

OBSTACLES AND RESISTANCE to the process of implementing the right to free, prior and informed consultation and consent in Brazil



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RCA members attending the audience

Davi Kopenawa Yanomami, Jawaruwa Wajãpi, Maurício Tomé Rocha, Reinaldo Yekuana, Yakagi Kuikuro Mehinaku, Cristina Velasquez, Patrícia Zuppi & Luís Donisete Benzi Grupioni

Text

Biviany Rojas Garzón, Erika Yamada, Rodrigo Oliveira, Daniel Cerqueira, Luís Donisete Benzi Grupioni

Designer

Tipográfico Comunicação | Renata Alves de Souza

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The right to free, prior and informed consultation and consent, as established under the framework of Convention 169 of the International Labour Organization, the United Nations Declaration on the Rights of Indigenous Peoples, and national and international jurisprudence (Inter-American Human Rights System and the UN system), faces serious challenges in terms of its full recognition and implementation in Brazil.

The government of the Federal Republic of Brazil is failing to meet its obligations in relation to consulting and obtaining consent from indigenous and tribal peoples. A recent series of administrative and legislative measures undertaken without consultation reveals a serious failure to comply with this right and consequent violations to the right to autonomy, social organization and the territorial rights of indigenous and tribal peoples.

A number of concrete cases involving government decisions, projects and programs, laws, legislative proposals and national case law reveal the limitations to the comprehension of the right to consultation among the executive, legislative and judiciary spheres.

We urge that recommendations are made to the Brazilian state to guarantee full recognition of this right and develop guidelines for making real progress in its implementation.

The Executive

DECISIONS WITHOUT CONSULTATION

Although the right to consultation has been recognized by various federal government bodies – responsible for taking decisions with significant impacts on peoples, lands and rights – there is an evident reluctance to conceive consultation as a right. Envisaged as a mere bureaucratic formality, consultation is frequently treated as a dispensable accessory to processes where the decisions have already been taken. Moreover, the degree to which this right extends to traditional peoples and communities is often disputed, along with the scope of cases where consent is required beyond free, prior and informed consultation. To cite just one example, various environmental licensing processes for large-scale projects with a significant impact on stakeholders have been planned and are being executed without this right being observed.

The Belo Monte Hydropower Plant has become world famous due to the huge scale of its socioenvironmental impacts. Now in its final phase of construction on the Xingu River, the dam's construction has affected eight **indigenous peoples** and innumerable traditional river-dwelling and fishing communities. Despite this impact, only informative meetings and public hearings were held, none of which were consultative in nature. Traditional peoples and communities were not assured any possibility of institutional participation in decision-making: neither at legislative level, where authorization was issued, nor at administrative level, where sector-based and environmental authorizations were issued.

The Arara, Juruna, Araweté, Asuriní, Parakanã, Xipaya, Kuruaya and Xikrin.

The project will impact the Juruna Paçiqãmba Indigenous Land and the Arara da Volta Grande Indigenous Land.

Also in the Xingu River region, within the jurisdiction of state authorities, another case of administrative decisions was taken without consultation, compounding the accumulative and synergetic impacts of economic activities and infrastructural works in the same territory. This is the Volta Grande Gold Project developed by a Canadian firm, the Belo Sun Mining Corporation, linked to the Forbes & Manhattan Inc. bank. Planned for installation in the area where the direct impacts of the **Belo Monte** Dam will be most heavily felt. It will also affect approximately 600 river-dwelling families and other indigenous peoples who live in the Volta Grande region in territories still not recognized by the State. The mining project received a preliminary license from the Pará state government despite failing to observe these populations' right to consultation.

Belo Monte and Belo Sun are not isolated cases. Much the opposite: history seems to repeat itself in all the major infrastructural projects planned by the federal government as part of its 'Growth Acceleration Program,' known by its acronym in Portuguese, PAC. The opening and implementation of new roads and railways, especially in the northern region of the country, are licensed and constructed without any kind of consultation even in those cases where the project is implemented inside indigenous lands. It is the case of the construction of the Manaus-Boavista Transmission Line in the Waimiri-Atroari Indigenous Land, Amazonas state.

One more example: the environmental licensing for the São Luiz do Tapajós Hydropower Plant is taking place without observing the obligation to consult affected

indigenous and traditional communities. Through its public pronouncements, the government has made clear that it is unwilling to negotiate on implementation of the project, taken as a *fait accompli*, and expresses its view that the scope of prior consultation is limited to discussing compensation and mitigation measures. The denial of the right to consultation is explained by no consensus in the government concerning the applicability of Convention 169 to collective subjects. Two of the peoples potentially affected elaborated their own autonomous consultation Protocols. In these documents they explain to the government how they are organized politically, how they take decisions, and how they intend to be consulted. Thus far the federal government has given no indication whether it will respect the Protocols. The São Luiz do Tapajós case is compounded by other examples of hydropower plants being built within the same river basin without any consultation.

Despite being self-executing, the right to consultation, as a basic right whose origin is consolidated in international human rights treaties, has not been applied in Brazil. Instead, the State relies on the argument that the lack of regulation justify the non-application of the right to consultation in specific cases.

The Munduruku and the shore dwellers of Montanha and Mangabal

Peoples directly affected by São Manoel, Teles Pires, Sinop and Colider Hydropower Plants are, namely, the Munduruku, Apiaka and Kayabi.

Advocacia Geral da União (AGU) is the entity responsible for legally defending the public administration and defending the demarcations of indigenous lands

An instance of agglutination and national reference of the indigenous movement in Brazil

Regulation

AN INCOMPLETE AND MISGUIDED PROCESS

In 2012, following civil society pressure and under the argument that the understanding of federal institutions needed to be standardized, a thwarted attempt was begun to regulate consultation by the Brazilian government. However, that same year the Attorney General's Office published Directive 303. That normative itself violates the right to consultation by allowing diverse kinds of activities in indigenous territories independently of any consultation with those affected. (For example, in the case of management activities in conservation units that overlap indigenous lands, and in the case of military installations and activities within indigenous lands.)

The *Articulação dos Povos Indígenas do Brasil (APIB)* announced the withdrawal of the indigenous movement from the discussion process on regulation. The demand repeals Directive 303 as a minimum display of lack of good faith from the part of the federal government to resume its participation in the dialogues on the regulation of consultation mechanisms.

The attempts to establish regulations showed the government's difficulty in maintaining a cohesive position to act in good faith with the stakeholders and forms part of a wider context of attacks on the institutional framework of the rights of the groups affected by large infrastructural projects.

The regulation of the right to consultation should set out an exemplary form of the consultation process, something which did not come about. The demands of indigenous representatives were not met and the traditional peoples and communities were deliberately excluded from the dialogue with the government arguing that these groups failed to fit the 'tribal' category used by Convention 169. Nonetheless, this definition was used as a parameter by the government itself when it came to defining traditional peoples during the adoption of the National Policy for Sustainable Development of Traditional Peoples and Communities as well as receiving unanimous agreement in Brazilian case law.

Decree
6.001/2004

Hence the government sought to continue the regulation process without the participation of the indigenous movement, developing a specific proposal for consultation with quilombola communities. However, the *quilombola* representatives complained that the meetings and seminars held by the government were merely informative, with no opportunity, adequate information or appropriate time given for the *quilombola* communities to manifest their views within available consultation process.

Which
inhabitants
are African
descendants

The content of this proposal for regulating consultation with *quilombola* communities undoes diverse international parameters concerning the right to consultation. It fixes rigid deadlines for finalization of the process, by conferring complete discretion to the administration in relation to compliance or not with established agreements.

Any regulation of the right to consultation should reinforce the obligatory nature of the internationally established standards applicable to the country, limited to guiding the public administration bodies themselves, setting out an internal procedure and distributing powers and responsibilities without invading the autonomous sphere of the consulted groups.

If the government aims to resume the discussion, we advocate the need for it to regain the trust of the indigenous movement by objective manifestations in defence of indigenous rights, such as the repeal of Directive 303/2012, and by recognizing traditional peoples and communities as possessing the right to consultation. Another demonstration of good faith would be to offer institutional guarantees for the exercise of this right by respecting consultation protocols. Indeed, the government should not only respect but also stimulate and support the production of autonomous consultation protocols across the country.

The Wajãpi, living in the state of Amapá have a unique initiative with the drafting of a specific protocol.

The Legislature

NO PARTICIPATION AND NO CONSULTATION

The most serious violation of the right to consultation takes place in the legislative sphere. The National Congress is performing the biggest legislative attack on the rights of indigenous peoples, *quilombolas* and traditional peoples and communities since the 1988 constitutional framework, which recognized the collective rights of these peoples. Led by the *bancada ruralista* the offensive aims to limit the territorial rights and autonomy of these groups, opening their territories up to economic exploration without respect for territorial rights of these peoples, much less consulting the economic and social developments for their territories. Furthermore, the actors involved in the legislative process are ignoring their obligation to undertake consultations on the measures that affect such groups. Along these lines, law bills and constitutional amendment have been pursued at federal level that have a direct and significant impact on the rights of these groups. Again, without any participation or much less consultation mechanism having been observed. Among the most serious examples:

- Constitutional Amendment Bill 76/2011: allows the exploration of water resources in indigenous lands with participation in the results;
- Law Bill 1.610/1996: regulates mining in Indigenous Lands;
- Law Bill 44/2007: alters the rules on the recognition and demarcation of quilombola territories;
- Law Bill 3.654/2008: removes the right to self-identification of quilombola communities;

A parliamentary alliance that works in defense of the interests of the large rural business.

Constitutional Amendment Bill which aims, among other things, to transfer responsibility from the Executive to the Legislature for carrying out the demarcation of indigenous lands, the official recognition of quilombola territories and the constitution of conservation units.

- Constitutional Amendment Bill 71/2011: alters the rules on the demarcation of indigenous lands;
- Supplementary Law Bill 227/2012: provides for mining in indigenous lands, quilombola territories and conservation units;
- Law Bill 5.807/2013 (New Mining Code): allows mining in indigenous lands, quilombola territories and conservation units;
- Law Bill 1.216/2015: alters rules on the recognition and demarcation of indigenous lands.

If approved, PEC 215 will mean the paralysation of the demarcation processes of these territories in the country, the review of the legal status of territories already recognized and the forced removal of communities of traditional territories to make way for infrastructural works or natural resource exploration projects by third parties.

PEC 215 is considered the legislative proposal most harmful to the rights of indigenous peoples and quilombola communities, implying a serious restriction of collective rights. Despite this fact, the bill has advanced through the legislature without an attempt to conduct free, prior and informed consultation.

A recent example of the complete failure to recognize the right to consultation was the approval of Law 13.123/2015 (Biodiversity Framework) regulating access

to and economic exploration of genetic resources and traditional knowledge associated with biodiversity and agrobiodiversity. There was no consultation either by the Executive prior to sending the bill to the Legislature, or by the National Congress, concerning the provisions incorporated into the text during the legislative process. The outcome was a text unfavourable to traditional knowledge bearers, which allows little scope for sharing benefits and fails to guarantee stakeholders control over their own traditional knowledge. As a bill drafted by the Executive, the latter should have ensured consultation prior to submitting the proposed legislation to the Legislature, which would not remove the obligation of the Legislature to conduct its own consultation process. Nonetheless, the federal government only carried out preliminary meetings with pharmaceutical companies and other private sector actors interested in regulation of the area – everyone except the indigenous peoples and traditional communities possessing traditional knowledge, very often associated with genetic heritage, the subject of the regulation.

As for the law bills introduced by the Legislature itself, although the internal regulations of the Federal Senate and the Chamber of Deputies provide mechanisms for the direct participation of civil society – such as public hearings, spontaneous meetings and mixed commissions – these are not the same as consultation and do not waive the obligation to allow the latter. For this reason, we strongly recommend that the National Congress covers the issue in its internal regulations, reaffirming the right to consultation as an indispensable stage of the legislative process so as to avoid new violations of this right by the Legislature. It

needs to be pointed out, however, that this inclusion is not indispensable to the guaranteeing the right.

The Convention 169 possesses immediate applicability and the internal regulations of the Chamber of Deputies and the Federal Senate provide mechanisms for ensuring the compatibility of law bills and constitutional amendments with Brazil's legal framework, which includes international human rights treaties ratified in the country, such as Convention 169.

The Judiciary

SUSPENSION OF INJUNCTION AS AN INSTRUMENT FOR CONSOLIDATING DECISIONS MADE WITHOUT CONSULTATION AS FAITS ACCOMPLIS

In the Judiciary, the Brazilian courts have recognized the direct and immediate applicability of the right to consultation, especially when associated with administrative measures that harm collective rights. A growing number of judicial decisions have reaffirmed the need for decision-making bodies to carry out consultation, albeit without providing the details or basic guidelines for this implementation. On the other hand, the stance taken by the Federal Supreme Court (STF) in its ruling on the demarcation of the Raposa Serra do Sol Indigenous Land (considered a leading national case) points to serious obstacles to the recognition of this right by the country's highest constitutional court.

The STF's non-binding but guiding interpretations, which derive from the conditions imposed in the Raposa Serra do Sol case weaken the State's obligation to consult and in some sections contradict the supralegal norm in force. For example, the STF introduced the exceptions that were incorporated into the aforementioned Directive 303 of the AGU (Attorney General's Office).

Another obstacle observed in the actions of the Judiciary is the widespread use of two instruments: Suspension of Injunctions and Anticipated Trusteeship.

These procedural instruments, available exclusively to state authorities, allows the presidents of courts to suspend any decision where authorized political motives are involved (serious harm to the public order, economy and administration). In practice, the instrument has allowed construction projects to proceed without compliance with the right to consultation, transforming badly planned projects into faits accomplis.

Thanks to the suspension of injunctions, the following projects were able to continue without any consultation: the Belo Monte, Teles Pires and São Manoel Hydropower Plants, doubling of the Carajás Railway, the Manaus-Boa Vista Line, and others.

TOWARDS EFFECTIVE IMPLEMENTATION OF THE RIGHT TO PRIOR CONSULTATION IN BRAZIL

The right to free, prior and informed consultation establishes a new kind of relationship, more symmetrical and respectful, between States and the stakeholding peoples, which is upheld by the recognition and respect of the basic rights of these peoples. It is related to the full exercise of another basic right, which is the right to free determination: that is, the power to decide freely on their present and future in the quality of collective rights-holding subjects. However, Brazilian State's capacity for intercultural dialogue between indigenous peoples, traditional communities and *quilombolas* is still under construction.

Despite Brazil's international commitments – voluntarily assumed both with the UN and with other international agencies, whether in relation to approval and promotion of the UN Declaration on the Rights of Indigenous Peoples, or ratification of ILO Convention 169 – the Brazilian State continues to disrespect indigenous peoples and their rights. Against the strong attack made on the rights of indigenous peoples over recent years by sectors opposed to maintaining indigenous territories, the national indigenous movement has made denunciations and manifestations in defence of their rights, their territories and their distinct ways of life. In this adverse setting in which a predatory development model breaches constitutional rights, the right to participation and prior consultation needs to be applied in decision-making processes on measures and projects that affect territories, cultures, and modes of indigenous life.

We ask that the UN Special Rapporteur recommend to the Brazilian government the following:

1. The State shall no longer ignore its duty to hold free, prior and informed consultations on administrative and legislative measures that affect indigenous peoples, quilombolas and traditional communities;
2. The federal government must **cease to use legal subterfuges**, as in the case of the suspension of injunctions and anticipated trusteeship, as a means to avoid application of the right to consultation as an inescapable requirement of the administrative decision-making process;
3. The processes of implementing the right to consultation of indigenous peoples, quilombolas and traditional communities concerning works and development projects that directly affect them must be considered at **all stages of public decision-making** from planning, licensing, execution and monitoring of the works;
4. Traditional communities **must be recognized as subjects** with the right to free, prior and informed consultation;
5. The State should consider the need to **introduce standardized rules** on its own actions and internal processes as proof of its willingness to meet its obligation to consult indigenous and tribal peoples prior to taking decisions that can affect them;
6. The violations of rights arising from non-realization, delays or other issues related to the implementation of effective free, prior and informed consultation processes **must be publicly recognized, rectified and compensated**.

7. Directive 303 and subsequent directions from the Attorney General's Office should be revoked, and the indigenous land demarcation processes concluded in order to **reverse the situation of distrust** as the basis for reviving the dialogue between the State and indigenous peoples concerning the implementation of the right to consultation;
8. Urgent steps shall be taken to **define the procedure** in the legislative process for carrying out consultations for Law Bill 1610 (mining in indigenous lands); Constitutional Amendment Bill 215 (altering the demarcation processes for indigenous lands, quilombolas and conservation units) and other law bills currently passing through Congress or that will do so in the future;
9. The State must **clarify its understanding** on consultation based on the specific interpretation of the Federal Supreme Court's ruling in the Raposa Serra do Sol case and the guidelines of the AGU;
10. Any future norm regulating the right to free, prior and informed consultation is necessarily subject to an exemplarily free, prior and informed consultation process, based on a **Consultation Plan** agreed with indigenous peoples, quilombola communities and traditional peoples and communities possessing this right;
11. The regulation of consultation processes is not limited to exercise of the right, nor contrary to the **principles of the plurality and autonomy of peoples**;
12. The discussion on regulation or establishing norms is discussed and consulted and is limited to

For
Indigenous
Peoples.

administration, creating better conditions for the effective implementation of the right, and respecting the autonomy of the groups, including **their own consultation protocols** where applicable.

For
Quilombolas
Communities.

13. The expertise of technical bodies like the National Indian Foundation and the Palmares Foundation is considered, **as well as interlocution with indigenous and quilombola** representatives and the National Council of Human Rights and the recently created National Council of Indigenist policy, in the processes of implementing the right to consultation, including in the discussion on any regulation;

14. **The State assumes responsibility** and recognizes its duty to support indigenous processes of understanding, discussion and autonomous elaboration of their own consultation protocols in accordance with the forms of social organization of indigenous peoples and traditional communities.

Brasília, March 9th 2016.



ASSOCIAÇÃO DO MOVIMENTO DOS AGENTES AGROFLORESTAIS INDÍGENAS DO ACRE – AMAAIC



ASSOCIAÇÃO TERRA INDÍGENA XINGU – ATIX



ASSOCIAÇÃO WITY-CATÉ DOS POVOS TIMBIRA DO MA E TO



CENTRO DE TRABALHO INDIGENISTA – CTI



CONSELHO INDÍGENA DE RORAIMA – CIR



COMISSÃO PRÓ-ÍNDIO DO ACRE – CPI/AC



CONSELHO DAS ALDEIAS WAJÁPI – APINA



FEDERAÇÃO DAS ORGANIZAÇÕES INDÍGENAS DO RIO NEGRO – FOIRN



HUTUKARA ASSOCIAÇÃO YANOMAMI – HAY



INSTITUTO DE PESQUISA E FORMAÇÃO INDÍGENA – IEPÉ



INSTITUTO SOCIOAMBIENTAL – ISA



ORGANIZAÇÃO GERAL DOS MAYURUNA – OGM



ORGANIZAÇÃO DOS PROFESSORES INDÍGENAS DO ACRE – OPIAC