

# **“For the democratic production of democratic societies” – Lessons from the transition from social-movement-driven to state-legislated consultations on extractive projects in Peru**

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Over the last two decades, various consultation practices regarding extractive activities have emerged and been implemented throughout Latin America. Some practices adopt a completely autonomous and communitarian approach, some are based on alliances between civil society and local government, while others are also increasingly centred around national governments in connection with new legislation as per international standards on indigenous peoples' rights.

These consultation practices come from two related sources. On the one hand, the long-standing struggle for the recognition of the collective rights of indigenous peoples led to International Labour Organisation (ILO) Convention 169 on the rights of indigenous peoples (ILO C169, signed in 1993) and the United Nations Declaration on the Rights of Indigenous Peoples (2007) that established indigenous peoples' right to prior, free and informed consent (PFIC)[\[1\]](#) concerning the projects and policies affecting their lives.

On the other hand, extractivism has intensified and expanded into new territories (especially those under the control of indigenous and peasant communities), provoking resistance and

social conflict. Social movements' experimentation with new political practices and the emergence of new public policies on governing these disputed territories and populations have also exacerbated the situation.[\[2\]](#)

In response to intense protest over the impact of extractive projects, Peru's nationalist government, led by Ollanta Humala (2011-2016), approved a law for prior consultation (*Ley de Consulta Previa*) when it came to power. This law was based on ILO C169, which Peru had signed in 1993 but had never implemented. The legal framework established through discussions on the implementation of the law has served as the cornerstone of government-led consultation on the exploitation of natural resources since 2013; no new grassroots-based consultations have taken place since.

Both the practice of social-movement-driven consultations on the exploitation of natural resources and the transition to state-led consultations offer an excellent opportunity to address one of the most intense debates in the *Global Working Group Beyond Development* regarding what democratic processes and institutions can allow with regard to the construction of alternatives to development and colonial-patriarchal capitalism, and what role the state can or cannot play in this connection.



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In this document we will examine the following questions: to what extent could social-movement-driven consultations influence decisions on territories and economic projects? How did the state-led institutionalisation of the right to be consulted affect people's capacity to make decisions about their territories and lives? What lessons can we learn here with regard to i) the dynamics between autonomous institutional processes and state-led processes; and ii) the potential scope of institutional processes concerning the exercise of rights and the transition beyond development?

## **SOME NOTES ON THE STATE**

Experience of consultation on extractive activities indicates that there are two major challenges facing contemporary liberal democracies, namely: how can we juggle cultural diversity, historical discrimination and, in particular, the

place of indigenous peoples in our societies? And in what ways can democracy allow decision-making on economic models and processes, more specifically with regard to the exploitation of the commons? These questions are deeply intertwined, as indigenous peoples hold tenure rights over a large part of the world's land surface, including particularly diverse ecosystems that are crucial to the future of mankind at a time of ecological crisis.

Within this document, I will consider two different theories of the state present in social movements, left-wing politics and the intellectual debate on emancipation in Latin America, as well as within the Working Group. Both perspectives would agree that the modern state in the Americas was built upon the exclusion, exploitation and dominion of the colonial elite over the indigenous peoples, Afro-descendants and women while simultaneously seeking to incorporate new territories into the global capitalism movement as providers of "natural resources". However, the theories differ when it comes to the extent to which the fundamentally colonial and extractivist nature of the modern state can be transformed through the institutional processes of formal democracy.

On the one hand, thinkers like Leonardo Avritzer (2002) and Boaventura de Sousa Santos (2010) have analysed how social movement theories and practices can transform the state from below, leading to new participatory practices like participatory budgeting in Brazil or even the new constitutions of Ecuador and Bolivia that sought to build a plurinational state. They insist that the state is a heterogeneous network of relations and institutions that both reflects the correlation of forces in wider society and can be transformed and permeated by grassroots practices, becoming an instrument of change.

Others insist that the state is essentially limited when it comes to emancipation, based upon two crucial understandings. Michel Foucault explained that the state is a meditated social

practice adopted to govern populations based on pre-existing instruments (like the police or fiscal systems). As such, the state is the result of historical practices of domination while at the same time forming part of a broader, continuously developing “field of practices of domination” (Foucault 2004: 291-339). Consequently, modern states in Latin America are deeply rooted in the “coloniality of power” that negates democratic and institutional practices rooted in other cultures, knowledge and political practices.

Furthermore, the so-called liberal democracies that guide these states are built upon “[...] a solid institutional separation –the technical term is differentiation– of the political system, from the general system of inequality in society” (Rueschemeyer 1992: 41). This separation results in a constitutive contradiction between the desire for self-government that sustains democracy and the logic of the accumulation of power and capital (i.e. capitalism).

In recent decades in particular, this contradiction has been resolved through neoliberal and technocratic reforms in favour of capitalism, which exclude the economic domain from the realm of democratic politics and prioritise transnational institutions and the corporate capture of the state over national political processes. Authors like John Holloway, Raquel Gutiérrez, Aníbal Quijano and Raúl Zibechi therefore assert that fundamental transformation can only happen through the construction of counterpower, autonomy or antipower that dismantles or socialises the power over the people that is institutionalised in the modern state.

## **STATE, DEMOCRACY AND EXTRACTIVISM IN PERU: BETWEEN CONFLICT AND CONSULTATION**

The expansion of mining in Peru was facilitated by the

neoliberal reforms first implemented by the authoritarian regime of Alberto Fujimori and then consolidated after the return to electoral democracy, during the presidencies of Alejandro Toledo, Alan García Pérez, Ollanta Humala, Pedro Pablo Kuczynski and Martín Vizcarra. These governments fostered legal, economic and political conditions that sought to reconstitute and reterritorialise the Peruvian State, economy, geography and society, further entrenching the country into the global economy as a primary exporter of natural resources.

As a result, mining concessions expanded considerably, growing from 2.26 million hectares in 1991 to 26 million by 2013, affecting twenty percent of the country's territory (without taking into account other extractive activities like oil and gas exploitation or large-scale industrial agriculture) and covering around ninety percent of the territory in some of the country's provinces. Consequently, large-scale mining projects spread throughout the country, without incorporating any consultation or territorial planning processes.



Due to the expansion of extractivist activities, the so-called socioenvironmental conflicts [\[3\]](#) (and particularly in the mining sector) became the main category of social conflict in the country. A wide array of motivations and demands sparked the mining conflicts, ranging from calls for a greater share in the distribution of profits and compensation for environmental damage to fundamental resistance among those communities potentially affected by such activities. The struggle between the mining companies and the communities over the control and management of the commons and the ways in which these are integrated into the local, national and global economies generally formed the focal point of the conflict.

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At the start of the 21st century, opposition to extractive activities (mining in particular) became a subject of national public debate for the first time, after almost a decade of mining expansion (including the implementation of the huge

Yanacocha and Antamina mines in the north of the country). In Tambogrande, a small town in the northern Department of Piura, local farmers in a relatively prosperous valley (thanks to an extensive irrigation project financed by the World Bank years before) saw a large-scale copper project as a threat to their economic model (which was based on the production and export of lemons and mangos). At the height of the conflict, protesters burned down the camp built by the mining company and one of the main leaders of the protests, engineer García Vaca, was murdered, presumably due to his opposition to the mining project.

The former president of the local civil-society movement (and later mayor of Tambogrande), Francisco Ojeda, explains how the idea of the consultations emerged in this context: “The conflict turned violent. The government did not want to listen to us anymore, and even talked about militarising the area. Therefore, in a meeting with the Technical Commission [confirmed by ally NGOs], we agreed to ask the government to take our perspective in account. As they told us no specific legislation existed for this, we had to create the consultation ourselves, obliging the local government to convoke it. It was not easy” (Ojeda 2009: 344).

The first consultation was held in Tambogrande on 1 June 2002, involving almost 70% of the local population, close to 99% of whom opposed the mining project. Almost twenty years later, no further headway has been made on the mining project, although the concession is still held by another company[\[4\]](#). The Tambogrande referendum inspired similar practices in Argentina, Guatemala and, later, Colombia and Ecuador. In Peru, other consultations were held in Ayabaca and Huancabamba (with the support of the same alliance involved in nearby Tambogrande) on the Rio Blanco project in 2007; on the Toquepala project’s expansion and use of water in Candarave in 2008; on the Tia Maria mine in Islay in 2009; and on the Cañariaco mine in the district of Cañaris in 2012.



Although participation has fluctuated (with between 43% and 71% of the local population getting involved at various times), all consultations resulted in over 90% of local voters rejecting the mining projects. Like in Tambogrande, Cañar, Islay, Ayabaca and Huancabamba, this resulted in the indefinite suspension of the mining projects, although in all cases (especially in Islay) the mining companies continued their campaigns to get their projects off the ground. There have not been any new social-movement-driven consultations since 2012, when the Law on Prior Consultation effectively came into force.

## **DEMOCRACY AND INSTITUTIONS IN GRASSROOTS-LED CONSULTATIONS ON MINING: SELF-DETERMINATION THROUGH PRACTICE?**

Social-movement-driven consultations on mining thus emerged from local discussions between social organisations, communities, local authorities and their civil society allies, who defined the scope, procedures, methodologies and objectives. The consultations were an effort to transform the logic and the balance of power in mining conflicts by channelling local energies through an institutional process like a referendum, which would constitute a “political event” that could not be denied by anyone (Vittor 2013).

On the one hand, this provided for the de-escalation of conflicts that were progressively becoming more polarised and violent. However, organising referendums also encouraged an intense process of mobilisation, information and political education through meetings, workshops, assemblies and communication campaigns. It forged deeper relations between different civil society actors and, in some cases, local governments, and inspired national and transnational networks

that connected local communities with alternative media, environmental and human rights NGOs and international networks. Although there were disputes between various stakeholders regarding leadership and visibility, the referendums and their results subsequently became a shared point of reference for local politics in the respective areas.

It was precisely this diversity of stakeholders that transformed the organisation of the consultations into a process of democratic creativity and institutional experimentation. At the same time, these processes were fundamental to the establishment and expansion of the National Confederation of Peruvian Communities Affected by Mining (CONACAMI), the Muqui network (civil society alliance on mining) and international solidarity that would far outlast the practical experiences of the consultations.

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The exact form of consultation varied depending on demographics, political leanings and the structure of the local conflict. Cañaris saw a communitarian consultation in the spirit of the ILO C169, with a clear message in favour of the indigenous self-determination of the local Quechua communities. In the coastal areas of Islay and Tambogrande, citizen consultations adopted liberal-democracy-style participation.

Ayabaca and Huancabamba saw intense debate among the peasant communities and with local government and civil society allies on whether a communitarian consultation should be held or if a citizens' referendum would be more effective. Some community leaders argued that the referendum should affirm the right to self-determination in recognition of their status as descendants of indigenous peoples. Others stated that a "citizen participation" mechanism would have more of an impact on the national debate and government and would shore up alliances with urban populations in the provincial capitals.



The second argument would prevail, but this example makes it crystal clear that decisions on the form of consultation were based on i) what institutions and processes would best fit the local context and culture; and ii) what methods would be most effective in consolidating and communicating existing grassroots decisions to particular audiences (the state, media) and geopolitical scales (i.e. national and international). The consultations were essentially efforts to translate processes of self-determination through assemblies, social organisation and popular mobilisation into the language of institutions, the state, media and formal democracy.

Much of that achieved was largely possible due to the lack of political frameworks for consultation. Although Peru ratified ILO C169, this was not implemented in any way until the Ollanta Humala government in 2011. The grassroots-led consultations were organised in this legal sphere of ambiguity that made space for experimentation and creation, giving life

to flexible and embedded institutions and democratic practices. However, as the legal basis of the referendums was disputed (and in any case would not allow binding decisions), the various stakeholders in favour of and opposed to a given mining project would make great efforts to demonstrate the (il)legality and (il)legitimacy of the referendums respectively, by means of media campaigns, judicial procedures and national and international political advocacy. One of the main strategies adopted by the pro-referendum sector involved carrying out referendums to the letter, complying with most of the conditions and methods of formal elections (e.g. by using the official register of voters in their jurisdictions or by inviting international observers).

As such, social-movement-driven consultations are rooted in a profound understanding by local communities of democracy as the right to identity and self-determination for which the choice over their “development model” (as they would phrase it) and the use of their territory is essential. While the federal government and the company consider land an economic resource, for the local people it is a space that sustains social relations, economic practices and cultural traditions, all of which give meaning to the lives of those in the area and ensure their social reproduction. For Rosa Huaman (2013) from the Cañaris community: “Territory is happiness, as it gives life, gives birth, reproduces”. Community leader Magdiel Carrión (2009) from Ayabaca states: “For us, democracy is much more than only voting in elections. It is about our full participation in decision-making on every level; that is why we implemented the consultation, as an expression of real democracy”.

As such, discussions and decisions about who, how, when and what should be consulted were defined by the stakeholders, who would “exercise their right to be consulted” themselves. This also meant that stakeholders like the peasants from Ayabaca and Huancabamba, farmers from Tambogrande and Islay and

indigenous peoples from Cañarís were at the centre of the debate on what democracy should look like, demonstrating the emancipatory nature of the democratic process itself. However, more analysis is needed into women's participation in the consultations. Although male leaders were the main public protagonists of all consultations, there are signs that the consultations were empowering for women as well, as they opened up new spaces for deliberation and mobilisation where women's organisations and female leaders and their views on mining played a crucial role (particularly in Tambogrande and Cañarís).[\[5\]](#)

## **INSTITUTIONALISING CONSULTATIONS: DISEMPOWERMENT BY DESIGN?**

The right to be consulted has been a matter of much dispute throughout its creation and implementation, as it emerged from the negotiations and struggles between different visions of its significance and goals. For the corporate sector, multilateral institutions and most governments, consultations should integrate indigenous peoples more effectively in projects and policies of economic development, whilst indigenous organisations and their allies see consultation as a means of securing indigenous peoples' right to self-determination.

ILO C169 resolved this issue by entrenching prior, free and informed consultation into economic projects and policies affecting indigenous peoples, whilst the United Nations Declaration on the Rights of Indigenous Peoples went further by insisting that consultations are intended "to obtain consent" from indigenous peoples (Rodríguez 2012). The right to PFIC would be expanded and amplified by national and international legislation (such as the Bolivian and Ecuadorian constitutions) and jurisprudence (by the Colombian constitutional court or the Inter-American Court and

Commission on Human Rights).

César Rodríguez states that the emergence of PFIC is a crucial part of a broader set of institutional processes that sought to create better conditions of governance for indigenous territories and dynamics. However, this process seeks to slot indigenous struggles for self-determination within a scheme of “neoliberal multiculturalism” (Hale 2002). Rodríguez states: “as all legal norms, the effects of the PFIC regulations depend on two distinct factors: on the one side, the limitations and opportunities created by the norms themselves, and on the other, the interpretations and strategies of the actors who use the law” (Rodríguez 2012: 52).

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In Peru, the conflict around extractivism and the defence of territories reached new heights during the Alan García government. The uprising of indigenous peoples (2009) against a series of decrees that sought to flexibilise the legal protection of their territories marked a turning point. Led by the national organisation Aidesep[\[6\]](#), the uprising lasted for several months and spread throughout Peruvian Amazonia, culminating in violent confrontations provoked by a police attack on a series of roadblocks near the northern town of Bagua that resulted in 31 deaths, including 21 police officers.

In the local and national elections (in 2010 and 2011 respectively), the issue of extractivism and human rights took centre stage like never before, and there were high hopes that the elected nationalist government of Ollanta Humala (who was elected on a progressive platform) would transform existing legal frameworks and state practices. During his first cabinet (which would turn out to be the only one with a reformist agenda), the adoption of the Law for Prior Consultation of Indigenous Peoples was approved and presented in Bagua as a gesture of reconciliation with indigenous peoples by the

Peruvian government, which sought to forge a new relationship.

The law would be implemented through a regulation setting out the framework and conditions for official consultations. The Peruvian government, in line with its more general view of politics, opted to elaborate a rather bureaucratic and exclusive set of implementation rules intended to limit the scope and depth of consultations, rather than fostering conditions conducive to innovation and experimentation. Prior experience of grassroots-led consultations was not explicitly considered a basis for the regulation.

Although the indigenous organisations took part in this process by means of regional and national consultation spaces (including some who had participated in social-movement-driven consultations), they felt that their demands were only very partially met. Four out of the six main national indigenous organisations rejected the final regulation through a joint declaration.[\[7\]](#) The National Human Rights Coordinator working group on indigenous peoples' rights deemed the process a "missed opportunity for genuine intercultural dialogue" and stated that the regulation does not guarantee the right to self-determination for indigenous peoples as recognised by international law. [\[8\]](#)

Some of the main decisions made during the process of legislation and the elaboration of implementation rules include the following[\[9\]](#):

- The Peruvian State would essentially decide which issues and projects would be consulted, not the indigenous peoples themselves.
- Consultations would not include (or even address) the obligation to gain consent for extractive activities per se, and actually focus on relatively less significant administrative decisions (Leyva 2018; Hallazi 2018) instead of touching on major decisions like the approval of Environmental Impact Studies or the concession of

mining rights.

- The new law would not be retroactive, excluding all existing projects and concessions from consultation, even if C169 had been officially in force since it was signed in 1993.
- The methodology and temporality of the consultations is set by the regulation and limits the time set aside for consultations to two months, suggesting a one-size-fits-all approach to very diverse contexts and cases.

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However, the most sensitive question may have been: who should be consulted? For many reasons, indigenous identity in Peru is more complex than in neighbouring countries, as many people with the “objective characteristics” of indigenous peoples might not identify as such themselves, and people who do identify as indigenous (particularly in peasant communities in the north of Peru) are often considered non-indigenous as they do not speak an indigenous language due to historical de-indigenisation, *mestizaje* and migration in their areas. All of this turned the definition of who had to be consulted into an extremely sensitive exercise.

The definition of who exactly would be consulted (in other words: the definition of who is indigenous and who is not) was based on a database of indigenous peoples. Although the database was seen as a “living document” open to adaptation and updates from the outset, it was also a highly contentious process: the Ministry of Energy and Mines *Minem* (and presumably the extractive lobbies through *Minem*) in particular tried to influence the process and endeavoured to limit the number of Quechua communities in mining areas included in the process, as the former Vice-Minister of Interculturality Ivan Lanegra later declared. [\[10\]](#)

The publication of the final version of the database took much longer than originally planned, and there is evidence that



communities included in initial versions of the database had been excluded from the final version, such as the Fuerabamba community that had to be relocated to allow the construction of the biggest mine in the country, Las Bambas.[\[11\]](#) The database also showed how at least 25 mining projects had moved forward in previous years without adequate consultation of the communities who were now on the list, despite the Peruvian State's constitutional obligation to consult indigenous peoples.[\[12\]](#) The process was also criticised for the fact that the definition of who is indigenous and who is not was initially handled by Minem itself, through private consultants, without adequate supervision or methodological guidance. Although this has since been rectified, it did reflect a lack of genuine engagement on the part of the Peruvian government (Leyva 2018).

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The disempowering nature of the process of the institutionalisation of the Law for Prior Consultation in Peru clearly reflects the general Latin American experience, as analyses from Ecuador, Bolivia, Colombia and Mexico show (Ecuador Debate 2019). Building on Marxist theory, Edwar Vargas identifies, in the case of Ecuador, the "devastation" of the right to consultation. Although the right officially exists, it is essentially destroyed by economic interests and existing power structures that instrumentalise the right for their own gain (Vargas 2019).

César Rodríguez states in summary that the institutionalisation of PFIC shifted the focus of social struggles from extractivism towards legal processes and negotiations on how to implement extractive projects: "with its power to transform substance in form; and its capacity to offer a space of contact between actors that defend radically different or even antagonistic positions" (Rodríguez 2012: 57). However, Rodríguez says: "The replacement is only partial and temporal. Because in the diligences of the consultations,

in every step, the substantial conflicts return, even if now in the form of procedural arguments” (Rodriguez 2012: 23). In the final section, we will explore what results this has had in Peru.

## STATE-DRIVEN IMPLEMENTING EXTRACTIVISM?

## CONSULTATIONS: MULTICULTURAL

As the institutionalisation of PFIC was far from a genuine intercultural process, there can be no surprise that its implementation has been full of challenges and contradictions. By the end of 2018, five national policies [\[13\]](#), twenty-five mining and oil operations, one hydropower project, one infrastructure project and seven natural reserves had been the subject of consultations in Peru. All but one of these consultations were promoted by the state; only the Hidrovia infrastructure project was imposed by a judicial ruling after indigenous organisations and human rights NGOs took legal action. However, other legal proceedings have started, resulting in the judicial ruling to consult on mining concessions. [\[14\]](#)

The analysis of the implementation of the law carried out by prominent human rights lawyers Ana Leyva (2018), Juan Carlos Ruiz (2019) and Alberto Hallazi (2019) coincide with the problematic logic of the institutionalisation of PFIC for the following reasons:

- So far, it is the Peruvian State alone that defines which projects and policies are to be the subject of consultation, and through what means, with indigenous peoples. Although the fact that indigenous peoples did help define several policies that affect them is a step forward, in many other cases there has been no consultation, nor is there any body that allows

indigenous peoples to define which policies will be the subject of consultation in dialogue with the state.

In the case of extractive projects, there have been consultations on relatively late and unsubstantial administrative measures (like the start of the project), rendering significant participation able to alter the substance of the project impossible (to not even speak of the ability to influence the decision on whether to move the project forward).[\[15\]](#)

However, indigenous organisations and civil society institutions have sought to utilise litigation and, in some cases, mobilisation to i) secure the right to consultation in cases initially neglected by the Peruvian State (successfully in the Hidrovia case); and ii) expand the scope of consultation by demanding consultation on mining concessions[\[16\]](#).

- In terms of the consultation methodology, Juan Carlos Ruiz shows that the consultations under the law were generally realised in one to two days and lacked information and technical support.[\[17\]](#) In contrast to the grassroots-led processes, it is the state that controls the agenda, time and location, including issues like language and methodology. Again, in the cases where local organisation was stronger, the methodological control of the process was transformed through grassroots demands.
- Unsurprisingly, none of the consultation processes resulted in an extractive project or a public policy being turned down, although in some cases communities and organisations left the process in protest against its direction or outcome. It is also significant that in the case of mining there were consultations on relatively small and lesser known projects, but not on any major projects, until the recently planned

consultation on the Antapakay project, which resulted from the strong and insistent demand by the quite organized communities of Espinar. However, even when consultations resulted in agreements, these did not include tangible arrangements regarding access to the economic benefits generated by the projects, with the exception of Lot 192. [\[18\]](#)

Although it is true that the law provided for the relative generalisation of the right to be consulted, this happened in a disempowering way in which existing power imbalances were ignored, replicated and sometimes exacerbated. There are no indications that the processes sought to assure or promote the participation of indigenous women in the consultations, especially in consultations on national policies in which the two organisations of indigenous women participated directly. In contrast to social-movement-driven consultations, the institutionalised versions seek to limit deliberation, mobilisation and collective decision-making. The consultation on Lot 192 in Loreto shows that even in these circumstances consultation and its significance is under dispute.

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Lot 192 is located in the Loreto region and was exploited for around forty years, resulting in widespread environmental, cultural and social damage to the territories of the Quechua, Kichwa, Kukama and Achuar peoples and a history of conflict and social struggle. As Pluspetrol's contract to exploit its concession ended in 2015, the new auction required a process of consultation, which would involve indigenous federations with ample experience of dialogue with the Peruvian State and transnational companies, in addition to solid national and international alliances. From the outset, they demanded that all consultation and auctions would first have to deal with their historical agenda, as one of their leaders, Aurelio Chino Dahua, explains: "After all of the disasters you've done to my home, first you will need to assure my rights, and after

you can consult me" (Zúñiga 2018: 10).

The political ability of the indigenous federations to negotiate the logic of the consultation meant that the state first had to satisfy predetermined conditions (more specifically taking into account environmental damage and associated health issues in their territories) and amplify the temporality of the process. This resulted in improved contracts for oil exploitation. Zúñiga and Okamoto, who served as advisors to the indigenous organisations, state: "The indigenous peoples used the opportunity of the consultation to teach the Peruvian State to connect the consultation to the territorial memories of its realisation" (Zúñiga 2018: 141). The federations also strengthened their alliances and boosted the profile of their struggles.

However, even in this case, consultation encountered considerable difficulty and was unilaterally declared concluded by the state after it had come to an agreement with only one out of the four indigenous federations involved. Once again, thanks to mobilisation this decision was partially reversed, when the government agreed on a new round of consultation before the conclusion of contracts on the Lot.

In other cases, the existence of a Law on Prior Consultation aided those at local level, who would demand their right to be consulted to open up debate on tangible projects, delay their implementation, foster better conditions for negotiation on the projects or deter strategies of repression. This, however, very much confirms that the Law's ability to guarantee indigenous rights is incredibly contingent on the capacities of indigenous organisations to dispute the associated logic and integrate consultation into their broader fight for justice, instead of an intrinsic emancipatory logic of the institutional process.

# FINAL THOUGHTS ON THE “DEMOCRATIC PRODUCTION OF DEMOCRACY”

The history of the right to be consulted in Peru clearly shows that institutions are never neutral and always under dispute. Their design distributes, reinforces or transforms power, and has to consciously be embedded in particular geographies, histories, rationalities and networks. Democracy therefore depends on these broader elements and the way institutions interact with them. Considering events in Peru, we can draw the following conclusions:

1. Social-movement-driven consultations on extractive projects emerged in Peru due to the combination of the following factors: i) intense conflict on mining in the country did not find institutional and democratic practices to be channelled and transformed; ii) the local communities in the cases specified were organised within strong local organisations and had already made their decisions through grassroots and autonomous institutions and democratic processes; iii) a strong alliances of civil society actors fostered political creativity and provided the necessary resources for the first two consultations (subsequent ones were mostly sustained by local actors); iv) alliances with local governments more receptive to local communities and civil society allowed the consultations to be entrenched in the local state and provided resources and institutional capacity; v) the design of the consultations could be flexible and dynamic due to the lack of formal policies and conditions, as it responded to rather ambiguous legal frameworks. These grassroots consultation processes took place within a wider landscape of self-determination and democracy, and even strengthened the local social network and created ties with national and international actors.

- Although the consultations took place in this atmosphere of legal ambiguity and definitely did not have any formal mandate for political decision-making on extractive projects, they did contribute to the consolidation of *de facto* self-determination and decision-making on the future of territories and local populations that opposed mining projects. The Rio Blanco, Tia Maria, Manhattan and Cañariaco mining projects are among the seven major mining projects that have been paralysed indefinitely due to local organisation and mobilisation. In Colombia, Argentina, Ecuador and, to a lesser extent, Guatemala, these autonomous consultations have managed to thwart extractive projects. The consultations became a powerful tool for these processes of self-determination, as they highlighted local communities' opposition to extractive projects and helped shore up alliances on different scales. However, these *de facto* decisions remain in dispute, as mining companies continue with their plans to move ahead with these projects.
- Intense conflict over extractive projects formed the basis of a series of political innovations within the Peruvian State to find institutional ways to channel conflicts. The implementation rules of the law did not really consider the previous experience of grassroots-led consultations and only involved indigenous organisations in the substance of their design to a limited extent. The law has consequently been regulated and implemented more according to state rationality and practices than through intercultural and grassroots-led participatory processes of design, leading to a legal framework that seriously limits the scope, substance and depth of consultations and indigenous peoples' right to self-determination.
- It is true that the institutionalisation of the right to

be consulted led to broader application of this right for indigenous peoples. Consultations took place on diverse national policies, and more consultations on extractive projects have taken place than ever before. It is also true that the existence of the law has given organised populations a new tool to defend their rights, particularly by demanding their right to consultation as a way to delay and possibly thwart mining projects. Current consultations could also allow better institutional spaces for negotiation on the benefits of projects, although this has not happened in practice.

However, the implementation of the law has taken place in a context of existing inequities and power structures, instead of through genuine engagement with intercultural transformational dialogue. As such, it has allowed the state to regain control over time, space and agendas by dissuading or channelling social conflicts in processes controlled by its rationality. Only where social mobilisation has been stronger and organisations sufficiently aware of this have the substance and scope of the consultation been deeper, as was the case for Lot 192. However, there is no case under the new law where an extractive project has been rejected due to consultation.

- The implementation of the law therefore consolidated a series of shifts, which are summarised in the table below. The bottom-up processes embedded in local culture, which inspired flexible and adaptive methodologies for collective deliberation and the factual exercise by local populations of their right to choose their way of life, was transformed into a restrictive institutionality from above through which the state granted the right to participate in the implementation of development and extractive projects to certain populations (namely those who the state identifies as indigenous).



<b>Table: Shifts in the logic of consultation</b>		
	<b>Social-movement-driven consultations</b>	<b>State-led consultations</b>
<b>Political logic</b>	Self-determination and participatory democracy	Governance, participation and dialogue for development
<b>Scope</b>	Ways of life and/or development, which determine whether extractive projects are approved or rejected	Conditions for the implementation of projects and policies
<b>Subjects</b>	Defined by local communities and populations. Beyond indigenous communities	Indigenous communities identified by the state
<b>Political-economy embedding</b>	Social struggles in defence of territories, identity and ways of life, led by grass-roots organisations and civil society alliances	Development programmes promoted by multilateral institutions, government and companies

<b>Table: Shifts in the logic of consultation</b>		
<b>Control over the process and institution</b>	Decisions are made in networks rooted in the local context, which generally involve social organisations, communities, civil society and local government and their allies in national civil society	The government, state institutions
<b>Methodology and time</b>	Process of political education, deliberation and mobilisation, based on context and embedded in local (political) culture	Formal procedure defined by State regulation (in Peru's case: four months), though disputed by local actors in some cases

Institutionalisation effectively sought to create a channel where the affectations and benefits of the economic model and its projects (but not the model itself) could be discussed. Consequently, the law really does not provide for the transformation of historical relations of domination over and marginalisation of indigenous peoples, as it at least indirectly pretended to do. As such, the process shows how the institutionalisation of the consultation process may have opened up opportunities for those fighting against these projects, but it also severely hampered the potential for self-determination and transformative processes afforded by social-movement-led consultations.

It is also significant that no new grassroots-led consultations have been held now that the law is in place,

suggesting that the complementarity between grassroots and state processes poses a challenge. One hypothesis would be that the state centrism present in many organisations and civil society strategies seriously limits interest in autonomous processes of self-organisation. As such, the overall balance of the institutionalisation process resulted in disempowerment.

- The history of consultation in Peru offers the following insights on democracy and institutions in the contemporary world:
  - Democratic decision-making (in this case, consultation) should be a community-driven, genuine process of self-determination before the start of any project, with sufficient time, information and resources.
  - Genuine democracy is only possible if it includes the economic realm, and allows collective decisions on ways of life, the economic model and the governance of territories.
  - It is the process of collective decision-making that ensures genuine democracy by creating spaces for political education, real deliberation and debate and mobilisation, which purposely transforms relations and patterns of exclusion and inequality (experienced by indigenous and peasant communities and women, for instance). Democracy should be a process of emancipation and empowerment, and not an act of election.
  - Local stakeholders should design democratic processes and institutions, and this process should be embedded in local cultures and practices, transforming the state from below.
  - Other institutional processes are needed to open up these spaces of local decision-making, allow decisions on bigger geographical scales and contest societal challenges and problems (e.g.

with regard to territorial planning as well as broader economic and ecological policies).

- There is still a huge question mark over whether this kind of democracy and institutions are viable in our current societies and political formations. Comparing the case in Peru with the very similar processes in Ecuador, Bolivia, Colombia and Mexico suggests that this requires a radical transformation of our current nation states and their role in mediating and protecting the fundamental processes and interests of contemporary capitalism and its interconnection with colonial and patriarchal elements. It would need what Aníbal Quijano called “the democratic production of a democratic society”. This might be easier at local level, as municipalities are entrenched in a web of different power relations and integrated in local culture and political practices, which makes them more permeable for experimentation.

Until we see this radical transformation, the history of this process demonstrates that it is driven by the need to defend and maintain autonomous, social-movement-driven spaces for genuine democracy, whilst at the same time disputing and resisting the disempowering logics of formal “democratic institutions” and making use of its internal contradictions, loopholes and flaws, understanding that both political logics need to be rooted in broader transformative strategies that cannot depend on the state as it is.

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[1] In Spanish a distinction is being made between “consentimiento” (consent) and “consulta” (consultation). Consent is a far bolder term, which refers to the active agreement with indigenous peoples prior to any extractive activities, which implicitly suggests indigenous peoples can also reject these activities. Consultation, on the other hand, refers to the obligation to consult the opinion of indigenous peoples on any project, to inform decision making by the State. So, although the formal term used in international legislation is “Free, Prior and Informed Consent”, the Peruvian “Ley de Consulta” is far closer to promoting consultation than consent, as we will see in the article. Therefore I will generally use the term consultation, only referring to consent when this is pertinent.

[2] In a study conducted for the United Nations Development Programme, Calderón (2012) highlights that access to territories and natural resources is the main reason for conflict in the contemporary world. He also states that these conflicts are “bearers of democracy” as they pave the way to stronger democratic institutions that can in turn transform conflict.

[3] The Peruvian Ombudsman (*Defensoria del Pueblo*) uses this term in its monthly reports on social conflict in the country (see <https://www.defensoria.gob.pe/documentos/>, in Spanish). I prefer to speak of “eco-territorial conflicts” (Hoetmer 2013), as this is a more accurate reflection of the fact that these conflicts actually express clashes of “modes of living” or “ontologies”, not just a lack of social responsibility or environmental governance.

[4] The Buenaventura Mining Group, which is owned by one of the country's richest and most powerful families.

[5] See Silva (2017) for more information on the role of women in disputes over territories and natural resources and the dual challenge they faced in participating in these disputes while fighting against patriarchal relations in their communities.

[6] Interethnic Association for the Development of the Peruvian Rainforest

[7] See <https://www.servindi.org/actualidad/60457> (in Spanish)

[8] See [http://www.servindi.org/pdf/DAR\\_Consulta\\_Previa.pdf](http://www.servindi.org/pdf/DAR_Consulta_Previa.pdf) (in Spanish)

[9] Human rights lawyer Ana Leyva (2018) conducted a comprehensive analysis of both the design and application of the law.

[10] See <https://ojo-publico.com/46/como-decide-el-gobierno-quien-es-indigena-y-quien-no> (in Spanish)

[11] See <https://ojo-publico.com/1149/afirmacion-de-morales-acerca-de-que-mincul-quito-condicion-de-pueblo-quecha-fuerabamba-es> (in Spanish)

[12] See <https://ojo-publico.com/77/los-secretos-detras-de-la-lista-de-comunidades-indigenas-del-peru> (in Spanish)

[13] The policy on intercultural health, the implementation rules for a law on indigenous languages, the national plan for intercultural and bilingual education, the implementation rules for the general law on climate change, and the implementation rules of the forestry law for flora and fauna



[14] See <https://www.servindi.org/actualidad-noticias/27/06/2018/balanc-e-del-litigio-constitucional-en-defensa-de-pueblos-indigenas> (in Spanish)

[15] See <http://cooperacion.org.pe/wp-content/uploads/2018/07/Consulta-me-de-verdad.pdf> (in Spanish)

[16] See <https://www.servindi.org/actualidad-noticias/27/06/2018/balanc-e-del-litigio-constitucional-en-defensa-de-pueblos-indigenas> (in Spanish)

[17] See <https://www.servindi.org/actualidad-noticias/06/11/2018/balanc-e-de-los-procesos-de-consulta-en-mineria-y-petroleo-en-el-peru> (in Spanish)

[18] See <https://www.servindi.org/actualidad-opinion/28/07/2018/comunidades-no-se-benefician-de-actividades-extractivas-en-sus> (in Spanish)



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