Consultation or non-consultation: herein lies the dilemma

In Peru, the Bagua Massacre prompted the adoption of the ILO Convention 169 in response to local demands and international pressure. However, far from respecting the communities’ decision, this has led to simulations of consultations that prevent the indigenous peoples from exercising their right to autonomy and self-determination. The consultation process, as outlined by the State, has become a threat.

By Frederica Barclay - October 1st, 2020

The obligation of States to conduct processes of free, prior and informed consultation and to obtain the consent of the indigenous or original peoples is a right established by Convention 169 of the International Labour Organization (ILO) in 1989 and was one of the major vindications enshrined in this global instrument. Indigenous peoples the world over were quick to embrace it, understanding it to be a path towards other rights, also covered by the Convention, to be implemented.

Until 2011, the indigenous peoples in Peru insistently brandished this agreement in the face of the state’s constant attempts to compromise their development rights and visions. The ILO’s Regional Office for Latin America and the Caribbean, which at the time was greatly committed to publicizing the agreement and its implementation, had the great idea of printing it out in a small format so that any leader could carry it in their shirt or pocket and always have it on hand to diffuse it among the community members and thereby reinforce the State’s duty to comply with it.

Prior consultation reflected such a strong demand that several Peruvian towns and communities organized popular consultations. However, today we have reached a point where indigenous peoples are questioning whether the consultation processes, as implemented by the Peruvian state, end up being a threat. This clearly constitutes a paradox: put into practice, their application contradicts their logic.
From expectation to great disappointment

More than a human rights policy, in Peru the approval of the law of free and informed consultation was a diplomatic action taken in light of the serious events that transpired on June 5, 2009 in Bagua. The event known as “el Baguazo” was the culmination of two years of active and sustained protests by indigenous Amazonian organizations throughout the country, in response to President Alan García’s repeated attempts to undermine territorial guarantees. His government's projects and laws were not only a reflection of his "dog in the manger", theory, but also intended to consolidate, as administrative norms, the 1993 constitutional reforms promoted by Fujimori. These reforms had honed in on territorial guarantees by eliminating the inalienability and immunity from seizure of collective territories. All of this occurred almost in parallel with the ratification of ILO Convention 169.

The fact that Peru's ratification of the Convention gave the norm constitutional status, raised hopes of containing or "balancing" that outrage. Nevertheless, successive governments have chosen not to implement the right to consultation and consent since it came into force in 1995. Firstly by disregarding the obligation entirely, then by claiming it required the development of a law.

The events in Bagua were of the utmost gravity due to the State’s use of excessive force to contain the protest, leaving a serious toll of civilian and police deaths, and dozens of indigenous leaders were held criminally responsible. These events placed Peru under the scrutiny of the United Nations system.. The international response to the Bagua massacre led to the unequivocal need to implement the provisions of Convention 169 concerning the right to consultation.

Eventually, the Law for Prior Consultation (Law No. 29785) was passed in 2011 and its regulations in 2012 (DS 001-2012-MC). Two of its features stand out. Firstly, no attention was paid to the early and insistent recommendation made by the Ombudsman's Office, which reiterated that consultations were "processes" and "not simple acts," which subsequently gave rise to a markedly bureaucratic approach. On the other hand, the notion of dialogue to achieve consent was blurred by unilaterally establishing how and by whom decisions were to be made. In this context, dialogue and consent became less important and
failed to become a vehicle for guaranteeing the demands of the people and their collective rights.

At the level of implementation, after having carried out fifty consultations throughout the country, it is no exaggeration to say, that in all the processes those consulted have drawn attention to the overtly ill-founded lack of adequate or sufficient information necessary to establish the potential impact and the measures that could be required, the management of deadlines or the deficient role of the governing body, which should be the guarantor of rights. Furthermore, in cases where an "agreement" was reached through dialogue, those consulted were not sure what obligations the state would acquire to guarantee their rights as a result of the consultation, or whether the agreement recorded in the final act had the same meaning as what they aspired or had the right to.

In several cases, those consulted have had to resort to forcible action: when the legitimate concerned parties were prohibited from participating, because the State assumed the authority to define who are affected, based on a criteria that fragments peoples or because of unilateral definitions about what to consult. One of the most relevant issues is the arbitrary handling of both the moment and occasion of the consultation. For indigenous peoples, this is clear evidence that the norm of consultation, which preaches the State’s "good faith", does not respond to it.

Various indigenous leaders have pointed out that the State deliberately shifted the consultation towards extractive issues and the creation of natural protected areas, reflecting its lack of commitment to dialogue. As a consequence, the consultation is being used to whitewash processes that involve tacit expropriations or authorizations of activities that generate an impact on the territory.

Despite these discrepancies, in Peru prior consultation has been under persistent attack by the extractive economic sectors. Not in a bid to eradicate it - which would be very scandalous - but instead to restrict it to its most minimal expression. To this effect, one of the formulas applied, has been to limit the access to this right for peasant communities in mining regions. More recently, there has been a push to reduce the duration of the processes and the ridiculous idea has even been suggested – under the pretext of Covid-19
– of conducting the consultations online. For its part, the governing body of the consultation processes, the Vice-Ministry of Interculturality, in 2015 set up a dialogue group with national indigenous organizations, which aims to convert consultation processes into public policies. The prevailing practice is that information provided by the State is used as a consulted and consented decision.

The limited effectiveness of the law of consultation is reflected in the fact that guarantees of collective rights have seen continuous deterioration in Peru. Simultaneously, due to the way in which the consultation processes are implemented, conflict has in no way been reduced, nor has the general distrust towards the State subsided. All of this is a reflection of the opacity that characterizes the Peruvian State with regard to its indigenous peoples, which is manifested in the apparent adherence to the norms and jurisprudence of the international system, while other norms of lower rank and practices limit their implementation through arbitrary interpretations.

**From disillusionment to a new demand for good faith**

Implementation of the law of consultation in Peru has led to public complaints and continued calls to action by indigenous organizations and NGOs to improve its procedural standards. Each process implies waging a battle to ensure even the minimum conditions of rights are respected.

Some indigenous peoples and organizations, such as those that constitute the platform United Indigenous Peoples of the Amazon in Defence of their Territories (PUINAMUDT), have been able to implement certain improvements, making significant achievements in the 2015 consultation process for oil lot 192. Based on 40 years of experience of enduring unacceptable practices, environmental and health damage, and taking advantage of the State’s urgency to grant concession of the lot, they successfully introduced a series of unprecedented conditions into the process. One of them being, the definition of what is submitted to consultation: not referring to a "yes" or "no" to the activities, but to the content of environmental and social aspects in clauses of the contract to be signed between Perupetro and the concessionaire. Further conditions put in place were: prior definition of the information to be provided, the criteria for selecting translators and guaranteeing the
right to participation of the communities directly affected by the new contract, which had previously been excluded from the process. Even so, the consultation process for lot 192 was unsatisfactory, as it neglected numerous agreements and proposals agreed upon prior to the State's decision. In the decisive stages of the process, the Government chose to incorporate new participants who vitiated the consultation’s final outcome.

The frustrations that arose following the implementation of Article 6 of the ILO Convention have been felt the world over. Pressure from business sectors and the States has led to a distancing of the ILO from the rights of indigenous peoples to be made viable by consultation.

In response to this experience, initiatives have emerged for the development of protocols in an autonomous manner by the indigenous peoples themselves, which set the conditions for standards to be improved. In some cases, these protocols have been recognized by national States as ground rules to which the processes must adhere to. In other words, they have exercised their right to self-determination as recognized in the United Nations Declaration on the Rights of Indigenous Peoples.

**Greater guarantees for free and informed prior consultations**

In Peru, there has so far only been one case in which consultation formats were developed, since the application of the principle of self-determination. The Wampis Nation has been developing an outreach policy with the Peruvian State, in a bid to get its rights recognised. This is expressed in the Wampis’ Statute approved in November 2015, which specifies that by proclaiming themselves a nation, they demand to be treated as an entitled political subject.

In actual fact, neither the Wampis Nation nor its communities have been involved in consultation processes under Law No. 29785 and its regulations. The experience that comes closest is their lawsuit against oil lot 116, which the legal advisors deemed a “failure to consult”. The lawsuit was won in two instances and it was established that the State was obliged to carry out the consultation and it was emphasized that there was no right of veto. In other words, the plaintiffs did not have the right to oppose oil activity, which in Peru is carried out under deficient regulations that disregard collective rights.
Cathal Doyle and Tami Okamoto analysed the Statute of the Autonomous Territorial Government of Wampis Nation (GTANW) to understand the framework in which these peoples are discussing the possibility of an autonomous consultation protocol. In respect thereof, they emphasize that the Statute of the GTANW establishes the criteria for prior consultation by introducing the conditions for the realization of their collective rights and affirming the intention of the Wampis Nation to exercise its autonomy as an expression of the right to self-determination. This means that the Wampis’ statute already defines the matters of substance regarding the consultation processes - or rather, the relationship between the Wampis Nation and the Peruvian State - by affirming the right to self-determination.

The definition of their territory as being indivisible, emanates very clearly from the statute which anticipates and delimits the conditions for a consultation to be valid. This statement alone establishes a requirement that sets the bar very high under Peruvian law. During the International Exchange Meeting on Prior Consultation and Prior Consent as Tools for the Protection of Forests held in Colombia, the Technical Secretary of the GTANW, Shapiom Noningo, stated: "The Wampis Nation’s proposal is to teach the State to think differently". Therefore, it is not surprising that the Wampis propose to exclude from the consultation and the use of their protocol, any project or plan that implies a significant impact on the territory. Noningo went on to explain: "For us, prior consultation does not apply if it concerns nature, because if it does, it inevitably affects human and collective rights, in other words, human life itself." Faced with the state's veto, the Wampis Nation understands that nothing that could affect the integrity and life of the territory can be subject to consultation.

In addition, other Wampis leaders have expressed their mistrust in consultation being a state procedure - unilaterally regulated by it - to reach agreements that respect rights and take into account the opinions representing "those consulted". The position of the Wampis Nation corresponds with the third resolution that appears as a preamble to their statute, where they assume "commitments and responsibilities incumbent upon the present Wampis generation towards future generations". It being an intergenerational commitment, the present generations cannot put the heritage of generations to come at risk.
These basic criteria do not exclude the creation of opportunities for dialogue, to the purpose of which the relationship with the Peruvian State is being discussed. There being no sympathy for the very term "consultation", the idea is to recover its original significance: that indigenous peoples participate freely "at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programs which concern them" (Article 6), in response to one of the main postulates of Convention 169, the "right to participate effectively in decisions which affect them".

It remains to be seen, to what extent the Peruvian State is capable of transforming a request for renewal of the relationship between indigenous peoples and the government, into an opportunity to achieve pluralism and justice.

The paradox

Since the 1990s, Peru has adopted a political stance that is known in political science as "Leopardism" or a "Lampedusian" position, in reference to an expression in Giuseppe Tomasi di Lampedusa's novel: The Leopard. The phrase "if we want things to stay as they are, things will have to change" has been best expressed as "change everything, so that nothing changes". In our country, this Leopardism is conveyed in the numerous laws of "authentic interpretation" that were naturalized in the decade of Fujimori’s presidency, as a feature of the State’s opacity, as well as in the law of consultation.

As noted above, we have reached a point where indigenous peoples are asking themselves whether consultation processes – as currently implemented by the Peruvian State – have ended up becoming a threat, rather than a right. This clearly constitutes a paradoxical fact and "contrary to logic". But indigenous peoples have understood such a paradox to be an expression of the political stance of making changes in order for nothing to change. On the brink of the bicentennial.

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