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Conflict Transformation through Prior Consultation? Lessons from Peru

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Abstract. This article analyses the background to and the content of the Peruvian prior consultation law – the only one enacted in Latin America to date – and its regulating decree. In contrast to the widespread conception that prior consultation is a means for preventing and resolving conflict, it argues that this new legislation will not help to transform conflicts as long as the normative framework itself is contested and the preconditions for participatory governance are not in place. Establishing these preconditions would result in state institutions capable of justly balancing the diverse interests at stake; measures that reduce power asymmetries within consultations; and joint decision-making processes with binding agreements.

Keywords: prior consultation, conflict transformation, participatory governance, Peru, indigenous people, extractive industries

Introduction

To include indigenous peoples and local communities in the crafting of legislative and administrative measures liable to affect them is a principle that is now widely accepted by organisations (for example, the World Bank, Oxfam, the United Nations) and governments around the world.[1] The

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[1] See César Rodríguez Garavito, Meghan Morris, Natalia Orduz Salinas and Paula Buriticá, *La consulta previa a pueblos indígenas: los estándares del derecho internacional* (Bogotá: Universidad de los Andes, 2010).

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right to prior consultation and to free, prior and informed consent (FPIC) is an essential part of the international human rights instruments that have been created out of concern for indigenous peoples. This right is of particular importance in Latin America, where to date 15 countries have ratified International Labour Organisation Convention 169 (ILO C169) on the rights of indigenous peoples and tribal populations. In addition, the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 has further enhanced the right to FPIC. Such a right to participation is fundamental, because if 'rights and citizenship are attained through agency, not simply bestowed by the state, then the right to participate – for example the right to claim rights – is a prior right, necessary for making other rights real'.[2]

In addition to having a rights protection function, prior consultation is frequently understood as a tool for conflict prevention and resolution. It is expected that taking into account the fears and needs of local populations, finding joint solutions and complementing expert knowledge with the insights of affected groups will bring about more democratic, peaceful and sustainable solutions.[3] But this expectation has not yet been empirically proven, especially because instances of meaningful participation in Latin America's resource governance are scarce, while reports of absent or flawed prior consultations abound.[4] Several states that have not complied with their obligation to guarantee the right to prior consultation – among them Peru – have insisted that this was due to the absence of specific national laws on prior consultation.

In September 2011 Peru finally promulgated such a law on prior consultation, which is the only one enacted in the entire region to date. Hence, the research into its potential for conflict transformation is of particular interest. After its promulgation, a 'meta-consultation' on its regulating decree was carried out – a process that, though faulty, may serve as an example of likely future consultation practices in the country. President Humala announced that the new legislation would give voice to the needs of Peru's indigenous communities and thus contribute to greater social harmony. However, it is still unclear whether the right to prior consultation according to the new

[2] John Gaventa, 'Towards Participatory Governance: Assessing the Transformative Possibilities', in Samuel Hickey and Giles Mohan (eds.), *Participation. From Tyranny to Transformation?* (London and New York: Zedbooks, 2004), p. 29.

[3] See Lisa Laplante and Suzanne Spears, 'Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector', *Yale Human Rights & Development*, 11 (2008), pp. 69–116; United Nations Interagency Framework for Coordination on Preventive Action, *Extractive Industries and Conflict* (New York: United Nations, 2010).

[4] See, for example, Due Process of Law Foundation, *El derecho a la consulta previa, libre e informada de los pueblos indígenas. La situación de Bolivia, Colombia, Ecuador y Perú* (Washington: DPLF/OXFAM, 2011); Amanda Fulmer, Angelina Snodgrass Godoy and Philip Neff, 'Indigenous Rights, Resistance and the Law: Lessons from a Guatemalan Mine', *Latin American Politics and Society*, 50: 4 (2008), pp. 91–121.

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legislation will apply to Andean and coastal peasant communities or only to Amazonian native communities. Peru's president and his predecessor Alan García have both publicly stated that they do not consider Andean communities to be indigenous and have thereby denied these communities' right to prior consultation.[5] In fact, the political mobilisation of rural communities in the Peruvian Andes has been organised more on the basis of class categories, with the people identifying themselves as 'peasants' rather than as 'indigenous'.[6] Nevertheless, Peruvian indigenous and peasant organisations, supported by many intellectuals and human rights defenders, have emphasised that Peru's peasant communities are descendents of Peru's original population, with many of their members speaking Quechua or Aymara and retaining cultural practices, and should be granted indigenous peoples' rights. In the past few years they have increasingly self-identified as indigenous.[7] Scholars also argue that violent or discriminatory practices are the reason that ethnicity has not been salient and that indigenous movements have been rather weak in the Peruvian Andes.[8]

In addition to important conflicts about the groups that hold the right to prior consultation, the rights subjects, there have been many other issues of contention related to the elaboration and content of the new consultation law and its regulating decree. As a consequence, their legitimacy is currently low. Moreover, our study on the Peruvian law in its wider political, economic and cultural context reveals that without the development of the 'pre-conditions of participatory governance' the new legislation will be able neither to diffuse existing violent conflicts nor to prevent new ones.[9] Based on our analysis we identify three basic, and currently lacking, conditions crucial for the effective implementation of prior consultations: (1) state institutions

[5] Carmen Ilizarbe, 'El gobierno de Ollanta Humala y el discurso sobre los pueblos indígenas' (2013), available at servindi.org/actualidad/87719.

[6] Carlos Iván Degregori (ed.), *No hay país más diverso. Compendio de antropología peruana* (Lima: Red para el Desarrollo de las Ciencias Sociales en el Perú, 2000).

[7] On the increasing self-identification of Andean 'peasants' and 'peasant organisations' as indigenous, partly as a strategy for defending their rights against extraction projects, see Donna L. Van Cott, *From Movements to Parties in Latin America. The Evolution of Ethnic Politics* (Cambridge: Cambridge University Press, 2005), p. 154; Claire Wright and Salvador Martí i Puig, 'Conflicts Over Natural Resources and Activation of Indigenous Identity in Cusco, Peru', *Latin American and Caribbean Ethnic Studies*, 7: 3 (2012), pp. 249–74.

[8] Such as the pejorative use of the terms 'indio' or 'indigenous', the 'campesinisation' of indigenous people as part of the 1969 agrarian reform and the terrible effects of Peru's armed internal conflict against Shining Path. The consequences of this internal war were assassinations, the destruction of social organisations, the recruitment of community members by the army or the guerrillas and massive urban migration, all of which especially affected Andean Quechua-speaking community members. See Van Cott, *From Movements to Parties*; Deborah Yashar, *Contesting Citizenship in Latin America: The Rise of Indigenous Movements and the Postliberal Challenge* (Cambridge: Cambridge University Press, 2005); Degregori, *No hay país más diverso*.

[9] Gaventa, 'Towards Participatory Governance', p. 33.

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capable of justly balancing the interests of diverse groups, (2) measures that reduce power asymmetries within consultations, and (3) joint decision-making processes with binding agreements. Especially in the context of expanding extractive industries in Latin America, we observe both power relations that clearly limit the decision-making power of indigenous peoples as well as strong disincentives for adopting participatory governance. Our findings thus connect to previous research about deficiencies in the area of citizenship rights – especially those of the poor, indigenous peoples and minorities – in Latin American practices, despite the increasing existence of de jure rights in the region.[10]

While the analysis of Peru is particularly revealing in relation to the study of contestations over the design and implementation of prior consultation, our findings are also of relevance beyond the country's frontiers – as many neighbouring countries are also struggling with their obligation to implement the right to prior consultation and to FPIC. Moreover, countries like Bolivia, Ecuador, Colombia and Mexico are currently in the process of crafting legislation concerning such consultation.

We base our analysis on data collected during various field research trips to Peru between October 2010 and December 2014. The first author participated as an observer in the consultation on the consultation law's regulating decree. The second author had previously completed a research project on the development of Peru's Law on Prior Consultation, as part of which she systematised the respective information for the Peruvian Ombudsman. Since the promulgation of the Peruvian consultation legislation, she has carried out field research in ongoing consultation processes in the Peruvian Amazon. The article's data originate from semi-structured interviews with state and indigenous representatives: Peruvian scholars and representatives of non-governmental organisations: from the researchers' roles as participatory observers; from the collection of draft proposals for both this law and its decree; and from related statements from a wide range of both public and private actors. We analysed the data with the support of ATLAS.ti. After a short outline of the theoretical framework we applied, the article describes the contentious processes that led to the adoption of the new legislation, then presents the legislation's content and the critiques that it has elicited. A subsequent analytical section examines the absence of basic conditions for participatory governance and conflict transformation. The article's conclusions follow.

[10] See Guillermo O'Donnell, 'On the State, Democratization and some Conceptual Problems: A Latin American View with Glances at some Postcommunist Countries', *World Development*, 21: 8 (1993), pp. 1355–69; Gretchen Helmke and Steven Levitsky (eds.), *Informal Institutions and Democracy: Lessons from Latin America* (Baltimore, MD: Johns Hopkins University Press, 2006); Rachel Sieder, 'Pueblos indígenas y derecho(s) en América Latina', in Cesár Rodríguez Garavito (ed.), *El derecho en América Latina* (Buenos Aires: Siglo XXI, 2011), pp. 303–22.

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Prior Consultation, Participatory Governance and Conflict Transformation

In order to analyse prior consultation's potential to contribute to conflict transformation, we draw on participatory governance literature. In so doing, we connect two academic debates (on conflict transformation and on participatory governance) which have in the past mainly developed separately. As we outline below, these debates overlap in their common interest in agency, especially that of marginalised groups, and the transformation of unjust institutional and structural orders.

The definition of conflict transformation that underlies this article goes back to authors such as Lederach and Galtung.[11] Scholars of conflict transformation proceed on the assumption that violent conflicts should be transformed into 'constructive non-violent tensions' with the aim of overcoming exploitative and oppressive relationships.[12] According to this view, conflicts and contestations hold the creative potential to make grievances visible and can lead to important societal changes. For example, Lederach defines conflict transformation in the following way: 'Conflict transformation is to envision and respond to the ebb and flow of social conflict as life-giving opportunities for creating constructive change processes that reduce violence, increase justice in direct interaction and social structures, and respond to real-life problems in human relationships'.[13] Capacity building and the empowerment of marginalised groups as well as the fulfilment of basic human needs are seen as necessary conditions for making such transformations possible.[14]

The concepts participatory governance and participatory development are both widely used, but scholars have interpreted them very differently depending on their general conceptions of development and participation as well as their underlying normative assumptions.[15] Drawing on Hickey and Mohan, our own usage of this term distances itself from the narrow focus, which pervades mainstream development thinking and research, on participation as a technical method of project work.[16] Instead, we share with these authors a

[11] See John Paul Lederach, *Preparing for Peace: Conflict Transformation Across Cultures* (New York: Syracuse University Press, 1995) and Johan Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization* (London: Sage, 1996).

[12] Ronald McCarthy and Gene Sharp, *Nonviolent Action. A Research Guide* (New York and London: Garland, 1997), p. xvi.

[13] John Paul Lederach, 'Defining Conflict Transformation', *Restorative Justice Online*, available at www.restorativejustice.org/10fulltext/lederach.

[14] Cordula Reimann, 'Assessing the State-of-the-Art in Conflict Transformation', in: Alex Austin, Martina Fischer and Norbert Ropers (eds.), *Transforming Ethnopolitical Conflict* (Wiesbaden: VS Verlag, 2004), p. 52.

[15] See Sam Hickey and Giles Mohan, 'Towards Participation as Transformation: Critical Themes and Challenges', in Hickey and Mohan (eds.), *Participation*, pp. 3–24.

[16] See Bill Cooke and Uma Kothari (eds.), *Participation. The New Tyranny* (London and New York: Zedbooks, 2001) and Glyn Williams, 'Evaluating Participatory Development: Tyranny, Power and (Re)Politicisation', *Third World Quarterly* 25: 3 (2004), pp. 557–78.

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political sense of agency; that is, we focus not only on the local but also on wider structures of injustice and oppression, and on power relations that enable or limit emancipatory participation (potentially including alternative development paths) as well as rights-based development approaches.

In particular, Hickey and Mohan have asked under which conditions participatory development can establish a 'legitimate and genuinely transformative approach to development'.[17] One of their main suggestions is that power relations should be made visible in the analysis of how individuals (re)make rules and (re)constitute institutions and, conversely, how institutions shape individual actions.[18] Advocating a similar approach, Williams adds that strengthening the poor's bargaining power within these relations is critical in order to make transformations possible.[19] Moreover, scholars from this strand have emphasised that transformation needs to reach beyond the local level and also involve the individual, structural and institutional levels; that long-term political projects are far more promising than one-off transformative events; that the local level and the community level should not be conceived of as self-evident and unproblematic social categories; and that not only an active and engaged society but also a more responsive and effective state is needed.[20]

The article brings such debates about conflict transformation and participatory governance into a dialogue with the empirical data collected with the aim of scrutinising the limitations and potential of the new consultation legislation in transforming socio-environmental conflicts. The literature on participatory governance has inspired us to focus on the analysis of power relations and helped us to formulate theory-guided and empirically grounded basic conditions that are currently lacking in Peru but would be necessary to realise prior consultation's transformative potential.

The Long and Rocky Road towards the Adoption of Peru's Consultation Legislation

In September 2011 newly elected President Humala, representing himself as left-wing and nationalist, promulgated Peru's consultation law (No. 29785). The symbolism of this act was emphasised and celebrated in a public ceremony attended by indigenous representatives in the province of Bagua, where violent

[17] Hickey and Mohan, 'Towards Participation as Transformation', p. 3.

[18] Hickey and Mohan, 'Towards Participation as Transformation', p. 14; Gaventa, 'Towards Participatory Governance'; Andrea Cornwall, 'Spaces for Transformation? Reflections on Issues of Power and Difference in Participation in Development', in Hickey and Mohan (eds.), *Participation*, pp. 75–91.

[19] Glyn Williams, 'Towards a Repoliticization of Participatory Development: Political Capabilities and Spaces of Empowerment', in Hickey and Mohan (eds.), *Participation*, pp. 92–108.

[20] See Giles Mohan and Kristian Stokke, 'Participatory Development and Empowerment: The Dangers of Localism', *Third World Quarterly*, 21: 2 (2000), pp. 247–68.

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clashes between indigenous protesters and police forces had occurred in 2009 (see below).[21] The new government wanted to demonstrate its break with the neoliberal political agenda that had been pursued by predecessor Alan García and had been characterised by open disrespect for indigenous rights. But while the consultation law was unanimously passed by Congress, and initially also widely supported by all national indigenous organisations as well as leading Peruvian non-governmental organisations, the indigenous organisations have since largely withdrawn their formal support of the law and lobbied for its modification in favour of a stronger interpretation of indigenous participatory rights.[22] We argue that to understand the social meaning of the consultation law it is necessary to look at its history, its content, and the ways in which it has been contested.

From rising protests …

Although Peru ratified ILO C169 in 1995, it has failed to implement the right to prior consultation. Prior consultations have been either entirely absent or incomplete, with information events arranged by the oil or mining companies themselves.[23] Such events have generally been carried out in a standardised, unilateral and superficial manner, without attention being paid to diverse localised forms of knowledge, organisation, epistemologies and ethical universes. These participatory processes have not ensured that the indigenous perspectives have been taken into account, and their documentation has not been made publicly accessible.

Indigenous rights lawyer Vladimir Pinto, with regard to public participation in the licensing of a new oil spot in the Amazon, has noted that

> the process was directed by the interested corporation and Perupetro. At the beginning they distributed caps and shirts, gave food to the people, explained the advantages of the project […]. There was not a moment of information about the project as a problem or as something that the participants could analyse; it was just propaganda. [24]

[21] Just as he did in his presidential campaign of 2006, during his 2011 electoral campaign, Ollanta Humala attracted the majority of indigenous and peasant votes. On ethnic voting in Peru and for a detailed analysis of Humala's 2006 campaign see Raúl Madrid, 'Ethnic Proximity and Ethnic Voting in Peru', *Journal of Latin American Studies*, 43 (2011), pp. 267–97.

[22] But note that despite their critique of the consultation legislation (as further detailed in this article), recent consultation experiences have shown that indigenous organisations are willing to participate in prior consultations under the current legal framework.

[23] Alejandra Alayza Moncloa, *No pero sí. Comunidades y minería. Consulta y consentimiento previo, libre e informado en el Perú* (Lima: CooperAcción, 2007); Tami Okamoto and Esben Leifsen, 'Oil Spills, Contamination, and Unruly Engagements with Indigenous Peoples in the Peruvian Amazon', in Havard Haarstad, *New Political Spaces in Latin American Natural Resource Governance* (New York: Palgrave Macmillan, 2012), pp. 177–97.

[24] Interview with Vladimir Pinto, Lima, Jan. 2012.

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Mining expert José de Echave has also criticised previous participation processes regarding mining activities:

> We saw several of these events and, truly, they were miserable. […] They were exclusively controlled by the private company; it convened, organised, and decided who could enter and who could not […]. In the best case the events were purely informative, but in general they did not even comply with its informative function. [25]

The absence of meaningful consultation has taken centre stage in the debates surrounding extractive industries in Peru. The gap has been partly filled with self-organised anti-mining events and referenda. The first such referendum, a precedent for other community referenda in Peru and beyond, took place in Tambogrande, where the Canadian company Manhattan Minerals had extracted minerals without prior consultation since 1998. In 2002, the affected local communities held a referendum and 78 per cent of all voters took part; 98 per cent of them rejected the mine. The central government did not accept this result, but the opposition to the project caused the mining company to abandon it. A similar referendum, in which the great majority (90 per cent) of the local population rejected the mining project, was held about the Río Blanco/Majaz project in the Piura region after violent conflicts in 2007. Again, the government did not recognise the vote, but because the congress intervened, the mine's operations were suspended. Legal claims of human rights violations against the company resulted in the (at least temporary) closure of the mine.[26] In the political and legal contests about these and many other socio-environmental conflicts in Peru, the indigenous demand to implement rights to prior consultation and to FPIC has played a prominent role.

Socio-environmental conflicts in the Andean and Amazon regions have increased in quantity and intensity since 2005.[27] While the Peruvian ombudsman registered 80 social conflicts in June 2006, this number had increased to 247 conflicts six years later, with 150 of the latter characterised as socio-environmental in nature.[28] Many of the indigenous protests that emerged were a reaction to President García's implementation of neoliberal policies and privatisation programmes aiming to attract foreign investment to promote the further expansion of the extractive and agricultural industries.[29]

[25] Interview with José de Echave, Lima, Feb. 2012.

[26] Anthony Bebbington and Mark Williams, 'Water and Mining Conflicts in Peru', *Mountain Research and Development,* 28: 3/4 (2008), p. 192.

[27] See Javier Arellano Yanguas, *Minería sin fronteras? Conflicto y desarrollo en regiones mineras del Perú* (Lima: Instituto de Estudios Peruanos, 2011).

[28] Defensoría del Pueblo del Perú, 'Conflictos sociales conocidos por la Defensoría del Pueblo. Al 30 de Junio de 2006. Reporte No. 28' and Defensoría del Pueblo del Perú, 'Reporte de Conflictos Sociales No. 100. Junio 2012', available at www.defensoria.gob.pe/temas.php?des=3#r.

[29] The area of the Peruvian Amazon covered by hydrocarbon blocks increased from 9 per cent in 2004 to 59 per cent in 2009 (María del Rosario Sevillano Arévalo, *El derecho a la consulta de los pueblos indígenas en el Perú* (Lima: DAR, 2010), p. 19. Moreover, more than half of all

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Amazonian and Andean communities alike mobilised against the environmental pollution caused by extractive industries and for more effective models of decision-making and benefit-sharing.[30] In a programmatic article in Peru's leading newspaper, García denounced his critics, and especially the indigenous protesters, as 'dogs in the manger' who were unable or unwilling to use the country's resources and thus prevented others from doing so. He argued that the 'dead capital' had to be turned into economic growth and that anyone opposed to this was a 'backward enemy' of Peru's development.[31]

Further conflicts arose after President García used temporary legal powers to adapt Peru's legislation to the Free Trade Agreement concluded with the United States, effective from 2007. In 2008, he passed nearly 100 legislative decrees without prior consultation, some of which included earlier draft laws that had been vetoed in Congress. In August 2008, indigenous organisations and local communities, supported by human rights and environmental organisations, mobilised against the decrees by blockading important highways, waterways and oil pipelines throughout the Peruvian Amazon. Their main focus became the derogation of 11 decrees directly affecting their livelihoods. The government consequently declared a state of emergency in several Amazonian districts. An escalation of the conflict could only be avoided through the intervention of the Peruvian ombudsman, an important actor throughout the whole process. This led the Congress to rescind two of the contested decrees on 22 August 2008.

To delegitimise his critics, President García accused local media, non-governmental organisations and 'leftist powers' of instigating the protests. In April 2009 a second nation-wide strike began as a result of the government's decision to postpone the revision of the remaining contested decrees despite the fact that Congress had recommended their derogation.[32] After a month of blockades, the government again declared a state of emergency in various Amazonian districts. The conflict escalated on 5 June 2009 when the national police force dispersed a peaceful highway blockade of approximately 3,000

peasant communities in Peru are estimated to currently be affected by mining activities (Bebbington and Williams, 'Water and Mining Conflicts', p. 190).

30 See José de Echave, Alejandro Diez, Ludwig Huber, Bruno Revesz, Xavier Ricard Lanata y Martín Tanaka, *Minería y conflicto social* (Lima: CBC/CIPCA/CIES/IEP, 2009); Anthony Bebbington and Denise Humphreys Bebbington, 'An Andean Avatar: Post-neoliberal and Neoliberal Strategies for Promoting Extractive Industries', *BWPI Working Paper*, 117 (2010).

31 Alan García, 'El síndrome del perro del hortelano', *El Comercio* (28 Oct. 2007). For more details see George Stetson, 'Oil Politics and Indigenous Resistance in the Peruvian Amazon: The Rhetoric of Modernity Against the Reality of Coloniality', *The Journal of Environment & Development*, 21: 1 (2012), pp. 76–97.

32 Derecho, Ambiente y Recursos Naturales (DAR), *Informe. Hechos y aspectos vulneratorios de los Decretos Legislativos 1090 y 1064* (Lima: DAR, 2009), pp. 6, 12.

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protesters near the city of Bagua. The same day 23 policemen were killed by furious protesters. In total, the *Baguazo* left at least 33 people dead, 200 injured and 83 under arrest.[33]

In contrast to his intentions, García's aggressive discourse actually resulted in increasing public solidarity with the indigenous protests. A new strike announced by the Amazonian indigenous organisation Asociación Interétnica de Desarrollo de la Selva Peruana (Interethnic Association for the Development of the Peruvian Rainforest, AIDESEP) was joined by more than 10,000 protesters in Lima demanding the investigation of the events in Bagua and the establishment of political responsibilities.[34] Partly due to the alliances formed with the Amazonian organisations in the previous few years, the Andean movements increasingly came to recognise themselves as 'indigenous' and thus jointly struggled for the enshrinement of their rights as indigenous peoples.[35] The indigenous organisations were also able to establish new networks with trade unions and the political opposition, as well as with human rights and environmental organisations, which provided them with ample organisational resources as well as expertise in legal matters. Finally, Peru's government was also put under pressure to handle the conflicts more effectively by financial and business actors affected by the blockades, and, as the uprisings were linked to the recently signed Free Trade Agreement, the United States government closely observed the Peruvian state's actions.

On 11 June 2009 the Grupo Nacional de Coordinación para el Desarrollo de los Pueblos Amazónicos (National Coordination Group for the Development of Amazonian Peoples, GNCDPA) was created by the Council of Ministers to institutionalise a forum for dialogue. The aim of this group was to formulate an integral plan for the development priorities of the Amazonian indigenous peoples.[36] The *Baguazo* had not only drawn national attention to indigenous issues but had also led to severe international criticism from bodies such as the United Nations. The UN special rapporteur on the rights of indigenous peoples, James Anaya, offered to mediate the conflict and visited Peru after the conflict escalated. In general, at various stages during these contentious episodes external authorities supported the

[33] Defensoría del Pueblo del Perú, *Informe de Adjuntía N° 006-2009-DP/ADHPD. Actuaciones humanitarias realizadas por la Defensoría del Pueblo con ocasión de los hechos ocurridos el 5 de Junio del 2009* (Lima: Defensoría del Pueblo, 2 July 2009).

[34] Alberto Villar Campos, 'Tensa marcha bloqueó el Cercado', *El Comercio* (12 June 2009), p. 4.

[35] On the nascent alliance between Amazonian and Andean representatives under an indigenous banner see Shane Greene, 'Getting over the Andes: The Geo-Eco-Politics of Indigenous Movements in Peru's Twenty-First Century Inca Empire', *Journal of Latin American Studies*, 38 (2006), pp. 327–54.

[36] The GNCDPA was presided over by the minister of agriculture and was comprised of government officials from other ministries, members of regional governments and representatives of Amazonian communities.

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claims of the indigenous movements, strengthening their demand for the implementation of the right to prior consultation. García eventually admitted that adopting the decrees without prior consultation and his government's handling of the *Baguazo* were a mistake.[37] On 18 June 2009, Congress revoked two of the contested decrees. The state of emergency was lifted and blockades ended.

… *to negotiations* …

With the end of this acute conflict, a dialogue phase between the government and indigenous organisations began, but it was not without severe drawbacks. Although the government had withdrawn the decrees and ended the state of emergency, the political and judicial persecution of indigenous leaders continued. AIDESEP's leader, Alberto Pizango, even left Peru for Nicaragua as a political refugee. In this tense atmosphere Working Group 3 (*Mesa* 3) of the GNCDPA had to develop a draft law on prior consultation, which was based on a proposal presented by the ombudsman on 6 July 2009.[38]

The draft law, which was based on the original version, increased the number of articles from 30 to 42.[39] While this final document included some substantial agreements, it still highlighted 29 issues on which no agreement had been reached between indigenous and government representatives.[40] The final draft document was submitted to the various Andean organisations for comment.[41] These organisations placed special emphasis on the fact that the term 'indigenous peoples' should explicitly include peasant communities. They also stressed the need to make agreements reached during consultation processes legally binding, and that the state institution(s) responsible for carrying out these consultation processes would have to be autonomous.[42]

The more detailed draft law was submitted to Congress on 9 April 2010. After heated discussions between the governing party and the opposition, a much shorter consultation law (20 articles) was finally passed on 19 May 2010. For

[37] Cecilia Rosales and Déborah Dongo, 'Mejor rectificar que obstinarse', *El Comercio* (18 June 2009), p. 2.

[38] The *Mesa* 1 was to set up a commission to investigate the events in Bagua, while *Mesa* 2 was in charge of discussing the contested decrees and developing a proposal to improve the forestry legislation. *Mesa* 4 had the task of negotiating a development plan for the Amazon.

[39] The indigenous organisations did approve the ombudsman's proposal, but they criticised the fact that it had not been developed with indigenous participation from the beginning.

[40] GNCDPA, *Informe final de la Mesa 3. Sobre el derecho a la consulta* (3 Dec. 2009), available at servindi.org/pdf/Mesa_Dialogo_3.pdf.

[41] The Confederación Campesina del Perú (Peasant Confederation of Peru, CCP) the Confederación Nacional Agraria (National Agrarian Confederation, CNA), and the Confederación Nacional de Comunidades del Perú Afectadas por la Minería (National Confederation of Communities Affected by Mining, CONACAMI).

[42] See www.servindi.org/pdf/Peru_OrgInd_PyConsulta2010.pdf.

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nearly all of the contested issues, members of the governing party and its allies either imposed their own vision or the respective provisions were kept vague.[43] Despite the limited nature of the law adopted by the Congress, the Amazonian and Andean indigenous organisations still advocated its rapid promulgation, considering this the best outcome they could achieve at that moment in time.

The Peruvian president, however, vetoed the law and sent it back to Congress on 21 June 2010 with a list of objections. He wanted the law to clearly indicate that 'national interests' was the single most important criterion for governmental decisions and argued that the peasant communities of the Andes and the coastal region should not be granted the right to prior consultation because he did not consider them to be indigenous. Furthermore, he stated that only communities with registered land titles should be consulted.[44] These objections were not consistent with the ILO C169 and resulted in new protests in October and December of 2010.[45] The consultation law was not debated again in Congress under García's government, particularly because at that time the political parties were focused on their campaigns for the upcoming elections. In addition, AIDESEP lost political influence after the *Baguazo* as it was weakened by legal persecution and the creation of parallel organisations.[46] Meanwhile, its leader, Alberto Pizango, was focused on his presidential candidacy after his return from exile in Nicaragua. Nevertheless, the consultation law remained a crucial issue in public debates during the election campaign.

...finally leading to Peru's consultation legislation

In September 2011 Peru's new president, Ollanta Humala, promulgated the consultation law following its unanimous adoption in Congress.

[43] For example, the indigenous organisations demanded their right to FPIC, especially when planned measures would directly affect their territory, require their resettlement or concern the storage of hazardous waste. Provisions specifying the right to prior consent were completely taken out of the law. Another element of the original law's proposal that was subsequently excluded was the stipulation that preparatory meetings to jointly plan the consultation process should be obligatory.

[44] Presidente de la República del Perú, *Oficio N° 142–2010-DP/SCM. Observaciones a la autógrafa de la 'Ley del derecho a la consulta previa a los pueblos indigenas u originarios reconocido en el Convenio Num. 169 de la Organización Internacional del Trabajo'* (21 June 2010), available at www.servindi.org/pdf/Observaciones_LeyConsulta.pdf.

[45] Meanwhile, the disputes also reverberated in the judicial field. On 9 June 2010 the constitutional court declared in a decision about several of the contested decrees that the non-existence of a Peruvian consultation law did not justify the non-application of prior consultations (Sentencia 022–2009, Tribunal Constitucional, 9 June 2010). On 30 June 2010 the court even directly requested that the congress approve the consultation law as soon as possible (Sentencia del Tribunal Constitucional, EXP. N° 05427-2009-PC/TC, 30 June 2010).

[46] See Alberto Chirif, 'Auges y caíadas de las organizaciones indígenas', in Stefano Varese, Frédérique Apffel-Marglin and Roger Rumrrill (eds.), *Selva vida. De la destrucción de la Amazonía al paradigma de la regeneración* (Lima: IWGIA, 2013), pp. 135–61.

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Subsequently, Humala's government carried out a meta-consultation on its regulating decree. While the indigenous organisations initially hoped that the decree might correct the main deficiencies of the consultation law, 'powerful extractive corporations' lobbied the state ministries to adopt a norm that would further restrict the indigenous rights contained in the law.[47]

The meta-consultation consisted of two periods: during the first period, referred to as the phase of 'internal deliberation', six nation-wide indigenous and peasant organisations were convoked by the Vice-Ministry of Intercultural Relations to six regional meetings and one final national meeting (each of a duration of two days).[48] During a second phase, the indigenous organisations were to meet with the relevant vice-ministries in a 'multi-sectorial commission' and negotiate the identified contested issues concerning the draft decree. The consultation about the decree, however, was marked by serious deficiencies, which are likely to hinder future consultations as well.

First, the multi-sectorial commission that was installed on 22 November 2011 with the task of formulating the decree comprised a total of 16 vice-ministers but the representatives of only six indigenous organisations. The commission's composition was criticised due to this imbalance between state and indigenous representatives. Moreover, some organisations operating at the regional and local levels raised complaints about their exclusion from the process.

Second, the time frame for carrying out the consultation process was very short and the indigenous organisations did not have enough time to debate the draft decree prepared by the Vice-Ministry of Intercultural Relations with their affiliated communities. The information about the consultation law and the draft decree was only distributed at the beginning of each event, so that participants did not have the opportunity to analyse it beforehand.

Third, subtle mechanisms reinforced the asymmetrical character of the procedure. For example, the predominant language style within the meetings, even the ones that were part of the 'internal deliberation', was rather technical and legalistic. The conditions for a genuine intercultural dialogue, one characterised by diverse communication repertoires, knowledge forms, values and logics, were missing. The indigenous and peasant representatives generally harked back to legal arguments to validate their points of view. It is doubtful

[47] Interview with de Echave.

[48] Among the indigenous organisations represented were the two Amazonian indigenous organisations AIDESEP and Confederación de Nacionalidades Amazónicas del Perú (Confederation of the Amazonian Nationalities of Peru, CONAP), the women's organisation Organización Nacional de Mujeres Andinas y Amazónicas del Perú (National Organisation of Andean and Amazonian Women of Peru, ONAMIAP) and the three Andean indigenous-peasant organisations CONACAMI, CNA and CCP.

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that they would have been taken seriously if they had brought forward radically different perspectives.

Fourth, although five of the indigenous organisations had formed a 'Unity Pact' and formulated a document on the 'minimal principles' that should guide the new legislation on prior consultation,[49] the consultation meetings highlighted two areas of tension: the fissions between and within diverse indigenous groups and representational deficit of the national indigenous and peasant organisations. The ombudsman's staff accompanying the process reported,

> the consultation meetings have shown that within the concept 'indigenous' you find many groups with totally different interests. [...] The Amazonian indigenous groups – within this group there are many different groups. The same is true of the Aymaras, the Quechuas, the coastal groups. [...] During the consultation process the issue that no national organisation has a close link with its base was also clearly apparent. The problems made evident were *Who represents whom? How do they represent us? What happens when you do not feel represented*?[50]

The divergence of the indigenous groups and organisations became especially visible during the regional meetings in Cusco and Loreto. At the Huancayo regional meeting the participants even decided to work in two separate groups, one with Amazonian and one with Andean participants. According to Van Cott, compared to neighbouring countries, the division between Amazonian and Andean indigenous peoples is particularly pronounced in Peru, where the two groups have received different legal treatment and organised themselves separately.[51] The representational deficit of the participating organisations became evident as several regional and local groups stated that they did not feel represented by the invited organisations. In addition, many decisions taken by the organisations' leaders (for example, about the schedule of each consultation meeting) were criticised by their base during the events. The Unity Pact succeeded only temporarily in formulating common claims towards the state. When the actual meta-consultation began, the competition between and different interests of the various national organisations, as well as their internal problems, became more virulent again.[52]

[49] Pacto de Unidad, 'Principios mínimos para la aplicación de los derechos de participación, consulta previa y consentimiento libre, previo e informado' (Lima, 17 Nov. 2011).

[50] Group interview with ombudsman's staff, Lima, Feb. 2012.

[51] Van Cott, *From Movements to Parties*, p. 140.

[52] On the national level various indigenous organisations compete for affiliates and representativeness. For example, AIDESEP and CONAP compete to represent a wide range of Amazonian communities, while CAN, CCP and CONACAMI are in dispute over influence within and representation of highland peasant communities. For an overview of the historic emergence of indigenous organisations in Peru see, for example, Deborah Yashar, *Contesting Citizenship in Latin America* and Lisa M. Glidden, *Mobilizing Ethnic Identities in the Andes: A Study of Ecuador and Peru* (Lanham, MD: Lexington Books, 2011).

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At the end of the national meeting in Lima, AIDESEP, CNA, CONACAMI and ONAMIAP all publicly declared that they were not willing to continue participating in the multi-sectorial commission until the consultation law was modified or replaced. This decision was unsurprising, as this standpoint had already been clearly expressed in all former subnational meetings. It was justified by stating that the consultation law did not fully incorporate the proposals from *Mesa* 3, that it had not been discussed in an adequate manner with the indigenous peoples and that it would set standards for prior consultation that were below those established by ILO C169. The invited organisations also lost their initial hope that the decree would compensate for the deficiencies in the consultation law. Only two organisations decided that they would continue to be part of these negotiations: CCP and CONAP.[53]

The multi-sectorial commission, now composed of 18 vice-ministries and of an indigenous and a peasant organisation, met six more times between 17 and 29 February 2012.[54] When the work of the multi-sectorial commission concluded, 28 points of disagreement still remained. On 24 of these points the executive ultimately imposed its own vision. In violation of the consultation law, which stipulated that agreements achieved as a result of these consultations were legally binding, the various ministries did not incorporate all of the agreements reached into the decree. They also introduced 13 new provisions that had not been previously discussed with the participating organisations.[55] In fact, several of these openly contradicted some of the Unity Pact's 'minimal principles'.

Contestations over the Content of the New Consultation Legislation

The decree was finally published on 3 April 2012. In contrast to the former situation, wherein prior consultations were never implemented, the new consultation legislation (law and decree) might potentially lead to improvements. It has, at least, clarified responsibilities, specified the procedures to be followed and defined some minimal standards that these proceedings should fulfil.

[53] CONAP's representative expressed the organisation's consensus that the consultation law was not perfect but said that they would still try to craft a regulating norm to enrich and further develop it. CCP's decision was to support the formulation of the regulating decree and, subsequently, to strive for some modifications to the consultation law.

[54] When CCP was founded in 1947, its discourse was class-based rather than ethnicity-based, despite the fact that it had many Quechua- and Aymara-speaking members. See Raúl Madrid, *The Rise of Ethnic Politics in Latin America* (Cambridge: Cambridge University Press, 2012), p. 115.

[55] See CNDDHH, *Informe de observación del proceso de consulta previa del Reglamento de la Ley del Derecho a la Consulta Previa a los pueblos indígenas u originarios* (15 Sept. 2012), available at www.servindi.org/actualidad/60910.

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However, the indigenous and peasant organisations have comprehensively critiqued the specific content of the new legislation. This critique will be briefly summarised here (for an overview see Table 1). While the state has favoured narrow participatory rights, including a narrow definition of the consultation subjects and of the measures requiring consultation, a process led by the state, and limited decision-making powers for the consulted groups, the indigenous organisations had originally lobbied for more comprehensive rights.

Consultation subjects: Regarding the consultation subject, subjective and objective identification criteria have been established in the consultation law. The indigenous organisations oppose the list of objective criteria defined by the national law, as these criteria are more restrictive than those established in ILO C169. [56] They fear that this definition could be used to deprive certain groups of the right to prior consultation. Moreover, the consultation decree emphasises the role of the indigenous representatives. This is contrary to the proposal made by the Unity Pact, which emphasised that: 'decisions will only be valid when taken by assemblies that guarantee broad, free and informed participation'.[57] Similarly, the executive has introduced the stipulation that only the representative organisations within the geographic area affected by the planned measure were to be consulted.

Measures to be consulted: The consultation law further states that only those measures directly affecting indigenous peoples are subject to prior consultation. The indigenous organisations have claimed that the consultation obligation should be expanded to also include those measures affecting indigenous peoples indirectly, especially in view of previous contestations about very narrow definitions of 'being affected'.[58] Moreover, much to the discontent of the indigenous organisations, the consultation law declares that those measures adopted prior to its promulgation will not be revised in light of the new legislation.

Responsible state institutions: The state institutions responsible for carrying out the prior consultation are the ones in charge of each respective measure (for example, the Ministry of Energy and Mines regarding new mining projects).

[56] The law establishes the following objective criteria: descent from original populations, close ties to their historical territory, their own institutions, customs and cultural patterns and ways of life that are distinct from those of the 'national population'.

[57] Pacto de Unidad, 'Principios mínimos'. The difference between representatives and representative institutions is important, first, because many Andean and Amazonian indigenous communities and organisations take decisions in assemblies and do not delegate decision-making power to selected representatives. Second, the requirement that decisions be supported by inclusive assemblies could reduce the risk that single representatives will be persuaded or even corrupted.

[58] See Alayza Moncloa, *No pero sí*. In addition, the law and its decree provide for consultation only on those measures that the state believes might negatively affect indigenous peoples, whereas ILO C169 provides for consultation on all measures that are likely to affect indigenous peoples, whether positively or negatively.

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Table 1. *Consultation Legislation and the Main Critiques of It*

	Consultation Subject	Measures to Be Consulted	Responsible State Institutions	Consultation Procedure	Final Decision
Consultation Law No. 29785 and Consultation Decree	➢ Andean or peasant and Amazon or native communities ➢ Objective criteria: descent from aboriginal populations; close connections with traditional territory; own institutions and customs; different culture and ways of life ➢ Database to be created by Vice-Ministry of Intercultural Relations ➢ Consultations with representatives of directly affected indigenous peoples from geographic area	➢ Legislative and administrative measures as well as plans, programmes and projects for national and regional development that directly affect collective rights ➢ Law does not change or abrogate previous measures	➢ Promoting entity of planned measure is in charge of implementing consultations ➢ Vice-Ministry of Intercultural Relations assists consultations	➢ Comprises the following: identification of measures and affected groups; gathering of complete information; internal evaluation of affected populations; dialogue with state entities; decision-making ➢ Promoting entity *can* organise preparatory meeting ➢ Maximum duration: 120 days	➢ Agreements reached are binding ➢ When no agreement can be reached the final decision will be taken by competent authority. It must be properly justified and include an evaluation of expected impacts on collective human rights

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Table 1. *Continued*

	Consultation Subject	Measures to Be Consulted	Responsible State Institutions	Consultation Procedure	Final Decision
Main Critique from Indigenous and Peasant Organisations	➢ Objective criteria from the consultation law too stringent ➢ Creation of the database without indigenous participation ➢ The representative institutions should be consulted, not just the representatives themselves ➢ Representative organisations from national, regional and local levels should be invited	➢ Consultations should also be carried out about measures that have indirect effects ➢ Previous measures should be revised	➢ Responsible entity for implementing consultations should be the specialised entity on indigenous issues, with ministerial rank and employing indigenous persons ➢ Provisions on how the legislative branch should enact consultation are missing	➢ A pre-consultative phase should be obligatory ➢ The time frame should be more flexible ➢ The design of the consultation process should be less unilateral	➢ Doubts that responsible state institutions will protect human rights and justly balance diverse interests ➢ The consultation legislation should list situations in which FPIC is necessary

Source: Authors' compilation.

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The specialised institution of the executive branch for indigenous issues, currently the Vice-Ministry of Intercultural Affairs, is supposed to support all consultations by coordinating state policies, assisting the responsible institutions and the indigenous peoples, creating a database on indigenous peoples and their representative institutions, providing a register of official facilitators and translators, and registering the results of the procedures (consultation law). Since this advisory role for the vice-ministry means it has relatively little influence and decision-making power, the indigenous organisations have opposed this solution. They have demanded that the entity responsible for indigenous issues should carry out and not just support prior consultation. Moreover, they have claimed that this entity should have the rank of a ministry and that indigenous persons should be included among the entity's employees.

Consultation procedure: The consultation procedure established by the new consultation legislation is likely to contribute to further asymmetrical consultation practices in future (with significant power imbalances operating to the disadvantage of the consulted groups). For example, no pre-consultative phase for the joint planning of the consultation procedure, as foreseen within the *Mesa* 3 proposal, is obligatory. Instead, the decree stipulates that the entity in charge should design the consultation plan and then communicate it to the communities chosen by the entity to be engaged.[59] The whole consultation process can last for up to a maximum of 120 days. The indigenous organisations would have preferred a more flexible scheme.[60]

Final decision: The law and the decree establish that the agreements reached are binding. The credibility of this stipulation is questionable, though, since it had already been violated during the consultation process about the decree. In cases where no agreement on the planned measure can be reached within the consultation, the consultation law and the decree both establish that the lead state entity will take the final decision. This decision should be sufficiently justified in order to guarantee the protection of the rights of the people involved and balance the diverse interests at stake. The indigenous organisations have, however, understandable doubts about whether this will actually happen.

The document on the 'minimal principles' of the Unity Pact underscored that prior consultations shall be prohibited when the planned measure would undermine the rights of the affected groups or persons. It also envisioned

[59] According to the legislation, indigenous organisations and communities can request to be included in an ongoing consultation process. This happened in 2013 during Peru's first consultation, which was on the Maijuna regional conservation area in Loreto.

[60] The indigenous standpoint could be supported by Masaki's finding that 'practitioners of social change should avoid imposing a linear and continuous notion of "calendar time" on to the "practical time" within which negotiations over power relations operate' (Katsuhiko Masaki, 'Towards Participation as Transformation: Critical Themes and Challenges', in Hickey and Mohan (eds.), *Participation*, p. 15).

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situations in which not only prior consultation with but also the FPIC of the consulted groups should be made obligatory, among them projects that would negatively affect sources of subsistence or indigenous property rights, as well as military activities. The indigenous vision shines through this document, demonstrating that indigenous peoples see consultations as mechanisms that not only enable them to participate and be heard, but that also secure their rights and bring about actual material improvements. Apart from some weakened fragments, not many of these 'minimal principles' have yet been incorporated into the decree. This is something which might represent a major obstacle to its future implementation.

Unresolved Tensions and Starting Points for Conflict Transformation

The analysis of the background to and the content of the new consultation legislation, and the contestation that it elicited, reveals the divergent views regarding state-indigenous relations, the development paths desired, and legitimate forms of participation and decision-making. The legal-institutional design of prior consultation remains highly contested, and the absence of a consensus about ground rules is likely to exacerbate social conflicts in the future. In addition, it can be expected that concrete future practices will diverge from the formal stipulations as political actors respond to a mix of formal and informal incentives.[61] Indeed, the mutual distrust between the state and indigenous peoples resulting from a history of discrimination and exploitation, combined with the great power asymmetries between the state and extractive corporations on one side and the indigenous peoples on the other, will continue to hinder the implementation of an egalitarian 'intercultural dialogue'. It is also very likely that divergent notions of development, territory, decision-making and society-nature relations between different local populations and the state will contribute to a lack of mutual understanding and to difficulty identifying culturally appropriate solutions.[62]

The study presented above provides evidence of unfavourable power asymmetries which exist within state institutions and in relations between the state and indigenous peoples, and which are manifested in the content of the new consultation legislation. The latter not only reflects the interests of the state and extractive companies to a greater extent than those of the locally affected populations but will also likely further exacerbate such power asymmetries in future consultations. We argue that in order to turn consultation

[61] North cit. after Gretchen Helmke and Steven Levitsky, 'Introduction', in Helmke and Levitsky (eds.), *Informal Institutions and Democracy*, p. 2.

[62] On diverging state and indigenous views see, for example, Marisol de la Cadena, 'Indigenous Cosmopolitics in the Andes: Conceptual Reflections beyond "Politics"', *Cultural Anthropology,* 25: 2 (2010), pp. 334–70.

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into an effective tool for conflict transformation, such unfavourable power relations must be challenged. Without strengthening the bargaining power of affected communities and without the state becoming more responsive, resource conflicts are unlikely to be transformed in Peru in the near future. While we are aware that this difficult task cannot be accomplished by adopting new laws alone, change is even less likely if there is legislation in place that sustains the status quo.

Given the current legal and political circumstances, consultation practices will most likely be 'pseudo-democratic instruments through which authorities legitimise already-taken policy decisions' rather than accepted instruments of conflict transformation, which are especially needed in the context of increasing resource extraction.[63] In this sense, we agree with César Gamboa when he remarks:

> You can identify several institutions that debilitate consultation processes. Why? Because they do not want to change the rules of the game. Meaningful consultation means changing the rules of the game, of the investments. But the consultation legislation and the state functionaries will not allow this. [...] Therefore, there will be some conflicts; the people will get angry about not being taken into account and there will be more conflicts.[64]

In this context, prior consultation will probably not be a tool for conflict transformation but may instead provoke disempowerment and diverse forms of resistance by local populations. It may even fuel violent conflicts.[65] It is to be expected that in future consultations, disputes about design and implementation will hinder deliberations on the planned measures, despite the fact that the latter are the actual objects of consultation.

Thus, and as we explain in more detail below, the conflict risk is particularly accentuated when biased state institutions intersect with great power asymmetries:

> Why do communities choose contentious politics as a strategy? The short answer is that they perceive this as the only means left open to them if they are to negotiate on a more or less equal footing with companies. This perception is fostered by the clear asymmetry of power between communities and companies, and the widespread public suspicion of collusion between the state and the mining companies.[66]

[63] Cornwall, 'Spaces for Transformation?', p. 79.

[64] Interview with César Gamboa, Executive Director of the Peruvian NGO Derecho Ambiente y Recursos Naturales (DAR), Lima, Feb. 2012.

[65] On subtle forms of resistance see James Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven, CT: Yale University Press, 1987).

[66] Javier Arellano Yanguas, 'Mining and conflict in Peru', in Anthony Bebbington (ed.), *Social Conflict, Economic Development and Extractive Industry. Evidence from South America* (New York: Routledge, 2012), p. 100.

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Unfavourable power asymmetries within the state

During the contentious process of adopting the new consultation legislation, criticism of current state institutions, perceived as biased towards corporate interests and hostile to indigenous ones, came to light. The demand for the reform of state institutions to be more representative of indigenous peoples and their perspectives was a core issue within *Mesa* 3, as well as during the meta-consultation on the decree. As prior consultations should not only protect the rights of those who might be affected by the measure(s) planned but also justly balance the diverse interests involved, indigenous organisations claimed that the entity in charge of implementing them should be strong and should counterbalance the existing power asymmetries within the Peruvian state. Thus, they demanded that an upgraded and multiculturally composed version of the existing state entity specialised in indigenous issues should be responsible for prior consultations and not, as the new consultation legislation envisioned, the promoting entity. As we have seen, the indigenous organisations have good cause to expect the latter to simply press ahead with the planned measure in question. The government has, however, disregarded this demand and has instead continued to insist that the promoting entity is to be the responsible state institution. The absence of an institution perceived as being legitimate will cause suspicion, distrust and feelings of exclusion on the part of the communities consulted, potentially creating the conditions for disempowerment, discontent and/or serious (violent) conflict.

But, our power analysis should not stop here, as the state institution responsible for carrying out prior consultations does not act in a political vacuum. Instead, it is part of the wider power relations that shape the Peruvian state. Within the Peruvian state there has been considerable diversity among individual actors and groups more or less sympathetic towards indigenous claims, for example, in the different commissions within the legislative branch, within the different political parties and within different ministries. This diversity, however, has been accompanied by significant power asymmetries in the sense that the forces that lobby for environmental and rights protection in the context of resource extraction are weak in the Peruvian state, while economic forces clearly predominate.[67]

To name but one example, the Ministry of Environment, created in 2008, 'in theory should be the national environmental authority, but in practice it is not. We say that the Environment Ministry is only painted on the wall: it is there, but it does not count. In practice, each ministry is the environmental

[67] See also Anthony Bebbington, Martin Scurrah and Claudia Bielich, *Los movimientos sociales y la política de la pobreza en el Perú* (Lima: Instituto de Estudios Peruanos, 2011), pp. 167ff. In their study of the Río Corrientes case, the authors show the diversity within the state apparatus, but generally characterise the Peruvian state as 'clientelist, authoritarian, bureaucratic and counter-productive' (*ibid.*, p. 219).

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authority of its sector.'[68] Similarly, the obligatory Environmental Impact Assessments (EIAs) are ordered and paid for by the corporations themselves. So long as it exists, this unfavourable institutional constellation will probably continue to reinforce the widespread perception that corporate and state interests are intertwined in Peru.[69]

Power asymmetries between the state and indigenous peoples

We have shown that one of the main reasons for the discontent of the participants in the meta-consultation has been its unilateral and asymmetrical character. The participants have been selected by the executive and the proceedings have not been conducted in a way that the Peruvian indigenous and peasant organisations agreed with. Time pressure and delayed dissemination of relevant information have constrained possibilities for comprehensive internal deliberation within the participating organisations and for genuine intercultural dialogue.

With regard to consultations about planned extractive projects at the local level, we can expect that the unilateral and asymmetrical character will be even more accentuated, thereby causing disempowerment and discontent and exacerbating conflicts between the state and the local populations, as well as divisions within the affected groups themselves. Many such future processes will take place in 'brown areas', indigenous communities that are characterised by 'low-intensity citizenship' and the 'unrule of law'.[70] Moreover, the indigenous organisations' lack of representativeness and internal conflicts, which we discussed above, will probably also hinder meaningful participation at the local level. In contrast to the style of consultation analysed at the national level, the representative institutions involved in these localised cases will tend to be weaker, having even less access to information, communications media and national and international allies, as well as more limited financial resources. Moreover, critical observers who could countervail power asymmetries and help to create greater procedural transparency (like the ombudsman, personnel from the ILO, and NGO representatives) will not be present during most of these processes. In such spaces, it is necessary to focus on developing the preconditions for participatory governance, including awareness building on rights and citizenship as well as institutional support for the strengthening of indigenous organisations.[71]

We have also shown that the new consultation legislation itself contains many provisions that endorse asymmetrical consultation constellations

[68] Interview de Echave.

[69] See Javier Arellano Yanguas, 'Minería sin fronteras? Conflicto y desarrollo en regiones mineras del Perú', *Investigaciones Geográficas*, 77 (2011), pp. 142–4.

[70] O'Donnell, 'On the State, Democratization and Conceptual Problems'.

[71] Gaventa, 'Towards Participatory Governance', p. 33.

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rather than mitigating them, among them, the stipulation that the responsible state institutions will decide who and how to consult. This is problematic, as those who shape a particular space affect who has power within it; we therefore expect that the new spaces will be filled with 'old power'.[72] For example, the provision that the representatives of the affected populations, and not their representative institutions, be consulted, and that only those organisations within the affected area will be taken into account will leave weak local populations unprotected, as they will not negotiate in tandem with the regional or national organisations they are affiliated with. It is likely that stronger and more unified organisations will be able to better use future consultations to achieve their objectives, while those that are weaker will be worse off. This is particularly relevant given that the logic behind prior consultation and FPIC is to include marginalised and under-represented groups in decision-making.

To do justice to the new consultation legislation, some of the articles included are indeed likely to improve participatory processes. They contain some important measures to counterbalance power asymmetries, such as the inclusion of facilitators and translators, logistical support for internal deliberations, the stipulation that official reports about the consultations and their outcomes be openly accessible, and, the explicit ambition to support the participation of vulnerable groups from within local populations (for example, women, elderly persons, children, and persons with disabilities). These provisions will not, however, be sufficient to create the conditions necessary for dialogue to take place on an equal footing.

Several case studies have shown that additional mechanisms can help reduce power asymmetries within consultations. These include the participation of regional or national indigenous organisations in support of the local ones, the presence of specialised advisors selected by the affected groups, sufficient resources and time for making internal deliberation processes possible, the timely circulation of complete and fully comprehensible information, cooperation with researchers and non-governmental organisations, and access to media.[73] Moreover, strengthening the intercultural character of the dialogue and the respect for different moral visions and concepts (for example, regarding territory, resource use or decision-making) in local contexts is crucial.[74] With this in mind, we believe that it is important to systematically foster,

[72] *Ibid.*, p. 35 and Cornwall cit. after *ibid.*, p. 35.

[73] Rodríguez Garavito and Orduz Salinas, *La consulta previa: dilemas y soluciones* (Bogotá: DeJusticia, 2012); Iván Bascopé Sanjínes (ed.), *Lecciones aprendidas sobre consulta previa* (La Paz: CEJIS, 2010).

[74] See Almut Schilling-Vacaflor, 'Contestations over Indigenous Participation in Bolivia's Extractive Industry: Ideology, Practices, and Legal Norms', *GIGA Working Papers*, 254 (2014).

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by legal and socio-political means, a wide variety of such practices so as to make consultations more equitable and transparent.

The lack of joint and binding decisions

We have found that the actual influence exerted by the groups consulted on the content of the law and the decree was very limited. Many of their claims and proposals were excluded from the texts ultimately adopted, and this is what contributed to the rejection of the legislation that was finally approved. A serious attempt on the part of the state to make genuine compromises and develop mutually acceptable solutions to the disagreements that came to light was missing. This way of proceeding is inherently risky, as our study has shown that unresolved conflicts have only been postponed and certainly not transformed. Furthermore, the government gravely violated the consultation law's stipulation that agreements reached during a consultation are binding. Not all agreements from *Mesa* 3 were incorporated into the consultation law, and at the end of the meta-consultation on the decree some of the agreements reached were even changed so as to have a contrary meaning.

A stark illustration of the fatal consequences arising from the government's lack of willingness to seek dialogue and to find compromises is the *Baguazo,* a conflict that only escalated in such a brutal fashion after the long period during which García's government failed to address the issues behind the protests, and even mocked and repressed the dissidents. Hence, it is doubtful that the Humala government's reluctance to revise the concessions and extractive projects already in place with regard to their socio-environmental impacts and to remedy the lack of prior consultation will promote peace in the long term.

In fact, the final decision, and, thus, the outcome of a consultation process, is the most contested issue. This became clear during the discussions within the United Nations General Assembly on the UNDRIP. There, several states strongly opposed indigenous rights to self-determination and to FPIC. The issue at stake here is whether the affected groups must only be consulted, without them actually having any real decision-making power, or whether the consultations should be consequential, meaning that they play a decisive role in shaping state policies and legislation. Vetoing states generally emphasise their sovereign role in governance, which they do not want to see threatened by any external or internal actors. As a consequence, indigenous aspirations to self-determined development are frequently trumped by so-called 'national interests'. In contrast, indigenous groups and local communities tend to argue that their rights are non-negotiable and that a just process in which diverse interests within the state are balanced should be the basis for defining what constitutes a 'national interest'. They state that this important decision should not simply be transferred to the government.

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We believe that three prerequisites in particular are necessary in order to improve consultation practices regarding the final decision: compliance with the principle that established agreements are binding; recognition that it is not enough to simply highlight existing disagreements, but that there should be a real effort made to find viable solutions to the most conflictive issues; and recognition that human rights are not negotiable and, because of this, the expansion of extractive industries should be restricted so as to protect these rights. The new consultation legislation does not foresee specific mechanisms for monitoring the implementation of agreements and sanctioning rights violations.[75] We feel that compliance with the above-mentioned standards would not only be fruitful for the state's enhanced legitimacy and governability, but could also help prevent future violent conflicts. However, putting these prerequisites into practice would imply the overhaul of historically developed power asymmetries and entrenched structures, which is not likely to happen in the near future.

Furthermore, in various socio-environmental conflicts that have occurred around the globe the demand for the implementation of prior consultations has, in general, not been expressed only for its own sake. Rather, it has been conceived of as a channel for resolving significant underlying problems, for example, with regard to environmental pollution or benefit-sharing. Thus, in contexts that are characterised by great social inequality and in which human rights and environmental standards are often disrespected, the implementation of consultations alone will not transform conflicts. Rather, these deeply entrenched problems must also be simultaneously addressed. Indeed, in the long term the demand for comprehensive prior consultation could be helpful in bringing these underlying issues to the surface and finding non-violent, joint solutions to them.

Conclusions

The main parts of this article were written in 2012 and 2013, when Peru's consultation legislation had only recently been adopted. However, by December 2014 eight prior consultation processes had been concluded. These new developments allow us to briefly reflect on the limitations and potential of prior

[75] Such follow-up mechanisms would be of crucial importance, especially within the Peruvian context where indigenous rights have often been disregarded. See, for example, the discussion of the Río Corrientes case in Bebbington, Scurrah and Bielich, *Los movimientos sociales,* p. 167. Even in countries like Canada, which are known for higher rights protection standards at the domestic level, the lack of effective follow-up hinders more socio-environmentally responsible corporate practices (Ciaran O'Faircheallaigh, 'Environmental Agreements, EIA Follow-up and Aboriginal Participation in Environmental Management: The Canadian Experience', *Environmental Impact Assessment Review*, 27 (2007), pp. 319–42).

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consultation in transforming conflict in practice. Five of these processes were about hydrocarbon projects, and two were about conservation areas, while the eighth concerned intercultural health-care policies.[76] No consultation process has yet occurred in the mining sector; this is particularly due to the state's remaining resistance to consult peasant communities. Hence, our article suggests that contestations about the subjects that have rights to prior consultation and to FPIC merit further scrutiny. In this context, the rights of the general citizenry to participate in decisions regarding extraction projects that affect them should also be discussed more comprehensively.

The first consultations carried out in the hydrocarbon sector did not demonstrate high levels of visible conflict. This was partly due to the state's choice to begin implementing consultation processes about new oil and gas concessions in areas that had little experience with extraction activities. This decision was made after indigenous local groups blockaded the first consultation about oil block 192 shortly after the consultation legislation entered into force. This blockade was due to unclear property rights and the grave environmental and health damages caused by previous oil projects in the area. The state's reluctance to initiate new consultations in the mining sector and in zones with greater resistance towards new projects indicates that it has postponed its confrontation with more conflictive local contexts.

Taking a closer look at the consultations that were concluded in the hydrocarbon sector reveals that effective participation therein was limited due to the absence of preconditions for participatory governance within the consulted groups – for instance, weak structures on the part of the local organisations and a lack of capacity to understand and evaluate the information presented by the consulting entity, as well as the imposition of consultation procedures by the state entity responsible for carrying out the consultations. While the Peruvian government has presented these consultations as success stories, several civil society organisations have labelled them as 'empty'.[77] Furthermore, the resulting agreements have been quite vague and there are no formal follow-up mechanisms in place to supervise compliance with them.

The concluded consultations also exhibited some positive surprises. For example, the consulting state entity developed the diverse consultation plans together with the local indigenous groups, which is not obligatory according to the legal framework. This entity also responded positively to indigenous organisations' demands for more inclusive and participatory procedures and for measures to counterbalance power asymmetries. For example, in the hydrocarbon sector the consulting entity Perupetro extended the information events

[76] The prior consultation processes regarding hydrocarbon projects were conducted for new oil blocks in the Amazonian regions Ucayali and Loreto.

[77] Interviews with representatives of indigenous organisations and NGOs in Lima, April and December 2014.

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from one to two days, made the meetings more interactive by including group work, and also financially supported the presence of indigenous advisors and local interpreters.

However, we should be cautious about being too enthusiastic about such selective bright spots, especially when given the current national and regional context. Generally, in Latin America the trend is that citizens' rights to participate in extraction projects that affect them are extremely weak; therefore, these groups do not have a decisive voice in the respective decisions. In Peru, extraction projects have been presented as 'national interests', and the Humala government continues to uphold Peru's 'market fundamentalism', which consists of the 'demonisation of environmentalism' and the hope that private investment will compensate for state failure.[78] Hence, we cannot expect the Peruvian state to change its previous attitude and become responsive to indigenous views and grievances in the short term. In June 2014 Peruvian civil society and the indigenous Unity Pact protested in the streets against a legal initiative of the government to reduce environmental standards and citizen participation rights. The law was adopted by Congress in July 2014 and is criticised for further marginalising the role of the Environment Ministry in EIA approvals and other decisions concerning natural reserves. It has also reduced the maximum amounts of environmental fines.[79] Protesters warned about 'Humala creating his own *Baguazo*' and showed that five years after the events of June 2009 they remain unresolved and the underlying tensions and conflicts still play an important role in national debates.[80]

While we do not adopt a fatalistic view, we emphasise the importance of states' and indigenous peoples' process of learning about and moving towards intercultural communication and dialogue. It is worth keeping in mind that participatory events cannot be totally controlled from above; rather, they can develop their own dynamics that might, in the long term, contribute to changing the rules of the game. To give consultation processes the potential to transform conflicts, building the capacity of local populations is essential, as is paying

[78] José Carlos Orihuela, 'The Environmental Rules of Economic Development: Governing Air Pollution from Smelters in Chuquicamata and La Oroya', *Journal of Latin American Studies*, 46: 1 (2014), pp. 151–83.

[79] The law 30230 'Law that establishes Tributary Measures, Simplifications of Proceedings and Permits for the Promotion and Dynamisation of Investments in the Country' was presented by the Ministry of Economy and Finance and adopted in Congress on 3 July 2014.

[80] See Claudia Cisneros 'Autogolpe al Perú: se viene el *Baguazo* de Humala' (8 July 2014), available at www.larepublica.pe/columnistas/de-centro-radical/autogolpe-al-peru-se-viene-el-baguazo-de-humala-06-07-2014. As of June 2014, trials against indigenous leaders are still open and investigations at the national and international level are ongoing. The results of the investigations into the *Baguazo* are contested, especially regarding the role of mining companies and the US government in pushing the Peruvian government towards police intervention, see Jacqueline Fowks, 'Perú sigue sin esclarecer qué pasó en el enfrentamiento de Bagua en 2009' (5 October 2013) available at www.internacional.elpais.com/internacional/2013/10/05/actualidad/1380946929_767164.html.

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special attention to local power asymmetries and divergent intercultural understandings of development, territory, decision-making, and society-nature relations. Finally, while acknowledging that legislation can be important in enhancing or inhibiting participatory processes in practice, we should not forget that the implementation of rights can go well beyond legislation and is often better promoted through public discussion, the monitoring of rights violations, agitation, and advocacy.[81] Thus, whether and to what extent prior consultation can open the door to the formulation of joint development visions and practices, implying power-sharing and open outcomes, will depend, in part, on the processes and impacts of future contestations.

Spanish and Portuguese abstracts

Spanish abstract. Este artículo analiza el contexto y contenido de la ley peruana del derecho a la consulta previa – la única en América Latina hasta la fecha – y sus decretos regulatorios. En oposición a la idea generalizada de que la consulta previa es una forma de prevenir y resolver conflictos, se señala que esta nueva legislación no ayudará a transformar los conflictos mientras el marco normativo mismo sea cuestionado y las precondiciones para la gobernanza participativa no existan. Establecer estas precondiciones resultaría en instituciones estatales capaces de balancear de manera justa los diversos intereses en juego. Entre las condiciones necesarias para viabilizar consultas efectivas están la creación de instituciones estatales capaces de balancear de manera justa los diversos intereses en juego, la implementación de medidas para reducir asimetrías de poder en los procesos de consulta y la toma de decisiones en conjunto que desemboquen en acuerdos vinculantes.

Spanish keywords: consulta previa, transformación de conflictos, gobernanza participativa, Perú, pueblos indígenas, industrias extractivas

Portuguese abstract. Este artigo analisa o contexto da criação e o conteúdo da lei peruana de consulta prévia, a única deste tipo promulgada até o momento na América Latina, além de seu decreto de regulamentação. Opondo-se à ideia generalizada de que a consulta prévia é um meio de prevenir e solucionar conflitos, argumenta-se que esta nova legislação não ajudará a solucionar os conflitos enquanto o arcabouço normativo em si for contestado e as precondições para a governança participativa não forem instituídas. O estabelecimento destas precondições resultaria em instituições estatais capazes de equilibrar os diferentes interesses em disputa de forma justa; em medidas que reduzam assimetrias de poder na esfera das consultas; e em processos decisórios conjuntos com acordos vinculativos.

Portuguese keywords: consulta prévia, resolução de conflitos, governança participativa, Peru, população indígena, indústrias extrativas

[81] Amartya Sen, 'Elements of a Theory of Human Rights', *Philosophy & Public Affairs*, 32: 4 (2004), pp. 319–20.

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