The Legal Framework for Brazilian Biodiversity and the Free Prior Informed Consent (FPIC) for Traditional Peoples[1]

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Abstract

The legislation proposes the protection of traditional knowledge and the regulation of the use of biodiversity in Brazil. The article provides a detailed account of the legislative process, including an analysis of the mechanisms, actors, and pathways involved and an examination of the role of legal persons in interpreting the interactions between official agents and traditional peoples' representatives. Specifically, the article examines how the legislation was conceived and approved, with specific attention to the perspectives expressed by traditional peoples during the process. The research methodology involves the collection of the proposed bill, its transcripts, and the written and oral statements of associations or individuals representing the interests of traditional peoples. The objective is to establish a descriptive category that reflects the procedural aspects (mechanisms, pathways) of this legislation and the perceptions of traditional peoples (actors) regarding this particular legal framework, which is known as the Brazilian legal benchmark of biodiversity.

Keywords: *Legal research, legislative procedure, MAP framework, Brazilian Legal Benchmark of biodiversity, traditional peoples, right to FPIC.*

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Introduction

This paper aims to elucidate the discourse and legislative process surrounding the utilization of biodiversity and the safeguarding of traditional knowledge (TK) in Brazil (Draft Bill n. 7735/2014). In 2015, Act n. 13.123 was approved following deliberations in the House of Representatives and the Federal Senate (Brasil, 2015c).

This investigation entails the extraction of aspirational goals from specific legislative instruments in order to unfold the theoretical MAP approach, which is constituted by mechanisms, actors, and pathways. In this analysis, the structure is employed to elucidate the functioning of formal legislative mechanisms and their effect on the lives of specific actors who will experience the consequences of this type of legislation (Haglund and Aggarwal, 2011; Haglund and Stryker, 2015; Haglund, 2019). The MAP framework underscores the necessity for social transformation through policy changes and cultural shifts to ensure the protection of human rights. This research employs the MAP framework to elucidate shortcomings in the legislative process with regard to the rights of traditional peoples and proposes amendments to achieve a society committed to the protection of these rights (Haglund and Stryker, 2015).

The primary objective is to address the most significant issue that emerged throughout the legislative process, namely the absence of free, prior, and informed consent (FPIC). FPIC is a legal international "mechanism and pathway" that traditional peoples (actors) must utilize during the formulation of the Brazilian Biodiversity Legal Benchmark, as stipulated by the 169 ILO Convention(OIT, 2011).

The aspiration (goal) of the norms, as set forth in the 169 ILO Convention, is to recognize the self-determination and autonomy of traditional peoples. This is to be exercised through FPIC. The aim here is to ascertain whether there are conflicting interests between traditional peoples and business corporations. The latter's intention is to acquire natural genetic resources from the former. The surrounding areas of traditional peoples' territories are to be protected by national legislation, as requested by the Convention on Biological Diversity (CBD). Additionally, traditional peoples' knowledge regarding the use of these resources may be used to apply for a patent, thereby monopolizing the use and application of certain products derived from natural resources. This effectively excludes the community as a whole from

profiting from the previously free use of traditional knowledge. This presents a conflict between private property rights and the social welfare of a community.

The objective of these analyses is to gain insight into the organization of the legislative process in light of the conflicting forces at play (corporate interests versus traditional peoples' interests) in the primary debate regarding intellectual property rights, the protection of traditional knowledge (TK), and the use of Brazilian biodiversity. This paper aims to demonstrate that, despite the coexistence of the Convention on Biological Diversity (UNITED NATIONS 1992), the 169 International Labor Organization Convention (OIT 2011), and the TRIPS Agreement (WIPO 1994), it is possible that the latter exerts a more substantial influence over countries' decisions regarding the protection of traditional knowledge (TK) and the use of biodiversity. This kind of research endeavor is, according to LaDawn Haglund, an essential project to transform unsustainable practices through the use of human rights theoretical tools. "Research that explores the strengths and limitations of human rights for exposing and challenging unsustainable social relations is especially needed"(Haglund, 2019, 14). However, this is a broader objective that can be initially delineated through the specific case analysis of the right to FPIC of traditional peoples during the legislative procedure concerning the approval of the Brazilian Biodiversity Legal Benchmark (Brasil 2015b).

This paper describes the process by which a piece of legislation, whose primary objective is to protect traditional peoples and to regulate the use of Brazilian biodiversity, is developed, discussed, and enacted. In doing so, it considers not only the theoretical approach of MAP as a tool for interpreting the interaction between Brazilian official agents and traditional peoples' representatives but also the concept of biocultural rights (Chen and Gilmore, 2015) as a defining element in evaluating the nature of the debates between official agents and traditional peoples.

The research question is developed following the collection of preliminary data and a review of the relevant literature, with the aim of gaining an accurate overview of the field to be explored. The objective of this study is to examine how this legislation, which serves as the Brazilian legal benchmark for biodiversity, was conceived and approved in relation to the expression of traditional peoples in Brazil during the legislative process.

The objective of this research is to collate the proposed legislation, along with the written and oral statements made by associations or individuals representing the interests of specific traditional communities, in order to cross-reference the coded expressions of these different actors and develop a potential category that could describe the nature of the legislation and the perception of traditional communities regarding this specific legal benchmark. This initial article will focus on an analysis of the public hearings conducted by the permanent commissions of the Brazilian Federal Senate.

Theories and Methods

This study is theoretically informed by the dual perspective of law, which intertwines the concepts of love and law, as well as universality and particularity (Bańkowski, 2001b, 2001a). Bańkowski posits that the nexus between law and love is where legality exists, as "the contingency of love finds its expression and meaning against the certainty of its law" (Bańkowski 2001b, 134). In this framework, the author theorizes that legalism and love, despite occupying opposing ends of the spectrum, converge in the middle ground, thereby enabling the practice of law through legality. This legal perspective is consistent with the MAP framework due to the transformative approach inherent in applying mechanisms, actors, and pathways to the effects of the interpretation of the FPIC (Free, Prior and Informed Consent) right during the legislative process on the lives of traditional peoples.

To comprehend the significance of efficacious FPIC utilization by traditional peoples, it is essential to theoretically grasp the distinction between the abstract bearer of rights and duties and the concrete legal subject, as elucidated by Zenon Bańkowski (Bańkowski 2001b). In this case, Bańkowski's legal theory aims to substantiate the necessity of understanding the identity of the relevant actors in this particular scenario, moving beyond the generality and universality of the legal norm and the concept of an abstract legal subject. Furthermore, the particulars of the case, as revealed during the application of the law, must be considered, along with the needs and interests of the parties involved. These individuals should be regarded as the concrete bearers of rights and duties (Haglund and Stryker, 2015).

Another theoretical concept that may assist in the comprehension of legislation pertaining to indigenous rights and the utilization of traditional knowledge is the notion of biocultural rights (Chen and Gilmore, 2015). Biocultural rights represent a fundamental legal mechanism that serves to guarantee the protection of indigenous cultural and natural resources (Chen and Gilmore, 2015). In light of the rich cultural heritage of Brazil, it is imperative that biocultural rights extend to the protection of other local communities, including Indigenous peoples, Quilombo (descendants of escaped enslaved people), and riverbank dwellers, who depend on natural and cultural resources that require preservation and protection.

In considering the grounded theory proposed by Kathy Charmaz, the objective is to construct a theory that is consistent with the collected data and the codes extracted from this data (Charmaz, 2014). The theoretical generalization will emerge subsequent to the completion of comprehensive data collection and analysis. Ultimately, in order to comprehend the essence of the Brazilian Legal Benchmark of Biodiversity with regard to the interests of traditional peoples and to generate a theoretical generalization at the conclusion of this study, it is crucial to adhere to Mark Tushnet's recommendations (Tushnet, 2006).

Firstly, Tushnet (2006, 371) advises that the focus should be on examining the institutional actions that represent the outcome of a complete congressional process. Accordingly, the methodological approach entails the extraction of all pertinent information from the legislative body responsible for approving the Brazilian Legal Benchmark of Biodiversity (Act n. 13123/15). The primary objective is not to evaluate the individual actions of legislators in isolation, but rather to assess the institutional performance with regard to the final piece of legislation, taking into account the various forces that shape the legislative process. Personal actions are to be examined as a key element of this research plan, with the aim of understanding the institutional outcome, as proposed by the adopted theoretical MAP approach.

Moreover, as Tushnet illustrates, it is essential to examine a variety of materials, including committee reports, floor debates, and even newspaper articles, in order to ascertain the constitutional rationale behind the legislature's actions (Tushnet 2006, 371). Therefore, this research is centered on the transcripts from the public hearings conducted by the Permanent

Commissions at the Federal Senate (mechanisms and pathways) and a comprehensive literature review.

In summary, this research aims to examine the institutional structure (mechanisms and pathways) in order to identify instances of "constitutionally irresponsible actions" or "inactions" (Tushnet 2006) with respect to the approval of the Brazilian Legal Benchmark of Biodiversity. In order to formally scrutinize the actions or inactions of a specific legislature, it is essential to consider the aspiration of the fundamental rights regarding the protection of traditional peoples in the Brazilian Constitution, as well as the international legislation that is protective of traditional peoples' interests, most notably the 169 ILO Convention. These fundamental elements are vital to the MAP framework for substantive transformation with regard to human rights.

With regard to the 169 ILO Convention, this research aims to develop a theoretical framework for understanding this particular mechanism and its associated pathways, which are based on the concept of FPIC. Colchester and Ferrari (2007, p. 5) elucidate that the right to FPIC derives from a people's right to self-determination and is strongly connected to their related rights to their territories and to self-governance. The 169 ILO Convention and the CBD serve to reinforce the notion of indigenous peoples as subjects of rights, rather than objects of tutelage (Porro *et al.*, 2015). As MacKay notes, FPIC is a complex administrative procedure, requiring consensus among all parties involved, including the government, the project proponent, and the indigenous and traditional peoples affected by the project. This consensus must be reached through a series of administrative actions, including options assessment, social, cultural, and environmental impact assessment, exploration, exploitation, or closure (MacKay, 2004, 15). Furthermore, indigenous peoples or traditional communities are entitled to exercise their right to FPIC over their territories, environment, and natural resources (Colchester and Ferrari, 2007, 5). The 169 ILO Convention establishes the right to FPIC whenever there are indigenous peoples' interests at stake. This is to say that the right to FPIC applies to projects that may affect Indigenous peoples' livelihoods or ways of living, whether these projects are pieces of legislation, public policies, or development projects (Colchester and Ferrari 2007; MacKay 2004).

This inquiry aims to gather systematic data that can inform a theory encompassing the intentions of the institutions involved in approving the Brazilian Legal Benchmark of Biodiversity and the application or non-application of the right to FPIC in the same legislative process.

In light of the legislative process's historical context, the different stages it has undergone, and the interaction between mechanisms and pathways as a crucial theoretical tool, it is also relevant to explain that this piece of legislation passed in Congress via expedited procedures since the Presidency, which was responsible for the initiative of this specific proposal. In order to regulate the protection of Brazilian biodiversity and traditional knowledge (Draft Bill n. 7.735/2014(BRASIL, 2014)), the legislative proposal was fast-tracked (TÁVORA *et al.*, 2015). This expediency results in the Congress Agenda being impeded until the piece of legislation has been put into motion. In accordance with § 1º, article 64 of the Federal Constitution (BRASIL, 1988), the President of the Republic is empowered to specifically request the fast-tracking of their legislative proposal. In accordance with the aforementioned expedited process, the Senate and the House of Representatives are required to engage in discussion and voting on the legislative proposal within a period of 45 days. In the event that this does not occur, both houses are unable to proceed with other legislative proposals. Methodologically, it is essential to identify and analyze the decisions made by the President and members of Congress throughout the legislative process. This is a crucial point of departure for a comprehensive understanding of the stages of this legislative process.

In lieu of an exhaustive description of the formalities of the Brazilian legislative process, the objective is to extract pertinent data from the stages of this particular legislative procedure pertaining to the Brazilian legal benchmark on biodiversity. This data will then be used to construct a theoretical generalization that may assist in understanding the interactions among different actors, as well as the diverse mechanisms and pathways that are taken in the process. The objective here is to provide an overview of the general functioning of the legislative process. Firstly, the initial piece of legislation proposed by the Executive Branch of the Brazilian Government is presented, with consideration given to the primary reasons for regulating biodiversity and traditional knowledge (TK) in Brazilian territory as developed in the legislative proposal. Secondly, the natural path is followed. Once the Presidency has

presented the legislative proposal, the Brazilian House of Representatives discusses the matter, including the possibility of proposing amendments, exercising vetoes, and considering transcripts of the debates. Thirdly, in accordance with the Brazilian Constitution, the Senate is permitted to alter the legislative proposal solely through amendments. The House of Representatives is then required to analyze these amendments within a period of ten days, as outlined in Article 64, "caput," of the Federal Constitution (BRASIL 1988). Ultimately, the final phase of this process entails the possibility of vetoes by the Executive Branch of the Brazilian Government (the President). However, these may be overridden by the House of Representatives in the final stage of the legislative procedure, namely the approval of the Brazilian Legal Benchmark of Biodiversity.

In light of the aforementioned procedural logic, this article seeks to examine the Senate hearings conducted to address sensitive matters pertaining to the interests of traditional peoples during the legislative process.

Public Hearings in the Senate

In light of the intricate interconnections between actors and mechanisms/pathways, the central focus of this article is on two public hearings convened by the Permanent Commissions at the Brazilian Federal Senate. Firstly, it is necessary to determine whether public hearings involving the participation of representatives of traditional peoples can be considered an implementation of the right to FPIC. This is a significant issue that warrants further investigation and should be considered alongside the primary research question of this study. The response to the preceding question will be developed as the data extracted from the public hearings are subjected to analysis. The initial point of departure for this analysis was the selection of the primary arguments presented by various actors during the public hearings (mechanisms). However, given that the traditional peoples are the primary stakeholders in this legislative process, it is crucial to prioritize their arguments in the analysis. In order to avoid bias, the proposed systematization also includes arguments from certain senators and the official governmental agent representing the Ministry of the Environment. These arguments are relevant insofar as they serve to reinforce the nature of the draft bill.

At the initial public hearing, Senator Telmario Mota, the Rapporteur for the draft bill in the Science, Technology, and Innovation Commission in the Federal Senate and the individual responsible for amendments 136 to 138 to this bill (TÁVORA et al. 2015), stated that:

> Indigenous peoples, traditional communities, and community farmers say they have been excluded from the process of elaborating the new Act […] Not only because, Minister, but they also left out – […] which are the quilombo (descendants of escaped enslaved people) communities and the traditional peoples of African origin. They have forgotten to consult them, and the concrete evidence that this consultation did not take place is that they were not even included in the proposed bill […] (Free translation from the transcript of the first public hearing)(Brasil, 2015a).

Furthermore, the Senator's statements confirm the prevalence of the pharmaceutical, cosmetics, and agribusiness industries' interests and the lack of FPIC during the procedures regarding this specific piece of legislation. It is noteworthy, however, that the use of particular linguistic terms in the statement reveals a political nuance with respect to the draft bill. For example, he explicitly states that "they **have forgotten** to consult them" and that "it is necessary to make these **small** amendments" (bold text added). These statements can be considered euphemisms, given that the 169 ILO Convention establishes the right to FPIC for any legislative or administrative act that may affect the interests of traditional peoples. It is pertinent to inquire whether minor amendments can adequately address a significant legal issue, namely the respect for the self-determination of traditional peoples through the right to FPIC.

To obtain further data from the Senatorial perspective, João Capiberibe, another Senator who was directly involved in the analysis of the draft bill, demonstrates that the right to FPIC was overlooked by the Federal Government (Brasil 2015a). The Senator asserts that while the Minister of the Environment has engaged in discussions with industrial agents, traditional peoples have not been afforded the same opportunity. A more comprehensive linguistic analysis of the following statement, "If the law does not take them into consideration and they

imagine that they are going to be harmed, they are going to abandon this project" (Brasil 2015a), reveals that the Senator, despite acknowledging the neglect of traditional peoples' interests, still emphasizes the necessity of securing their adherence to the draft bill through mere consultation, rather than through the culmination of a prolonged process of informed and free negotiation. Nevertheless, the 169 ILO Convention legally requires that free, informed, and prior consent be obtained as a necessary stage of the legislative process. The issue is not merely to guarantee their participation in the process, but rather to ensure their collective right to be informed and to consent to the legislative act. At a seminar on the 169 ILO Convention, organized by the Instituto Socioambiental, Débora Duprat (2014) asserted that this right has been disregarded in numerous economic development projects in Brazil. Empirical evidence exists demonstrating such disregard in the context of economic development projects, as Duprat has identified (Garzón, 2009). In such cases, it is reasonable to conclude that the lack of FPIC will be even more prevalent with regard to legislation that affects the interests of traditional peoples. This is due to the nature of the legislative process, which is characterized by universality, generalization, and abstraction, and which falls within the realm of normativity. These concepts and their more indirect effects on the fundamental day-to-day problems of traditional peoples represent a complex and opaque set of factors that alienate them.

Another Senator who served as Rapporteur for the draft bill before the Commission of Environmental Issues (TÁVORA et al. 2015), Jorge Viana, played a significant role at the public hearings held in the Senate. He endeavors to justify the necessity of considering the perspectives of all stakeholders engaged in the protection and utilization of Brazilian biodiversity (Brasil 2015a). It is noteworthy that the Rapporteur of one of the most significant commissions for the protection of the Brazilian environment emphasizes the importance of considering the perspectives of various stakeholders, including the government, the technical-scientific community, industry (without explicitly naming this economic sector), and the Indigenous community. It is only necessary to consult with the traditional people in a legally binding manner. In accordance with the 169 ILO Convention, traditional peoples are entitled to the right to FPIC in the event that legislative measures are proposed which may affect their interests. In a detailed and well-reasoned argument, the Senator makes the case for the necessity of engaging in constructive dialogue with all relevant stakeholders. Nevertheless,

from a legal standpoint, it is not advisable to equate disparate interests and unequal statuses as if they are discharging their obligations in an appropriate manner. The proposal to hold public hearings in the Senate could prove an effective means of facilitating dialogue with traditional communities. Nevertheless, the hearing represents merely the initial phase of a complex administrative process (Hanna and Vanclay, 2013), within which the right to FPIC must be fully implemented. The public hearing held at one of the Houses of Congress (the Federal Senate) does not compensate for the absence of discussion and debate concerning the interests of traditional peoples in the legislative process.

In a statement, Francisco Gaetani, representing the Ministry of the Environment, acknowledged the Ministry's failure to organize hearings to listen to the traditional peoples (Brasil 2015a). The specific argument, based on the premise that more structured hearings will be conducted in the future, reveals a confession about past events that resulted in the disregard for the needs and the free, informed consent of the traditional peoples with regard to the draft bill. From a legal standpoint, it is crucial to consider the predicament of the official government representative attempting to rectify the absence of respect for the traditional peoples' rights by consenting to participate in the Senate's public hearings. The aspiration of the right to FPIC applicable to the legislative process that may affect traditional peoples' interests is based on the premise that all parties involved in the process have fulfilled their respective roles in a manner that allows traditional peoples to exercise their right to FPIC at each stage of the legislative procedure.

On the second day of the public hearings held by the Federal Senate, traditional peoples' representatives will express their profound discontent regarding the disregard for their right to FPIC. One of the speakers is Maira Smith, a representative of an official governmental organ, FUNAI (National Foundation for Indigenous Peoples Protection). She denounces the fact that FUNAI has consistently repudiated the process by which this new legal framework was elaborated, without any participation by indigenous peoples (Brasil, 2015b). The representative from the National Foundation for Indigenous Peoples (FUNAI) asserts that the public hearing conducted in the Federal Senate does not constitute an implementation of the right to FPIC. This is a compelling argument insofar as the FUNAI, as an official governmental institution devoted to the protection of indigenous peoples, repudiates the Senate's public

hearings as a means of fulfilling the free, prior, and informed consent demanded by the 169 ILO Convention. A federal government official has denounced the disregard for the 169 ILO Convention, thereby reinforcing the significance of a legislative failure.

Subsequently, on the second day of public hearings, Nilson Gabas Jr., representing the Paraense Museum Emilio Goeldi, underscored the legal nature of FPIC, emphasizing the traditional peoples' right to determine the best course of action for their lives (Brasil, 2015b). Mr. Gabas (Brasil, 2015b) posits that there is a significant distinction to be made concerning the right to FPIC in its complete form. This right is not merely a matter of participation; rather, it entails the opportunity to determine the most appropriate course of action for the well-being of the community affected by this kind of legislation. On the second day of presentations in the Federal Senate, it became evident that the individuals testifying were experts on the 169 ILO Convention and therefore well-versed in the legal concepts associated with it, such as the right to free, prior, and informed consent. The speaker presents a compelling argument for the inclusion of the power to veto as part of the right to FPIC. The distinction between consultation and consent implies the possibility of attributing to traditional peoples the power to decide the content of legal dispositions in this draft bill. The right to FPIC, as interpreted by the speaker, consists of making traditional people effective collaborators in the elaboration of the draft bill.

Claudia Pinho (Brasil, 2015b), representative of the National Commission on Traditional Peoples and Communities, expressed discontent and frustration with the manner in which the Brazilian government has handled the matter of the traditional peoples during the process of drafting the bill. As Claudia Pinho elucidated, the crux of this argument hinges on the examination of international regulatory instruments. As a representative of the National Commission on Traditional Peoples, the speaker confirms that traditional peoples have yet to be consulted and consented to this legislation, a fact that is in clear violation of the aforementioned legal instruments. In consequence, she identifies this as a contravention of the 169 ILO Convention, among other legal instruments.

Marciano Tolêdo, representing the Via Campesina (Small Farmers' Association), presented a well-reasoned argument in which he highlighted the unequal treatment of traditional peoples (Brasil, 2015b). The speaker presents a compelling argument, given that he represents the

interests of small farmers, who will be afforded less legal protection than their counterparts in larger agribusiness corporations. In his discourse, he asserts that this legislation is more favorable to international business than it is to national industries. The speaker does not present a rationale for why international corporations stand to gain from this norm in comparison to national companies. Nevertheless, an analysis of the Brazilian legal framework reveals that the majority of legal provisions are oriented towards the interests of corporations (Feres *et al.*, 2020). It is crucial to underscore that the speaker distinguishes between interloquence and dialogue. This implies a more efficacious involvement in the regulatory process, namely the active participation of traditional peoples in the construction of this legislation. In this instance, their voices may be formally heard. Nevertheless, there is no assurance that the actual modifications requested by the traditional peoples will be incorporated into the final version of the text. It is interesting to examine this particular argument in the context of the Act's promulgation. A mere handful of the demands put forth by traditional peoples were incorporated into the final version of the legal document (Feres *et al.*, 2019) .This suggests that the speaker's concerns, particularly those related to fear and suspicion, were genuine and substantial.

Maurício Guetta, representing the Socioambiental Institute, centered his argument on the illegality and unconstitutionality of the Brazilian Biodiversity Legal Benchmark. He asserted that traditional peoples were not formally consulted and thus did not consent to legislation that affects their legitimate interests (Brasil 2015b). The speaker highlighted the illegality of the government's actions and the discontent of the traditional communities in the public hearings. Furthermore, he asserts that "the holders of traditional knowledge are acutely aware of the extent of their rights being violated, beginning with their exclusion from the drafting process of this bill." This argument is of significant import in demonstrating the illegitimacy of the legislative procedure (Habermas, 1996), specifically the exclusion of traditional peoples from participation in the drafting of this bill in light of the 169 ILO Convention and the Brazilian Constitution.

In a compelling and well-reasoned argument, Sônia Guajajara (Brasil, 2015b), a representative of the Articulação dos Povos Indígenas do Brasil Association, elucidates the deficiencies in the respect accorded to the rights of traditional peoples. Sonia Guajajara is an indigenous

Brazilian politician and activist for indigenous rights. She is the current head of the Ministry of Indigenous Peoples, a recently created governmental department. In her critical speech delivered before the Federal Senate, she commends the democratic regime and calls for respect for constitutional rights from all branches of government. Furthermore, she asserts that the traditional peoples were not sufficiently consulted and did not contribute to the drafting of the bill. Additionally, she elucidates the relationship between the federal government and the so-called "Business Coalition for Biodiversity." This is a highly significant argument, as it is relatively straightforward to identify a number of different dispositions within the approved legislation that are in alignment with the demands of the Business Coalition for Biodiversity (Feres et al., 2020). Guajajara employs a compelling argumentative structure, namely, "a conscious and deliberate decision by the Federal Government in conjunction with the so-called 'Business Coalition for Biodiversity.'" The use of adjectives such as "conscious" and "deliberate" is significant in that it reveals the underlying agenda between the Federal Government and business corporations. The decision to exclude traditional peoples from this debate demonstrates a disregard for legal dispositions concerning the right to FPIC (International Labor Organization – ILO 1989).

Additionally, Denildo Rodrigues de Moraes, representative of the National Coordination of Quilombo Communities, addresses the necessity for free, prior, and informed consent in accordance with the 169 ILO Convention (Brasil, 2015b). Denildo Moraes attempts to highlight the absence of consultation with quilombo communities and the House of Representatives' apparent disregard for their interests. He also underscores a common concern among representatives of traditional peoples: their lack of involvement in the drafting of this bill.

Edel Nazaré de Moraes Tenório (Brasil, 2015b), a representative from the National Council of Extractive Activities (forest management, mining, hunter-gathering), attempts to illustrate the complexities inherent in the practical implementation of the right to FPIC, particularly in light of the distinctive lifestyles of traditional peoples. The speaker elucidates the considerable difficulty in applying international legislation regarding the right to FPIC, particularly in consideration of the living conditions of traditional peoples. The right to FPIC is not merely an openness to dialogue or participation; it also entails the necessity of establishing the material conditions that would enable traditional peoples to engage effectively in

participation and negotiation with business corporations and governmental agents on an equal footing. The testimony of Edel Tenório concerning the lack of access to means of communication in her region provides relevant evidence that there are insufficient resources to formally facilitate openness to dialogue. It is imperative that the requisite conditions be established to enable the traditional peoples to exercise free and informed consent. She reiterates their willingness to engage in dialogue and to be heard. Nevertheless, it is pertinent to question whether this testimony, once conveyed, can be considered an effective means of implementing the right to FPIC.

Final Remarks

In conclusion, it is imperative to consider the arguments presented during the deliberation and approval of Draft Bill n. 7.735/2014 when researching legislative data. Mark Tushnet underscores the significance of scrutinizing the actions or inactions within the legislative process that may potentially give rise to unconstitutionality (Tushnet, 2006). The draft bill has the potential to impact the interests of traditional peoples, necessitating the effective implementation of the right to Free, Prior, and Informed Consent (FPIC) as outlined in the 169 ILO Convention. The case of this draft bill is defined by the data extracted from the proposed draft bill by the federal government and two public hearings in the Brazilian Federal Senate.

In accordance with Tushnet's theoretical framework (Tushnet, 2006) and the theoretical MAP approach (Haglund & Aggarwal, 2011), it can be asserted that, initially, the Brazilian Federal Government did not request the involvement of traditional communities during the formulation of the draft bill that was presented to Congress for deliberation. The arguments presented by government representatives indicate that the perspectives of traditional communities were overlooked. Legislative methods were employed with the objective of displacing traditional peoples and suppressing their interests. It is troubling to observe how the relationships between actors, mechanisms, and pathways have resulted in the alienation of traditional peoples and the disregard for their right to FPIC. The Brazilian Biodiversity Legal Benchmark was developed without the free, prior, and informed consent of traditional communities. This underscores the necessity of considering the needs and interests of these communities and recognizing their role as rights-holders and duty-bearers, extending beyond

the boundaries of a mere legal entity. The findings of Haglund and Stryker (2015) corroborate the assertion that structural transformation will only occur when there is a genuine alignment of power and cultural shifts, accompanied by policies and institutions that are committed to human rights. This underscores the inherent conflict between the private property rights of corporations and the social welfare of communities. It further highlights the critical importance of prioritizing the recognition of traditional peoples' self-determination and autonomy through the effective implementation of FPIC.

The Brazilian federal government failed to implement the right to FPIC during the drafting of this legislation, as the Traditional Peoples' Representative explicitly stated during the public hearing in the Federal Senate. From the outset of the legislative process, significant concerns have been raised regarding the principle of democracy (Habermas, 1996). As Habermas (1996, p. 110) asserts, the democratic principle should inform "a procedure of legitimate lawmaking." As he proceeds to elaborate, the democratic principle stipulates that only those statutes may claim legitimacy that can garner the assent (Zustimmung) of all citizens in a discursive process of legislation that has been legally constituted (Habermas 1996, 110). The same argument has been presented previously (Ribeiro and Brito, 2018). However, in this particular case, the objective is to establish a correlation between the principles of democracy, discourse theory, and morality with specific data. This data can be used to substantiate the assertion that those who are directly affected by this legislative measure did not provide their consent during the lawmaking process.

The Federal Government's failure to acknowledge the role of traditional peoples as a relevant participant in this realm is a cause for concern. This inaction has the potential to lead to unconstitutionality with regard to the fundamental rights of traditional peoples, particularly given the integration of the 169 ILO Convention into the Brazilian Legal Order (Tushnet, 2006). The manner in which the Brazilian federal government formulated the draft bill constitutes a contravention of the requisite intertwining between cultural and natural resources with respect to the biocultural rights of traditional peoples (Chen and Gilmore, 2015). When natural and cultural resources are viewed from the perspective of traditional peoples' culture and identity, it becomes evident that denying their participation in this legislative process not only concerns the misappropriation of natural genetic resources but

also exemplifies a disregard for the cultural identity of traditional peoples. As Habermas (1996, p. 110) asserts, the democratic principle should inform "a procedure of legitimate lawmaking." As he proceeds to elaborate, the democratic principle stipulates that only those statutes may claim legitimacy that can garner the assent (Zustimmung) of all citizens in a discursive process of legislation that has been legally constituted (Habermas 1996, 110). The same argument has been presented previously (Ribeiro and Brito, 2018). However, in this particular case, the objective is to establish a correlation between the principles of democracy, discourse theory, and morality with specific data. This data can be used to substantiate the assertion that those who are directly affected by this legislative measure did not provide their consent during the lawmaking process.

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With regard to the arguments presented by representatives of traditional peoples, it is evident that all representatives from the various organizations express discontent with the non-implementation of free, prior, and informed consent during the legislative process, as required by the 169 ILO Convention. It is possible to derive valid inferences from the speeches delivered by these representatives during the public hearings held in the Federal Senate.

Firstly, the 169 ILO Convention is frequently invoked by representatives of traditional peoples to substantiate their non-participation in the formulation of the draft bill. These representatives are fully cognizant of their rights, particularly the right to FPIC enshrined in the 169 ILO Convention. This demonstrates that the current assumption that traditional peoples are unable to comprehend political, economic, and legal issues is erroneous.

However, during the drafting of the bill, the Brazilian Federal Government failed to take into account this fundamental right of traditional peoples. The traditional peoples (actors) are not regarded as concrete subjects or bearers of rights during the legislative procedure. However, formal rights are attributed to them as abstract subjects, in accordance with the distinction between formal and abstract bearers of rights, as developed by Bańkowski (2001b).

Moreover, the Business Coalition for Biodiversity has played a significant role in the formulation of this draft legislation. There are notable similarities between the official draft and the business coalition's proposal, as highlighted by Sonia Guajajara. Secondly, the draft bill incorporated the interests of corporate business to the detriment of the needs and fundamental rights of traditional peoples (Feres, Cuco, and Moreira 2019; Feres et al. 2020). These representatives are fully cognizant of their rights, particularly the right to FPIC enshrined in the 169 ILO Convention. This demonstrates that the current assumption that traditional peoples are unable to comprehend political, economic, and legal issues is erroneous. However, during the drafting of the bill, the Brazilian Federal Government failed to take into account this fundamental right of traditional peoples.

The traditional peoples (actors) are not regarded as concrete subjects or bearers of rights during the legislative procedure. However, formal rights are attributed to them as abstract subjects, in accordance with the distinction between formal and abstract bearers of rights, as developed by Bańkowski (2001b). In this specific instance, the MAP framework underscores the significance of democratizing the decision-making process during the legislative phase. The failure to consider the voices of traditional peoples underscores the necessity of accounting for diverse interests and perspectives in the development of new legislation.

Ultimately, the specific lifestyle of traditional peoples presents a significant challenge to the implementation of the right to FPIC in its entirety. As articulated by one of the representatives, Edel Tenório, the majority of traditional peoples lack access to the most fundamental forms of communication in a readily available manner. It is pertinent to invoke the aforementioned theoretical perspective, which posits the notion of legality as an indispensable articulation between law as the expression of legal obligations and love as the embodiment of contingency and the intricacies of reality (Bańkowski 2001a; 2001b). The free, prior, and informed consent must be expressed as an administrative act. This requires not only the participation and

consultation of traditional peoples from a formal point of view (as a formal legal duty), but also the free, informed consent as an essential tool and necessary pathway for incorporating traditional peoples' arguments and propositions into the long process of drafting a specific bill that may affect their interests. This is in accordance with the complexity of reality with all its contingent factors.

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