

# The academic interest around the Free Prior and Informed Consent for indigenous people in Brazil.

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**Abstract.** Due to the intensification of the global climate changes, this research aims to weave a panorama about the main laws and issues involving the Free, Prior and Informed Consent (FPIC), based on current academic publications, and in defense of the ways of life of indigenous peoples and traditional communities in Brazil. For the discussion of the topic in question, the methodology used was a literature review followed by theoretical reflection, from which it was observed how academic interest in the country has addressed the debate about the ILO Convention 169 and socio-environmental conflicts between indigenous people and mega-commodity enterprises, aimed at the developmentalist ideology. As a result of the research, there has been noted a growth in academic publications on the subject since 2018, whose interdisciplinary debate is of utmost importance for overcoming obstacles to, for example, the recognition of the binding nature of the law, which guarantees indigenous peoples and traditional peoples the right to self-affirm their identity, their priorities, and their relationship with their own territory and with nature.

**Keywords.** Free Prior and Informed Consent (FPIC), indigenous people, Brasil, ILO Convention 169, socio-environmental conflict.

## 1. Introduction

This article deals with an overview of Brazilian academic interest in the theme of Free Prior and Informed Consent (FPIC), backed by ILO Convention 169, which was ratified by the Brazilian State in 2002, and promulgated by Decree No. 5.051, of April 19, 2004. Approved by representatives of signatory governments in Geneva, in 1989, the convention guarantees indigenous and traditional peoples the right to self-affirm their identities, as well as to self-determine their forms of organization and ways of life.

Thus, ILO Convention 169[1] establishes, in its Article 6, that governments shall “consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly”. That said, the government must provide appropriate procedures through representative institutions. Not just that, such a consultation process must be carried out in a prior, free, informed, and consented manner by the peoples affected, by projects that want to somehow use their territories and resources. From this perspective, the Free Prior and Informed Consent

(FPIC) is given as a means to enable the legal legitimacy of what the convention in question provides. ILO Convention 169, according to D’Almeida[2], is the main international normative instrument that offers inspiration to national norms regarding the consultation and participation of indigenous peoples and quilombola communities.

More specifically, Brazil also has the National Policy for Sustainable Development of Traditional Peoples and Communities[3], established by Decree No. 6.040, of February 7, 2007, which defines the scope of the concept of traditional peoples and communities: “[...] culturally differentiated groups that recognize themselves as such, that have their own forms of social organization, that occupy and use territories and natural resources as a condition for their cultural, social, religious, ancestral and economic reproduction, using knowledge, innovations and practices generated and transmitted by tradition (translated by the author)”.

That said, community consultation protocols began to be provided for in the Brazilian legal system, officially with the advent of Law No. 13.123, of May 20, 2015. According to Maia, Brito and Gifoni[4], one of its most important functions is precisely to ratify and provide means that enable the Free Prior and Informed Consent.

Not just that, the document called Consultation Protocol presents itself as a way that traditional peoples and indigenous communities in Brazil have found to facilitate the step by step to public authorities in the consultation process. Thus, according to Gomes et. al.[5], the protocol is a set of rules approved by the community on how the approach should occur at the time of FPIC.

The Free, Prior and Informed Consent needs to occur without any pressure or imposition on the results, as its main objective is to reach an agreement through dialogue. For this reason, it is of utmost importance that interested parties know why they are being consulted, as well as the strength of their veto or assent. For this, the federal public agencies responsible for representing traditional peoples and communities in environmental licensing processes were, until 2020, the Palmares Cultural Foundation and the National Indian Foundation. However, as D'Almeida[2] explains, the assignment of the Palmares Cultural Foundation, which had the function of mediating the relationship between entrepreneur and quilombola community, guaranteeing and protecting their rights, providing technical and legal assistance when conflicts and impasses are established with companies, was transferred to the Institute of Colonization and Agrarian Reform, from Decree No. 10.252, of February 20, 2020.

From this perspective, the guide organized by Gomes et. al.[5] brings 6 steps and guiding questions for the collective construction of a Consultation Protocol for the Free Prior and Informed Consent. As they suggest, initially, a general assembly should be held in the territory, followed by training on the ILO Convention 169. After this moment, a Timeline of the community's history is built together, which can initially use the report of the elders who inhabit the territory as a source. In a fourth moment, it is important to build a "Threat Map", which consists of becoming aware of how the territory can be affected, such as something that could bring food insecurity to the community, for example. Then, a map of potentialities is developed, valuing productive, cultural, territorial, spiritual, food, educational and leisure practices. Finally, after collectively taking the notion about their history, threats and powers, the community jointly elaborates the consultation protocol.

## 2. Research Methods

The methodology used for this research was a Literature Review, whose analyzed works were extracted from a bibliographic survey on Google Scholar. From the selection criteria of the results, the search string applied was "Free, Prior and Informed Consent" in Portuguese, with the terminology necessarily appearing in the title of the articles. Therefore, a total of 19 works that met the selection criterion were accepted. Works published at any time were considered, as long as they were Brazilian publications in which the search string appeared in the title of the article published on Google Scholar,

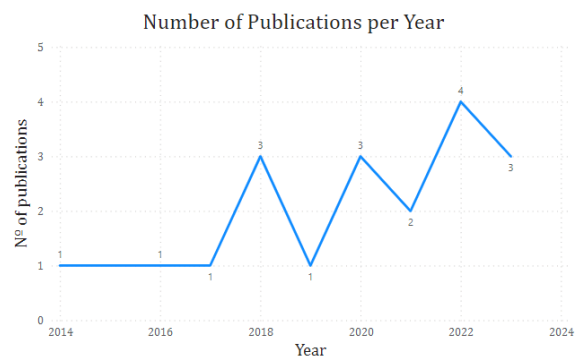
and that had ISSN, ISBN or Doi registration number. That said, it is worth noting that scientific articles published in journals, publications in event proceedings, as well as theses and dissertations in various areas, were accepted until the year 2023, so that the number of productions in the year 2024 would not interfere with the frequency calculation.

The presentation of the results was based on the strict reading of the Abstract of each work, from which analysis categories were listed that allowed an overview of the main discussions mobilized by the research in question. In this sense, this work observed whether the abstracts defined the concept of Free, Prior and Informed Consent, as well as its effects; if they mentioned the ILO Convention 169, if they addressed the theme of socio-environmental conflicts, as well as the places and ethnic groups studied and mentioned in the Abstract.

The fruit of this analysis can be checked according to the presentation of the results below.

## 3. Results

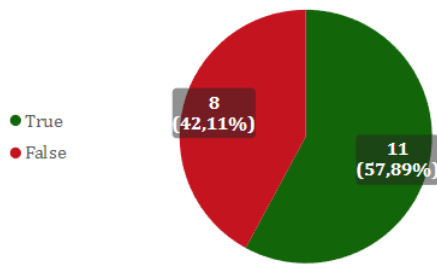
The following are the results of the literature survey, conducted during the month of March 2023, which observed a universe of 19 works.



**Fig. 1** - Graph on the frequency of publications per year.

Regarding the frequency of publications on Free, Prior and Informed Consent, whose term appeared directly in the title of the work, it was found that the year of greatest relevance in this sense was 2022, with 4 publications on the theme (Figure 1). Not only that, it is worth noting that, on the Google Scholar platform, the frequency began to grow from 2018, with no results found prior to 2014. What can explain this phenomenon is the fact that community protocols began to be provided for in the Brazilian legal system, officially with the advent of Law No. 13.123, of May 20, 2015, as mentioned earlier.

### Addresses socio-environmental conflict



**Fig. 2** - Graph on the number of publications which addresses socio-environmental conflict.

Regarding the studies that addressed the issue of socio-environmental conflicts, which represent the dispute over territory, it was observed that 11 of the 19 works addressed the conflict in question (Figure 2), on which a brief discussion will follow.

One of the researches, conducted in 2018, dealt with the administrative procedure on a mining enterprise that would affect the territory of the quilombola community of Queimadas, in the municipality called Serro, in the state of Minas Gerais. Two other studies conducted in 2020 and 2022 also addressed the threat that mining enterprises, as well as forestry, large estates, and conservation units impose on traditional communities and quilombolas who pick ever-living flowers in the region of Espinhaço Meridional, also in the state of Minas Gerais [6,7,8].

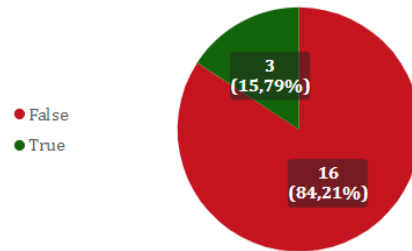
Not just that, as the results of the bibliographic survey point out, the quilombola community Abacatal/Aurá has been suffering environmental damages with the construction of the “Lixão do Aurá”, and the Sanitary Landfill of Marituba, in the Metropolitan Region of Belém, state of Pará. As stated in the Abstract, the process took place without compensation and without carrying out the Free, Prior and Informed Consent [9].

Another study on enterprises with potential for environmental degradation revealed that in the Amazon region, the riverside communities, quilombolas, and indigenous peoples suffer from the possibility of construction of the port terminal of Lago do Maicá in Santarém, state of Pará. Matos[10] addresses the issue seeking to analyze whether the decision taken by the communities from the FPIC has a binding effect, that is, whether its application is considered mandatory by the authorities in the case.

Another work interested in the binding effect of the law that supports the Free, Prior and Informed Consent, was carried out with the intention of demonstrating the mandatory nature of the consultation, in order to validate the legislative process consolidated by the Brazilian Constitution of 1988 and by the ILO Convention 169. The reality of the socio-environmental conflict can be perceived and researched in various regions of the country, as can be seen from the research on the construction of

the Belo Monte Hydroelectric Plant, in the state of Pará; the structuring of the Transnordestina railway in the quilombola territory of the communities Contente and Rio Vermelho, in the state of Piauí; as well as the Silvinita exploration enterprise in the territory of the Mura people, developed by the company Potássio do Brasil after obtaining the preliminary license to research the mineral in Autazes, in the state of Amazonas, without carrying out the FPIC, as the law determines [11,12,13].

### Defines Free Prior and Informed Consent (FPIC)



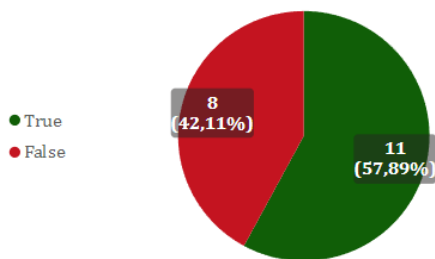
**Fig. 3** - Graph on the number of publications which defines the Free Prior and Informed Consent (FPIC).

Out of a total of 19 works, only three brought the definition of Free, Prior and Informed Consent (FPIC) in the Abstract (Figure 3). The work done by Castro[14], in which the author wove a comparative study between Guatemala and Brazil, FPIC is a “mechanism by which indigenous communities have the fundamental right to be consulted when an administrative or legislative measure directly affects their way of life, with the aim of obtaining their consent (translated by the author)”.

For Domingos, Junior and Fernandes[15], FPIC “is related to the principle of human dignity, after all, it acts by guaranteeing the autonomy and self-determination of indigenous peoples, that is, it allows these interested parties to decide their destinies and contribute to decision-making; to recognition, as it provides an intercultural dialogue with traditional populations; and to the ecological dimension of the minimum existential, allowing a prevention of damages and negative impacts to the indigenous people in the face of economic activities (translated by the author)”.

In another research, a translation issue is observed, this is because the term for FPIC in Brazilian Portuguese is “Consulta Prévia, Livre e Informada (CPLI)”, whose difference from the term in English is due to the use of the word “consultation” instead of “consent”. The work of Brito[16], proposes, among other things, to discuss the difference between these terms in the Portuguese language.

Addresses FPIC Impacts



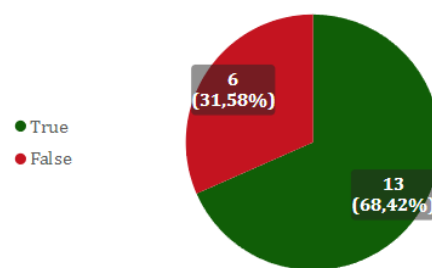
**Fig. 4** - Graph on the number of publications which addresses Free Prior and Informed Consent Impacts.

Of the total of 19 works, 8 addressed the impacts of FPIC (Figure 4). In this sense, all the impacts reported were positive, whether they allowed communities to exercise their right to resistance against hegemonically thought governmental decisions, as in the cases of Abacatal and Maicá, located in Ananindeua and Santarém, respectively, in the state of Pará [4]; or for having demonstrated the possibility of expanding the rhetorical space of the communities that pick ever-living flowers from Lavras, Pé de Serra, and Macacos, in Minas Gerais[7].

Other research describes the effects of the Free, Prior and Informed Consent, and thus, the result of its application is, for example, the facilitation of dialogue between the State and Traditional Peoples and Communities, in the face of the advances of economic enterprises on traditional lands and their biodiversity. In this regard, Moraes and Chai[17] add that FPIC can be understood as an instrument for an inclusive, democratic development model that protects the self-determination of traditional peoples and communities.

In another study, regarding the Assembly on FPIC with the Mura people, started in December 2017 and finished in February 2018, it was found that, as a result, the Mura people decided to elaborate the Consultation Protocol before being officially consulted. According to Castro[13], they also “defined the methodology for the elaboration of the protocol and expanded the number of Lands, communities and villages that would be consulted, extrapolating the limits of the municipality of Autazes, regardless of whether they were regularized or not, as all are Mura Land (translated by the author)”.

Adresses ILO Convention 169



**Fig. 5** - Graph on the number of publications which addresses International Labour Organization (ILO) Convention 169.

Given that it is a very important international standard for the defense of the consolidation and mandatory application of the Free, Prior and Informed Consent in Brazil, 13 out of 19 works mentioned or addressed the ILO Convention 169, directly in the research Abstract (Figure 5).

#### 4. Discussion

The reality of Brazil and Latin America, in general, is permeated by private and governmental initiatives whose investments are directed, among other things, to the commodities market. Commodities are goods produced on a large scale, which can be stored without losses, such as oil, iron, aluminum, soy, and which can be exported in large volumes. Thinking about the external market, and not always about indigenous populations, companies turn to the conquest of lands, highways, energy production, railways, and sophisticated communication systems. For this, it is important, among other factors, that costs have reduced tax values, in addition to little regulation and supervision. Despite this search for the development of capital coming from commodities, in practice rivers are contaminated, there is an increase in the death of water animals, deforestation and the death of forests intensify, air pollution increases, the numbers of serious diseases and types of violence grow, in addition to poverty and prostitution. “Let’s remember the recent cases of the death of hundreds of farmers in Mariana and Brumadinho/MG, leaks of toxic waste with the contamination of people in the rivers of Barcarena and Abaetetuba, which has caused the death of fish, a drop in the production of açaí, among others [5, translated by the author]”.

Zhour et al. apud D’Almeida[2] draw attention to the intransigence of the ideology of development present in these contexts, such as those exposed above, which contribute to greater flexibility of the rules that regulate environmental licensing, in addition to the precariousness of the working conditions of those in charge of monitoring and positioning themselves in the face of large enterprise processes.

Given what has been exposed so far, an expensive

issue to be discussed, observed from the reading of the Abstracts, was the binding nature of the law, that is, the processes of struggle for the recognition of the mandatory application of FPIC. This issue demonstrates the still existing and insistent obstacles to the fulfillment of the right to Free Prior and Informed Consent in Brazil.

One of the works that addresses the issue of the mandatory nature of FPIC, is the research conducted in 2023, published in the Journal of Federal Public Advocacy[16], in which the author argues about how “the absence of regulation of ILO Convention No. 169 in Brazil through more objective and specific parameters than stipulated in the international field causes legal insecurity in the protection of indigenous rights (translated by the author)”. For this reason, debates and questions about how the consultation should take place, the legitimacy of the representatives, the difference between consultation and consent, as well as the most appropriate languages to achieve what is established by the ILO Convention 169 at the time of carrying out a Free, Prior and Informed Consent are important.

This problem demonstrates a possible demand for an interdisciplinary approach in data collection and treatment of the legal repertoire of traditional communities in Brazil. It is important that the stages of the process are widely known, abolishing the constant confusion that is made between FPIC and public hearings, which are not equivalent to the consultation process. In this sense, to demystify such confusion, Maia, Brito and Gifoni[4] affirm that the fundamental difference between the two is that the public hearing is part of the administrative procedure of environmental licensing, regulated by Law No. 9.784/1999 and by Resolutions No. 01, of January 23, 1986, and No. 09, of December 3, 1987, both from the National Environment Council, unlike FPIC. The Free, Prior and Informed Consent guarantees peoples the recognition and identification as indigenous, as well as their destinies and priorities, in an autonomous and binding way. As Junior and Lemgruber[7] add, the public hearing occurs when the political decision about the intervention in the territory has already been made. That is, FPIC must occur before any legislative measure.

It is also worth noting the importance of taking into account the existing materials, produced in conjunction with traditional communities, quilombolas and indigenous people, regarding the best way to conduct a consultation. From this perspective, the material organized by Gomes et al.[5] can be very significant for suggesting that, at the time of conducting the FPIC, some questions should be asked such as the following: “How? When? Where? With which language? How will the state communicate to the community about its intention to conduct the consultation? Will people external to the community be allowed during the consultation? Will armed forces, police be allowed? Will filming, photographs by the state or third parties be allowed? The protocol should indicate how the

consultation process will take place based on the answer to these questions (translated by the author)”.

## 5. Conclusion

As seen so far, the seriousness of the recognition of indigenous and quilombola territories in Brazil is backed by ILO Convention 169, and must be respected, even if the actions mobilized on the legal plane are not always sufficient for its proper compliance. This is because the international agreement, in dialogue with the national order, has contributed to the so-called socio-environmental justice[4].

Despite the challenges, the international agreement recognizes “the right of possession and property of these peoples [...], including on lands that, as observed in certain cases, are not exclusively occupied by them, but to which they have traditionally had access for their activities and subsistence[2, translated by the author]”.

In summary, the panorama of the main laws that regulate the Free, Prior and Informed Consent, as proposed in this work, aimed to highlight and reaffirm the importance of dialogue between international and national scenarios in strategic mobilization, whether in UN conventions or in other discussion environments, especially in times of intensification of the climate crisis. In this sense, the traditional way of life and the sustainability of its various ways of interacting with nature, dealing with the land and the environment in a harmonious way, can have much to teach and propose ideas for slowing down the climate issues that affect the global population in general.

Finally, this work reinforces the importance of recognizing the citizenship of people from the countryside and the forest, as subjects holding much knowledge and alternatives to the aggressive extractivist mode of the dominant operations over land and territory. In this regard, it is important to emphasize that, despite the challenges for the effective realization of FPIC, it does not mean that the quilombolas and indigenous peoples of Brazil position themselves in a passive and conformed way, on the contrary, they participate and build this struggle historically in the country, for the recognition of their lands and the valorization of their ancestral practices.

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