uprisings (Seligmann, 1993). Furthermore, Native Law was a mean to assure internal colonisation because after titling communities, huge extension of land remained without 'owners' (land that truly constituted indigenous territory), favouring land taking by foreign people. That is why from the beginning many called the process of titling as an 'institutionalised dispossession' (Barclay and Santos Granero, 1980: 43-74; Chirif, 1980: 15-24; Espinosa, 2010: 245).

The Consultation Law inaugurated the third wave of legal indigenism in Peru. The aim of this paper is to show the dark side of the Consultation Law and how it is still embedded in coloniality.

2. Critiques on the Prior Consultation Law

The original optimism about the Prior Consultation Law was quickly abandoned. Its process of implementation – that had as first outcome its regulation (*Reglamento* of the Law N° 29785 of April 2012) -, was strongly criticized because it established rules that would make superfluous the advancements obtained by the Law.

It is true that the regulation has many defects, but even the Law had polemical solutions: first of all, it does not recognize comprehensively 'the right of consent' (as in the United Nations Declaration of the Right of Indigenous Peoples of 2007), and it does establish a restrictive definition of the category of 'indigenous' (more limited than the Convention 169). With these premises, the regulation just deepened the problems. The main criticisms are:

- There is a continuous emphasis of the necessity of 'direct affectation' of indigenous collective rights as a requirement to undertake consultation, what can be used to limit indigenous peoples' rights by asserting that the affectation of those rights is just 'indirect'. The Declaration does not mention the necessity of 'direct affectation' and the Convention does not have that emphasis.
- There are very polemical cases of exoneration of consultation processes, such as the construction and maintenance of infrastructure to provide health, education and in general 'public services' (15 Final Disposition of the Regulation). This norm is very dangerous because it can exonerate from consultation any development project that usually produces major impacts on the indigenous population.
- There is not a proper regulation of the right to consent. The regulation only recognises two cases in which the consent of the indigenous peoples is necessary (7 Final disposition): when the state seeks to displace them to other territories (according to Convention 169), and when dangerous materials are attempted to be kept in indigenous land (according to the Declaration). The necessity of consent in projects that would produce 'major impacts on large part of the territory' established by the Inter-American Court of Human Rights in the Case Saramaka is not included.
- The Second Final Disposition established that all legal and administrative measures previously enacted without a consultation process, maintain their validity. For many activists, the measures approved after 1995 (date in which Convention 169 entered into force), should be reviewed and consulted.

These critiques are common among NGOs; indeed, instead of the academia, the massive intellectual production on Consultation Law is developed by NGOs, who are

worried in generating social impacts rather than deeply reflecting on fundamental questions. The problem is that the analysis used to be limited to a description of what has been established by the Convention 169 and the Inter-American Court of Human Rights, without observing the roots of indigenous rights and its relation to coloniality. In fact, International Law is constantly re-constructed by struggles for rights' recognition, so it is more important to analyse critically the social tendencies, the discourses and the emancipatory potentials of human rights than describing what the current state of affairs is.

For example, a high functionary of Afrodita mine in Northern Amazon argues that Afrodita obtained mining concessions in 1993, before Convention 169 was ratified by the Peruvian state; therefore, consultation was not a requirement for mining activities in this very sensible ecological area (Company representative interview, 21-05-13). Although legal activists (Ruiz, 2012) have promoted audacious legal interpretations to address this issue, from a legalistic view, indeed, there would not be a right of consultation in this case. From a broader perspective on the tendencies of International Law and Human Rights, the right to self-determination cannot be ignored and recognised just with a legislative act. It is an inherent right of a people.

Thus, it is a mistake to focus on consultation as a key element of indigenous legality and its political agenda. Even more, a profound analysis on Consultation Law and its regulation would lead us to question its very rationality. Let's start by observing the structure of the consultation process. It is a process of 'dialogue' between the state and the peoples (with no intervention of companies); it is led by the public entity that enacted a Law or administrative norm (including licenses for extractive activities) that would affect in-

igenous collective rights. Then, the process may have 6 stages (arts. 14 – 23 of the Regulation): identification (of the people affected and the norm enacted); publicity (of the norm); information (the state inform about the measure to indigenous peoples); internal evaluation (the community will evaluate the convenience of the measure); intercultural dialogue (which emerges only if there is not agreement after the internal evaluation); and decision (in case of not agreement the final decision is made by the state). This process has a very short duration: 120 days.

As can be observed, the whole process is designed as a mechanism to inform and convince indigenous peoples of a decision already made by the state; the 'intercultural dialogue' just appears if indigenous peoples are not persuaded. But should not be the other way around? An intercultural dialogue should be the first stage in a state really respectful of indigenous peoples, in order to identify the priorities of indigenous populations regarding their needs and aspirations and undertake a dialogue mutually enriching.

This rationale is rooted in the colonial character of Western legality and the capitalist economy. Capitalist expansion needs the elimination of any barrier to investment, and social conflict is a barrier. The hope of some private actors (within and outside the state) was to institutionalise the conflicts within the Consultation Law, and through this process – of passing information and persuasion – legitimise the policy: "If properly obtained previous consent should allow large extractive industry projects to go forward in a less conflicted atmosphere" (Laplante and Spears, 2008: p. 71). In sum, the law and its regulation is aimed at freezing indigenous politics into new extractivist policies.

In addition, the expectations and propaganda raised by the Consultation Law

make us forget other important rights that have been historically part of indigenous peoples' agenda, such as territoriality. As the activist Diego Garcia (Activist interview, 12-06-13) asserts, nobody is thinking of consultation as an act of self-determination or even as a proper indigenous right, but as a means of not addressing serious issues.

3. Prior to Prior Consultation: territoriality vs. coloniality

According to Salmón (2013), currently, indigenous communities not only demand free, prior, and informed consultation, but also claim the recognition of territorialities and informed consent. This affirmation is incorrect because the struggle for territorialities and consent is not a 'current' claim, but a historical one. The academia and activists tend to conceptualise indigenous rights around the right of consultation, so other rights are just emerging rights that someday would be recognised by the Law.

In fact, territorial rights and prior consent are connected to their self-determination, the original indigenous right. Indigenous peoples have lived in autonomy before colonisation. The indigenous legality (each one with their particularities) recognised territorial rights for indigenous nations, collective and individual land use rights, and a whole system of rights and duties that were attempted to destroy or invisibilise by Western legality. In the process, different peoples have maintained different degrees of autonomy, from peoples in voluntary isolation to peoples in process of complete assimilation to the Western logic. However, those peoples that have maintained their legal framework and their idiosyncrasy as 'peoples' still struggle for the maintenance of their foundational rights.

Therefore, self-determination is a principle and right for indigenous peoples, but is not just a cultural, fundamental or human right (all of them elaborated in Western terms as constitutional rights) but a *foundational right* in the sense that it is the basis of a whole legal, political and economic system rooted in non-Western ontologies and epistemologies. That is why I conceive this right as the 'right to have communal rights' beyond Western thinking (Merino, 2013). Self-determination and territoriality as foundational rights support the right of consent, the right to use and obtain direct benefits from the land among others rights that contrast with new indigenous rights recognised in the last decades by international standards.

Indeed, many of these new rights respond to Western logics: the right of consultation (arts. 6 .1; 6.2; 15.2 of Convention 169), for example, has as premise that a state is going to affect indigenous self-determination and it needs at least to ask indigenous peoples their opinion; the right of indigenous peoples to participate in economic benefits obtained by extractive industries (art. 15.2 of Convention 169) respond to the fact that companies are exploiting (or are going to exploit) indigenous land and resources.

It does not mean that there is not certain recognition of foundational rights at international level (indeed, in an ambiguous way, the Convention 169 recognizes the right to territory and the Declaration the right of self-determination); or that many indigenous peoples, because of their historical process, are closer to the discourse and practice of the new rights (such as consultation and economic benefits); but that the problem of coloniality is still alive and hidden behind an optimistic discourse of indigenous rights' globalization.

This situation generates practical consequences. After the regulation of Consul-

tation Law, the government had to decide which would be the first process of consultation. The communities of the Quichua of Pastaza were elected as the first communities to be consulted because they had suffered during decades from environmental impacts and the media recently had showed their situation. The consultation was planned to the commencement of exploitation activities of the oil concession TAB located close to the communities. The Quichua of Pastaza, however, argued that before any process of consultation they wanted the recognition of their territorial rights and the remediation of 60 years of environmental impacts on their territory. The government had to, firstly, delay the process of consultation, and then renounce to implement the process. This example shows how new rights such as 'consultation' are confronted with foundational rights, such as territoriality.

The problem of focusing on consultation is that it can invisibilise foundational rights that are components of today's indigenous agenda. AIDSEP and the Institute of the Common Good (*Instituto del Bien Común* – IBC), for example, are promoting the notion of 'integral territory'.

One of the experts of the IBC is an Awajun who has developed technically and theoretically this concept. According to him (Indigenous interview, 04-04-2013), the problem is that native communities titling covers small parcels in which they live (as in the Andes) without taking into account the whole territory that includes spaces for fishing, hunting and collection. Then, huge areas become 'free spaces' that are given for extractive activities without the necessity of consultation. To face this problem, communities claim the extension of their titled land or they try to create new communities, but both of them are very bureaucratic processes. This problem can be overcome by titling peoples territorial

habitats instead of specific plots. National and international legal standards do not completely protect indigenous 'territories', but somehow they allow the elaboration of legal arguments in its favour. For example, the Law of native communities (article 10), establishes that areas used sporadically for hunting, fishing, collection can be marked and titled; Article 13 of Convention 169 establishes that the term 'land' refers also to indigenous territories, and the Inter-American Court of Human Rights has established that is an obligation of the state the titling of 'collective property' (*Awás Tingni vs. Nicaragua*).

However, territorial rights and 'collective property' remains contentious and ambiguous concepts at the international level. The key concept of territory has specific features that make it different from property, however, whereas liberal legality tries to assimilate the concept into its logic; Amazonian indigenous peoples are demarking their territory in a long term strategy until its comprehensive legal recognition.

4. The right of self-determination, the national interest and the appropriation of liberal legality

To consider 'consultation' a mechanism of guarantying the exercise of the right of self-determination of indigenous peoples (Sevillano, 2010) is mistaken. As the International Andean Coordination of Indigenous Organisations – CAOI explains, without recognising the right to consent, consultation can be reduced to a simple procedure directed to legitimate the imposition of norms, programs and projects that negatively impact on indigenous peoples' rights (CAOI, 2012).

Thus, one consequence of the right and principle of self-determination is the right to consent, wrongly called 'right to veto' because it does not derive from a spe-

cial power conferred to indigenous peoples due to their hegemonic position in the democratic system (as is the case in presidential veto power), but it is expression of their self-determination as peoples. The problem is that no state wants to recognize self-determination for indigenous peoples because of the alleged possibility of secession.

But in reality what most indigenous peoples claim with self-determination is the respect of their vital spaces instead of the creation of new states. The anthropologist Richard Smith (2003) has accompanied indigenous movements for decades and has found that self-determination refers the right of a people to choose the type of relation it wants to maintain with a dominant state. There are of course some exceptions such as the radical proposals of the American Indian and scholar Ward Churchill (2002), who claim for the constitution of an Indian nation independent from the U.S. However, most academic and political proposals range from some degree of autonomy through decentralization within a dominant nation such as the liberal multiculturalism in Latin America, to political projects that recognize Indian nations within the state, such as a Federal state in the Tully's proposal (1995) or the Plurinational state of Bolivia.

Then, to exert the right of self-determination does not mean secession, but an adequate relation between indigenous peoples and the state. In Peru, self-determination is legally recognized within the context of multiculturalism. Multiculturalism

in Peru is equivalent to pluri-culturalism or the respect of the cultural plurality. Thus, Article 2.19 of the Constitution recognizes the 'ethnic and cultural plurality' of the country and the right of each person to maintain their ethnic identity.

Article 89 and 149 of the Constitution recognizes self-determination as the autonomy of peasant and native communities (what involve the right of autonomic organization, communal work, use and free disposition of land, economic, administrative and jurisdictional autonomy within the 'Law'). Nonetheless, as this autonomy does not mean that indigenous peoples hold a complete power of decision on their land (and they have not right on the resources of the subsoil), their claims often go toward decolonial projects. A decolonial project, as in the case of Bolivia, would mean the recognition of indigenous peoples not as 'communities' but as 'nations' and the recognition of their vital spaces not just as 'land rights' but as 'territorial rights'.

However, even in decolonial projects or any other project in which there is a dominant state, the principle of self-determination is affected by norms of exception and national interest. The application of these norms has always been connected to the expansion of extractive industries. Indeed, as Orihuela asserts (2012), the rise of modern extractive industries is connected to indigenous exploitation and dispossession, in the mines of the Andes or the rubber plantations of the Amazon. Then, it was natural that in post-colonial nations, land rights were not well defined

Independent nations	—————>	Radical Indian projects (Ward Churchill)
Plurinational State	—————>	Decolonial project (Bolivian constitution)
Federal States	—————>	Postcolonial/liberal project (James Tully)
Administrative autonomy	—————>	Multicultural project (Most constitutions in LA)

and the state owned all underground resources: this allows the legal displacement of communities in the name of the greater public good.

The state, thus, by exception can exploit resources in protected areas created for its environmental fragility (Law 26834, Art. 21 b., 1997), and even in reserves for indigenous peoples in voluntary isolation (Law 28736, Art. 5 c., 2006) because the untouchable character of the reserves might be broken by the state on behalf of the public interest (Finer et al, 2008; Hughes, 2010). Thus, by designing policies from the logic of coloniality, the government completely control peoples' vital spaces and the reduction or violation of indigenous rights is a necessary sacrifice given the promise of development (Stetson, 2012).

This power on indigenous peoples is usually justified as an expression of state sovereignty (the argument that indigenous peoples cannot have a 'veto power' over the state) or the necessity of economic development and the fulfilment of the government social responsibilities (Laplante and Spears, 2008).

However, there is a historical connection between the political economy of extraction and the power to exploit indigenous territories on behalf of national interest. This connection expresses the logic of coloniality by which certain peoples can be exceptionally sacrificed on the ground of the alleged economic benefits for all (economic argument) and the national cohesion (sovereign argument). But what is obscured is that the people sacrificed usually have been ranked as the less civilised and constructed as those who urgently needs be integrated into modernisation. It is also obscured that these people are often those who have suffered most of environmental disasters and have never enjoyed real state public services. As

they usually say, "the state only reaches us when it wants to exploit our territory".

Indeed, the sovereign argument is very problematic because it is rooted in the colonial denial of indigenous foundational rights: all the consequences of this 'national cohesion' when territorial rights are at stake, entail the exclusion of indigeneity. The economic argument is also problematic. The scholar and activist Eduardo Gudynas asserts (Activist interview, 26-10-13) that the argument about the necessity of extractivism for supporting social programs and development goals is flawed because in the majority of cases there is not a correlation between revenues from extractivist industries and specific social achievements, and governments spent a lot of money in subsidize extractivism and manage its social and environmental impacts.

In this context, the discursive use of the term self-determination is not guarantee of the respect of indigenous rights. In a recent case (*Tres Islas*, 2012), the Constitutional Tribunal recognised the right of self-determination of a community against illegal logging, but: Would it be the same if self-determination would have been opposed to development state projects or extractive activities? Apart from that decision, the Constitutional Tribunal indeed has been very conservative when deciding about indigenous rights (Ruiz, 2011).

But the Law is still useful. Activists assert that they supported the approbation of Consultation Law because of the political opportunity. Indigenous peoples know about the limitations of the Consultation Law, they are very critical of it but at the same time they demand the government to respect the Law by implementing more consultation processes (Indigenous interview, 26-04-13). Thus, in the same way with titling procedures and international human rights, indigenous peoples appro-

appropriate strategically the Consultation Law to express their political claims. Liberal legality becomes a medium to express their indigeneity.

In sum, there is a similar rationale in the different waves of legal indigenism: recognition of rights according to Western parameters; norms of exception to impose the capitalist logic; and the indigenous response through the appropriation and use of the legality. Thus, the main challenge of Consultation Law is still coloniality, or the colonial logic on which liberal legality is embedded.

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