

Governance and the Decentralization Process in Peru

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In Peru the process of decentralization, although its final goal is to increase governance capacity, could in itself present a problem for governance in the extractive industries and developments on Indigenous territories. The Ministry of Energy and Mines of the Republic of Peru is presently undergoing a process of decentralization, which is changing the role of the Ministry and its relation to communities and the private sector. The role that governance plays in this process is as much an issue as the end results of decentralization. As stated in Article 4 of the *Ley de Bases de la Descentralización*, the policy of decentralization is permanent, dynamic, irreversible, and democratic. In other words, it is a continuous process that is based on a participatory relationship between the State and society. Implied in this process are constitutional and legislative changes that will have an impact on Indigenous communities in Peru. Under the ILO Convention 169, consultation of Indigenous peoples is required when such impacts are foreseen. In this context, governance becomes of even greater significance considering the timing of the decentralization process and the growth in the activities of the extractive industries on or near Indigenous territories.

The general concept of governance, as it applies in the case of a State, does not vary much from the more specific concept of Indigenous governance in terms of self-determination. The issue of self-determination is as relevant to a State – reflected in the concept of sovereignty – as it is to the individuals or groups within the State. Stuart Mills, in his essay *On Liberty*, discusses this very theme of where the self-determination of the individual and the sovereignty of the State interfere with one another and under what circumstances should the sovereignty of one take precedence over the self-determination of the other. Governance implies an exchange between actors within a system in order to define these limits and the rights and responsibilities that the process of exchange implies. In this context, the governance sought by individuals or groups within the State has as much to do with the issue of self-determination as does the governance that is reflected in the sovereignty of the State.

According to Mill's second maxim an individual is accountable to others when their actions are "prejudicial to the interests of others". Under law a company is considered a legal person and would therefore seem to fall under this maxim. It should be pointed out that in this case, prejudicial is defined as causing the impairment to the validity or force of a right or claim.¹ However, Mill also points out how exception should be made to the activity of free trade considering it as a social activity. Regardless, Mill does mention that opposition of interests between individuals, in relation to economic activities, arise when bad social institutions are in place to regulate these activities and that there is cause to interfere when means of success have been employed that make use of force.² Many of the Articles in the ILO Convention 169 make use of similar arguments in order to provide legitimacy to the rights and claims of Indigenous peoples. The convention seeks to protect these rights and claims against the unjust use of force in economic and social (political) activities by requiring the use of consultation, as outlined in Article 6 of the Convention. Some believe that the convention falls short of providing protection against the use of force because the convention does not require the consent of Indigenous peoples, which is seen as weakening the convention's

¹ Reference to this definition can be found in *The Canadian Oxford Compact Dictionary*. 2002.

² John Stuart Mill, *On Liberty*. 1859.

ability to provide legitimacy to the very rights and claims of the Indigenous peoples that it seeks to define. This is precisely where the clash between the self-determination of the State comes into conflict with the governance of the State in relation to a specific group and the self-determination of that group.

Governance requires a State presence at the local level that is efficient and representative. It is in the exchange between actors at the regional and local levels that the governance capacity of a State is put to the test. In order to have greater efficiency in exchanges between actors at the local levels, representation must be clearly defined and generally accepted. In the case of Peru, and in the context of the exchange between the State and Indigenous communities a clearly and generally accepted representation does not always exist and continues to be a weakness in the exchanges between actors at the local level and especially when such exchanges involve the private sector. Indigenous communities seeking to have their voice heard in consultation processes have had to conduct the daunting task of seeking representation at a national level when their desire for representation really lies at a local level and where the issue of self-determination is linked to the lands and territories they inhabit.

When multinational companies enter into the territories of Indigenous peoples looking for mineral deposits or oil and gas reserves they encounter communities that operate under a system that is ill-equipped in representing the latter's collective rights and interests. Having been granted the rights and licenses to develop in the territories occupied by these groups, companies find themselves negotiating with communities whose culture they do not understand and whose government lacks the resources to aid in the process of consultation. At the same time the communities involved are often unaware of their legal rights, for example rights granted through the ratification of the ILO Convention 169. During the negotiation process that follows between companies and communities false expectations are often built, which lead to conflict in later stages of development projects. When such conflicts arise, the State's presence becomes paramount in order to alleviate the confrontations, which are often the cause of losses to investment and the free flow of economic factors. To add to the confusion, the sporadic presence of the State and its negatively perceived role leads to mistrust and greater problems of governance.

The Peruvian system of governance is presently undergoing a strengthening process. A large part of this strengthening process implies the decentralization of the State. The *Ley de Bases de la Descentralización*, Law No. 27783 of the Republic of Peru outlines the process of decentralization for the country. Although the desired outcome of the decentralization process is greater governance capacity, it is important to ask whether the process of decentralization itself presents a possible risk to the State's capacity for governance over the short and medium term. This is of special relevance in the context of recent growth in the activities of the extractive industries and its possible implications for the timing of the decentralization process and the weaknesses in governance that could result. Timing is a crucial factor in governance. It is in the present context of increased economic developments on or near the territories of Indigenous peoples that a strong system of governance is required and demanded by affected communities.

The Ministry of Energy and Mines in Peru has set for itself short-term and long-term goals. In the long-term, the ministry would like to act as promoter of industry, as a means of building sustainable communities. This implies capacitating communities to take advantage of the opportunities that present themselves through mining, oil, and gas developments. The ministry would also take a

more decentralized approach to the industry relying more heavily on regional offices and focusing its efforts at the national level on promotion and capacity building. In the short-run, the ministry realizes that it will have to take a greater role as mediator in conflicts. These tasks will be increasingly complicated to coordinate through the process of decentralization as the role of the ministry and its regional offices shift and the assignment of responsibilities at each level within the ministry change.

In many cases mining, oil and gas companies are seen as the replacement for the representation of the State and are therefore viewed, by some communities, as being responsible for providing social services. Although, some companies do provide some services to communities as part of agreements that they have negotiated and signed, companies view their role to society as indirect. The payment of taxes, which are re-circulated to communities through the mining or oil and gas Canons, is the way that companies contribute to local programs. However, these Canons have been described by some as inefficient and that the benefits do not actually reach the affected communities. The Ministry of Energy and Mines is exploring the option of using public-private associations to help in the decentralization process and to provide social services to communities. A public-private association could be a good means of bringing a State presence to the local levels at a quicker pace. It is important that the decision to use public-private associations make use of consultation processes that involve Indigenous communities when it is foreseen that they will be affected. The use of public-private associations, if accompanied by appropriate mechanisms for consultation could help alleviate some of the stresses inherent in the decentralization process.

Article 6 of the ILO Convention 169 indicates that the Peruvian government must consult Indigenous communities through appropriate procedures and the participation of the organizations that represent them in the case that a legislative or administrative measure will affect the Indigenous community directly. Article 17.2 of the *Ley de Bases de la Descentralización* also refers to a need to consult all affected groups, which includes Indigenous communities, in a manner that conforms to the Constitution. The issue at hand here is who should be involved in the consultation process or, in other words, who represents the affected communities. It is important that Indigenous communities have the right to define who will represent them in these consultations. However, a problem still exists in defining who represents who. Should local and/or regional authorities represent affected Indigenous communities? Under the ILO Convention representation should come from those appointed by the Indigenous communities to represent their interests and claims. In order for the decentralization process to conform to the articles of the convention, appropriate Indigenous organizations should be included in the consultation process.

A decentralized approach that makes use of public-private associations could also provide a better framework for dealing with case-by-case issues between the private industry and Indigenous communities. Each case is different in the impacts of developments on communities. In some cases, the conflicts surround the provision of employment opportunities, whereas in other cases the conflicts are of a more fundamental nature, as in the case between priorities in the use or development of resources. The ILO Convention 169 points out in Article 7 that Indigenous communities should have the right to define their priorities in terms of their own development. This has fundamental implications for the process of decentralization when it impacts Indigenous communities. Article 8 of the convention goes on to point out that in applying legislation to Indigenous communities, their culture and customary rights should be taken into account. An

important part of these rights are the importance and identification that Indigenous peoples place on land and territories. Any process of decentralization should take these factors into account.

In the case that public-private associations are used to provide social services to Indigenous communities, the private interests should not conflict with the rights stated in the ILO Convention 169. In other words, the use of public-private associations in the process of decentralization, especially as they apply in the case of the Ministry of Energy and Mines, should not compromise the State's role of protecting the rights and claims of Indigenous communities from undue force from private interests. This requires the use of appropriate consultation processes, which include representatives that are identified by the actual communities to represent their interests at national forums. Although the decentralization process presents a possible threat to governance in a context of increased investments in the extractive industries, if the government takes the appropriate steps to involve Indigenous communities from the onset of the process many of the ill effects could be avoided. In the case of the decentralization of the Ministry of Energy and Mines, it is important that the use of public-private associations does not place undue force or pressure on governance capacity when it comes to the fragile balance between the private interests of the extractive industries and the rights and claims of Indigenous communities.

About the Author

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