

The Legality Of The Belo Monte Hydroelectric Construction From The Perspective Of Indigenous Land Rights

Sayuri Fujishima
M.A. Student in Human Rights
University of Minho, Portugal
sayurifujishima@gmail.com

ABSTRACT

The paper focuses on a recent case considered by the Inter-American Commission on Human Rights, which relates to the legality of the Belo Monte hydroelectric dam from the perspective of indigenous rights to land. The proposed project is to be carried out in the Xingu valley, a region in the Amazon that is well-known for its natural resources and the presence of several indigenous communities, which the Brazilian government intends to remove from the area, despite their land rights which are legally established and consolidated by the UN Declaration and the national Constitution. We are faced with a clear conflict between a minority's right to land and a majority that seeks national economic development. Thus, how can we achieve respect for indigenous rights when these rights represent an "obstacle" for economic success? Is the UN Declaration being taken into consideration by the government? I will argue that indigenous land rights cannot be seen as a hindrance to national development, but rather as the confirmation of a democratic multicultural State. In order for the UN Declaration on the Rights of Indigenous People to be respected and enforced – together with the indigenous rights it aims to protect - we need to change the views on minority rights as a whole, and indigenous rights specifically.

1. INTRODUCTION

Democracy in Brazil is still rather recent. The country had its first democratic election at the end of the 1980s, after twenty-five years of military dictatorial government, a period characterized by many development plans, some of which were focused on the Amazon Basin. Besides the construction of the "Transamazônica" (a road that connects the center of the Amazon with Brazil's northeast region), the government planned several projects for hydroelectric dams in Amazonian rivers, such as the Tucuruí dam, built in 1974 and located in the Tocantins River, also in the state of Pará.¹ What is now known as "Belo Monte", the project this article refers to, was first called "Kararaô" and intended to be built along the Xingu River and the Iriri River with five other dams.²

The Xingu Basin is well-known for its biological wealth and the presence of several riverine and indigenous groups, given that thirty recognized indigenous territories are located in this area.³ The process of planning these dams, however, was characterized by the absence of free, prior and informed

1 The construction of dams in the Amazon Basin also occurred outside Brazil, such as the Afobaka dam, built in Suriname in the 1960s.

2 Ironically, although the government ignored the existence of several indigenous people living in the area, these projects were named after indigenous peoples: Kararaô, Babaquara, Ipixuna, Kokraimoro, Jarina and Iriri. See Erwin KRÄUTLER, "Mensagem de Abertura", in FILHO, 2005:10.

consultation of the basin's inhabitants. As a reaction to this lack of consultation, the indigenous Kayapó people, one of the many groups residing in the affected region, organized, in 1989, the First Meeting of Xingu Indigenous Nations (I Encontro das Nações Indígenas do Xingu). Their goal was to discuss the impacts of building the dam between themselves, the government, and the companies responsible for its construction. This meeting had international repercussions and was a contributing factor to a temporary pause in the plans to build hydroelectric plants in the Xingu region.

The crisis of electrical supplies in the South and Southeastern regions of Brazil in 2001 gave rise to new plans for dams in the Amazon. This time, however, the project was given a new name, Belo Monte, although the aim remained essentially the same. According to studies carried out by Eletronorte, concessionaire of the project, Belo Monte would now be the only hydroelectric plant built in the Xingu River, with a total flooded area of 516km².⁴ The plan is for the Belo Monte hydroelectric complex to be constructed in a region of the Xingu River called "Volta Grande" (Big Bend), known for its rapid change in elevation, which would make a hydro development possible (Júnior, Reid, 2010:249-253).

Despite considerable pressure on the part of the government to construct the dam, there are many controversies surrounding Belo Monte, from low energy production and high costs to severe environmental and social impact. From the perspective of engineering, Belo Monte presents a serious problem: the river's flow is highly seasonal and the dam would only be fully exploited during three months of the year (Júnior, Reid, 2010:256). The total cost of the enterprise is not defined and constantly keeps changing. The Ministry of Mines and Energy has said that initial estimates of the cost were about 20.3 billion reais (approximately 6.76 billion euros),⁵ an extremely high figure, considering that production would only be sufficient for a quarter of the year. According to predictions, the dam will flood part of the city of Altamira and cause a reduction in the volume of water situated in the "Paquicamba" indigenous territory. As a result of these consequences, since 2001 federal prosecutors (Ministério Público Federal) have filed several lawsuits⁶ against Eletronorte to stop the dam being constructed, given the plan to install it in area of indigenous influence (Filho, 2005:74).⁷ According to reports of indigenous peoples in the region, it will wipe out animals and plants and the arable land will be flooded, which will also prevent transport and create diseases.⁸ In 2011, the Inter-American Commission on Human Rights ordered the suspension of the dam construction until the rights of the

3 For more information about social movements in the region of Xingu, we recommend the website of the NGO "Xingu Vivo" <<http://www.xinguvivo.org.br>>.

4 Eletronorte (Centrais Elétricas do Norte S.A.), Relatório de Impacto Ambiental (RIMA) do Aproveitamento Hidrelétrico de Belo Monte, 2009:16.

5 Ministério de Minas e Energia (Brasil), Projeto da Usina Hidrelétrica de Belo Monte – Fatos e Dados. <<http://www.epe.gov.br/leiloes/Documents/Leil%C3%A3o%20Belo%20Monte/Belo%20Monte%20-%20Fatos%20e%20Dados%20-%20POR.pdf>>, accessed 30th May 12.

6 At the time of writing this article, fifteen suits have been filed against the concessionaire and the government, arguing the illegality and unconstitutionality of the licensing and demanding the urgent suspension of the construction.

7 The lawsuit was filed on behalf of the following indigenous communities, all of those directly affected by the dam: A'Ukre, Arara, Araweté, Assurini, Gorotire, Juruna (Yudjá), Kararaô, Kayapó- Kuben Kran Ken, Kayapó-Mekrangnoti, Kikretum, Kokraimoro, Moikarakô, Panará, Parakanã, Pituiaro, Pu'ro, Xikrín, Xipaia e Kuruiaia. However, it is estimated that other indigenous communities will be affected by the construction of Belo Monte.

8 Testimony of Kuit Arara, Lawsuit n° 2001.39.00.005867-6/Justiça Federal (Brazil).

indigenous peoples living in the region are guaranteed. However, IBAMA, the national agency responsible for environmental licensing, ignored this injunction and, in June 2011, approved the construction plans (Amnesty International, 2011:6). Although there are many controversies related to this enterprise, we will focus only on how it affects indigenous peoples and their right to the lands that they have traditionally occupied.

2. THE LEGAL INSTRUMENTS ON THE RIGHTS OF INDIGENOUS PEOPLE TO TRADITIONALLY OCCUPIED LAND

One of the main obstacles to guaranteeing the right to land for indigenous peoples is the concept of property itself. The western concept of property, which prevails in the agencies' understanding, is centered on individual ownership. This concept differs from most indigenous communities' perception, given that they see property and the rights derived from it as a collective entity, especially when it comes to land. Thus, indigenous people face obstacles when they try to adapt their communal claims to the concept of individual property (Wiersma, 2004-2005:1072-1074).

What mainly distinguishes the concept of land and territory held by indigenous peoples is their special relation to the land, whether it is physical, cultural or metaphysical (Duffy, 2008:506-507). The relationship with their lands, territories, and resources is difficult to separate from that of their cultural values; land is at the core of indigenous societies (Daes, 2001:7). For indigenous people, land also has several other dimensions: a political dimension, related to self-determination; an economic dimension, because it provides a means of subsistence; and a spiritual and cultural dimension, for land has a religious and non-monetary value (Duffy, 2008:509-511). These characteristics are not separated; rather, they must be seen as a whole. This is why the idea, largely accepted in civil law, that you can displace someone as long as you pay them the amount of money considered to be the economic value of the land, cannot be applied literally when it comes to traditional forms of land occupation.

Largely ignored by the international community in the past, indigenous peoples began to see their rights addressed more consistently after the ILO Convention no. 107 (1957), later amended by the Convention no. 169 (1989), with an approach that was less integrationist and more orientated towards the respect for their culture. In article 13, it recognizes the collective ownership of indigenous territories, addressing the right to land as the right of an indigenous community, not just the right of an individual representing this group.

The United Nations Declaration on the Rights of Indigenous Peoples (2007), although not legally binding, represented a triumph for indigenous peoples, who had persevered for more than 20 years to obtain an instrument that could provide redress for the injustice of dispossession (Davis, 2008:440). It recognizes their right to culture directly (e.g., article 11 "right to practice their cultural traditions" and article 8 "right to not be subjected to forced assimilation") and also indirectly, by ensuring their right to possess the land they traditionally live in (article 26 to 30). The Declaration recognizes that culture and access to land are intrinsically connected when it comes to indigenous peoples (article 25). Furthermore, the right to land directly affects the enjoyment of all rights contained in the declaration and the deprivation of this means the deprivation of the others.

International standards, however, are only effective when adapted to the needs of the people they protect and the different national situations in which they are to be applied. Likewise, if the people

concerned have resources, knowledge and access to legal and administrative machinery to secure their implementation (Swepston, Plant, 1985:92). It is one thing to say that indigenous peoples' right to land must be protected; another thing is to "set forth in a legal instrument how they will be protected, how conflicts which have deep historical roots can be settled [and] what special rights are to be recognized for indigenous peoples" (Swepston, Plant, 1985:95).

In terms of national law, the Brazilian Constitution, enacted in 1988, has a special section dedicated to the rights of indigenous peoples, guaranteeing their right to land. This was obviously not a charitable gesture on the part of the government, but rather the result of several pressures from the indigenous communities and international bodies. Article 231, §3º states that the use of water resources, including for potential energy, can only be used with the authorization of the Congress and the consultation of the communities affected.

The Environmental Impact Study of Belo Monte, carried out by the companies that intend to participate in the construction of the dam, admits that once the construction begins it will be necessary to remove the indigenous communities from the region. This is due not only to flooding, but also to the consequences already foreseen by the communities: the death of animals and plants essential for their survival and the arrival of diseases unfamiliar to their immunological system, which can often result in death. Due to the conditions agreed prior to the licensing, the concessionaire is responsible for buying the land to which the Jurunas people (one of the indigenous communities affected by the dam) must be relocated. However, recent news announced that the concessionaire denies the responsibility of acquiring the lands needed for this community.⁹ It remains clear that the process of Belo Monte's construction has been lacking proper future planning (where are they going to and what will they live off?) and respect for indigenous tradition, strongly linked to the land, as has been said before.

In violation of article 231, §3º, the requirement of consulting indigenous peoples has not been fulfilled by the government and the companies planning Belo Monte. This same article, in §5º, states that the removal of indigenous people from the land they traditionally live in can only occur with the Congress's approval, in case of a catastrophe that puts communities in danger or if there are risks for national sovereignty (warfare and/or secessionism). In technical terms, Belo Monte is legally impossible: the dam will necessarily flood indigenous territories, which would imply their removal from the area. However, this can only happen in cases of catastrophe, warfare, or a risk of secessionism¹⁰ and none of these hypotheses applies to the case of Belo Monte. Although the Congress has approved the project for the dam's construction in an incredibly fast fifteen days, it was unconstitutional due to the absence of a legal hearing with the indigenous communities affected by the project, as will be discussed below.

9 Ministério Público Federal, "Norte Energia se recusa a obedecer condicionante indígena e MPF quer punição", <<http://www.prpa.mpf.mp.br/news/2013/norte-energia-se-recusa-a-obedecer-condicionante-indigena-e-mpf-quer-punicao>>, accessed 14th August 2013.

10 It is important to note that indigenous peoples established in that area have never demanded secessionism from Brazil, but they have sought autonomy and the right to be legally consulted in cases such as Belo Monte. On how the principle of self-determination for indigenous peoples poses no real threat to States, see HUFF, 2005.

3. INDIGENOUS LAND RIGHTS AS A RATIFICATION OF MULTICULTURAL DEMOCRACY

“In liberal democracies, there are two recognized politico-juridical entities – the individual and the sovereign will of the undivided collective. Consequently, there was no place for intermediate interlocutors such as national minorities [...]” (Porter, 2003:63). Usually defended by liberal “blind-to-differences” authors,¹¹ this shallow concept of democracy as the mere representative vote and the will of the majority over the minority puts indigenous people in serious danger, for they represent a literal minority in most of the states they still live in. Political decisions made by the majority who only consider the benefits a majority can receive will potentially lead to unjust policies for minorities, especially cultural minorities, such as indigenous peoples, whose culture differs substantially. If a State wishes to become a (multicultural) democracy,¹² it must seek to “avoid threats to national cohesion based on ethnic variety and to give every citizen an equal chance in life regardless of cultural or racial background” (Jupp, 1996-1997:514-515).

A multicultural democracy, therefore, must include in its core an effective respect for the different cultures that live within the borders of the State. This includes the idea of permanent, differentiated rights for specific groups, if they are needed to maintain cultural differences, as is the case of indigenous peoples and their traditionally occupied territories. Kymlicka (1995:108-109) alerts that governments’ decisions inevitably involve recognizing and supporting the needs and identities of a particular societal culture, thereby disadvantaging others and undermining the viability of minority cultures. His argument is that a group of differentiated rights can help rectify the disadvantages of minorities by alleviating the vulnerability of minority cultures to majority decisions. Indigenous peoples are especially prone to vulnerability due to their different culture and usually small amount of population in comparison to the majority.

The adoption of a multicultural democracy with an indigenous framework by a State implies (1) implementing policies that take into account the importance of land for indigenous peoples and the multiple dimensions it represents to them; and (2) recognizing the collective ownership of indigenous lands by incorporating new forms of property in the legal system that can guarantee the ownership of territories by indigenous communities themselves. Regarding the first requisite, constitutional law itself currently offers considerable protection for indigenous peoples. However, as the case of Belo Monte shows, the implementation of policies for indigenous peoples remains attached to liberal concepts of land and territory that jeopardize indigenous peoples’ rights. Thus, a major change in domestic policies regarding the implementation of indigenous peoples’ rights is required. In this sense, according to article 231, §3° of the Brazilian Constitution, the mere approval by Congress to construct the dam is not sufficient; there must be a free prior informed hearing with the local indigenous people, once they are traditionally established in that territory. A correct implementation of this provision must guarantee that

11 For authors such as Brian Barry, “a framework of egalitarian liberal laws leaves them [individuals] free to pursue their ends either individually or in association with one another”. See BARRY, 2001:317.

12 We understand that the word “multicultural” must be implicit in the word “democracy”, because we do not believe in the legitimacy of a democracy if it is not multicultural.

political and economic interests will not be addressed without due respect for the will of indigenous peoples when decisions regarding their territories must be made.

According to James Anaya (2004:61), the United Nations' Special Rapporteur on the rights of indigenous peoples, the ideal model for a multicultural state is the political ordering that simultaneously embraces unity and diversity on the basis of equality. In order to reach this ideal democracy, in the case studied here, it is essential to listen to indigenous people and take this hearings seriously, respecting the importance of their opinion by making their voice crucial to deciding whether or not to build the dam. The principle of Free Prior Informed Consent, based on the right to self-determination (United Nations Commission on Human Rights, 2005:9) is present in several international documents, such as the ILO's Convention no. 169 and the UN Convention on Indigenous Peoples.¹³ Its applicability, however, is still precarious, particularly in situations where the government itself intends to violate this right and the legal recognition of indigenous lands "is not backed up by safety mechanisms capable of controlling the colonial mentality with which national societies relate to indigenous territories" (Hiero, Surrallés, 2005:8). The same logic applies to the Brazilian Constitution: in spite of significant progress in domestic law regarding indigenous rights to land, indigenous peoples still have to deal with the lack of enforcement of constitutional provisions (article 231). Political and economic interests are undoubtedly the main reasons behind the problem of enforcement, as they tend to collide with international and even domestic indigenous rights. The growing interest in indigenous territories that might provide economic benefits through exploration (dams, logging, mining, etc.) sets a framework of economic priorities over human rights in general and indigenous rights specifically. When this framework is largely supported and financed by the government, the consequences for indigenous peoples can become catastrophic.

The arguments of the defenders of the Belo Monte dam are frequently based on viewing indigenous rights to land as a hindrance to national development. They often say that because the dam will benefit a large part of the population and industries with "clean" energy, bringing economic development to the nation, it is worth removing indigenous communities from that region, given that there are "few" of them. This kind of thinking disregards the whole argument of minority rights and multicultural democracy. "The problem is that conflicts between two societies are always settled in a conflict resolution body that is the product of only one of the societies – applying the legal system of that society" (Ahrén, 2004:100). Because they disregard the amount of land that indigenous people need and their particular relationship with it – which is completely different from western parameters - these arguments tend to dehumanize indigenous people, by removing them from an essential feature of their culture and themselves.

These arguments also use what we consider to be a mistaken meaning of "national development". They consider national development to be the (hypothetical) economic growth of the majority of society and, clearly, those immersed in western culture.¹⁴ But how could a nation possibly develop in any way

¹³ Articles 10, 12, 27 and 30 of the UN Declaration on the Rights of Indigenous Peoples impose States the obligation of effectively hearing indigenous peoples when their rights are affected.

¹⁴ Nevertheless, we are not convinced that ordinary citizens will be the main receivers of the energy Belo Monte intends to generate, but mostly companies exploiting the Xingu Basin's natural assets.

(economically, socially or culturally) when they sacrifice the fundamental rights of a minority that had no chance of being taken seriously about the damages they would suffer? Moreover, development, according to the meaning given by the arguments that defend the dam, overlooks international agreements, domestic law, and the principles of multicultural democracy.

Finally, given that current Brazilian policies regarding indigenous peoples do not follow the principles of multiculturalism, what could a multicultural democracy achieve in a case like Belo Monte? A multicultural democracy would make sure that construction licenses would not be given unless the indigenous peoples affected by the dam were legally consulted and, by consultation, we mean what the ILO Convention no. 169 (articles 6, 15 and 16) and the UN Declaration on the Right of Indigenous Peoples (articles 10, 11, 19, 28, 29 and 32) guarantee: free, prior and informed consent given by indigenous communities living in the area through democratic hearings where the members of the communities can express themselves and, if it represents their interest, engage in further negotiation with the governments and the concessionaire in equal parameters to show what their requisites are and what benefits they demand in exchange. Plus, in case of denial by the indigenous communities, the government has the obligation to guarantee that no retaliation occurs against these people, whether it is from private sectors interested in the dam construction or from government's agencies themselves. If indigenous policies continue to be guided strictly by political and economic interests, international and domestic law will keep being violated and indigenous peoples' fate might be translated into cultural and even physical extinction.

4. CONCLUSION

Cases of the construction of dams in the Amazon Basin are iconic due to the serious difficulties they cause for indigenous people. In the past, dams like Tucuruí, built in Brazil in the 1970's, or Afobaka, built in Suriname in the 1960's, were also responsible for the removal of traditional communities due to flooding as well as the social and environmental impacts. The Belo Monte project, however, is the first one whose negative impacts have had significant international repercussions, representing considerable pressure against its implementation.

This paper started by asserting that how to build a strong democracy in Brazil it is not yet entirely clear, due to the quite recent shift from a dictatorial government to a democracy. International instruments such as the ILO Convention no. 169 and the United Nations Declaration on the Rights of Indigenous Peoples represent a significant step towards the consolidation of indigenous rights and, therefore, a multicultural democracy. Unfortunately, the law in the Americas still works as if indigenous rights did not exist (Clavero, 1994:114), and Brazil is no exception to this situation. Thus, the government should take international agreements and its own Constitution into account if it ever wishes to become a democratic State, by guaranteeing that indigenous peoples who live inside their territories are given a real opportunity to decide their future. The right of the indigenous peoples to remain on the land and free from harm by the dam surely imposes restrictions on the national majority, who, in theory, would have less electric energy available, but this "sacrifice required (...) is far less than the sacrifice members [of the minority] would face in the absence of such rights" (Kymlicka, 1995:109)

Indigenous peoples have long struggled to maintain their existence without assimilation and the latest events in the conflict between the government/companies and the indigenous communities living in the

dam region offers yet another example of this situation.¹⁵ The right to traditionally occupied land is a central element of that struggle, given that it is vital to their culture and physical survival (Wiersma, 2004-2005:1087). Thus, taking into account the arguments we have shown in this paper, the Belo Monte dam presents a serious threat to their existence and allowing its construction means signing a certificate of disregard for indigenous peoples' rights and democracy.

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15 The surroundings of the dam's construction were occupied by 350 indigenous people from nine different ethnicities between 21 June 2012 and 12 July 2012. They demanded fulfillment of the conditions established by FUNAI (the agency responsible for the rights of indigenous people) to IBAMA (the agency responsible for issuing environmental licenses) and to the concessionaire. These conditions go from land demarcation and removal of non-indigenous from the land to adaptations to make the river navigable and health care. Source: Instituto Socioambiental, <<http://www.socioambiental.org/nsa/detalhe?id=3609>>, accessed 12th July 2012.

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