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THE GITXAALA NATION VS CANADA CASE: ECONOMIC ACTIVITIES IN INDIGENOUS LANDS AND THE PARAMETERS FOR CONSULTING FIRST NATIONS

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ABSTRACT

Based on the Canadian experience, the article analyzes the procedures for consulting indigenous peoples and their special relevance in cases of research and mining of mineral resources in indigenous lands. The article proposes that the consultation must be part of a serious and committed process that really considers the concerns and fears of these communities. Although authorization is a more protective measure for the rights of native peoples, it cannot be considered the ultimate goal. Bringing the focus to the result can drive away the dialogue needed to pacify conflicts. The article concluded that the consultation process cannot be based only on the fulfillment of a formality and that the characteristics pointed out in the Canadian decision present guidelines and parameters that can contribute to the improvement of the Brazilian legal system. Searches were carried out in bibliographic sources. The deductive hypothetical method was used, with reference to national legislation, foreign jurisprudence and specific bibliographic texts.

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O CASO GITXAALA NATION VS CANADA: ATIVIDADES ECONÔMICAS EM TERRAS INDÍGENAS E OS PARÂMETROS PARA A ADEQUADA CONSULTA PRÉVIA AOS POVOS ORIGINÁRIOS

RESUMO

O artigo analisa, a partir da experiência canadense, os procedimentos de consulta aos povos indígenas utilizados no Brasil e sua especial importância na promoção do diálogo em relação à pesquisa e à lavra dos recursos minerais em terras indígenas. O trabalho propõe que a consulta integre um processo idôneo e comprometido com os anseios e os receios dessas comunidades. Embora o consentimento com poder de veto seja uma medida mais protetiva dos direitos dos povos originários, este não pode ser considerado um fim em si mesmo. Atrair o foco para o resultado individualmente considerado pode afastar o diálogo tão necessário à pacificação dos conflitos. O trabalho concluiu que o processo de consulta não pode se ater apenas ao cumprimento de uma mera formalidade e que as características apontadas na decisão da Corte canadense apresentam balizas e parâmetros que podem contribuir para o aprimoramento do sistema jurídico brasileiro. Foram realizadas pesquisas em fontes bibliográficas, além de utilizado o método hipotético dedutivo, com consultas à legislação nacional, jurisprudência estrangeira e textos bibliográficos específicos.

Palavras-chave: *consentimento; consulta prévia; mineração; terras indígenas.*

INTRODUCTION

The 1988 Brazilian Constitution recognizes the rights of indigenous peoples for preservation and protection of their culture and ethnical diversity, in addition to the original rights over the lands traditionally occupied by them. From the protection to the indigenous land, gives rise to greater rigor concerning the exploitation of the resources existing in them, in view of the close cultural relationship that traditional peoples have with the territory they occupy.

It is well known that mining is an activity that has an effective or potential impact on the environment. In this context, the research and mining of mineral resources on indigenous lands in Brazil is conditional on authorization from the National Congress after hearing the impacted communities. The legal nature of this hearing is controversial and gives rise to legitimate discussions. Consultation and consent are the modalities that alternate according to the interests at stake. This circumstance comes to justify the present research.

We cannot lose sight of the perspective that, in the soil and subsoil of indigenous lands are present the most varied natural and mineral resources, which attract the interest of major enterprises.[4] This reality has the power to make the regulation of mineral extraction on indigenous lands even more relevant. This is a recurrent subject on the State agenda and therefore deserves a detailed analysis so that the parameters of this hearing can be precisely outlined.

The aim of this work is precisely to analyze the characteristics and parameters for consultations with the original peoples. We intent to investigate which participation modality is able to promote the construction of a successful dialogue among the parts interested in the enterprise and the affected indigenous populations.

For didactic purposes, we divided this work into three topics. In the first, we describe the relationship established between the colonizer and the indigenous peoples, the assimilationist practice of certain public policies, and the treatment given to the indigenous in the 1988 Brazilian Constitution. In the second topic, we analyze some of the constitutional and infra-constitutional instruments concerning the participation mechanisms

4 According to Silva, there are numerous requests for environmental licensing in relation to projects with the potential to impact indigenous peoples. The author states "Note that in 2015 there were more than three thousand requests for environmental licensing registered before FUNAI, about projects that would affect indigenous peoples, among them the construction of hydroelectric dams, […], mining projects, pipelines, highways, among others" (SILVA, 2019, p. 165).

for traditional communities. In the third topic, we present reflections on a paradigmatic decision from the Canadian Federal Court of Appeal. This decision portrays how a country that is not a signatory to the ILO Convention 169 (BRASIL, 2019) positioned itself on the subject, shedding light on the contribution of this understanding to the improvement of the Brazilian legal system.

What would be the characteristics of a prior consultation committed to the two-way process of building understanding between native populations and those interested in using the natural resources in their territories? This is what we intend to answer in this paper based on an analysis of the Canadian model, reaffirmed by the Federal Court of Appeal's decision in the case of Gitxaala Nation v. Canada.

Research in bibliographic and jurisprudential sources presented the characteristics of free, prior and informed consultation with traditional populations in environmental licensing processes of mining enterprises. We used the hypothetico-deductive method, starting from the premise that the consent of native peoples to mineral exploration on their lands is not characterized as an indispensable legal requirement for achieving a dialogical construction between all the actors involved.

The scarcity of literature concerning the hearing of native peoples in licensing processes for enterprises that impact the environment, associated with the need for constant review of the legal instruments seeking to implement the principles of information and popular participation in environmental matters, justify the choice of the proposed theme.

1 INDIGENOUS LAW IN BRAZIL: THE MEETING WITH THE COLONIZER AND THE 1988 CONSTITUTION

The colonization process in Brazil was marked by a history of violence, oppression, and submission of the native peoples who lived here. There are countless reports of abuses experienced by them, such as violation of their culture, their traditional ways of life and their freedom through assimilation and enslavement, as well as, as Peruzzo (2017, p. 9) reports, sexual violation evidenced by the "bodies of indigenous women who were systematically raped by the colonizers". Thus, the relationship established between the colonizers and the indigenous peoples was not based on the recognition of free and equal peoples.

Furthermore, the framing of all native peoples in a single classification, called "Indian", demonstrates the ethnocentrism of the colonizer. This

single subsumption overlooked the plurality existing among the native peoples themselves. At this point, the colonizer proceeded to a double and polarized identification, whose parameter ended in itself. The white European behaved as an ethnocentric reference of identification to the extent that all those who were not white were "Indians", regardless of the heterogeneity already existing among indigenous peoples. In this sense, Peruzzo (2017, p. 9) teaches that:

> Despite narratives permeated with benevolence, the colonizer approached the original peoples from the top down, ethnocentrically, and has done so since the first contact between representatives of these European and American cultures, starting with the hetero-identification of the peoples under the mantle of an abstract concept that has never translated the plurality of the peoples living in Brazil, that is, the concept of "Indian".

This "top-down look" was also present in the State's actions post the Paraguayan War (1864-1870) when, according to the same author (PERUZZO, 2017, p. 10), "the Brazilian State began a process of occupying the Amazon lands and exploiting the west of the country, especially Mato Grosso, granting irregular property titles and exterminating indigenous groups". In 1910, the Indian Protection Service (SPI) was established, which continued the practices of cultural assimilation under the mantle of "guardianship" of these peoples, seen as incapable of deciding for themselves and as an obstacle to national development.

> The discourse of "guardianship" guided the creation of the SPI, which was designed to guard the Indians in one sense, but in the background there was a more decisive proposal, which was to guard the Indians so that they would not get in the way of what at the time was propagated as "national development" (PERUZZO, 2017, p. 10).

In the mid-1970s and 1980s, social movements waged by indigenous peoples grew strong, both nationally and internationally. It was a struggle for the recognition of their ethnic diversity, their ways of life, especially linked to the territory they occupy, and a struggle for self-determination. According to Rodrigues (2014, p. 51), "The right to self-determination as a 'right to citizenship' encompasses, as seen, not only its political aspect, but also its economic, cultural, and social one". The same author affirms the importance of the decision-making power of these populations: "All peoples have the right to decide about their own community life, their laws, their rules, their institutions, symbols, and their own political destiny" (RODRIGUES, 2014, p. 51).

The self-determination of indigenous peoples encompasses their cultural identity, manifested in their relationship with the natural environment. In the lesson by Rodrigues (2014, p. 51), "The requirement of self-determination, in other words, focuses on the right to land, to historical resources, and to autonomous cultural organization (encompassing cultural identity)". It is seen that the cultural manifestation and autonomy of native peoples constitute inseparable values from the environment they occupy, as they are interconnected.

In this way, the struggles for indigenous rights seek to "give voice" to those who, for so long, have been silenced. It was necessary to break with the assimilationist model and begin a process of recognition with the participation of indigenous communities in issues that concern their lands, culture and resources, configuring a new and (re)signified citizenship (RODRIGUES, 2014).

The 1988 Constitution dedicated an exclusive chapter to the protection of indigenous peoples. Article 231 of the constitutional charter guarantees indigenous peoples recognition of "their social organization, customs, languages, beliefs and traditions, and the original rights over the lands they traditionally occupy" (BRASIL, 1988). Furthermore, the first paragraph of the same provision recognizes the bond of the indigenous people with their land, in a relationship necessary "for their physical and cultural reproduction, according to their uses, customs, and traditions" (BRASIL, 1988). Thus, it can be seen that the legislator wanted to ensure the interculturality and self-determination of indigenous peoples in a special way in the Article 231, as well as in a general way, as provided in Article 216 regarding the ways of creating, doing and living.

> An important step for this debate is to understand that interculturality is extracted from the constitutional text itself, since, as stated above, besides Article 3, Item IV, having raised the good of all without any form of discrimination to the condition of fundamental objective of the Republic, also Article 231 recognized to the indigenous their social organization, customs, languages, beliefs and traditions, while Article 216 recognized the ways of creating, doing and living (PERUZZO, 2017, p. 15).

The conquests achieved in the text of the constitutional charter materialize in the recognition of the traditional ways of life of indigenous peoples, in addition to ensuring the maintenance of their ethnic diversity. In view of the close cultural relationship that indigenous peoples maintain with the territory they occupy, the 1988 Charter also sought to guarantee the use and preservation of these lands, adopting a stricter regime when it comes to activities likely to pose a high impact on indigenous territory.

2 MINING ACITIVITES IN INDIGENOUS LANDS AND THE CONSTITUTIONAL HEARING

Paragraph 3, Article 231 of the 1988 Brazilian Constitution provides for the possibility of researching and mining mineral wealth on indigenous lands, as well as the use of other resources (BRASIL, 1988). However, on indigenous lands, this exploitation of water resources, including energy potential, and the research and mining of mineral wealth is conditioned to authorization from the National Congress, after hearing the affected communities. It can be seen that by requiring authorization from the Legislative Branch, the constitutional text honored the protection of the ethnic diversity of indigenous peoples in order to correct a past of dispossession and violent invasion, as Joyceane Bezerra de Menezes teaches:

> The requirement of authorization by Congress does not intent to elevate the ownership of indigenous land vis-à-vis civilian ownership. It is an additional measure to protect ethnic diversity. The indigenous peoples have been massacred over the last five hundred years and continue to be the object of discrimination, suffering with the continuous disrespect of their rights. If the Constitution surrounded indigenous ownership with protection, it was in an attempt to end the integrationist culture that has prevailed in Brazil since the colonial period (MENEZES, 2007, p. 101).

We should remember that the Article 231, § 2 of the 1988 Constitution grants the indigenous peoples the exclusive usufruct of the riches from the soil present in the lands traditionally occupied by them (BRASIL, 1988). If, on the one hand, the indigenous have the usufruct of the soil and its riches, on the other hand, the subsoil belongs to the Union, as provided in the Article 20, clause IX, of the constitutional diploma.[5] However, although ownership of the subsoil belongs to the State, its exploitation was conditioned to compliance with two requirements, namely, legislative authorization and hearing of the indigenous peoples affected. Thus, we can conclude the constituent's desire to curb and/or balance the action of the executive in regulating the exploitation of these resources, once again giving prestige to respect for the ethnic diversity of the indigenous peoples and their traditional relationship with the land, as well as their self-determination.

According to Brito and Barbosa (2015, p. 103), "The need to preserve indigenous land to protect the environmental resources that are essential to guarantee the indigenous way of life turns this *locus* into a specially protected territorial space". Added to this is the fact that mining is a polluting

5 According to the Article 20 of the 1988 Constitution: "Article 20 The following are property of the Union: […] IX – the mineral resources, including those of the subsoil; […]" (BRASIL, 1988).

or potentially polluting activity, which, according to Menezes (2007, p. 99), can cause irreparable damage to indigenous territories "[…] not only to the environment, but also to the socio-cultural organization of indigenous communities, causing cultural disintegration and the introduction of diseases". In this context, the constitutional strictness dispensed to the matter is duly justified.

No doubt remains that the impact caused by mining activities on indigenous lands is considerably more relevant than the impact of the same enterprise in areas not occupied by indigenous peoples. The environmental degradation intrinsic to mining activity affects not only the natural but also the cultural environment[6], so dear to indigenous communities and may cause the violation and even the extinction of the community and its ways of living and doing, as well as its cultural and religious expressions. In the same line of thought, Brito and Barbosa (2015, p. 99) teach that: "In this scenario of growing environmental degradation on indigenous lands we verify that the indigenous spaces of life, freedom, and physical-spiritual reproduction are also undergoing an ecological crisis […]".

However, despite the robustness of the protection granted to the indigenous peoples, their lands, and culture, we find that these rights are in constant violation. The intense search for natural resources, fostered by the current economic model, is also responsible for found violations.

> Although Article 231 of the 1988 Federal Constitution expressly recognizes the ethno-cultural importance of the land to indigenous peoples, there is a constant and real disrespect for that right, since the indigenous peoples living space has become the focus of controversial demarcations, irregular possession, and economic exploitation of their natural resources. In short, the indigenous land, as an environmentally protected space, has become vulnerable in recent decades from the socio-environmental point of view. In addition, the guarantee of the constitutional rights that deal with its protection, besides running into administrative obstacles that make its regularization difficult, has also been held hostage by a game of political and economic forces (BRITO; BARBOSA, 2015, p. 102).

The legislative omission, embodied in the absence of a law regulating the Article 231, § 3º of the 1988 Constitution, makes it extremely difficult to deal with the issue and gives rise to many debates.[7] The question is, for

6 According to the understanding argued by Fiorillo (2013), the environment can be classified into four aspects, namely: natural, artificial, cultural, and work environment.

7 The Brazilian Chamber of Deputies is debating the Law no.191/2020, which intends to regulate § 1 of Article176 and § 3 of Article 231 of the Constitution. The bill establishes specific conditions for the research and extraction of mineral and hydrocarbon resources and for the use of water resources to generate electricity on indigenous lands, and establish compensation for the restriction of the usufruct of indigenous lands.

example, whether the constitutional hearing has the nature of a mere consultation, or whether it represents consent, in the latter case with the power to bind the authorization of the National Congress, an indispensable requirement. If the legal nature of consent is recognized, the absence of such consultation would prevent the authorization of the National Congress and would, therefore, have veto power. However, the issue divides the opinion of the doctrine. The constituent's choice of the term "hearing" opens the debate. Silva points out that

> […] during the National Constituent Assembly, the debated projects spoke expressly about **consent** of indigenous peoples, having been replaced by the expression "hearing" only in the final stages of the constituent process […] and without there being a debate about the scope and meaning of this change (SILVA, 2019, p. 167, our emphasis).

This means that, by using the term "hearing" instead of "authorization" or "consent", which was changed only in the final stages of the process and without due debate about the change, the constituent opened a margin for more restrictive interpretations in relation to indigenous rights.

> Thus, in the second substitute presented by the rapporteur of the Systematization Commission, Bernardo Cabral, the requirement of "authorization" of the indigenous communities would be substituted by the term "in consultation with the impacted communities" in the case of mining exploration and exploitation of hydroelectric and energy potential on indigenous lands. This would last until the version approved (draft Constitution C), which we have today. […] The substitution of terms led to an opportunity for more restrictive interpretations regarding the rights of indigenous peoples to take hold in the public arena, pushing aside more emancipating constitutional interpretations consistent with the international framework of consultation (SILVA, 2019, p. 57; 167).

We find that such instruments of popular action also derive from the principles of community participation, as well as the principle of information, both in environmental matters. On the principle of participation, Thomé (2020, p. 77) teaches that the current view of democracy should be more comprehensive, to the extent that "Democracy, today, is not satisfied only with the deliberative instances of elected representatives and bureaucratic bodies faithful to legal commands". There must be means of direct community participation when it comes to environmental issues:

> In addition, means of direct participation of the people or the community are required, both in terms of macro decisions (plebiscite, referendum, and popular legislative initiative), and in decision-making processes of sectorial extension (administrative, condominium, and business decisions, for example), to the extent that these deliberations directly or indirectly affect individuals (THOMÉ, 2020, p. 77).

In this regard, it is extremely important that the State put its efforts into the realization of this principle. Thomé (2020, p. 79) has a similar understanding, arguing, "The effective implementation of the socio-environmental rule of law requires the strengthening of the principle of mandatory State action and the democratic principle […]". It becomes relevant, therefore, the improvement of instruments and mechanisms that assist in the implementation of effective community participation in environmental matters.[8]

The principle of information is configured as an assumption of the principle of participation. It is not possible to participate without the necessary information about the object at issue. For this reason, Thomé (2020, p. 78) explains, "The right to participation presupposes the right to information, since there is an inseparable link between the two". There is no doubt that "there is a logical dependency between them: there will only be popular participation if there is access to environmental information" (THOMÉ, 2020, p. 79).

Concerning the participation of indigenous communities, it worth emphasizing that, post the promulgation of the 1988 Constitution, Brazil ratified the International Labor Organization (ILO) Convention 169 on indigenous and tribal peoples. ILO elaborated this normative instrument in 1989, later incorporated into our legal system through Legislative Decree no. 143 of June 20, 2002, while the instrument of ratification with the Executive Director of the ILO had its deposit on July 25, 2002. It came into effect internationally on September 5, 1991, and in Brazil as of July 25, 2003, according to its Article 38, promulgated on April 19, 2004. It was consolidated nationally with the publication of Decree 10,088, of November 5, 2019 (BRASIL, 2019).

Article 6 of the Convention states that indigenous peoples shall be consulted whenever administrative or legislative measures may in any way affect them. The device further prescribes that the consultation must be carried out "with the aim of reaching agreement and obtaining consent

8 For instance, the holding of a public hearing remotely to be promoted by the State Secretariat for Environment and Sustainability of the Rio de Janeiro state government. As reported by INEA (2020): "The State Commission for Environmental Control (Ceca), a body of the State Secretariat for Environment and Sustainability (SEAS), will hold, on July 22, at 7 p.m., a public hearing. The reason is the presentation and discussion of the Environmental Impact Report (RIMA) for the Açu Petróleo company's for a preliminary license for the implementation of two pipelines that will connect the Petroleum Treatment Unit at the Port of Açu, in São João da Barra, to Petrobras' Barra do Furado station, in Quissamã. The public hearing will be held remotely. The remote modality makes it possible for the population to access it and broadens popular participation, constituting an important tool for realizing the principle of community participation in environmental matters.

about the proposed measures" (BRASIL, 2019). Thus, it is clear that the goal of any and all consultations, including the hearing provided for in § 3 of Article 231 of the 1988 Constitution, is to seek an agreement with the affected communities (BRASIL, 1988).

In this sense, Silva (2019, p. 150) states that "Every consultation carried out must present the intention of obtaining an agreement or achieving consent, according to the general rule established by ILO Convention 169. One cannot admit the carrying out of empty consultations that have the objective of merely complying with a protocol or the mere "harvesting of opinion" of indigenous peoples without the real intention that their demands be accepted, because this thought goes against all the constitutional treatment granted to indigenous peoples in the recognition of their self-determination and participatory importance.

Based on this international framework, some authors argue that the consultation procedure, which also includes constitutional hearings, should result in the consent of the affected communities, without which the measure could not be implemented. According to this line of reasoning, the implementation of the activity would be bond to the decision-making power of the indigenous communities.

We must note, however, that the indigenous veto matter is not peaceful, and has raised many discussions. According to Silva (2019, p. 150), "First, it is worth highlighting the difference between consent as an objective and consent as a legal requirement for the adoption of the intended measure". This is because if consent is understood as a legal requirement, its absence implies veto power for the execution of the intended measure, whereas if consent is understood as an objective and not as a legal requirement, it cannot be admitted to exercise veto power.

However, the ILO has already pronounced itself on the matter, clarifying that Convention 169 recognizes consent as an objective and not as a legal requirement, thus ruling out the "indigenous veto". Hence, Silva summarizes that consent is not an end in itself, and that the ILO does not recognize the veto power of affected communities, i.e., indigenous peoples could not prevent, for example, the research and mining of mineral resources on their lands based on the provisions of the ILO Convention. However, tthe indigenous peoples' position must be considered in forming the decision:

> The Organization makes it clear that although consent is the objective pursued by adequate consultation, it is not an end in itself, and does not recognize the so-called "indigenous veto". The ILO expressly states that it is impossible for indigenous

> peoples to prevent the use of their lands. However, it specifies that their opinion, values and understanding should be considered by the State in the formation of the decision, which should keep symmetry with the content of what remained consulted, giving the opportunity for the peoples to participate in the formulation and application of measures and programs that affect them at all levels (SILVA, 2019, p. 153).

Furthermore, the ILO itself admits that such consent will not always be obtained, and in such cases, Silva suggests that the reasons for the indigenous peoples' refusal should be considered:

> In fact, the ILO has already stated that a valid consultation is one that has the sincere objective of obtaining consent or reaching an agreement, even if this objective is not reached. Consultation must aim at this understanding, efforts must be directed at obtaining consent, but if consent is not obtained, the reasons for this must be contemplated in the final act (SILVA, 2019, p. 150).

At this point, we conclude that ILO Convention 169 does not require signatory countries to consider consent as a legal requirement. However, nothing would prevent them from adopting such a requirement, whether based on the conjunction of principles present in the legal system, such as the principle of participation, of the self-determination of indigenous peoples, or by express provision in infra-constitutional legislation.

An example is Federal Law No. 13,123, of May 20, 2015, which is subsequent to the ratification of ILO Convention 169. This law provides for access to genetic heritage, as well as access to traditional knowledge associated with it, involving the indigenous population and other traditional communities. Article 9 of this law requires that prior consent be obtained as a condition for access to the associated traditional knowledge of a given community. Without this consent, it is not possible to access the traditional knowledge of that community (BRASIL, 2015). In this same way, Decree n. 8,772/2016, which regulates Law n. 13,123/2015, in Article 13, which states that "The indigenous population, traditional community or traditional farmer may deny consent to access to their associated traditional knowledge of identifiable origin" (BRAZIL, 2016). In this case, the denial of consent prevents the access to traditional knowledge, which ensures the veto power.

For Silva (2019, p. 172), by demanding prior consent as a legal requirement for access to traditional knowledge, both Law n. 13,123/2015 and Decree n. 8,772/2016 are in line "with the most modern and emancipating forms of interpretation on the right to consultation that have been establishing themselves on the international scene. They seek to obtain the

free and informed consent of indigenous populations and not only a formal participation […]". It is a matter of guaranteeing the self-determination of indigenous peoples more broadly.

Despite the progress made in legislation with regard to the protection of the rights of indigenous peoples, in practice those rights have been violated. While, on the one hand, Brazil has made great strides in consolidating the principle of participation as an instrument for protecting the rights of indigenous peoples, as exemplified by Law 13.123/2015, on the other hand, Brazilian multinational companies from various sectors, including mining, have not publicly made commitments regarding consultation or prior consent:

> Oxfan Brazil published a study in 2018 about the behavior of 21 major Brazilian multinational companies operating in Latin America and Africa in the mining, oil and gas, construction, steel and agribusiness segments, evaluating their statements and commitments publicly made regarding prior consent, consultation, community engagement and human rights. Unfortunately, the study was conclusive about the absence of commitment by Brazilian companies to carrying out consultation and obtaining the consent of indigenous and traditional populations impacted by economic enterprises of major impacting potential (SILVA, 2019, p. 156).

We notice that the participation of traditional peoples in decision-making processes is the measure that confers greater effectiveness with regard to the self-determination of indigenous peoples. To this end, the State must hear these peoples within a process of prior, free, informed, adequate consultation, in good faith and in accordance with the protocols established with the indigenous communities, respecting their ethnic and cultural diversity. If, at the end of this real effort, consent is not obtained, the most appropriate forms should be sought in order to adjust the projects to the indigenous peoples' concerns, as well as to seek full compensation for the affected community.

We conclude that directing the debate towards the possibility or not of the indigenous veto limits the range of existing possibilities and alternatives for the implementation of an effective participatory democratic process, which can take effect in a variety of ways. Silva (2019, p. 154) demonstrates that in 2009, the UN rapporteur, James Anaya, lamented the discussion formed around the indigenous veto. The discussion "would only help to disseminate and inflame anti-indigenous discourse from sectors of society that promote the false idea of antagonism between development and indigenous peoples' rights" and the mistaken image of indigenous peoples

as members of a minority that is uncomfortable with the development process.

Thus, light is shed on the purpose of consultation and its character as a negotiation, as opposed to the idea of the unilateral imposition of wills, whether by the State or by the indigenous peoples. To prioritize the discussion around the indigenous veto is the same as prioritizing the arrival point while disregarding the starting point and the path traveled. Making available to the indigenous the right to veto without committing to the dialogue process makes consultation a vulnerable instrument that can represent even more violations to indigenous rights. In the same direction, Peruzzo (2017, p. 19) clarifies that

> The pure and simple veto dismisses dialogue and understanding, while alternative proposals or abstentions presuppose them. Prior consultation is an instrument that, if regulated in this sense, can not only ensure the full exercise of the rights guaranteed to indigenous peoples in the law, but also contribute to the rooting of the practice of participatory democracy as an exercise of active citizenship, structuring, from the bottom up.

The outcome of a consultation with indigenous peoples must come from an effective and committed dialogue on both sides. Consent resulting from inadequate and uncommitted consultation would not be a desirable outcome. According to Milanez (2020, p. 2),

> Systems based on Prior Consent can be distorted and generate the illusion of autonomy, since negotiations take place in contexts of power imbalances resulting from access to financial resources, control of information, and the predisposition of governments to favor extractive projects.

Dialogue and understanding between the parties are the means to be encouraged. The unilateral impositions of will by any of the parties and the lack of commitment in the construction of the participation process empty the results of the consultations. Peruzzo (2017, p. 23) states:

> Along these lines, considering prior consultation with respect to the asymmetries between the various culturally differentiated groups and clarifying the role of understanding as something that goes beyond “yes” and “no”, it is necessary to clarify, by way of conclusion, what agreement or consent would be thought of together with the right to say “no”. This clarification is important to reinforce the role of understanding, because even in consent it is not only the right to veto that is at issue.

It is also important to emphasize that the lack of definition and the delay by the State in carrying out prior consultation and in regularizing

economic activities on indigenous lands can lead to numerous socio-environmental damages. This is the case of the Buenos Aires mine, located in northern Ecuador, where thousands of people extract gold illegally due to the absence of the State (LIÉVANO, 2019). A number of economic, social, and environmental ills can arise from illegal mineral exploitation on indigenous lands, such as money laundering, slave-like labor, prostitution, environmental damage, and non-collection of taxes to the public coffers. In countries whose environmental administrative structure is weak and scrapped, illegal exploiters of indigenous lands have carried out economic activities without the participation of traditional populations and also without the official sanction of state command and control instruments.

Regularizing the mineral activity, when environmentally and socially viable, is, therefore, relevant; and should occur based on the precepts of the principle of community participation. Patience and care on the part of the actors involved, especially the government, are essential elements in an environment that intends to count on effective community participation. Failure in the consultation process can lead to serious conflicts that, if not remedied administratively, will ultimately be decided by the Judiciary.

The Ecuadorian Judiciary, for example, is dealing with a socio-environmental dispute involving one of the most important mining projects in that country, concerning the exploitation of underground gold and silver deposits in the Rio Blanco mine, a town located in the Andes Mountains, 3,550 meters above sea level. Native communities in the mountainous region of Cuenca claim there had been no prior consultation about the mineral exploration project of a Chinese company on their land. The case is in the courts and awaits the pronouncement of the Constitutional Court (LIÉVANO, 2019).

In Brazil, the Federal Regional Court of the 1st Region has ordered, on November 30, 2016, the suspension of the environmental licensing of the Teles Pires Hydroelectric Plant, located on the border of the states of Pará and Mato Grosso, until "free, prior, and informed consultation" with the Kayabi, Munduruku, and Apiaká indigenous peoples, affected by the work, has taken place (DECISION, 2016). The traditional peoples allege, in addition to the absence of prior consultation regarding the use of water resources that will occur on their lands, violation of areas considered by them to be sacred.

We see, therefore, that the debate on prior consultation with traditional peoples is becoming increasingly present in the courts of mining countries,

which is why we consider it relevant to analyze the paradigmatic decision of the Canadian Judiciary in the case of Gitxaala Nation v. Canada.

3 PRIOR CONSULTATION AND CANADIAN JURISPRUDENCE

At the international level, there is an important court decision handed down in Canada regarding the inadequate implementation of prior consultation with native peoples. It is the case of Gitxaala Nation v. Canada, judged in 2016 by the Federal Court of Appeal (FCA). The case was brought by different aboriginal communities in the British Columbia region, as well as associations, foundations, and other members of society against the issuance of a Canadian government order allowing the implementation of a large economic exploration project in the region.

The project consisted of the construction of two 1,178 km pipelines and associated facilities to transport oil and light crude oil. Along the way, the pipelines would pass through or near numerous territories of traditional Canadian populations (indigenous peoples), affecting communities in a variety of ways, impacting harvest areas, traditional village sites, places of spiritual worship, waterways, areas of hunting, fishing, timber use, etc. (CANADA, 2016, p. 8-12). The Court recognized that the sheer magnitude of the project meant that its effects would also be significant, thus bearing a considerable importance (CANADA, 2016, p. 132).

The Canadian Court found that the order issued, by itself, i.e., individually considered, would have met all the requirements of administrative law, and would be within legal parameters. However, the order could only have been issued if Canada had previously observed its constitutional duty to consult with the indigenous peoples who would be impacted by the development. The Court analyzed the procedure carried out and concluded that there was a failure in the execution of a specific point during the consultation process and, for this reason, decided to annul the order granted to the companies responsible for the project.

This is a case where the Canadian legal system requires the duty to consult with native peoples. In Canada, the legal basis for the duty to consult is found in the Constitution (CANADA, 1982) and is grounded on the honour of the Crown[9]. The duties of consultation are part of the process

9 According to the § [142] of the ruling: "In Canada, executive authority is vested in the Crown—the Crown also being subject to the duty to consult Aboriginal peoples—and the Governor in Council is the advisory body, some might say the real initiator, for the exercise of much of that executive authority" and the § [171]: "The duty to consult is grounded in the honour of the Crown".

of reconciliation and fair dealing between Canada and the first nations that inhabited the territory when the settler arrived (CANADA, 2016, p. 74). The duty involves consulting with the indigenous peoples and if necessary accommodating, that is, adjusting, altering, modifying projects or measures so that the process of reconciliation and fair negotiation can be effective. Since this is a large undertaking, the Court considered that consultation should be carried out in a thorough manner, taking into consideration the concerns of the traditional peoples.

For consultation process, Canadian jurisprudence does not require compliance with a standard of "perfection". According to the Court's understanding, "In determining whether the duty to consult has been fulfilled, 'perfect satisfaction is not required'" (CANADA, 2016, p. 78). What is expected is that there is a real commitment to the consultation process through reasonable efforts (CANADA, 2016, p. 79) being enough to fulfill the duty to consult. Thus, the Court adduces that it is not necessary to have a standard of consultation that approaches perfection, but it becomes essential to demonstrate that the Crown has made efforts within reasonable standards.

One of the reasonable standards appears in the duty of good faith that must be reciprocal towards both parties. This means that the Crown must demonstrate a true intention to address Aboriginal concerns in a substantial, considerable, and committed manner (CANADA, 2016, p. 77). Similarly, according to the FCA, First Nations peoples should not frustrate the Crown's good faith attempts and "[…] nor should they take unreasonable positions to thwart the government from making decisions" (CANADA, 2016, p. 78).

It is important to note that in the case in question, the consultation process does not confer veto power on native Canadian peoples. Thus, consent is not recognized as a legal requirement for the adoption of the measure embodied in the issuing of the order. The duty of consultation means to inform, to dialogue and, if necessary, to accommodate and adjust the economic project to the wishes of the traditional peoples:

> The consultation process does not dictate a particular substantive outcome. Thus, the consultation process does not give Aboriginal groups a veto over what can be done with land pending final proof of their claim. Nor does consultation equate to a duty to agree; rather, what is required is a commitment to a meaningful process of consultation (CANADA, 2016, p. 77).

In this way, consultation is characterized as an important instrument of dialogical construction in which its bi-directionality is observed. For the

Court, a simple consultation is not enough; the consultation has to hold a meaningful character. Therefore, for the Canadian Federal Court of Appeal, meaningful consultation "is not intended simply to allow Aboriginal peoples 'to blow off steam' before the Crown proceeds to do what it always intended to do. Consultation is meaningless when it excludes from the outset any form of accommodation" (CANADA, 2016, p. 98).

As such, meaningful consultation would be one in which the Crown is prepared to make changes to the proposals, taking into consideration the information it has received, as well as prepared to provide feedback to the actors involved in the process (CANADA, 2016, p. 98). The duty to consult is not just about formal compliance with a pre-established protocol. It is necessary to dispel the idea that consultation is a process that seeks a superficial exchange of information between the parties involved, because in reality it requires that the Crown be willing to implement the additional modifications in order to adapt the economic project to the reality of the Aboriginal populations that may be affected by the enterprise.

The Court also establishes the manner in which the considerations and concerns of indigenous peoples shall be addressed. It does not accept that concerns about specific points be treated in a generalized, abstract or imprecise manner. In this way, it considers that specific concerns about the economic project, raised by the First Nations, deserve specific answers from Canada, as well as the due considerations and explanations related to them (CANADA, 2016, p. 100).

In this case, the consultation process had five phases, subdivided into: (I) preliminary phase; (II) pre-initiative phase; (III) hearing phase; (IV) post-report phase; and (V) regulatory phase (CANADA, 2016, p. 14-15). The construction of the process demonstrated that a broad consultation would be conducted, capable of fulfilling the goals of reconciliation and fair negotiation required by the constitutional precept governing the matter. In general, the Canadian Court considered that the consultation process was carried out in a reasonable manner, with broad participation of the original peoples.[10]

However, the Court acknowledged that the implementation of phase IV failed to meet expectations. In this particular phase, the parties were to engage in dialogue about the report formulated in the previous phases, and

10 Examples of active involvement of Aboriginal groups: the Gitxaala community submitted 7,400 pages of written material, oral testimonies from 27 community members, and 11 expert reports on various subjects. The Haisla community submitted a traditional use study that described their culture, tenure system and laws, and how the project would interfere with the use and occupancy of their land, water, and resources. The Haida community submitted a 336-page marine traditional knowledge study with information on marine plants, invertebrates, and more (CANADA, 2016, p. 22-24).

the government body responsible for mediation, the Canadian Environmental Assessment Agency, was to specifically conduct and respond to the concerns of the original peoples. The main failure observed in this phase was the lack of meaningful dialogue between the parties.

The Court found that Canada had not considered or discussed several concerns raised by First Nations. Government officials said during the proceedings that they did not have the power to consider or make changes to the project with regard to the concerns of traditional groups. They demonstrated that they were only authorized to note the issues, but not to suggest solutions or decide any matters. Thus, the Court understood that: "Missing was someone from Canada's side empowered to do more than take notes, someone able to respond meaningfully at some point" (CANADA, 2016, p. 116).

Thus, it would not be enough to "write down" the issues raised by traditional populations. It would also be necessary to have a dialogue about them with the stakeholders. In this sense, the Court concluded "The case law is clear that Canada, acting under the duty to consult, must dialogue concerning the impacts that the proposed project will have on affected First Nations" (CANADA, 2016, p. 120). The Court held that even before any mitigating conditions were presented to the project, the Crown would have an obligation to have discussions regarding the depth and nature of the impacts caused to the affected peoples. Presenting any mitigation solution before hearing the peoples concerned represented a stance incompatible with the principle of fair dealing and reconciliation.

> "In our view, it was not consistent with the duty to consult and the obligation of fair dealing for Canada to simply assert the Project's impact would be mitigated without first discussing the nature and extent of the rights that were to be impacted. In order for the applicant/appellant First Nations to assess and consult upon the impacts of the Project on their rights there must first be a respectful dialogue about the asserted rights. Once the duty to consult is acknowledged, a failure to consult cannot be justified by moving directly to accommodation. To do so is inconsistent with the principle of fair dealing and reconciliation" (CANADA, 2016, p. 126).

The decision of the Canadian Federal Court of Appeal analyzes, in detail, the particularities of a consultation process that involves the rational use of natural resources on lands inhabited by traditional populations, and points out possible flaws that tarnish the construction of a two-way understanding. It is important to mention that Canada does not adopt the understanding that considers consent as a legal requirement, besides not being a

signatory to ILO Convention 169. However, the points argued in the Court decision demonstrate that the country has been concerned with carrying out the consultation process in a way that promotes dialogue, understanding, and adjustments, as well as the necessary changes to accommodate the demands of the First Nations.

We do not intent to refute the importance of ILO Convention 169. On the contrary, there is no doubt that by ratifying the Convention, Brazil adopted one of the most modern instruments for the protection of the self-determination of indigenous peoples. What we intend to show is how a country, even though it is not a signatory of the Convention, has understood and applied prior consultation. We may see, therefore, that even though Canada has not ratified the Convention, the Federal Court of Appeal of Canada, in the decision presented, adopted an understanding that can contribute to the improvement of the Brazilian legal system of prior consultation, for it presents a path towards a respectful and supportive dialogue with its first nations.

FINAL CONSIDERATIONS

Brazilian native peoples have been the target of violations since the beginning of colonization. Although the 1988 Constitution gave special importance to the indigenous issue and the protection of their culture and lands, it is clear that to this day they are still the target of exploitative actions based on the ideal of development.

The subsoil of indigenous lands holds a wide variety of natural and mineral resources. The impacts resulting from the exploitation of these resources, by means of research and mining, represent a threat not only to the physical territory, but also to the culture of these peoples.

For this reason, the consultation procedures with the affected communities take on special importance, as they promote dialogue and the effective participation of these communities within a legitimate process that is committed to the fears of these populations in the case of the implementation of economic exploration projects in their territories. The consultation/hearing cannot, however, be empty and superficial. The fears, evaluations, and suggestions of the indigenous peoples need to be substantially considered by the State in the environmental licensing processes of economic projects with the intention of avoiding, mitigating, or compensating for eventual negative impacts on their territories.

Although it is possible to affirm that consent understood as a veto power and legal requirement is in line with the principle of self-determination of indigenous peoples, the understanding is that this instrument of participation should not be seen as an end in itself, since its adoption purely and simply can be detrimental to the native peoples. Understanding consent as a result and point of arrival means disregarding the starting point and the path, such important milestones for the materialization of the participation of the communities involved.

We concluded, therefore, that a consultation substantially committed to a two-way process of understanding-building proves to be a peacemaking tool, while consent obtained through uncompromising consultation holds the potential to further violate impacted communities.

The decision handed down by the Canadian Federal Court of Appeal shows that a satisfactory consultation cannot be restricted to the fulfillment of a mere formality, as the State must take into consideration the opinion and concerns of the traditional communities involved. The characteristics of a consultation procedure portrayed in the Canadian decision can contribute to the improvement of the Brazilian legal system, as they present objective guidelines and parameters for carrying out a satisfactory consultation, in order to refine the understanding of the principles of participation and information in Brazil.

Furthermore, the adoption of parameters for a materially adequate consultation is relevant not only as a measure to protect the rights of the traditional communities involved, but also as a measure of legal certainty for the entrepreneur, reducing surprises and uncertainties regarding the cancellation of authorizations and environmental licenses for the project, as a result of an unsatisfactory consultation.

From this perspective, we need to look back to the path, considering that the dialogical process of consultation represents nothing more than a process under constant construction. This realization requires, from all actors involved, the adoption of actions capable of effectively seeking a substantial understanding, based on acceptable socio-environmental parameters.

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