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FREE, PRIOR, AND INFORMED CONSENT: NOT THE RIGHT IT IS MADE OUT TO BE

Robert T. Coulter

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I am profoundly concerned about the concept of free, prior, and informed consent and about the way it is typically treated in connection with the rights of indigenous peoples. I think it is likely to result in serious harm to Indian nations and other indigenous peoples unless we fundamentally change how we deal with the concept.

What does "free, prior, and informed consent" mean? It is simply a noun with redundant intensifiers. It is an expression of agreement or willingness that an act take place that would otherwise be a violation of a right. It is not a substantive right like the right to land or the right of self-determination. It is not a legal rule creating legal duties or protecting legal interests. It is at most a procedural right (the right to give or withhold consent) that is incidental to or a part of some substantive right. To say it another way, free, prior and informed consent is the act of giving up or compromising a legal right, a human right – usually only temporarily or in part, but sometimes completely.

When free, prior, informed consent refers to relinquishing or compromising fundamental rights – human rights -- it is likely to be a bad thing, even dangerous in the extreme. We should be on high alert for a multitude of possible harms.

But instead it seems that free, prior, informed consent is usually treated as a good thing – supposedly beneficial. In fact, I believe that free, prior, informed consent has become the formula for getting around and overcoming the rights of indigenous peoples. It is the Shibboleth that can open the gates for mining companies, oil companies, timber companies, and countries to get hold of Indian lands and resources.

And so, we ought to ask whether it is sensible to give primary attention to giving away,

evading, waiving, by-passing, and overcoming Indian rights rather than to safeguarding, clarifying and promoting Indian rights.

Sometimes, perhaps in most instances, free, prior, informed consent is not a right at all – merely a thing, a concept. As it is used in the UN Declaration, free, prior, informed consent is not a right at all. The term appears six times in the Declaration:

Article 10, forbidding forced relocation; the term is redundant and adds nothing to the article.

Article 11 on takings of cultural, religious and other property; the term merely helps to define a wrong for which redress must be provided.

Article 19, calling for consultation "in order to obtain" their free, prior, informed consent; in this article, it is clearly not a right – merely a desired objective.

Article 28 refers to redress for lands taken without free, prior, informed consent. In this article the term merely helps define the wrong for which redress must be provided.

Article 29 prohibits hazardous waste storage except where there is free, prior, informed consent. Such consent creates an exception to a general prohibition.

Article 32 requires consultation "in order to obtain" free, prior, informed consent. Free, prior, informed consent is not required but must be sought.

As can be seen, nothing in the Declaration creates a right of free, prior, informed consent in any meaningful sense.

Whether it is a right or merely a concept, free, prior, informed consent is so poorly defined (or not defined at all) that it is practically useless because it is so uncertain and treacherous. Who can give it? What constitutes consent? How is it to be expressed? How do we know it is free, not coerced, given under duress, or corrupted? When is it informed? All of these questions need answers, and, in practice, monitoring is needed to guard against abuse, fraud, corruption and dishonorable dealings.

This unlawyerly concept of free, prior, informed consent seems to have come from environmentalists working in countries where they did not have the courage to speak of actual legal rights of indigenous peoples to their lands and resources. With good intentions, it appears that some advocates use the concept in two ways:

a. It appears that the term is used as a kind of euphemism to avoid alarming states with talk of actual, enforceable rights to land or resources; and

b. Where no actual legal right exists for a community or a people, the concept seeks to gain some opportunity for the community to have a say or to object to a project or activity affecting the community or people.

There is a proper place for free, prior, informed consent. It is not a concept that is bad *per se*. From what has been said above, we can observe that it has at least two proper uses and meanings:

- It refers to an incidental right (the right to grant or withhold consent) to rights to lands, resources, and self-determination, and to some other rights.

- It can be justifiably used as a makeshift argument in situations where no formal legal right exists, yet justice demands some level of control or a right to be heard for the community or people affected by some plan or activity.

I think it is seriously misguided and confusing to treat free, prior, informed consent as a substantive right and as something beneficial in itself. It is analytically and intellectually backward or awkward at best. It's like looking at the hole rather than at the doughnut. Many people, especially non-lawyers, seem to believe now that free, prior, informed consent is a serious right in itself. I believe they have been misled and confused.

I can think of no other field of law where primary attention is given to the process of giving up rights rather than to the content of those rights and the protection of those rights. I mean the right to own, use, control, benefit from, and dispose of lands and natural resources and the right of self-determination, the right to control or govern activities that seriously and directly affect indigenous peoples, communities, and resources.

Why do we in the field of Indian law turn away from real rights to focus on incidental or even *ersatz* "rights"? This free, prior, informed consent approach to indigenous rights is backward, confusing, and in practice, it is a disservice to indigenous peoples.

If free, prior, informed consent is not deserving of the attention it is given, what should we be concerned with? For indigenous peoples in this country and in others, let me suggest:

1. We need genuine, substantive legal rights that are clearly established;
2. We need rights that are defined in straight-forward legal terms;
3. We need the Rule of Law; and
4. We need effective judicial remedies when those rights are infringed.

We do not need jury-rigged concepts, substitute, half-way concepts, illusory rights, or "unique – rights." Such stuff results in just what we have right now: an unworkable, ineffective and harmful legal framework that benefits primarily those who oppose and prey upon Indian peoples. We as lawyers must not go on purveying these kinds of legal ideas in place of real law.

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