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Social needs in Brazilian forest governance

Necessidades sociais na governança florestal brasileira

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RESUMO

As florestas desempenham um importante papel para o ser humano, fornecendo uma ampla gama de produtos, bens e serviços para as pessoas. Neste contexto, o Brasil deve ser considerado como um país florestal, hospedando a floresta mais rica do mundo em biodiversidade e aplicando alta tecnologia para produzir madeira através de plantações florestais. No entanto, esse recurso tão importante não parece ser levado a sério, já que a conversão de florestas naturais e os conflitos sociais relacionados à exploração florestal ainda são grandes problemas no Brasil. Este documento discute alguns desafios dos instrumentos de governança florestal brasileiros para abordar impactos sociais, enquanto sugere a integração com leis ambientais internacionais e leis transnacionais de direitos humanos como oportunidades para abordar as questões dos "povos da floresta". Esquemas de governança empresarial transnacional, como a certificação florestal, parecem ser uma maneira promissora de liderar essas questões e mecanismos como o Consentimento Livre, Prévio e Informado (CLPI) emergem como mecanismos potenciais para gerar progresso nesse campo. Por fim, o artigo discute oportunidades para abordar as necessidades sociais nos esquemas de governança florestal brasileira e dá sugestões para pesquisas futuras.

Palavras-chave: Governança Florestal, Certificação Florestal, Impactos Sociais, Direitos Humanos.

ABSTRACT

Forests play an important role for human being, providing a wide range of products, goods and services for people. In this context Brazil shall be considered as a forestry country, hosting the world richest forest in biodiversity and holding top technology to produce wood through forest plantations. However, such important resource does not seem to be taken seriously, as deforestation and social conflicts related to forest exploitation are still big issues in Brazil. This paper discusses some challenges of Brazilian forest governance instruments to address social impacts, while suggest integration with international environmental law and human rights transnational laws as opportunities to address forest people issues. Transnational business governance schemes, such as forest certification, seems to appear a promising way to take lead in these questions and mechanisms such as Free, Prior and Informed Consent (FPIC) emerge as potential mechanisms to provide progress in this field. Lastly, the paper discusses opportunities to address social needs in Brazilian forest governance schemes and gives suggestions for future researches.

Keywords: Forest Governance, Forest Certification, Social Impacts, Human Rights.

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Forests are known mostly by its importance delivering a wide range of products, goods and services for people, which helped civilizations to evolve and still today are essential for human being. Furthermore, the importance of forests and nature to humans exceed consumer goods and also include intrinsic values such as nourisher of culture, historical document, guardian of mental health, sustainer of human dignity and diversity, among others (Talbot, et. al., 1976). In Brazil, the importance of forests is clear. The name of the country itself makes reference of a native tree, "Pau Brazil" (Caesalpinia echinata), because of a resin of red color brazil, Brazil, that was extracted from this wood and used to dye fabrics. After colonization, which consumed most of Atlantic Forests in the coast, Brazil now needs to take care of the Amazon Forest, that represents a third of the world's rainforests, is home of the most biologically diverse biome in the world, significantly influences global climate and also shelter many indigenous people and native culture.

Besides the importance of the natural forests, Brazil also have a huge potential regarding forest plantations, mostly growing species of eucalyptus sp. and pinus sp., which are well adapted over the Brazilian climates regions and reach high wood volume productivity in 7 to 18 years. Forest plantations are important because while provide wood for products such as paper, wood panels, energy and wood to civil construction, also reduce the pressure of natural forests, reducing deforestation. Both kind of forests, natural and plantations, play an important economic role in Brazil and as all extractive economic activities, forests operations also delivery environmental and social impacts. In Amazon Forest, wood extraction is still the most common economic activity and happens mostly illegally. Forests plantation are concentrated mostly in south and southeast of the country with large areas of the landscape being used, sometimes, without planning nor considering environmental and social impacts properly.

While it is critical that international environmental law rises to the challenge of ensuring the conservation of our rapidly vanishing natural resources, the integration of local peoples' rights over such natural resources ought to remain part of the equation. The interaction and relationship between international environmental law and human rights are not new and have increasingly been developed in recent years. Nonetheless, the increasingly important role that international environmental law is playing in the management of natural resources needs to integrate a larger focus on the human rights of peoples to freely dispose of their natural resources (Gilbert, 2013). Social impacts and land tenure conflicts are common in Brazil as indigenous people and rural communities depends on forest ecosystems to develop economic activities and live. The United Nations (UN, 2008) recognize the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources. As in many other countries, Brazil use the Environmental Impact Assessment as a tool to predict, mitigate and compensate environmental and social impacts of economic activities. However, while playing a key role in mitigating impacts and enhancing project design, EIA system in Brazil needs many changes (Fonseca, et al., 2016)

A study made by Fonseca et al. (2016) evaluated EIA in the context of Brazil, whose three-decade-old of the system is under strong pressure for change. Several Civil Society Organizations (CSOs) have voiced criticisms of the current EIA system, especially when applied to large projects in the Amazon. The authors made a list of priority of proposed changes to EIA system in Brazil, which ranked integrate EIA with planning tools as first needed matter, second was for transparency in decision making process and third for procedural harmonization. In another research about new approaches for EIA system, with a more social perspective, Doelle and Sinclair (2005) propose that it is time to consider a different approach to legislating public participation in project assessments, one that starts with the ultimate objective of cooperation and consensus building. While in Fonseca (2016) public participation ranked in eleventh place of priority, for Gilbert (2013), certainly public participation is important in impact assessments, since most affected people not only do not participate, or benefit from the exploitation of their natural resources, but in several situations the

exploitation of the natural resources has expressly gone against their interests and fundamental human rights.

In a study of case about social impacts in palm oil plantation, Mingorría et al. (2014), explored the interactions of two Q'eqchi indigenous communities with oil palm plantations located in the Polochic valley, Guatemala. The authors demonstrated that while the income generated by working in an oil palm plantation increases specific elements of the basic material conditions for a good life, such as basic materials, other components such as security (food security), health, freedom of choice, and social relationships can worsen. Oil palm cultivation results in higher gross and net incomes, but increase in the level of household-work saturation and, especially, of a reduction in women's spare time. It can also result in negative impacts such as loss of land rights, social conflict, and environmental degradation. Mingorría research pops up some questions, for instance, how and when the affected communities become aware of the potential impacts of a project or some operation activity? Moreover, what kind of social impacts an EIA study is able to predict?

The EIAs that have been conducted so far, typically do not include community engagement activities and do not adequately address social issues. These EIAs have a project-specific focus with a very limited scope that does not cover cumulative impacts or higher- level, strategic considerations (Hansen, et al., 2015). One of the fundamental challenges of project-based environmental assessments has been to deliver on the promise of meaningful public participation leading to decisions that put affected societies on the path to sustainability. Such processes and legislation assume that if an opportunity is provided in appropriate circumstances at crucial decision-making points in the process, the public will be ready, willing and able to step up and make constructive and convincing contributions, and that those contributions will be incorporated into project design and decision-making. As well, intervenors are typically treated as if they had been involved in the project planning, design and assessment process along with the proponents and the regulators rather than at the end of the project planning cycle as is usually the case (Doelle; Sinclair, 2005).

Besides EIA, forest-based enterprises in Brazil also need to follow the Brazilian Forest Code (BFC), a national law that provide guidelines for forest protection and conservation in Brazil. The BFC was established in 1934 when for the first time it was declared that private (and not just public) land was to be formally conserved under the law. This code required the preservation of "protective forests" that, as defined by their location, play an important role in the conservation of hydrological services and the geological stability of the property and a legal reserve (i.e. contiguous forest) of at least 25% of the property set aside to preserve biodiversity. The law requires that landowners in forest ecosystems the Legal Amazon set aside 50% to 80% of the property as Legal Reserve (LR), and that environmentally sensitive areas (such as riverside forest buffers and hilltops) be protected as "Areas of Permanent Protection" (APPs). Although ambitious in scope, to date the law has made little impact on land use due to limited adherence and enforcement (Santiago et al. 2017). The Brazilian Forest Code, which for decades was criticized by rural producers, has become a controversial case of environmental policy reform. Many argue that the 2012 revised code is substantially weaker than the previous 1965 version (Soares Filho et al., 2014). Brazil is known for having conservative legislators, who are biased towards corporate farming and industrial interests. Such legislators represent a constant menace to pro-environment proposals (Fonseca, et al., 2016).

The weaknesses and limitations of EIA and the Brazilian forest code, that current are the most relevant state tools of forest governance in Brazil, ask for improvements, mainly in the social field. While there are opportunities to enhance public participation in EIA studies, the Brazilian forest code lack to cover social aspects and issues, regarding indigenous people, small landowners and communities, as well as, addressing land and tenure rights. In such a big and diverse country as

Brazil is, with about 58% of their land covered by forests (SFB, 2016), issues related to people and forests should not be missed or omitted. The United Nations (2008) is convicted that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs. For Owen et al. (2014), within this debate there is insufficient attention paid to the socio- logical and socio-historical dimensions that determine the industry's relationship with indigenous and other project-affected people.

To compensate the lack of social guidelines in state polices and laws, an increasing portion of business regulation emanates not from conventional state and interstate institutions, but from an array of private sector, civil society, multi-stakeholder and hybrid public–private institutions operating in a dynamic, transnational regulatory space. Accounting standards, fair trade labels, forestry certification schemes, labor rights monitoring, transparency standards, and many more: transnational business governance (TBG) has grown in scope and importance as production, consumption, and their impacts globalize and as states reconsider established modes of regulation. In forestry, for example, industry- and NGO-led certification programs compete for users and legitimacy – while all intersect with state (e.g. legality requirements) and international regulation (e.g. international trade law) (Eberlein et al. 2014). Transnationalisation of law is partly a result of the fact that markets have internationalised while governments remain by definition bound by their borders. International law is becoming transnationalised when it relates to issues that used to be subject to private or national regulation, often in an effort to remedy governance gaps resulting from the inability by national legal systems to adequately regulate transnational business and its social impact (Buhmann, 2015).

In Brazil, the limitations of state forest governance rules open space for forest certification systems, which are voluntary schemes that are also becoming increasingly important. The idea behind forest certification, is very simple: it is basically a labeling program, designed to recognize officially those companies and landowners who voluntarily operate well-managed or sustainable forestlands according to predefined criteria (Bernstein; Cashore, 2004). The most influential forest certification schemes are promoted by the non-state market-driven organizations, the Forest Stewardship Council (FSC) and the Program for the Endorsement of Forest Certification (PEFC). Both schemes develop benchmark standards which are used nationally or regionally to set up forest management criteria in a country (FSC, 2015; PEFC, 2010). Forest certification standards enforce forest operations to comply with environmental and social criteria that directly or indirectly regulate issues like human rights, social impacts or labour conditions. To comply with forest certification standards usually an audit process in conducted by a third-party organism applying a due diligence process. In the social field, McCorquodale at al. (2017) studied specifically the Human Rights Due Diligence (HRDD) process, and argue that this tool should enable a company to comply with the diverse range of regulations applicable to its operations, and assist the company to address its other actual and potential human rights impacts which are not (yet) addressed by any regulation. The authors research demonstrates that a company which undertakes dedicated HRDD – with a human rights lens – is much more likely to identify adverse human rights impacts than through its ordinary non-specific HRDD (such as labour procedures or health and safety processes).

Despite of the complementary approach transnational schemes, such as forest certification, faces challenges to be implemented in the social context. Studies made analysing forest certification audits reports in Brazil, showed that the companies had difficulties to comply mostly with social criteria of the FSC standard (e.g. Rafael et al., 2018; Silva et al., 2016; Basso et al., 2012). Such evidences are driving forest certification schemes to improve their social approach, for instance, FSC developed a guide about implement the concept of Free, Prior and Informed Consent (FPIC) in forests managed by its standards (FSC, 2012). The principle of FPIC was first formally established in the 1989 International Labour Organisation's Convention on Indigenous

and Tribal Peoples in Independent Countries (ILO 169). Articles 6, 7, and 9 of ILO 169 establish that consent is required before Indigenous communities are relocated or before development is undertaken on their land. (Hansen, et al., 2015). The FPIC is linked to treaty norms, including the right to self-determination affirmed in common Article 1 of the International Human Rights Covenants. When affirming that the requirement flows from other rights, including the right to develop and maintain cultures, under article 27 of the International Covenant on Civil and Political Rights (ICCPR) and article 15 of the International Covenant on Economic Social and Cultural Rights (ICECSR), the treaty bodies have increasingly framed the requirement also in light of the right to self-determination (UNHR, 2013). The bottom line of FPIC is that the affected communities must understand that they will benefit from the proposed project, and that these specific benefits will far exceed any worst case scenario of unforeseen impacts. Affected communities must become convinced that prudent mechanisms are in place to guarantee their benefits, compensation will be just, and rehabilitation will ensure the communities are clearly better off with the project. In addition, affected people must understand that they will be fully involved in legally enforceable monitoring to ensure compliance with whatever they are consenting (Goodland, 2004).

Although FPIC is seen as a good practice to address social issues, the implementation process is not an easy task as well. For Colchester and Ferrari (2007), an isolated and instrumental application of FPIC runs the risk of subverting established political processes without providing structural support for the broader recognition of rights, and as a consequence does not guarantee community approval for the company with any more certainty than it respects the broader human rights concerns of people. In a research made by Owen, et al., (2014) in mining industry, the authors discuss that there are a range of factors necessary for ensuring that context and circumstances are conducive to operationalizing FPIC and unless there is a radical recalibration of the industry's approach to the social dimensions in mining, FPIC may well become an instrument of social risk rather than an instrument for reforming the way the industry conceives and values its relationships. Another concern is about the FPIC scope of the application of the right to freely dispose of natural resources. For Gilbert (2013) this incarnation of the right over natural resources is limited to indigenous peoples only. It is because indigenous communities have a special attachment to their ancestral lands and are especially marginalised that they have a specific right to free, prior and informed consent. While clearly this is justified due to the nature of indigenous communities' attachment to the land, it nonetheless raises questions as to the application of the right to freely dispose of natural resources as it applies to other communities. This restricted application raises a danger of compartmentalisation of human rights law under which only specific peoples – indigenous peoples – would have a specific right to freely dispose of their natural resources as expressed in the limited sense of consent.

In Brazil one shall not expect easy task in implement FPIC concept considering the quantity and diversification of indigenous people and rural communities. Forest operations in the Amazon most of times extract wood from indigenous land and for forest plantations operations, the challenge is to deal with the amount and regional diversity of rural communities and small-land owners nearby large plantations areas. As Hansen et al. (2015) suggest, a comprehensive framework and plan should be developed so that decisions about the extractive industries can be evaluated with respect to: their compatibility with overall social goals; the likely effects of individual project activities on all groups and individuals likely to be affected; and the likelihood that the activities will result in undesirable effects that are long lasting or difficult to reverse. To address this concern, guides describing good social practices and how to implement socio-environmental concepts in forest operations should be developed, considering the diversity of Brazilian regions and people that depends on forest ecosystems to live. Furthermore, researches need to be done to analyse and study the Transnational Business Governance Interactions (TBGI) of forest governance schemes in Brazil, i.e. the relation between forest certification systems with EIA studies guidelines and the Brazilian forest code. In a study made by Eberlein et al. (2014), the authors developed a framework to evaluate TBGI and suggest that the theory-based point of departure for the framework is the definition of transnational business governance (TBG) as "systematic

efforts to regulate business conduct that involve a significant degree of non-state authority in the performance of regulatory functions across national borders". Such studies and researches would certainly improve the knowledge of how forest certification may interact and possibly improve state forest governance schemes in Brazil, pointing out their strengths, weaknesses and how to integrate them to evolve forest policy making.

Transnational Business Governance is a reality in forest governance in Brazil, as forest certification plays an important role for forest companies' social performance, as well as, acceptability in overseas markets. For Buhmann (2015), by combining a range of actors, drivers, mechanisms and forms of interaction, transnational business governance interaction offers governmental and intergovernmental authorities' opportunities to shape private sector action outside their formal regulatory boundaries. To accomplish this, the interactions need to be better understood so every scheme can complement each other and also other needs of improvement can be evidenced. Its past time for Brazil to break up with the old ghost of the "resource curse" and take care better of its forests and forest people.

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