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Indigeneity in the Debate. The Right to Prior Consultation in Peruvian Ethnopolitics

Indianidad en el debate: el derecho a la consulta previa en la etnopolítica peruana

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ABSTRACT

Two hundred years of the independence of the Republic of Peru and the ongoing debate on the multi-ethnic and multicultural character of the Peruvian nation are inextricably linked with the determination of legislative norms relating to the indigenous peoples inhabiting the territory of the state. The ratification of the ILO Convention no. 169 in 1994 did not contribute to the implementation of the rights set out in the document, including the right of indigenous peoples to the procedure of prior consultation and expressing free and informed consent to all state actions that may affect their quality of life. However, the wave of socio-environmental conflicts in the 21st century changed the relationship between the state and the indigenous population. As a result, in 2011, the Congress of Peru passed the Law of Prior Consultation (Ley de Consulta Previa) unanimously. Thus, Peru found itself in the vanguard of states introducing the right to consultations into the national legislative system, but this did not mean that all problems were solved. Since indigenous communities live in economically attractive territories, identification of the beneficiaries of the new Law has become the focus of a new conflict. The indigeneity

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of the peasant communities (comunidades campesinas) of the sierra and costa regions began to be challenged by both the mining lobby and government circles. In this article, using the historical perspective and referring to the acts and norms of Peruvian laws, I briefly discuss the course of the conflict and present the problem of the terminology and definitions used for the indigenous sector of Peruvian society concerning authoritative decisions of the state and the so-called "discursive colonialism", still present in Peruvian ethnopolitics after two hundred years of independence.

KEYWORDS: *Peru, indigenous peoples, prior consultation, peasant communities, indigeneity.*

RESUMEN

Los doscientos años de la independencia de la República del Perú y el debate en curso sobre el carácter pluriétnico y pluricultural de la nación peruana están indisolublemente ligados a la determinación de las normas legislativas dedicadas a los pueblos indígenas que habitan el territorio del Estado. La ratificación del Convenio no. 169 de la OIT en 1994 no contribuyó a la implementación de los derechos establecidos en ese documento, incluido el derecho de los pueblos indígenas al procedimiento de consulta previa y a expresar un consentimiento libre e informado a todas las acciones estatales que puedan afectar su calidad de vida. Sin embargo, la ola de conflictos socio-ambientales de finales del siglo XX y principios del XXI obligó a cambiar la relación entre el Estado y la población indígena. Como resultado, en 2011, el Congreso de Perú aprobó por unanimidad la Ley de Consulta Previa. Así, el Perú se encontró a la vanguardia de los Estados, introduciendo el derecho a la consulta en el ordenamiento legislativo nacional, pero esto no significó que todos los problemas estuvieran resueltos. Dado que las comunidades indígenas viven en territorios económicamente atractivos, la identificación de los beneficiarios de la nueva ley se ha convertido en el foco del nuevo conflicto. La "indianidad" de las comunidades campesinas de las regiones de la sierra y la costa comenzó a ser cuestionada tanto por el lobby minero, como por los círculos gubernamentales. En este artículo, utilizando la perspectiva histórica y haciendo referencia a los actos y normas del derecho peruano, analizo brevemente el curso del conflicto y presento el problema de la terminología y definición utilizadas para el sector indígena de la sociedad peruana en relación con las decisiones autoritarias del Estado y el llamado "colonialismo discursivo", aún presente en la etnopolítica peruana luego de 200 años de independencia.

PALABRAS CLAVE: *Perú, pueblos indígenas, consulta previa, comunidades campesinas, indianidad, etnopolítica.*

Introduction

The right to the prior consultation procedure (*consulta previa*) has become the basis of the current vertical participation policy, implemented between the state and the indigenous peoples inhabiting its territories. The right to

be consulted is one of the essential provisions of the *Indigenous and Tribal Peoples Convention no. 169* of the International Labour Organization (further: ILO Convention no. 169, date of entry into force: September 5, 1991). It is still the only international document recognizing indigenous peoples' right to consciously and freely participate in any decision-making process of public institutions and state administration bodies. The ILO Convention no. 169 defines the essential criteria and standards of the consultation procedure, indicating the need to apply it in all areas of state activities that may affect collective rights, concern indigenous territories, or directly representatives of indigenous peoples, therefore in the sphere of economic policy, the justice system, security or the broadly understood cultural policy. The document also emphasizes that to be able to reach an agreement based on free and informed consent, all activities must be performed in good faith, in a manner appropriate to the circumstances, and with the use of suitable means (ILO Convention no. 169, Art. 6.2; see also: Kania, 2021).

In Latin America, the prior consultation procedure can be interpreted from a broader historical perspective as one of the instruments of ethnic policy used in this area for many centuries. This procedure would follow a long tradition of *política de pactismo* – negotiations and treaties concluded during the colonial period between representatives of the Spanish administration and authorities of indigenous communities. The policy of negotiations was introduced and implemented from the time of Charles I and Philip II (2nd half of the 16th century) through a system of indirect power and recognition of the status and authority of the local elites (*caciques*) as representatives of the *pueblos de indios*. Above all, it was used in the areas on the borders of the Viceroyalty of New Spain and Peru as an instrument of a new formula of pacification and subordination policy toward the so-called *indios fronterizos* (defined as "from conquest to pacification", see: *Ordenanzas de descubrimiento…,* 1573). The strategy of treaties was supposed to lead to a compromise in diplomatic relations. It was based both on the European tradition (the negotiation procedures carried out in the Iberian Peninsula between the central government and representatives of the lower-level administration (e.g. *cabildos*) in the process of consolidation of the Spanish state) and the American practice (negotiations that were carried out in pre-Columbian times to conclude strategic and economic alliances between political organizations such as *señorio* or *altepetl*). Considering the policy of treaties and negotiating procedures of the colonial period, we must take into account the difficulties that had to be overcome to implement them. There was a problem of communication (the use of indigenous languages and the Spanish language); complex conditions of the negotiations caused by the low level of mutual trust (due to the previously conducted military aggression); the problem of the scope of the agreed final provisions, which had to be beneficial to both parties and expressing the goodwill to reach a compromise. The crucial was the mutual acknowledgment and recognition of the

authority of the negotiating participants (representatives of the Spanish and indigenous authorities) and the legitimacy of their decisions.

During the 19th century, such a form of inter-ethnic policy and the participation of representatives of indigenous people in the decision-making processes of new states were rejected. With the concept called *indigenismo republicano* has come the policy of indigenous peoples' marginalization, assimilation, and subordination to the dominant position of the authorities deriving from the Creole-Mestizo circles. There was no question of negotiation anymore, as the authority of indigenous leaders and the autonomy of their communities were not recognized officially. This situation did not change almost until the end of the 20th century.

The development of the concept of *indigenismo moderno*, formally implemented as a pro-Indian policy, continued to hide practices leading to the integration of the indigenous sector of Latin American societies. The overall vision of monocultural, homogeneous states, with a dominant position of the Creole-Mestizo groups, led to the continuation of the assimilation, hegemonic vertical ethnopolitics, therefore to the development of political programs, development plans, and administrative actions towards and for the indigenous peoples, but without their active participation. Only the end of the last century (especially the 1980s–1990s) brought significant changes in the relations between the state and the indigenous part of national societies. Along with the democratization processes, the accompanying concept of cultural pluralism, and the emergence of the contemporary, dialogue-based concept of interculturalism, the politics of negotiating and compromise have returned. The right to prior consultations enshrined in the ILO Convention no. 169, which in Latin America has been ratified by the most significant number of countries in the world[1], was also in line with the idea of ethnodevelopment (*etnodesarrollo*) promoted in this area as an alternative to the assimilation policy. Its central premise is to promote modernization and development processes while maintaining and being able to express one's own ethnic and cultural identity freely. It is also the result of the contemporary Indianism (*indianismo*) policy, based on respect for the right to self-determination and the cultural autonomy of indigenous peoples.

The Republic of Perú ratified the ILO Convention no. 169 through the *Resolución Legislativa Nº 26253* of January 17, 1994. The Convention entered into force on February 2, 1995; thus, its provisions became binding in the Peruvian legal system, and following its content, since 1995, the state formally accepted the obligation to implement the procedure of prior consultation of any administrative or legislative decisions that would affect indigenous peoples and their territories. Over the years, however, this obligation was not respected. The Peruvian government was repeatedly criticized by national and international human rights organizations and expert forums (see: CEACR, 2009,

[1] 15 out of 24 countries during the 1991–2021 period.

pp. 686–689). The situation changed only due to the increase in the number of violent social and environmental conflicts that shook Peru at the beginning of the 21st century. They led to severe tensions in the internal politics (in the relations between the state and the indigenous peoples) and the weakening of Peru's image in the international arena. As a result, the government decided to take specific institutional actions, accelerating the development of appropriate national legislation and the implementation of consultation procedures.

The events of June 2009, known as the "Bagua Massacre" or "Baguazo", became the flashpoint. The source of the conflict was the enactment of Laws 1064 and 1090, which, as part of the implementation of free trade agreements between Peru and the United States, facilitated the sale of land to private investors and mining activities in the indigenous territories of the Peruvian Amazonas Department. These laws were adopted without supplementing the provisions of the ILO Convention no. 169, primarily without implementing the prior consultation procedure. By residents of the Department, they were considered a violation of their rights to self-determination and territorial rights. The indigenous organizations of the Peruvian Amazon began protest actions demanding the repeal of the package of laws. In April 2009, some 5,000 demonstrators – mainly from the Awajún and Wampis tribes – blocked the Fernando Belaunde Terry Highway in a place known as *Curva del Diablo* in Bagua Province. As it is an important communication and transportation route, on June 5, after a 55-day blockade, the central government in Lima ordered the pacification and removal of the protestors. The brutal action ended in a clash between them and the police officers. According to official government sources, 33 people were killed in the confrontation (23 police officers and 10 indigenous), and around 200 were injured. To prevent the escalation of conflict, the new laws were cancelled, and on July 15, 2009, Congress established a special commission chaired by Guido Lombardi from Unidad Nacional. This commission presented 4 reports of its work, clearly indicating the lack of implementation of prior consultation procedures as the source of the conflict (Cavero, 2011). Another socio-environmental conflict was the so-called "Aymarazo": protest of the residents of the Puno Department (Indian Aymara) against the introduction of *Decreto Supremo No. 083*, which granted mining concessions to the Canadian Bear Creek Mining Corporation. The request was made to cancel the planned investment – the construction of the Santa Ana mine in the district of Huacullani, province de Chucuito – pointing to the threat it posed to the environment by contaminating the hydrographic system, including the waters of Lake Titicaca. The government was accused of an absence of consultation or even a will to dialogue with the local population. A violent riot of May 2011 led to the blockade of the Peruvian-Bolivian border in the vicinity of Puno, brutal clashes with the police, and much damage to the public buildings in the city itself.

Under pressure from the public, to prevent further conflicts of a similar nature, the Office of the Ombudsman (*Defensoría del Pueblo*) proposed the

introduction of the right to prior consultation into the national legislation. In 2010, the Constitutional Court issued a decision (ATC 0022-2009-PI / TC) that revised the right to consultation as a constitutional right based on the ratification of the ILO Convention no. 169. On August 23, 2011, the Congress of Peru unanimously approved Law No. 29785 of the *Right to Prior Consultation of Indigenous and Tribal Peoples, recognized in Convention 169 of the International Labour Organization* (further Ley de Consulta Previa 2011). The Act regulated the procedure of implementing the right to prior consultation before approving any administrative or legislative measures that could affect indigenous peoples' collective rights, physical existence, cultural identity, quality of life, or development (Ley de Consulta Previa 2011, Art. 2). The Law was signed by newly elected left-wing President Ollanta Humala Tasso on September 6, 2011, at a public ceremony held in Bagua, the site of the aforementioned violent riot. We can interpret that official even as a kind of "political spectacle": the president, proclaiming pro-Indian slogans, wanted to demonstrate an official break with the neoliberal direction of Peruvian politics implemented by his predecessor, Alan García Pérez.

Peru is the first country to implement the right of prior consultation directly into its legislative system. Prior consultation procedures involve representatives of indigenous peoples in the decision-making process, particularly in formulating and implementing investment and development plans applied by the state in their territories. Based on intercultural dialogue, the inclusion is to lead to an agreement on the principle of specific administrative and legislative measures. Adopting an indigenous perspective on issues crucial for its existence is an expression of the state's recognition of its right to self-determination. The draft of the new Law was received positively by Peruvian indigenous organizations, which saw it as an essential step forward in the process of implementing the provisions of ILO Convention no. 169. However, this optimism faded when *Ley de Consulta Previa* was published. Its final version contained articles that were not consulted or not agreed with local indigenous organizations. Because of the next wave of protests, a special commission was appointed to which representatives of 6 indigenous organizations were invited. Despite the lack of unanimity and the resignation of some indigenous representatives, some amendments and regulations were introduced to improve the document. On April 3, 2012, *Regulation of the Norms of Prior Consultation Law* was published and entered into force the next day, under *Decreto Supremo No. 001-2012-MC* (Reglamento de la Ley del derecho a la consulta previa, 2012; Ministerio de Cultura, 2012; see also: Schilling-Vacaflor, Flemmer, 2013, pp. 11–18; Flemmer, 2019).

The implementation process of the *Ley de Consulta Previa* from the beginning has been conducted in a highly polarised atmosphere. On the one hand, indigenous leaders demanded the broadest possible definition of the beneficiaries of the introduced Law and the inclusion of as many indigenous communities as possible in the decision-making processes carried out con-

cerning the territories they occupy. However, it quickly became apparent that ethnic policies based on intercultural dialogue, respect for the right to self-determination, and indigenous peoples' autonomy pose a threat to the interests of the influential mining industry. On the other side, representatives of the energy and mining sectors presented negative attitudes toward the new Act. First of all, they questioned the right to be consulted among peasant communities (*comunidades campesinas*) in the Andean *sierra* area, claiming that the inhabitants of this region did not meet the "indigenous criteria" (Paucar Albino, 2014b; Paucar Albino, 2014c). Roque Benavides, CEO of Compañía de Minas Buenaventura S.A.A. (the main shareholder of the mining company Yanacocha, intended to implement the Conga mega-project in the Cajamarca province) during the mining convention in Arequipa in 2011 stated: "There are no indigenous communities in the highlands of Peru. There are peasant communities, which are a product of the era of General Velasco"[2]. The company's finance director, Carlos Gálvez, in an interview with the TV program "Semana Económica", expressed his concern that the provisions of the new law would lead to a situation in which "anyone who clogs a feather will have the right to be consulted". This situation would paralyze any investments and industrial development and, as a result, threaten the state's interest (Paucar Albino, 2014a; Paucar Albino, 2014b). There were also those – among them the first lady, Nadine Heredia – who believed that the access to information technology deprived members of rural communities (*comuneros*) of indigeneity: if they were using cell phones or computers, they could no longer be called indigenous[3]. Peruvian President Ollanta Humala Tasso himself, in a TV interview on April 28, 2013, questioned the status of Quechua and Aymara peasant communities *(comunidades campesinas)* as indigenous peoples, calling them *comunidades agrarias* – "the product of Agrarian Reform" of 1969–1979. He also questioned the indigenous status of the Amazonian *comunidades nativas*, who for a long time have succumbed to the *mestizaje* processes caused by migration and industrialization. According to the president, the only indigenous peoples in Peru were tribes in the phase of initial contact or the so-called *no contactados* (Ávila, 2013; LaMula.TV, 2013)

The *Reglamento de la Ley de Consulta Previa* took into account the development of the Official Database of Indigenous Peoples of Peru (*Base de Datos Oficial de los Pueblos Indígenas del Perú*), which was to be publicly available and was to identify indigenous peoples eligible for the consultation procedures. However, the publication and release of the Database were deliberately

[2] "Peru is very diverse. In the highlands of Peru there are no indigenous communities. What exists are peasant communities. I was criticized for saying that they had been invented by General Velasco, but certainly, they were recognized by him. They are different communities than the Ashaninka communities of the jungle" (see: Diez, 2013; also Remy, 2013, p. 7).

[3] In the popular political program "Hildebrandt en sus trece", the first lady, Nadine Heredia, was quoted as asking the then Deputy Minister for Intercultural Affairs, Paulo Vilca, "You have to change. A native who has a cell phone is no longer a native" (Paucar Albino, 2014c).

delayed, as there was fear in government circles that it would trigger an avalanche of claims from indigenous communities living in the country, who would demand special rights and paralyze any investments. The then Minister of Culture Luis Peirano stated:

No Database will be published because it can create confusion, unnecessary expectations, and problems of all kinds. We have a Database, but the Ministry [of Culture – MK] policy is to work from requests. When a community is somehow affected by an investment project, it can ask for the right to be recognized. (see: Maldonado Chavarri, 2013)

In the interview mentioned above, President Ollanta Humala agreed with that decision, explaining that if the Database were to be made public, "the next day, half of Peru would declare themselves indigenous" (LaMula.TV, 2013). Therefore, both the *Ley de Consulta Previa* and the *Reglamento* sparked lively discussions and a nationwide debate. The right to prior consultation became a part of the "political game" played by both the state and the indigenous leaders. The problem of disagreement and friction between public institutions and representatives of indigenous organizations not only concerned the final version of the documents so crucial for Peruvian ethnic politics. A fundamental to the entire consultation procedure is recognizing the authority and autonomy of the parties involved and the right of a given group to be consulted. Therefore the issue of the ethnic identity of Peruvians became once again at the centre of the public debate: to whom should the prior consultation procedure be applied? Who is entitled to invoke the new law, and who is not? How to define the beneficiaries of both the ILO Convention no. 169 and the Law of 2011? Those questions were not a novelty in Peruvian ethnopolitics and have already repeatedly echoed in the political debate of the Republic for several centuries.

Who is indigenous? Who has authority? Some comments about the terms, definitions, and official recognition of indigenous communities from a historical perspective

The most commonly used terms for indigenous communities in Peru and which have been cited in the debate on prior consultation procedures are *pueblos de indios*, *comunidades indígenas*, *pueblos originarios*, *comunidades nativas* and *comunidades campesinas*. Each of them was associated with a specific legal status of *indígenas* and was announced in a specific political and social context.

Looking for the sources of the official nomenclature, we should go back to the *New Laws of India* from 1542, based on which the colonial society of the Viceroyalty of Peru was divided into two parts, called republics: *república de los Españoles* and *república de los indios*. The indigenous peoples were dis-

placed by force to the *pueblos de indios*, secular reductions introduced in the Viceroyalty during the reforms of Viceroy Francisco de Toledo (the so-called *reducciones toledanas*, 1569–1581; see: Malaga Medina, 1974). In return, their collective rights and production methods were recognized as a tributary duty, their customs and traditions were respected (if they did not threaten the Catholic religion), and the authority of their leaders, called *caciques*, was officially recognized. According to Maria Isabel Remy from the Institute of Peruvian Studies in Lima, colonial legislation was to be an extension of the *status quo* of the pre-Columbian period: the inhabitants of the *pueblos de indios*, who previously operated in the Inca state under the control of a solid central authority from Cusco, became then the subjects and tributaries of the Spanish crown, which in return valued their land rights and local jurisdiction. The term *indios* referred to the inhabitants of the *sierra*, while those who lived on the border of the known and colonized world, i.e. in the Amazon, were perceived as savages (*salvajes* and *bárbaros*) (Remy, 2013, pp. 7–8; Kania, 2016, pp. 12–13; Contreras & Cueto, 2018, pp. 32–34).

A turning point for the status of indigenous peoples was the events of the 1820s and the independence of the Republic of Peru. By *Decreto Supremo* of August 27, 1821, General José de San Martín not only abolished indigenous tribute and guaranteed equality before the law for all Peruvian citizens but also cancelled the earlier colonial terminology and declared *indios* as Peruvians: "Aborigines shall not be called *indios* or *naturales*: they are sons and citizens of Peru and should be known by the name of *Peruanos*" (Salmón, 2012, pp. 83–91). A few years later, on July 4, 1825, a similar provision was made in a decree issued by Simón Bolivar in Cusco. It affirmed equal rights for all citizens of the Republic, releasing the *indios* from servant dependence and establishing that "henceforth they will be called Peruvians" (Gaceta del Gobierno de Lima Independiente, 1950, p. 67; see also: Contreras & Cueto, 2018, pp. 86–88). Those authoritatively imposed administrative measures were supposed to lead to the integration of all Peruvian people and eliminate any colonial nomenclature. However, there was not only the question of terms or designation. It was the socio-political status of indigenous peoples that was regulated by new legislation expressing the concept of *indigenismo republicano* – the assimilation or marginalization of indigenous communities, negating their right to cultural identity, the autonomy of jurisdiction, and the authority of their leaders. Except for the first Constitution (1822), throughout the 19th century, Republican constitutions expressed the idea of constructing a united, culturally homogeneous nation of "all Peruvians". Nonetheless, in Peruvian legislation, indigenous communities from the *sierra* were called "semi-civilized", and indigenous groups from the Amazonian *selva* were referred to as "savage tribes" (1832), "un-civilized natives" (1837), "barbarians", and "reduced Indians" (1847) (Flindell Klarén, 2000, pp. 134–146; Kania, 2016, p. 13).

Attempts to systematically define the term "indigenous" based on clearly defined criteria appeared in the Peruvian public debate in the first half of

the 20th century. Although indigenous peoples constituted more than half of Peru's population (about 51.7%, see: Millones, 1973), they occupied the lowest social position and remained on the principal political and economic life margins. In the course of work on codifying their legal and political status, Erasmus P.S. Roca proposed a definition of *indios* based on their socio-political position and, above all, their constant economic inferiority. *Indios* were those who: "have been dependent on the owners of *haciendas* or *fincas*, working in the fields, animal husbandry or small workshops for little wages as *yanaconas*, *pongos*, *mitayos*, *tápacos*" (Roca, 1935, pp. 79–80). The ethnic and economic factors were also referred to by Atilio Sivirichi, the author of the classic publication *El derecho indígena peruano. Proyecto de Código Indigena* (1946). He pointed out that the term *indio* can be applied to the descendants of indigenous peoples, who were in social, political, and economic inferiority. They remained on the margins of political life and outside the democratic legal system of the state to such an extent that they were not subject to the dictates of general legislation. They were inhabitants of the country "who present a degree of cultural inferiority, conserving uses and customs in conflict with civilized life, and to those who, having the conditions mentioned above, and to avoid confusion, are registered in the indigenous record (*Registro de Indígenas*)" (Sivirichi, 1946, p. 29; see also Nalewajko, 1995). Luís E. Valcárcel, one of the leading representatives of the Peruvian *indigenismo*, was even more radical in his definition of *indios*: "Millions of Indians are proletarian and primitive, illiterate and ignorant of the language of the state, peasants or ranchers or both at the same time, pseudo-Catholics, minimal consumers, scattered in the immense extension of Peru" (Valcárcel, 1945, p. 99). The opinions of external observers did not differ much from those presented by the Peruvian circles. Moisés Poblete Troncoso, in his report for the International Labor Organization in 1938, emphasized the existence of permanent features of the indigenous part of the Peruvian population: their preserved cultural identity, illiteracy, or primary education and marginalization in social life (Poblete Troncoso, 1938, p. 11).

Along with the development of the *indigenismo* movement, interest was also drawn to the institution of indigenous communities – *comunidades indígenas*. Some Peruvian indigenists derived their organization from pre-Columbian times, pointing as their source to *Ayllu* social organization, typical for the Andean region. The word *ayllu* in Quechua and Aymara has a similar meaning and means genealogy, lineage, or kinship. This meaning indicates the nature of relationships between members of each *Ayllu*, which were based on kinship (Valcárcel, 1925, p. 165; Nalewajko, 1995, p. 107). The land was cultivated together, and the natural resources belonging to the community were used in common. The Peruvian politician and sociologist Hildebrando Castro Pozo, who conducted studies on the institution of communities, deriving them from pre-Columbian *Ayllu,* divided them into agricultural communities, agricultural-ranching communities, pasture and water communities, and

usufruct communities. According to him, fundamental for the existence and identification of those communities was common ownership of the land and joint work of their members, as well as the strong bonds of kinship nurtured by generations:

> *Each community preserves the memories of its unique descendants, that the ancestors or "grandparents" [abuelos], as the Indians say, previously lived on the top of those hills, where they still preserve and can admire the ruins of the buildings that served them as shelter. (...), and the supreme Malquis still survive, divine founders of the first family from which those that today constitute the ayllu are derived.* (Castro Pozo, 1924, pp. 16–19)

Other authors, however, were inclined to associate the origins of *comunidades indígenas* with the aforementioned colonial system of *pueblos de indios*. For the management of the *pueblos*, the functions of local leaders were established, who represented them to the colonial authorities. After the pacification of the famous uprising of Tupac Amaru II (the 1780s), the post of *cacique* was abolished, and a new one was established: *alcalde de vara* (*varayoc* – the one who holds the symbol of power – *vara*), a leader who was elected every year from *pueblo* members, and who was responsible for the internal administration of the community. It was then that the name *comunidad* appeared. It was introduced in the resemblance of social units with a similar function in the Iberian Peninsula (*comuna ibérica*) (Lynch, 1979, p. 1; Flindell Klarén, 2000, pp. 44–53, Urrutia Ceruti, Remy, Burneo, 2019, pp. 14–16). *Pueblos* (*comunidades*) *de indios* functioned throughout the colonial period; then, in the 19th century, in terms of the assimilation policy, their autonomy was eliminated, the rights to community land were taken away, and the collective rights previously guaranteed were abolished. Despite the legal absence and assimilation processes, the indigenous communities survived, though transformed. Despite attempts to destroy communal land ownership and abolish the traditional functions of their leaders, they retained their authority of *varayocs*, *alcaldes*, and *ilakatas* even when they were not officially recognized at the state legislature level. They functioned as informal assistants to the local political and judiciary administration. A key and constitutive role in making decisions was the role of assemblies (*asambleas comunales*), in which all adult members of the group participated, sometimes excluding married or single women.

The pro-Indian policy of Augusto B. Leguía's presidency (*Oncenio*, 1919–1930) influenced both the perception of indigenous people in Peru (for example, the state-promoted policy of their gradual integration through education) and the official recognition of the existence of *comunidades indígenas* and their collective rights. Official recognition was confirmed in article 58 of Peru's Constitution of 1920: "The State will protect the indigenous race and

will dictate special laws for its development and culture in harmony with its needs. The Nation recognizes the legal existence of indigenous communities, and the Law declares the rights that correspond to them" (Constitución para la República del Perú, 1920). It was a new chapter in relations between the state and the indigenous sector of the national society. Based on the *Resolución Suprema* of August 28, 1925, the Indigenous Affairs Section of the Ministry of Development and Public Works was established. The process of registration at the *Registro Oficial de las Comunidades Indígenas* also started. The inscription process began in 1926; by March 1935, 481 indigenous communities had been written down. Some changes also took place in the internal organization of communities. According to Law no. 479 of August 22, 1921, the position of *alcalde de vara* was abolished, and a completely new leader appeared – a *personero de comunidad*. Since he was an intermediary between the community and the state, he had to be literate and Spanish-speaking. He represented the interests of his community towards the central administration, initiating and participating in negotiations relating to the recognition of land rights, social-help obligations, organization of education, and settlement of financial duties. The position of *personero* was performed *ad honorem*, and the duration of the *cargo* lasted one year (Castro Pozo, 1924, pp. 34-37; Poblete Troncoso, 1938, p. 47; Dobyns, 1970, p. 35).

The provisions of the 1920 Constitution were also included in the 1933 Constitution, which confirmed the existence and legal status of indigenous communities (Article 207) and guaranteed the integrity and inviolability of their communal property and rights (Article 208) (Constitución política del Perú, 1933). By the end of the Manuel Prado Ugarteche regime (1962), the number of officially recognized indigenous communities had exceeded 1569. According to the General Directorate of Indigenous Affairs, until 1961, they had 1,367,093 members, which constituted about 10% of the then population of Peru (see Dobyns, 1970, pp. 11–13; Nalewajko, 1995, pp. 107–120; Urrutia Ceruti, Remy, Burneo, 2019, pp. 20–21). However, it should be noted that the term *comunidades indígenas* used in both constitutions referred only to the indigenous peoples who lived on the coast and in the *sierra* region but did not refer to the peoples of the Amazonian forest. Furthermore, in a new Penal Code (1924) Peruvian population was divided into four categories: civilized peoples (*Creoles* and *Mestizos* from the coast); aboriginal peoples (*indígenas*); semi-civilized aboriginal peoples (*semicivilizados*); and wild peoples (*salvajes*). Inhabitants of the *sierra* were put into the category of "semi-civilized", degraded due to abuse, hard work, and alcohol. At the same time, the indigenous of the Amazonian region were briefly defined as a population incapable of self-determination in both legal and economic terms (Penal Code, 1924, Art. 44 and 45; see Yrigoyen Fajardo, 2002, p. 160; Kania, 2016, p. 14).

Comunidades campesinas and *comunidades nativas* – ethnopolitical manipulations

The emergence of new terminology for the indigenous sector of Peruvian society was related to the inclusive social and economic reforms carried out during the government of General Juan Velasco Alvarado (1968–1975). The crucial to our considerations is the agrarian reform initiated by the *Ley de Reforma Agraria,* Act no. 17716 of June 24, 1969. The date of the bill's announcement was not chosen by chance. Since the time of President Augusto B. Leguía, June 24 has been celebrated in Peru as *Día del Indio*. Now, the celebrations were to have a new name, corresponding to the direction of reforms introduced by Velasco Alvarado and the process of recovery of indigenous communities – *Día del Campesino*. The term *indio / indígena*, perceived as a pejorative, racist, symbolizing the status of inferiority, deprivation of rights, and a state of marginalization, was replaced with the new, neutral term *campesino* not burdened with colonial discriminatory stigma. At the same time, the concept of *comunidades campesinas* was introduced into the official legislative terminology, replacing the previously used *comunidades indígenas*. Interestingly, even though the new terminology was imposed top-down, administratively, and without any consultation, it was quickly adopted by the members of the communities themselves. Nobody wanted to be called *indio*. Terminological manipulation was to eliminate previous discrimination and inequalities, shaping the belief in a Mestizo Peruvian society where all citizens were supposed to be equal and enjoy equal rights (Meetzen, 2007, pp. 139–142; Remy, 2013, pp. 11–12; see also: Rousseau, 2012; CHIRIPAQ, 2015).

Between 1970 and 1980, the number of communities officially recognized by the state increased significantly. In *El Estatuto especial de comunidades campesinas*, promulgated in 1970, and its successor *Ley General de comunidades campesinas* Act of 1987, *comunidades campesinas* were defined as:

> *(…) organizations with legal existence and legal personality, made up of families that inhabit and control certain territories, linked by ancestral, social, economic and cultural ties, expressed in communal ownership of the land, communal work, mutual aid, democratic government and the development of multisectoral activities.* (Ley General de comunidades campesinas 1987, Art. 2)

From a contemporary perspective, we can say that these communities were the groups that had the most significant contact with the urban world and whose members participated in the processes of mass migration and industrialization, characteristic of Peru in the second half of the 20th century (Salmón, 2012, pp. 84–85, see also: Matos Mar, 1990; Flindell Klarén, 2000, pp. 341–343; Barié, 2003, pp. 486–488).

The term *comunidades campesinas* referred only to the inhabitants of the *sierra* and *costa* (primarily the Quechua and Aymara populations). However, it did not include the tribes inhabiting the Amazon area, for whom the term *tribus salvajes* was still used. Due to the intensive processes of migration and colonization of the north-eastern territories of Peru (the emergence of the so-called *colonos* in the Loreto Department), it became necessary to regulate the legal aspects of land ownership and grant legal status to the tribes living there. In 1974, by *Decreto Supremo* no. 20653 the *Ley de Comunidades Nativas y de Promoción Agropecuaria de las regiones de Selva y Ceja de Selva* was established. This Law became the driving force for the legislative and structural changes in the Amazonian areas of Peru. The new Law defined *comunidades nativas* as kinship groups that use the same language, cultivate common cultural traditions, and are related to a specific territory:

> *(…) they originate in the tribal groups of La Selva and Ceja de Selva and are made up of groups of families linked by the following main elements: language or dialect, cultural and social characteristics, possession and common and permanent usufruct of the same territory with the nucleated or dispersed settlement.* (Ley de Comunidades Nativas, 1974, Art. 7)

In the 1970s, a new constitution was also being worked on. Chapter VIII of the document both confirmed the rights acquired by *comunidades campesinas* and *comunidades nativas* in earlier acts, emphasizing their legal personality, autonomy, and community right to land, and defined the type of their organization:

> *The Peasant and Native Communities have legal existence and legal status. They are autonomous in their organization, community work and use of the land, and economic and administrative matters within the framework established by Law. The State respects and protects the traditions of the Peasant and Native Communities. It promotes the cultural improvement of its members.* (Constitución para la República del Perú 1979, Cap. VIII, Art. 161)

The terms *comunidades campesinas* and *comunidades nativas* are also used in the Peruvian Constitution of 1993, which is still in force today; thus, the term *comunidades indígenas* has disappeared permanently from the official legislative nomenclature:

> *The Peasant and Native Communities have legal existence and are legal persons. They are autonomous in their organization, in collective work, and the use and free disposal of their lands and economic and administrative matters, within the framework established by Law (...). The State respects the cultural identity of the Peasant and Native Communities.* (Constitución Política de la República del Perú, 1993, Art. 89; see also: Barié, 2003, pp. 479, 490–494)

Important for considerations on the right to the prior consultation procedure are also the provisions relating to the authority and jurisdiction of the leaders of *comunidades campesinas* and *comunidades nativas*. They were recognized following common law and within the territories that belong to the given community, provided that the application of the law will not conflict with fundamental human rights (Constitución Política de la República del Perú, 1993, Cap. VIII, Art. 149).

Whom to consult? – contemporary formal bases of indigeneity

The need to reach an agreement on the definition of indigenous peoples appeared when international documents relating to their rights and regulating relations between indigenous peoples and the state were drafted; that is, when they became particularly important in the political and economic context. However, this definition cannot be found in the text of the ILO Convention no. 169, even though it is dedicated to the indigenous population of national societies. The document only provides guidance on what criteria should be considered in determining to whom the provisions of the Convention can be applied (including the prior consultation procedure). The final definition of indigenous peoples is left to the states that have ratified the Convention.

According to the ILO Convention no. 169, which is the normative reference for the Peruvian *Ley de Consulta Previa*, indigenous peoples are those groups that lived in a given area before conquest or colonization (historical and territorial criteria). Their members maintained their own social, economic, cultural, and political institutions during the formation of new states (the criterion of being different from the rest of society). Apart from the objective criteria, the emphasis was also placed on the subjective criterion, i.e. self-identification, related to the right to self-determination and autonomy (ILO Convention no. 169, Art. 1). The criteria included in the Convention follow the so-called "working definition of indigenous peoples", as proposed by the UN Special Rapporteur José Martinéz Cobo in his *Study of Discrimination against Indigenous Populations* in 1986 (Martínez Cobo, 1986). According to the author, the fundamental identification criterion is self-identification, while the remaining criteria (territorial, historical, and the criterion of dissimilarity) are indicative or supplementary.

As mentioned before, the problem of definitions, appropriate criteria, and adequate terminology applied to indigenous peoples became a primary issue in the debate in Peru over the implementation of the right to prior consultation. The opponents argued that the terms *comunidades campesinas* and *comunidades nativas* present in the official Peruvian nomenclature are not the same as the term "indigenous peoples" (*pueblos indígenas*) contained in the ILO

Convention. It is worth mentioning that the variety of terms applied to indigenous people living in the territory of Peru was criticized by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) itself. In its report from 2009, the Committee pointed out that the terms and criteria used in the Peruvian Constitution and laws did not comply with the ILO Convention no. 169 ratified by Peru, so it was not clear to whom the Convention should be applied. It was also emphasized that the terms "native communities", "rural communities", and "originated peoples" were used inconsistently, sometimes to mean similar or different groups, depending on the laws in question. It was also noted that while the application of the prior consultation procedure was perceived positively towards *comunidades nativas* in the Amazonian region, its implementation in rural communities of *sierra* and *costa* territories constituted a severe problem. Meanwhile, according to ILO experts, if these communities met the criteria set out in Article 1 (1) of Convention no. 169, they should enjoy the rights enshrined in it, regardless of what they were called. The Committee suggested that:

> *The Government [in consultation with the representative institutions of the indigenous peoples – MK] might develop harmonized criteria for the populations which the Convention may cover since the various definitions and terms used may give rise to confusion between rural, indigenous and native populations and those living in the highlands, the forest and cleared land.* (CEACR, 2009, pp. 686–687)

Therefore, the enactment of *Ley de Consulta Previa* in 2011 made it necessary to rethink the problem of identification and appropriate terminology for the indigenous sector of Peruvian society. The provision of the ILO Convention no. 169 was adopted as a point of reference, stating that only those groups that meet the criteria indicated therein and whose collective rights have been threatened by state activity have the right to the prior consultation procedure (Ministerio de Cultura, 2014, p. 21). In Article 5 "Subjects of the right to consultation," the new law states that: "the holders of the right to the consultation are the indigenous or native peoples whose collective rights may be directly affected by a legislative or administrative measure". As for the participation of indigenous peoples in the consultation procedures, Article 6 states that they participate "through their representative institutions and organizations, chosen according to their traditional uses and customs". In Article 7 "Criteria for identifying indigenous or native peoples", the Prior Consultation Law specifies the elements that determine those groups. As "objective criteria", it is indicated: "a) Direct descendants of the original populations of the national territory; b) Lifestyles and spiritual and historical links with the territory they traditionally use or occupy; c) Social institutions and own customs; d) Different cultural patterns and way of life". The "subjective criterion" is related to the consciousness of the collective group of having an indigenous or original identity, that is, self-identification. At least,

Article 10 indicates that the identification of the indigenous or native peoples to be consulted must be carried out by the state entities promoting the legislative or administrative measure based on the content of the proposed measure, the degree of a direct relationship with the indigenous people and the territorial of their scope (Ley de Consulta Previa 2011, Arts. 5, 6, 7, 10).

As the implementation of prior consultation procedures aroused much controversy and was criticized both by indigenous communities and the mining lobby, the provisions of the 2011 Law were clarified and supplemented in the document *Reglamento de la Ley de Consulta Previa*. In the following articles, first and foremost, the recipients of the consultation and the institutions that represent indigenous peoples were precisely identified:

> ***Art. 3k: Indigenous or Original People***.
>
> *People that descend from populations that inhabited the country at the time of colonization and that, whatever their legal situation, retain all their own social, economic, cultural and political institutions or part of them; and that, at the same time, recognize themselves as such.*
>
> *The criteria established in Article 7 of the Ley de Consulta Previa must be interpreted within the framework stated in Article 1(1) of ILO Convention 169. According to the given criteria, the population that lives organized in peasant and native communities may be identified as indigenous peoples or part of them. The names and terms used to designate indigenous peoples do not alter their nature or collective rights.*
>
> ***Art. 3m. Representative Institution or Organization of the Indigenous Peoples***.
>
> *According to the indigenous peoples' uses, customs, own norms, and decisions, an institution or organization constitutes the mechanism of expression of their collective will. Its recognition is governed by the special regulations of the competent authorities, depending on the type of organization and its scope. Therefore, the term "representative organization" will be used in the Regulations.*
>
> ***Art. 7. Subjects of the right to consultation***
>
> *7.1 The holders of the right to the consultation are the indigenous peoples whose collective rights may be directly affected by a legislative or administrative measure.*
>
> *7.2 The holders of the right to the consultation are the indigenous people or peoples of the geographical area in which said the measure would be executed or directly affected by it. The consultation is carried out through their representative organizations. The indigenous peoples will appoint their representatives according to their own uses, customs and norms.* (Reglamento de la Ley del Derecho a la Consulta Previa 2012, Art. 3k, 3m, 7.1, 7.2; see also discussion: Salmón, 2012, pp. 39, 107–111; Schilling-Vacaflor, Flemmer, 2013, pp. 16–17; Ministerio de Cultura, 2014, pp. 21–23; Flemmer, 2019, pp. 108–109).

Considering the proposed definition, using both objective and subjective identification criteria, we must not forget, however, that these are not and cannot be static norms or indicators. They change over time and are subject to many social, political, and cultural factors that affect the way of defining the communities and the terminology used formally by the state, and the process of self-identification of indigenous peoples. This is a natural phenomenon of social transformations that we observe not only in highly polarised Peruvian society but on a global scale. Tensions between public institutions that introduce a predetermined nomenclature and representatives of indigenous peoples who are subject to authoritarian definitions for administrative purposes may still recur from time to time and need revision of settled terms.

In the "Final Complementary Provisions", the Prior Consultation Law establishes the Vice Ministry of Interculturality (VMI) of the Peruvian Ministry of Culture as the technical body of the Executive Power specializing in indigenous matters (Ley de Consulta Previa, 2011, art. 20). Among the functions entrusted to the Deputy Ministry, the preparation and updating of a Database on indigenous peoples were distinguished, along with an indication of their representative institutions and organizations. The VMI Official *Database of Indigenous Peoples* is still a reference tool that allows access to information on indigenous or native peoples identified by the state. It should be noted that the Database is declarative and only referential. Given its nature, which is different from a registry, it does not constitute rights. Its primary sources of information are the National Institute of Statistics and Informatics (INEI), the Informal Property Formalization Agency (COFOPRI), and data produced by the Regional Agrarian Directorates (Ministerio de Cultura, 2014). Concerning the identification of indigenous or native peoples, it is worth mentioning that the Vice Ministry of Interculturality approved a Directive 001-2014-VMI/MC entitled *Guidelines that establish instruments for the collection of social information and sets criteria for its application within the framework of the identification of indigenous or native peoples*. Based on this standard, the VMI has developed the *Methodological Guide for the Identification Stage of Indigenous or Native Peoples* (Ministerio de Cultura, 2014).

The original plan of the deputy Minister for Interculturalism, Ivan Lanegr, was to publish the *Database of Indigenous Peoples* shortly after the government announced the *Regulating Norms* (April 2012). However, the publication of the census (and only partially) did not begin until October 2013 (Ministerio de Cultura, 2013). Identifying and registering indigenous groups eligible for the prior consultation procedure was relatively quick in the Amazon region. *Comunidades nativas* were considered assimilated to a much lesser extent than the other indigenous groups in the country. It allowed (and still allows) them to maintain their dissimilarity from the dominant society, so necessary from the point of view of the *Ley de Consulta Previa* criteria. They are also homogeneous groups in terms of ethnic self-identification, the indigenous nature of which has not been questioned by public institutions or the mining sector. In the case of

the *sierra* or *costa* area communities, living on the economically attractive territories and constituting the axis of many environmental and social conflicts, the identification procedure was (and still is) much more difficult. For decades they were subject to assimilation processes, and their identity for several generations has been expressed through belonging to *comunidad campesina* – a rural, peasant community. It is worth mentioning that they called and recognized themselves as *comuneros*, not *indígenas,* because the term *indio* / *indígena* has been associated with discrimination, marginalization, and inferiority for many years. This puts the most significant obstacles in identifying communities Quechua or Aymara as indigenous peoples eligible for the prior consultation procedures. As late as April 2015, the deputy minister of interculturalism pointed out that none of the Quechua-speaking peasant communities was considered, even though they constituted more than half of the communities that should have been included in the *Database of Indigenous Peoples* prepared by the VMI. Until then, not a single consultation procedure had been completed (Salmon, 2012; Lanegra, 2015; see more: Huber, 2021, pp. 118–120).

The National Census carried out in 2017 became extremely important for determining the ethnic structure of the Peruvian state and, in a way, verifying the functionality of the subjective criterion of self-identification. For the first time in Peru's history, next to the question about the native language or the language learned in childhood, the question of self-perception or own assessment of ethnic origins was included. The question about ethnic self-identification made the results of the census highly anticipated. It was interpreted in line with the actual recognition of the multi-ethnicity of the Peruvian state and a departure from the ethnopolitics implemented so far, intentionally diminishing the importance and number of the indigenous population in the structure of Peruvian society. According to the Census information and the information gathered at the *Database of Indigenous Peoples*, Peru is home to 55 indigenous peoples (*pueblos indígenas u originarios*) organized in *comunidades campesinas* or *comunidades nativas*: 4 of them come from the Andes area, 51 from the Amazon territories. 13 tribes are in a phase of initial contact or isolation (INEI, 2018, pp. 214–215).

By March 2022, 69 prior consultation processes had been completed, mainly in the mining sector and protected areas, and seven more procedures were being implemented.

Conclusions

The prior consultation law can be interpreted both as a "product" of the mobilization of indigenous peoples, who demand recognition of their political status and respect for their collective rights, and as a result of the evolution of international law, which places particular emphasis on the right to self-determination and autonomy. Respecting these rights means that the state should

not make any decisions and initiate any actions without taking into account the voice of indigenous peoples, thus ensuring that they regain and maintain control over their lives, both in the present and in the context of future development, on an equal footing with other members of the national society (Kania, 2021, pp. 164–165).

Ethnopolitics implemented in the territory of Peru almost from the very beginning was a real challenge for the governmental spheres. It was shaped by variables related to economic development, commercial prosperity, global changes in human rights, and reforms related to the nature and functions of the state. The state's attitude towards indigenous peoples was marked by protectionism, paternalism, policies of exploitation or marginalization, indifference, or forced assimilation. Today, despite the ratification of many documents guaranteeing indigenous peoples' rights, their ethnic and cultural identity is still denied, or criteria for their identification are imposed in line with the top-down, arbitrary vision of the state – a phenomenon that we can define as "discursive colonialism" (see discussion: Hernández Castillo, Cruz Rueda, 2021, pp. 408–415). The struggle of indigenous peoples for their rights is therefore also a fight for the right to define their own identity or, as Marisol de la Cadena and Orin Starn named it, an expression of "the tense dynamics between being classified by others and attempts to define oneself, from inside (...)" (De la Cadena & Starn, 2010, p. 11; see: Huber, 2021, pp. 133–134; also CHIRAPAQ, 2015).

In the end, we have to pass the voice to the indigenous peoples. In response to the attempts to discredit or even eliminate the presence of indigenous communities in Peru, Peruvian indigenous organizations announced the Pact of Unity of the National Indigenous Organizations. It negated various terminology introduced into Peruvian legislation, which masked the multi-ethnic nature of the Peruvian nation and limited access to globally recognized rights. The right to self-identification and the will to preserve one's ethnic and cultural identity are considered the most important criteria for identifying indigenous peoples:

> *WE REAFFIRM that, in Peru, all the peasant communities, native communities, rondas campesinas and other organizations descended from native peoples are indigenous peoples. Therefore, we have the right to self-identification and to the exercise, respect and application of all the rights of indigenous or originated peoples.* (Pacto de Unidad de las Organizaciones Nacionales Indígenas, 2019, art. 2)

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