Identifying rights-holders in natural resource regimes : a critical assessment of the Peruvian protected areas legislation

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Abstract

One way of improving natural resource regimes would be through a more careful and consistent identification of rights-holders, with more explicit attention for the relationship between the rights of indigenous peoples and other local non-indigenous communities. This argument is illustrated with a critical analysis of the protected areas legislation in Peru, focusing on the right to consultation prior to the establishment of a protected area, and the rights to use and sustainably manage natural resources within protected areas. On the basis of both international human rights law and empirical data, it is suggested that limiting subsistence-related rights in protected areas to indigenous peoples could endanger the enjoyment of the right to food of the local non-indigenous population. Moreover, the extension of certain human rights that are currently only or mostly granted to indigenous peoples to the broader local population affected by a protected area, should be considered.

Keywords

Protected areas – rights-holders – human rights – indigenous peoples – local communities – Peru

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1. Introduction

Natural resource regimes are complex systems, of which the attribution of rights to different categories of rights-holders constitutes an important component. Especially when such regimes are established by or codified in written documents – often within the state legal system –, the adequate identification of the individuals or groups that hold certain rights in relation to these natural resources becomes paramount, in order to avoid legal insecurity, discrimination and conflict.

This paper was prepared for a workshop which aimed to "examine and assess the nature and impact of legal and governance initiatives aimed at improving natural resource regimes in developing countries".[1] To that end, the paper analyses the Peruvian legal framework regarding protected areas, in order to answer the following questions: how does the Peruvian protected areas legislation attribute rights to various categories of rights-holders, and how is this to be evaluated? Insights from a legal-technical, empirical and human rights perspective are combined: (i) is the scope *ratione personae* of legal provisions attributing rights in relation to protected areas clear and consistent *within* the Peruvian legal framework?, (ii) how do these provisions play out on the ground, drawing on ethnographic research carried out in a protected area in the Peruvian Amazon?; and (iii) are these legal provisions and practices in line with Peru's international human rights obligations?

Focus is placed on two (bundles of) rights: the right to be consulted prior to the establishment or categorization of a protected area, and the rights of access to and use of natural resources within a protected area. This demarcation is based, firstly, on considerations of maintaining an appropriate balance between the breadth and the depth of the analysis. More importantly, however, these rights were selected because from a human rights perspective, they are representative of two possible – and opposite – scenarios regarding the relationship between national and international legal frameworks: one where the national legislation goes beyond current international human rights obligations – and could actually inspire future evolutions at the international level (right to consultation), and one where national legal provisions are problematic from a human rights perspective (certain resource access and use rights). A red thread running through the evaluation of the personal scope of these two (bundles of) rights in

[1] Workshop on the Rule of Law, Governance and Natural Resources, University of Amsterdam, 22-23 January 2015. The author thanks the participants to this workshop as well as the reviewers of this journal for their valuable comments. This research has been funded by the Interuniversity Attraction Poles Programme initiated by the Belgian Science Policy Office, more specifically the IAP "The Global Challenge of Human Rights Integration: Towards a Users' Perspective" (www.hrintegration.be).

the Peruvian protected areas legislation, concerns the distinctions in the attributions of rights between indigenous and non-indigenous populations. Based on general human rights considerations and in light of research pointing to the at times strategic and historically evolving character of indigenous self-identification, this article supports a critical re-assessment of some of these attributions in relation to resource access and use rights in protected areas in Peru.

Empirical data are drawn from fieldwork carried out in Peru in April-September 2006 and April-May 2009, complemented with shorter research stays in 2003, 2004, 2005 and 2007.[2] At the national (Lima) and regional (Iquitos, capital of the Amazonian department of Loreto) level, semi-structured interviews were held with representatives of indigenous organizations, the state, NGOs and academics, involved in or concerned with nature conservation and/or the rights of indigenous peoples and local communities. Whenever politically and logistically feasible, these interviews were taped and transcribed. In addition, ethnographic fieldwork was carried out in the Güeppí Reserved Zone (GRZ), a protected area situated in the extreme northeast of the Peruvian Amazon (see section 4).

After a more precise delimitation and justification of the paper's scope, some general reflections on indigenous peoples and local communities in relation to protected areas are provided, in order to contextualize the findings emanating from the subsequent analysis of the Peruvian legal framework. In a third section, the Peruvian context and case-study are introduced. The fourth part assesses the protected areas legislation as to its identification of rights-holders and assignation of rights, concentrating on the right to consultation prior to the establishment or categorization of an area, on the one hand, and the rights to access and use natural resources within protected areas, on the other. The conclusion recapitulates the main arguments.

2. Delineating the scope of this paper

This section presents three reflections on the scope of this contribution. First, its focus on state legislation by no means intends to deny the empirical fact that multiple, state and non-state, normative orders co-exist in a same socio-political space.[3] Natural resources are the object of many rights, claims and interests, held by a wide variety of actors. These actors invoke

[2] For more background on the methodological approach and challenges encountered, see Desmet 2011, pp 35-38; 359-363; 538-546.
[3] von Benda-Beckmann 1997, p 1.

diverse normative orders (international law, state law, customary law, religious law, local law, etc.) to substantiate their claims and try to realize their objectives. Improving natural resource management requires a thorough understanding of the complex interplay between these multiple normative orders. Although this paper focuses on the state legal framework, it is grounded in the understanding that state law is usually only one of the legal orders at play in a given context.

Second, this article deals with nature conservation regimes, as a specific instance of natural resource regimes. In recent years, much attention in scholarship is rightfully paid to the often devastating environmental and human rights consequences of, particularly large-scale, resource exploitation.[4] Attention is also warranted, however, for legal regimes on nature conservation, first of all in view of the need to act upon the accelerating rates of biodiversity loss. Moreover, conservation initiatives taken by external actors have triggered a variety of responses within local populations, ranging from outright rejection over passive acceptance to active support – depending on the specific context (see Sect. 3).

A final consideration regarding the scope of this paper concerns the inquiry of how to design 'better' or 'more effective' legal regimes for natural resources – one of the objectives of the abovementioned workshop. When looking for 'better' or 'more effective' regimes, uncertainty on the yardstick of evaluation may arise. Which standard is used to assess whether a particular natural resource regime is better than another one? How is effectiveness defined? As preventing or mitigating pollution or resource degradation? As actively contributing to the conservation of biological diversity, geodiversity and/or ecosystem services? As respecting the human rights of the people subject to or affected by that natural resource regime? Ideally, the operationalization of the concept of effectiveness in relation to natural resource regimes should include at least these three – and probably many more – components.

But then disciplinary constraints and practical impediments come in. As for one, it is impossible for a legal or social science scholar to assess whether a certain natural resource regime has achieved its objective of, for instance, maintaining biodiversity in a particular area.[5] A comprehensive assessment of the effectiveness of natural resource regimes requires

[4] See Rights and Resources Initiative and Asociación Ambiente y Sociedad 2013; Sawyer and Gomez 2012; UN General Assembly (2013) Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples, UN Doc. A/HRC/24/41.

[5] Admittedly, for doctrinal legal scholarship, it results difficult to engage with *any* change in the real world, given that such scholarship evaluates legislation and judgments on the basis of a closed system of legal reasoning, referring to authoritative texts and focusing on matters of legal coherence (see McCrudden 2006). In

the input of the exact sciences, to appropriately evaluate the impact of legal provisions or amendments on the natural environment. Such a sustained interdisciplinary enterprise requires extensive human and financial resources – and brings along its own challenges as regards cross-disciplinary understandings of concepts and methodologies. Therefore, in this paper, the analysis of the 'effectiveness' of a natural resource regime – the protected areas legislation of Peru – is confined to the component of 'respecting the human rights of the people subject to or affected by that natural resource regime'. Focus is placed on the appropriateness, from a human rights perspective, of differentiating between various categories of rights-holders. The question of the actual conservation impact of the legal regime is, out of necessity, left unanswered.

3. Indigenous peoples, local communities and protected areas: setting the scene

A prominent state legal instrument for conservation *in situ* are protected areas. Such areas have often been created without informing, let alone consulting or achieving the consent of, the indigenous peoples and local communities living in or adjacent to these areas. Especially in Africa and Asia, conservation-induced displacement has seriously disrupted many local livelihoods. But also in less problematic cases, protected area regimes are often not uncontested, as they imply restrictions on the access to and use of natural resources for the population living in or nearby these areas. Moreover, state protected areas management often does not take into account local environmental knowledge and existing resource management practices. The establishment of protected areas may also be locally perceived as a way of the government to 'reserve' the land for subsequent resource exploitation.[6] Finally**,** the creation of state protected areas may constitute a manner of curtailing (especially indigenous) land and territorial claims. This is illustrated by the expert testimony of Rodolfo Stavenhagen, the former UN Special Rapporteur on the Rights of Indigenous Peoples, in the 2010 case of *Xákmok Kásek Indigenous Community v. Paraguay* of the Inter-American Court of Human Rights (IACtHR).[7] Stavenhagen stated that "the said declaration as a protected wooded area could constitute a new and sophisticated mechanism adopted by the private owners of land

reaction to such an 'internal approach' (Ibid.), various interdisciplinary approaches emerged, such as socio-legal studies. When doing research on natural resource regimes, however, a socio-legal approach does not suffice.

[6] As a Peruvian indigenous leader formulated it: "If you look where the national parks are, there are the hydrocarbon blocks. . . . As long as you are not going to exploit oil, gas, or mineral resources, [the parks] can still be guaranteed. But for me [the establishment of national parks] is a form of guaranteeing the interests of the transnationals. It is not a national interest."

[7] IACtHR, *Xákmok Kásek Indigenous Community v. Paraguay*, 24 August 2010.

claimed by indigenous communities "to obstruct the land claims of the original peoples … using legal mechanisms and even invoking purposes as virtuous as the conservation of the environment"".[8] For a variety of reasons, the establishment of protected areas may thus generate tensions with the local population. Addressing these tensions requires balancing two objectives that are generally considered as inherently valuable: conservation of nature and rights of local populations.[9]

In certain contexts, however, local populations have accepted or even actively sought the establishment of state protected areas on their lands. In the Amazon region, a cautious alliance between conservationists and indigenous peoples developed during the 1980s, stimulated by the increasing number of common threats to the integrity of ecosystems and indigenous livelihoods, such as extractive industries, logging and large infrastructure projects.[10] This alliance has also been criticized, however, for being based on the erroneous assumption that indigenous natural resource use practices are by necessity compatible with Western conservationist objectives.[11] Moreover, the priorities of conservationists, who seek sustainable resource management, and indigenous peoples, who first and foremost aspire self-determination and control over their natural resources, do not always align.[12]

Scholarship has often exclusively addressed the relationship between conservation and indigenous peoples.[13] Historically, the rights and interests of the as 'backward' perceived indigenous peoples were indeed frequently ignored, both in general and in protected areas legislation. During the last decades, however, indigenous peoples have been remarkably successful in using the language and instruments of human rights, in order to claim and gain recognition of their rights. Specific instruments have been elaborated on indigenous peoples' rights (most notably ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)); special mechanisms have been established within the United Nations (such as the Permanent Forum on Indigenous Issues and the UN Special Rapporteur on the Rights of Indigenous Peoples); and general human rights standards have been interpreted in a way tailored to the context of indigenous peoples, for instance by the UN treaty-based bodies and within the Inter-American human rights system. As a result, current international human

[8] Ibid para 169.
[9] See eg Dowie 2006, p 38 , referring to the impact of global conservation on indigenous peoples as a "good guy vs. good guy story".
[10] See Conklin and Graham 1995.
[11] See K. von Benda-Beckmann 1997.
[12] See Conklin and Graham 1995, p 696.
[13] See eg Kemf 1993; Stevens 1997.

rights law guarantees specific rights of indigenous peoples, such as rights to their lands, territories and resources[14] and the right to be consulted whenever legislative or administrative measures may affect them directly.[15] Sawyer and Gomez have pointed to a paradox in relation to this growing recognition of indigenous rights: "despite the burgeoning number of international charters, state constitutions and national laws across the world that assert and protect the rights of indigenous peoples, they often find themselves increasingly subjected to discrimination, exploitation, dispossession and racism".[16]

In many cases, though, indigenous peoples are not the only ones affected by the establishment and management of protected areas. These areas and their buffer zones are often inhabited by a heterogeneous mix of persons and communities. The human rights of other local, 'non-indigenous' populations may also be threatened or violated by state conservation measures. An exclusive focus on indigenous peoples in conservation legislation, policy and scholarship therefore entails the risk of marginalising local non-indigenous communities.[17] The situation of the latter may even be more precarious. As Igoe has observed, "[i]ndigenous peoples are not always the most marginal people displaced and impoverished by protected areas."[18] For instance, conservation projects directed at indigenous peoples have more easily obtained international funding than projects targeting 'peasants' or 'the rural population'.[19]

The greater attention for indigenous peoples and their rights may at least partially be a reflection of the fact that local non-indigenous communities do not have the organizational strength, the shared identity, the financial and human resources, and the network to defend their rights and take their case to the international level. According to Lustig and Kingsbury, states may moreover be more willing to accept specific rights of indigenous peoples than general human rights, for pragmatic reasons: "The indigenous category, although imprecise, is to some extent a self-limiting one – many governments are able to support new norms on indigenous issues because they do not expect this to be costly for them. By contrast, the

[14] ILO Convention No. 169, arts 13-15; UNDRIP, art 26.
[15] ILO Convention No. 169, art 6; UNDRIP, art 19.
[16] Sawyer and Gomez 2012, p 2. This argument is made in the context of resource extraction, but seems more widely relevant.
[17] See Brechin et al. 2003, p 268; Brockington et al. 2006, p 251. Beyond the conservation context, Li has similarly observed that "one of the risks that stems from the attention given to indigenous people is that some sites and situations in the countryside are privileged while others are overlooked, thus unnecessarily limiting the field within which coalitions could be formed and local agendas identified and supported". Li 2000, p 151.
[18] Igoe 2005, p. 384-385.
[19] Rouland et al. speak of an "effet de mode." Rouland et al. 1996, p 34.

general international law of human rights potentially affects all states engaged in development or conservation programmes".[20]

The problematic character of solely or disproportionally focusing on indigenous peoples in relation to conservation is compounded by the complexities surrounding the legal subject of indigenous peoples and the idea of 'indigeneity'. The concept of indigenous peoples being a 'normative construction', Franz von Benda-Beckmann pointed out that the creation of this legal category in international law and the concomitant granting of rights have often affected populations with a similar history and socio-political organization in different ways. A people may be considered indigenous under the laws of one country, whereas members of the same or a closely related group in the neighbouring state may be seen as 'just' peasants.[21]

Self-identification has been identified as a core element in the determination of who is considered indigenous.[22] Perceptions of indigenous identity are not static, however, but evolve depending on internal and external evolutions. As such, Li has characterised a group's self-identification as indigenous as a 'positioning': it is "not natural or inevitable, but neither is it simply invented, adopted, or imposed. … The conjunctures at which (some) people come to identify themselves as indigenous … are the contingent products of agency and the cultural and political work of *articulation*".[23] The relativity and variability of indigenous self-identification were also observed during the fieldwork in the Northern Peruvian Amazon (see section 4). The use of the terms 'indigenous' and 'non-indigenous' in this contribution should thus be understood – and relativized – in light of these reflections.

4. The Peruvian context and case-study

Peru is one of these countries where the richness in natural resources may have been experienced by local populations as a curse rather than a blessing, especially in recent years. On the basis of neoliberal, extractivist policies, numerous concessions have been granted for

[20] Lustig and Kingsbury 2006, p 409.
[21] von Benda-Beckmann 1997, p 5.
[22] See ILO Convention No. 169, art 1(2); UNDRIP, art . 33(1).
[23] Original emphasis. Li 2000 p 151.

the exploration and exploitation of hydrocarbons in the Peruvian Amazon, which considerably overlap with titled indigenous lands and protected areas.[24] Deforestation has increased, caused by, among others, road and dam building, oil palm cultivation, illegal logging and gold mining.[25] On the other hand, as a mega-diverse country and stimulated by (the financial opportunities offered by) the international conservationist movement, Peru has taken action to conserve biodiversity, mostly through the establishment of state protected areas.

The Protected Natural Areas Law (PNA Law), adopted in 1997, constitutes the cornerstone of the Peruvian legal framework on protected areas.[26] The Law aimed to establish a new participatory vision on protected areas management; its drafting process being driven by civil society. Although a draft of the Regulations of the PNA Law was ready shortly after passing the Law, it took four years for these regulations to be adopted.[27] This long delay reveals the government's reluctance towards the implementation of this participatory approach.

Particularly in the Amazon region, many protected areas have been superimposed on lands and territories inhabited or traditionally used by indigenous peoples and local communities, usually without consulting or even informing the populations concerned. From a state legal point of view, the scale of the overlap remains largely invisible, because only a fraction of the ancestral territories of indigenous peoples is formally recognized through the system of communal titles. The 1993 Constitution does not recognize 'indigenous peoples' as a legal subject, but only mentions 'peasant communities' (*comunidades campesinas*), referring to the indigenous peoples of the Andes and the coast, and 'native communities' (*comunidades nativas*), for the peoples of the Amazon region.[28] Consequently, an indigenous people is divided into multiple 'communities', creating fragmentation. Only such communities can receive land titles.[29] This explains why in Peru as well, indigenous peoples have experienced the creation of protected areas as a way to curtail their territorial aspirations (see also section 3). More recent legislation does incorporate the concept of indigenous peoples,[30] but this does

[24] See Finer et al. 2008; Finer and Orta-Martínez 2010.
[25] See AIDESEP and Forest Peoples Programme 2014.
[26] *Ley de Áreas Naturales Protegidas*, Law No. 26834, 30 June 1997 [Protected Natural Areas (PNA) Law].
[27] *Aprueban el Reglamento de la Ley de Áreas Naturales Protegidas*, Supreme Decree No. 38-2001-AG, 22 June 2001 [PNA Regulations].
[28] Constitution 1993, art 89.
[29] Ballón has pleaded to reverse the fragmentation of indigenous territories through the reunification of communal titles. Ballón Aguirre 2004, p 64.
[30] See eg *Ley que Establece el Régimen de Protección de los Conocimientos Colectivos de los Pueblos Indígenas vinculados a los Recursos Biológicos*, Law No. 27811, 24 July 2002; *Ley General del Ambiente*, Law No. 28611, 13 October 2005; *Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios, reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT)*, Law No. 29785, 31 August 2011.

not change the fact that indigenous peoples are constitutionally not entrenched as legal subjects. Moreover, there are still villages that are not registered, and thus cannot claim the rights that accrue to these peasant and native communities.

In addition to indigenous peoples, a large number of riverine communities (*comunidades ribereñas*, also identified as '*ribereña mestiza'* or '*campesina ribereña*') are living the Peruvian Amazon.[31] These Spanish-speaking communities date back to the rubber boom era, and have settled along the banks (*riberas*) of the great rivers of the Amazon forest. They usually have a strong connection with and knowledge about their lands and natural resources: "The … *ribereños* of Amazonia are not formally recognized as "indigenous" peoples in the countries where they reside and yet they regularly interact with and adopt "traditional" production practices that are basically identical to those of officially sanctioned indigenous groups".[32] Similarly, Camino has observed that the *ribereños* and indigenous peoples of the Peruvian Amazon share various characteristics as their subsistence strategies are concerned.[33] Nevertheless, riverine communities often find themselves in a more precarious situation, because their land rights are not adequately protected under Peruvian state law, and they are not organized at intercommunity level. These communities can request their inscription as a peasant community.[34] Until today, less than a hundred of the estimated 2400 riverine communities have been able to do so; a few others have registered and titled as native communities.[35] In its report to the ILO of 2004, the Peruvian state has recognized that the indigenous population includes persons "living in rural contexts which are not necessarily communitarian, such as the *ribereños*."[36] It may thus be argued that such riverine communities fall under the protection of ILO Convention 169. Nevertheless, since the majority of riverine communities has not been registered as a peasant (or native) community, they cannot legally access the rights that are granted to these communities. Finally, there are also colonist or migrant settlements in the Peruvian Amazon, which are of more recent origin.

The argument of Li that a group's identification as indigenous is first and foremost a 'positioning' (see section 3) is confirmed by the variations in indigenous identification

[31] See Smith and Salazar 2014, p 19.
[32] See Brechin et al. 2003, p 268.
[33] Camino 2000, p 3.
[34] *Aprueban Reglamento de la Ley General de Comunidades Campesinas*, Supreme Decree No. 008-91-TR, 12 February 1991, First Special Provision.
[35] Smith and Salazar 2014, p 19.
[36] See *Confederación General de Trabajadores del Perú - CGTP, Informe Alternativo 2008 sobre el cumplimiento del Convenio 169 de la OIT en Perú*, p 7, referring to *Memoria del Estado peruano del cumplimiento del Convenio 169 de la OIT*, 2004.

observed in the Peruvian rainforest. The historical exploitation of Amazonian peoples, for instance during the rubber boom, as well as current racist attitudes and practices in Peruvian society have pushed some on the road to *mestizaje.* They experience their culturally distinct roots as an impediment towards a higher social status, economic well-being and educational opportunities. As one person with a Huitoto background told me: "*Nadie quiere ser indígena ya*" (Nobody wants to be indigenous anymore). Other peoples, in contrast, have engaged in a process of revalorizing and strengthening of their identity; they claim their rights as indigenous peoples, herein often supported by non-governmental actors. Traditionally, the *ribereños* refused to be categorized as indigenous, due to the negative connotations of this label and the abuses indigenous peoples were subjected to in the past. More recently, the growing recognition of indigenous rights led some of these communities to reassess their ethnic affiliation: they started calling themselves indigenous and are claiming the corresponding political, cultural and land rights.[37]

The analysis of the Peruvian protected areas legal framework hereinafter is enriched with data from ethnographic fieldwork carried out in the Upper Putumayo region, which is situated in the extreme north of the Peruvian Amazon. The Putumayo River forms the border between Peru and Colombia. The region is inhabited by three peoples who generally self-identify as indigenous, and are in Spanish referred to as Secoya, Kichwa and Huitoto. The Secoya (auto-denomination *Airo Paị*) are the ancestral inhabitants of the region. They mainly live at tributaries of the Putumayo River, their estimated presence going back 1500 to 2000 years.[38] The Kichwa have established various villages at the banks of the Putumayo River itself. Within this population, self-identification as indigenous was more variable and fluid. In one village, for instance, some family members presented themselves as being Kichwa, whereas other members of the same family considered themselves to be *mestizos.* There is one Huitoto (auto-denomination *Murui*) community in the Upper Putumayo region, called Santa Teresita.[39] The remaining half of the region's population are migrants coming from other parts of Peru or from Colombia. Some of these villages may be considered riverine communities, whereas others are more recent colonist settlements. In daily life at the Putumayo River, both groups are referred to together as *mestizos*.

[37] See Plant and Hvalkof 2001, p 22.
[38] See Vickers 1989.
[39] The majority of the Huitoto people lives in Colombia and the Lower Putumayo region.

In 1997, the Güeppí Reserved Zone (GRZ) was established with the aim of conserving biodiversity.[40] The GRZ overlapped with titled indigenous lands of the Secoya, Kichwa and Huitoto, as well as with ancestral territory of the Secoya that has not been recognized as such by Peruvian state legislation. The GRZ was also superimposed on several *mestizo* villages (*centros poblados*), various of which were not legally recognized, as well as on Kichwa communities that lacked legal recognition and titling of their lands. A reserved zone is an interim category of protection which is established in areas that fulfil the requirements to be declared protected areas, but where more research is needed to decide, among others, on the definitive category and extension.[41] After a lengthy and complicated consultation process, an agreement – known as the Agreement of Pantoja – was reached in 2006 between the state protected areas agency at the local level and the local population.[42] In this agreement, the parties decided to categorize the GRZ in one national park (the Güeppí-Sekime National Park) and two communal reserves (the Airo Pai and Huimeki Communal Reserves), and reached a consensus on the extension and boundaries of the respective areas. It took until 2012 for the national government to endorse this local agreement and formally categorize the reserved zone in these three protected areas.[43]

5. Identifying rights-holders and granting rights

This section assesses the identification of rights-holders within the Peruvian protected areas legal framework, with respect to two rights that are respectively particularly promising (the right to consultation prior to protected area establishment or categorization) and problematic (certain rights to use natural resources within protected areas) from an international human rights law perspective.

a. Right to consultation

Article 6 of ILO Convention No. 169 guarantees the right of indigenous peoples to be consulted by their government about legislative or administrative measures that may affect

[40] *Declaran como Zona Reservada de Güeppí área territorial del Departamento de Loreto, destinada a la conservación de la diversidad biológica*, Supreme Decree No. 003-97-AG, 7 April 1997.
[41] PNA Law 1997, art 13.
[42] For more background on this categorization process, see Desmet 2011, pp 600-612.
[43] *Decreto Supremo que aprueba la categorización definitiva de la Zona Reservada Güeppí como Parque Nacional Güeppí -Sekime, asi como de la Reserva Comunal Huimeki y la Reserva Comunal Airo Pai*, Decreto Supremo 006-2012-MINAM, 25 October 2012 [Supreme Decree of Categorization of the GRZ]. See Desmet 2014, pp 145-147.

them directly. Even though this convention entered into force in Peru in February 1995, for more than fifteen years, the country did not incorporate the right to consultation at a general level in its legal framework, nor did it respect this right in practice. Only in 2011, a Law on the Right to Prior Consultation was adopted, followed by Regulations in 2012.[44] Nevertheless, in some sectorial legislation, for instance on protected areas, the right to consultation had already been previously included.

The PNA Law of 1997 did not mention consultation. The Directorial Plan (*Plan Director*) of 1999, which contains the national strategy regarding protected areas, stated that the future creation of a protected area requires a careful consultation "of the local populations, especially when it concerns areas occupied by indigenous peoples".[45] This principle was given more legal weight through its incorporation in the PNA Regulations of 2001, which provided that the process for the establishment of a protected area or for the definitive categorization of a reserved zone "must be carried out on the basis of transparent processes of consultation of *the local population involved, including the peasant and native communities*".[46] For peasant and native communities, the Regulations emphasize that these consultation procedures must comply with the provisions of ILO Convention No. 169.[47] This inclusion of the right to consultation in the PNA Regulations was positively noted by the Committee of Experts on the Application of Conventions and Recommendations of the ILO.[48] What is particularly relevant in light of the present contribution, is that the right to be consulted in both the Directorial Plan and the PNA Regulations is not reserved for indigenous peoples ('peasant and native communities'), but extended to 'the local population involved'. This goes beyond the current state of international human rights law, which only grants a right to consultation to indigenous and tribal peoples.

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[44] *Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios, reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT)*, Law No. 29785, 31 August 2011; *Reglamento de la Ley N° 29785, Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios, reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT)*, Supreme Decree N° 001-2012-MC, 2 April 2012. The Law and its Regulations have been criticized by both civil society and indigenous organizations, as not living up to international human rights standards. See eg Schilling-Vacaflor and Flemmer (2013).

[45] *Aprueban el Plan Director de las Áreas Naturales Protegidas*, Supreme Decree No. 010-99-AG, 17 April 1999 [Directorial Plan]. The revised version of the Directorial Plan of 2009 elaborates on mechanisms of citizen participation in the management of the protected area (see section 2.3.8.5 (a)) and on the right to consultation of indigenous peoples (see section 2.3.8.5. (b)). The Plan does not specifically develop the right of the local population to be consulted when the creation of a protected area or categorization of a reserved zone are envisaged. *Aprueban actualización del Plan Director de las Áreas Naturales Protegidas*, Supreme Decree No. 016-2009-MINAM, 2 September 2009.

[46] Emphasis added. PNA Regulations 2001, art 43.1.

[47] Ibid.

[48] ILO Committee of Experts on the Application of Conventions and Recommendations (76th session, 2006) Individual Direct Request concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Peru (ratification: 1994), para 3.

Regarding the implementation of the right to consultation in the Güeppí Reserved Zone, two moments have to be distinguished: the creation of the reserved zone as a provisional protected area, and the categorization of the reserved zone into definitive protected areas. At the creation of the GRZ in 1997, neither the indigenous nor the *mestizo* communities were consulted – they only learnt a few years later that the legal status of their lands had changed. Given that ILO Convention No. 169 is in force in Peru since 1995, all protected areas established since then should have been subjected to a consultation process – regardless of the concretisation of this obligation in laws or regulations. This direct effect of ILO Convention No. 169 was confirmed by the Constitutional Tribunal of Peru in the *Cordillera Escalera* case of 2009.[49]

With respect to the categorization of the GRZ, in contrast, a consultation process was set up – be it one with many hurdles and shortcomings.[50] In this process, not only the indigenous peoples, but also the local non-indigenous (*mestizo*) communities were involved, as required by the Peruvian protected areas legislation. During the local categorization workshops, the indigenous peoples and *mestizo* communities emphasized the need of legal recognition and titling of the Kichwa communities and of legal recognition of the *mestizo* villages that were situated within the boundaries of the GRZ. As a consequence, a strip of land bordering the Putumayo River was excluded from the definitive protected areas and classified as a buffer zone.[51] In this way, legal recognition and titling could be obtained and there was space for future expansion of these communities. For this aspect, the 'indigenous' and '*mestizo*' communities thus found themselves in a similar situation, which shows the relevance of not limiting the consultation process to indigenous peoples.[52] The inclusion of *mestizo* communities in the process is also evident from the denominations of the definitive protected areas, which were chosen by the local population. Both in the name of the national park ('Sekime': SEcoya – KIchwa – *MEstizo*) and in the name of one of the communal reserves

[49] The Tribunal stated: "Thus, Convention No. 169 being approved by Legislative Resolution No. 26253, published on 5 December 1993, its content becomes part of national Law, as Article 55 of the Constitution clearly states, *its application moreover being compulsory for all state entities*." Emphasis added. Constitutional Tribunal of Peru, No. 03343-2007-PA/TC, 19 February 2009, para 31.

[50] These are only mentioned here insofar as they are relevant for the analytical purposes of the paper.

[51] In this sense, the principle of free, prior and informed consent for the definitive categorization of a protected area on *communal* property (ie of native and peasant communities) was respected. See PNA Regulations 2001, art 43.2.

[52] In the categorization process of the Sierra del Divisor Reserved Zone, a similar process took place. During the consultation workshops with the local population, it became clear that there were colonist settlements as well as two native communities in the buffer zones of the Reserved Zone. Therefore, a 're-dimensioning' took place based on "the agreements with the local population and the native communities concerned". *Decreto Supremo que aprueba la categorización de la Zona Reservada Sierra del Divisor en Parque Nacional Sierra del Divisor*, Supreme Decree No. 014-2015-MINAM, 8 November 2015, preamble. See also Monteferri et al. 2009, p 11.

('Huimeki': HUItoto – *MEstizo* – KIchwa), the role of *mestizo* communities is explicitly recognized. The 2012 Supreme Decree of Categorization of the GRZ does not adequately reflect this reality, however. Although its preamble refers to the obligation in the PNA Regulations to consult with "the local population, including the indigenous peoples", the next paragraph only mentions the "native communities" as those with whom an agreement was reached – in contrast to what actually happened.[53]

b. Rights to use and sustainably manage natural resources within protected areas

The establishment of a protected area usually entails the imposition of limitations on the use of natural resources within that area. These limitations constitute the greatest source of conflicts between the local population and the PNA staff.[54] The Peruvian protected areas legislation contains various specific provisions regarding the rights of the local population to use and sustainably manage natural resources within a protected area. Overall, the identification of the rights-holders in these provisions is unclear and inconsistent, as is demonstrated hereinafter.

In the PNA Law itself, only one – the last – article explicitly addresses local rights to sustainably use natural resources within protected areas. Pursuant to Article 31,

> [t]he management of the protected area will give priority attention to ensure the traditional uses and the life systems of the *ancestral native and peasant communities* inhabiting the Protected Natural Areas and their surroundings, respecting their self-determination, to the extent that those uses are compatible with the objectives of these [protected areas].

[53] Supreme Decree of Categorization of the GRZ 2012, preamble. But see Article 6: "The general objective of the Huimeki Communal Reserve consists in conserving the biological diversity of the area and the sustainable management of its resources, *to the benefit of the Kichwa, Huitoto and mestizo populations* of the Peruvian-Colombian border region". Emphasis added.

[54] Camino 2000, p 24. The staff of a protected area is usually composed of the Chief of the area (PNA Law 1997, art 14), 'professionals' (eg biologists) and park guards. The Chief is responsible for leading and supervising the management of the protected area (PNA Regulations 2001, art 24.1). The overall staff size may considerably vary, depending on whether the protected area enjoys additional resources, for instance from international conservation projects, in addition to the basic funding of the Peruvian state. In the case of the GRZ, the area had a large staff during the implementation of the project "Participation of Native Communities in the Management of Protected Natural Areas in the Peruvian Amazon" (PIMA, 2001-2006), financed by the Global Environmental Facility (GEF). At the end of this project, the staff of the GRZ was reduced to the Chief, one professional and two park guards, all paid by the Peruvian state.

In general, the legal subject of 'native and peasant communities' is already inappropriately restrictive, as it implies a fragmentation of indigenous peoples (see section 4). Moreover, it is not clear why the adjective 'ancestral' is added to this legal subject, nor whether this addition implies an actual restriction to certain – 'ancestral' – communities, excluding other native and peasant communities. Additionally, the norm suffers from an internal contradiction: on the one hand, the provision claims to respect the self-determination of the (ancestral) peasant and native communities; on the other, traditional uses are only allowed as far as they are compatible with the objectives of the protected area.[55]

Turning to the PNA Regulations, Article 1.3 provides that the protected areas management "considers the importance … of the respect for the *traditional* uses of peasant or native communities within the ambit of the Protected Natural Area, in harmony with its objectives and aims of creation". But in Article 90, the Regulations limit recognition to "*ancestral* uses *linked with subsistence*" (see below on the concept of subsistence). The scope of the latter provision is extended to include "human groups in voluntary isolation or initial or sporadic contact". It is not clear whether there is a difference between 'traditional' (in Article 1.3) and 'ancestral' (in Article 90), nor why indigenous peoples in voluntary isolation or initial contact are only mentioned in the latter provision, and not in the PNA Law or in Article 1.3 of the PNA Regulations. Article 90 of the PNA Regulations also requires the state to promote mechanisms to make the objectives of the protected areas compatible with these ancestral uses. No guidelines are provided on what kinds of mechanisms the legislator had in mind. In practice, compatibility between the objectives of a protected area and the traditional uses of indigenous peoples may not be so easy to obtain.[56]

Still another interpretation of the personal scope of the right to have one's traditional resource uses respected in a protected area, can be derived from Article 11 of the PNA Regulations. This provision lists the functions of the Coordination Council, which acts as a platform for coordination and exchange of information at the level of the national protected areas system (*Sistema Nacional de Áreas Naturales Protegidas por el Estado* – SINANPE).[57] One of the Council's functions is to "identify the necessary general guidelines so that the management of

[55] Newing and Wahl 2004.
[56] Monteferri 2008.
[57] The Coordination Council consists of nine members, representing various governmental sectors (environment, tourism), the regional governments, the Management Committees, research institutions, non-governmental organizations and the private sector (PNA Regulations 2001, art 10.1). If the Council addresses matters in protected areas with a presence of "peasant and native populations", a representative from the governmental department dealing with indigenous issues is added as a full member to the Council (PNA Regulations 2001, art 10.2 (a)).

the Protected Natural Areas respects the traditional uses of the *local communities in general*, and of the peasant or native communities in particular".[58] On the basis of this provision, it can be argued that also the traditional uses of local non-indigenous communities should be respected. In sum, in the same legal instrument, the legal subject whose traditional uses in a protected area should be respected, ranges from (most restrictively) "ancestral native and peasant communities" to (most broadly) "local communities in general". Such an imprudent drafting generates confusion and legal insecurity.

A key provision regarding the use and sustainable management of natural resources within protected areas is Article 89 of the PNA Regulations, entitled "Rights of the local populations and peasant or native communities". Article 89.1 reads as follows:

> The State recognizes vested rights, such as property and possession among others, of the *local populations including the settlements of artisan fishermen and of peasant or native communities* that live in the Protected Natural Areas prior to their establishment.[59]

This is the only instance in the PNA Regulations and Law where "artisan fishermen" are explicitly mentioned. It is positive that not only property, but also possession rights are recognized. Nonetheless, possession cannot lead to acquisition of property by prescription.[60] Such a norm discourages new settlements within protected areas by persons who would attempt at acquiring property by alleging prior possession.[61] However, the norm is unfair towards possessors from before the establishment of the PNA who may not have obtained titling of their land because of the long, costly and bureaucratic titling procedure established by the Peruvian state and the consequent lack of advancement in titling[62], since the protected areas legislation grants more rights to owners than possessors.

Whereas Article 89 of the PNA Regulations is generally entitled "Rights of the local populations and peasant or native communities", Article 89.2, which contains the right to use species of wild flora and fauna for subsistence aims, only applies to "peasant or native communities":

[58] Emphasis added. PNA Regulations 2001, art 11 (f).
[59] Emphasis added.
[60] PNA Regulations 2001, art 45.3.
[61] In any case, it is forbidden to establish new human settlements in protected areas after their creation. PNA Regulations 2001, art 46.2.
[62] Smith and Salazar 2014.

> The access to and use by the *peasant or native communities* of the natural resources situated in a Protected Natural Area, includes the possibility to use the allowed species of wild flora and fauna, as well as their products or sub-products, *with subsistence aims*.[63]

Given the general character of the human right to an adequate standard of living, which includes the right to adequate food,[64] it appears difficult to limit the right to use wild flora and fauna *for subsistence aims* to peasant and native communities. As Olivier De Schutter has pointed out, the right to food requires that states "refrain from taking measures that may deprive individuals of access to productive resources on which they depend".[65] Also other local population groups should have the right to sustainably use natural resources within a protected area, if this is necessary to provide in their livelihood.

At the time of my fieldwork in the Güeppí Reserved Zone, the protected area staff did not distinguish between *mestizo* and native communities in the exercise of this right to sustainably use wild flora and fauna for subsistence aims. It was considered that this would lead to unnecessary frictions among the local population. The implementation of the PNA Regulations was thus adapted to local realities. This approach is also more in line with general human rights obligations regarding the right to an adequate standard of living, including food.

Furthermore, many questions arise as to the limitations imposed on the right of peasant and native communities to use allowed species of wild flora and fauna within a protected area. More specifically, four restrictions apply: (i) the use must be "with aims of subsistence"; (ii) it cannot include species of flora and fauna threatened with extinction; (iii) the species may not be extracted from strict protection zones or wild zones; (iv) and the use may not endanger the objectives of creation of the protected area.[66]

Regarding the first restriction, "with aims of subsistence", it is provided that "[t]he scope of the concept of subsistence is determined in each case in coordination with the beneficiaries".[67] It may be positive that flexibility is left to determine the scope of the concept of subsistence in coordination with the beneficiaries, as this allows for adaptation to local circumstances and needs. However, there is no further information as to how this process

[63] Emphasis added.
[64] International Covenant on Economic, Social and Cultural Rights, art 11.
[65] UN General Assembly (2010) Report of the Special Rapporteur on the Right to Food, UN Doc. A/65/281, para 2.
[66] PNA Regulations 2001, art 89.2. and 89.3.
[67] PNA Regulations 2001, art 89.2.

should be conducted. Moreover, the lack of any definition of the concept of subsistence entails the risk that it will be interpreted too narrowly by the state protected areas agency.

The content of the concept of subsistence evolves with the extent that indigenous peoples are interacting with Western society and the neoliberal market economy. Before, hunting, fishing and gathering may have been sufficient to cover subsistence needs. Today, indigenous peoples need some monetary income to satisfy basic needs of daily life: they need to buy medicines and send their children to school; they may want to buy a radio or television. Therefore, various interviewees as well as the Special Multisectorial Commission for Native Communities[68] have pleaded for an interpretation of the concept of subsistence as including the right to commercialize those resources that are necessary to satisfy the basic needs of subsistence. Every commercial use that generates profit remains excluded from this definition.

The management practice of the Güeppí Reserved Zone confirmed the relevance and appropriateness of this point of view. The local, indigenous as well as *mestizo*, population of the GRZ and its buffer zone were permitted to commercialize a small quantity of allowed flora and fauna from within the protected area as to satisfy their subsistence needs. The staff of the GRZ thus applied the protected areas legislation in a way better tailored to the reality of the area and the needs of the local population.

In general, the question arises whether the four abovementioned restrictions to the natural resource use of indigenous peoples within protected areas are compatible with ILO Convention No. 169. Pursuant to its Article 15(1), indigenous peoples' rights to their natural resources must be "specially safeguarded" and include the right to "participate in the use, management and conservation of these resources." The language of this provision is in itself already rather weak, as it only gives indigenous peoples a right to "participate" in the use, management and conservation of their resources. Nevertheless, the Convention does not provide that these rights to their natural resources may be restricted in the name of conservation. It could thus be argued that restrictions on the natural resource use rights of

[68] *Comisión Especial Multisectorial para las Comunidades Nativas, Mesa de Diálogo y Cooperación para las Comunidades Nativas: Plan de Acción para los Asuntos Prioritarios*, Lima, 2001, p 52. This Commission had been established in 2001 under the transitional government of Paniagua. However, as an expert who was involved in this process observed: "[W]hen the government of Toledo began, they forgot about [the Action Plan] completely."

indigenous peoples in the context of protected areas constitute a violation of ILO Convention No. 169.[69]

Also as regards the use of *renewable* natural resources more specifically, various categories of rights-holders appear. For example, the right to carry out traditional agricultural activities in special use zones and recuperation zones is reserved for "the population previously settled and duly registered by the PNA chief".[70] In direct use protected areas, non-timber forest products are – subject to various conditions – as a priority used by the "local population", with aims of autoconsumption or commercialization.[71] In indirect use protected areas, the use of non-timber forest products is only allowed on a small scale by "traditional populations living within the area", for subsistence aims.[72] This is the only instance in the PNA Law and Regulations where the term "traditional populations" is used. Who are these traditional populations? Does the term refer only to indigenous peoples in voluntary isolation or initial contact? Does it include all peasant and native communities, or only those peasant and native communities that can be considered "traditional"? And what about riverine communities that uphold a "traditional" lifestyle? Again, the legislator demonstrates a lack of precision, clarity and consistence.

Subsistence fishing is allowed for "local populations, peasant and native communities".[73] In contrast, subsistence hunting is limited to "peasant or native communities", thus excluding local non-indigenous communities.[74] The different approach towards subsistence fishing and subsistence hunting seems difficult to justify. On the basis of the general human right to an adequate standard of living, including adequate food, it could be argued that the right to subsistence hunting should also apply to local communities that are not peasant or native communities.

[69] Gamboa Balbín and Santillán Bartra 2006.
[70] PNA Regulations, art 104.1. See also art 106.2 regarding the exceptional use of timber forest products by "local populations previously settled".
[71] PNA Regulations 2001, art 107.1.
[72] Ibid.
[73] PNA Regulations 2001, art 112.3.
[74] PNA Regulations 2001, art 110. This subsistence hunting must be practiced "according to traditional methods". Such 'enforced primitivism', whereby natural resource use is only respected as long as traditional practices are upheld and no modern lifestyle is adopted (see Colchester 2003, p 4), should be abolished.

6. Conclusion

The Peruvian legal framework struggles to identify its rights-holders. At a general level, the lack of constitutional recognition of the concept of indigenous peoples has led to a fragmentation of peoples into native and peasant 'communities'. The protected areas legislation, on which this paper focused, uses a variety of terms in relation to natural resource use rights within protected areas – such as 'traditional populations', 'ancestral peasant and native communities', 'peasant and native communities' and 'local communities in general' – without clarity as to the meaning and consequences of these different terms. To enhance the effectiveness of natural resource regimes, rights-holders should be identified and defined after careful reflection, using a clear and consistent terminology. To a certain extent, this is a technical-legal matter and as such not very exciting from an academic point of view. The matter goes deeper than that though.

Some rights in the Peruvian protected areas legislation are reserved for indigenous peoples ('native and peasant communities'). This may put local communities who have not "positioned"[75] themselves as indigenous in a more vulnerable situation. The extent to which the rights of indigenous peoples in relation to protected areas are or should be different from the rights of local non-indigenous communities is a complex question, which has no simple or fixed answer. Recognizing specific rights of indigenous peoples should, however, not be an escape route for not respecting general human rights.[76] As such, limiting the rights to subsistence hunting and to use wild flora and fauna for subsistence aims within protected areas to indigenous peoples, as is done in the Peruvian protected areas legislation, does not seem warranted from a general human rights perspective, as it may endanger the enjoyment of the right to food. The inappropriateness of these legal limitations was confirmed by empirical data. In the management practice of the Güeppí Reserved Zone, no distinction was made between indigenous and *mestizo* communities as regards the use of natural resources for subsistence aims within the area. The need to adapt these legal provisions can thus be substantiated on the basis of both normative, international human rights law arguments and empirical data.

Moreover, indigenous peoples' rights could serve as a stepping-stone towards a further recognition of general human rights. Some of the rights granted today only or mostly to

[75] Li 2000.
[76] See Lustig and Kingsbury 2006.

indigenous peoples could be incorporated (more firmly) in general international human rights law, or at least extended towards other categories of rights-holders.[77] As such, the entrenchment of greater rights of consultation of the non-indigenous local population in the context of conservation initiatives could be considered. In this sense, the Peruvian legislation may provide inspiration, as it extends the right to consultation before the establishment of a protected area or categorization of a reserved zone to the local population in general, rather than limiting it to indigenous peoples (peasant and native communities).[78]

[77] See also, as regards the right to communal property, UN General Assembly (2010) Report of the Special Rapporteur on the Right to Food, UN Doc. A/65/281, para 13.

[78] There may also be inspiration in the reverse direction. For instance, in the draft Declaration on the rights of peasants and other people working in rural areas, adopted by the Human Rights Council Advisory Committee in 2013, the right to biodiversity and the right to preserve the environment go beyond what is currently recognised for indigenous peoples. UN Human Rights Council (2013) Declaration on the rights of peasants and other people working in rural areas, UN Doc. A/HRC/WG.15/1/2.

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